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Journal
UCLA School of Law Public Law & Legal Theory Series

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Publication Date
2023-12-20

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Duke Law Journal

VOLUME 73 DECEMBER 2023 NUMBER 3

LEGAL ETHICS AFTER #METOO: AUTONOMY, DOMINATION, AND NONDISCLOSURE AGREEMENTS

SUNG HUI KIM†

ABSTRACT

The legal profession has long embraced what is called the "standard conception" of legal ethics, the prevailing model guiding the social and professional norms of American lawyers since at least the 1970s. The standard conception requires lawyers to promote their clients' interests vigorously within the bounds of law and urges lawyers to be morally neutral toward lawful client ends, regardless of even the predictable consequences of their representations, including any harms inflicted on third parties or the public at large. Central to the most prominent defenses of the standard conception is the value of individual autonomy, specifically the client's. According to these defenses, when lawyers help to preserve and express the autonomy of clients vis-à-vis the legal system, lawyers provide a moral good.

This Article challenges the standard conception—specifically, the critical role that "autonomy" plays in its justification. It calls for an alternative model of legal ethics that draws from the republican intellectual tradition. Part I reviews some of the leading defenses of the standard conception and shows how they have identified autonomy as a core value underlying the standard conception. Part II interrogates the notoriously nebulous notion of autonomy and teases out its various

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entailments, including the distinction between negative *liberty and* positive *liberty—concepts which have been integral to all major modern political philosophical traditions, including the classical and contemporary liberal traditions, which have provided the intellectual grounding for the standard conception. With these distinctions in hand, Part III explains how the standard conception exacts an "autonomy appropriation" from lawyers to their clients in disproportionate and regressive ways. It argues that the standard conception violates the very value used to justify its existence. Part IV looks outward from the bilateral relationship between lawyer and client to think about the impact on third parties and raises the "autonomy externality" problem. It argues that, even if we stay laser-focused on the value of autonomy alone, clients' exercise of* their *autonomy can undermine the autonomy of* others*. Hence, lawyers' enhancement of their clients' autonomy can simultaneously undermine the autonomy of third persons. To explore the autonomy externality problem in stark, real-world terms, Part IV conducts a case study of pre-filing nondisclosure agreements ("NDAs") used by lawyers to settle sexual abuse claims made against powerful clients. It shows how lawyers who recommend, negotiate, and draft NDAs on behalf of their clients undermine the autonomy of third persons by enabling repeat sexual abuse. What is more, the justifications for the standard conception are paralyzed by a commitment to value neutrality, making the standard conception ill-equipped to assess autonomy tradeoffs between the client and third parties, such as with NDAs. Part V introduces an alternative conception of autonomy, based on the republican notion of liberty. Whereas liberal understandings of autonomy emphasize negative and certain forms of positive liberty, the republican conception of autonomy is the* absence of domination*. Returning to the case study of NDAs, it argues that an alternative model of legal ethics based on republican liberty is better able to assess autonomy tradeoffs and to provide moral guidance that better comports with our sense that some incursions on autonomy are more serious than others. It then offers suggestions on how we might rekindle the civic virtue of the legal profession around the value of republican liberty. Part VI answers objections that a republican conception of legal ethics would perversely lead to lawyers dominating clients or be inferior to the direct regulation of autonomy externalities.*

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INTRODUCTION

Zelda Perkins was the former assistant to Harvey Weinstein in Miramax's London office.[1] After enduring years of sexual harassment by Weinstein, she eventually learned that he had sexually assaulted a new, young female colleague. Enough was enough. Perkins and her colleague walked out of their offices for the last time and marched into the law offices of Simons Muirhead & Burton.[2] As Perkins explained decades later, she wanted Miramax to create safeguards to protect current and future employees.[3] Insisting to her lawyers that she did not want a payout, she demanded that Weinstein receive therapy "for as

1. Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589 [https://perma.cc/S3ZW-KXLZ].

2. *Id.*

3. *Id.*

long as his therapist deems necessary" and that Miramax implement a proper human resources complaint procedure and sexual harassment training.[4]

Perkins's lawyers engaged in several days of grueling negotiations with Miramax.[5] Under-resourced and legally outgunned, they got some of her requested provisions into the final settlement agreement.[6] The settlement also included an airtight nondisclosure agreement ("NDA").[7] NDAs, which are widely used to settle sexual abuse allegations,[8] bind survivors of sexual abuse to silence, suppressing negative publicity about their allegations.[9] Although some of the settlement provisions were implemented, others were not, despite Perkins's continued pressing. Despondent that Miramax wasn't living up to its bargain, an exhausted Perkins finally gave up on monitoring Miramax's compliance.[10]

In the end, there was no deterrence. There was no accountability. There was only more rape. Nineteen years later, more than eighty women have come forward to accuse Weinstein of sexual misconduct, including sexual assault.[11] By keeping Weinstein's abuses secret, the NDAs embedded in multiple settlements allowed the sexual abuse to continue.[12]

Weinstein may be a talented film producer, but he is no lawyer. He did not write up the settlement contract or its NDA provisions. Instead, a good lawyer did. The case study of Weinstein and his lawyers' NDAs bring a fundamental question in legal ethics into sharp

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4. *Id.*; JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT 65 (2000).

5. Garrahan, *supra* note 1.

6. RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS 130 (2019).

7. Garrahan, *supra* note 1.

8. *Id.* ("Most financial settlement agreements between accused and accuser include non-disclosure provisions that bar [the accuser] from talking about their allegations or even revealing the amount of the settlement . . . .").

9. *See infra* Part IV.A (describing how NDAs suppress probative evidence relating to survivors' claims, which in turn creates an environment in which protected abusers are underdeterred and thus more likely to coerce new victims).

10. FARROW, *supra* note 6, at 130.

11. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017, 11:27 AM), https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001 [https://perma.cc/VQ24-KRTT].

12. *See infra* Part IV.A.

relief. As Charles Fried, Harvard law professor, former United States solicitor general, and former Massachusetts Supreme Court Justice, once asked, "Can a good lawyer be a good person?"[13] Fried's answer to that provocative question was a resounding "yes," even when that good lawyer does horrible things on the client's behalf.[14]

Fried is not alone in this defense; indeed, the "standard conception" of legal ethics provides this answer.[15] The standard conception has been the prevailing model guiding the social and professional norms of American lawyers since at least the 1970s.[16] It embraces three familiar principles: partisanship, neutrality, and moral nonaccountability. *Partisanship* requires lawyers to promote the

13. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976) [hereinafter Fried, *The Lawyer as Friend*].

14. *See id.* ("I maintain that the traditional conception of the professional role expresses a morally valid conception of human conduct and human relationships .... [T]he traditional conception is so far mandated by moral right that any advanced legal system which did not sanction this conception would be unjust."); *see also infra* notes 32–52 and accompanying text.

15. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (referring to the "standard conception of the lawyer's role"). Most legal ethics scholars believe that the standard conception is the modern dominant view of legal ethics. *See, e.g.*, David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470–73 (1990); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 2–3 (2005); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36–37; David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 84 (D. Luban ed., 1983).

16. Although elements of the standard conception have been recognized in both public and professional discourse since at least the antebellum period, many legal scholars believe that it was not self-consciously embraced by the elite members of the bar until the 1970s and 80s. *See* Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1398 (2003) (finding that client-centered and ethically neutral lawyering was well-recognized in public and professional discourse in the antebellum period); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 395–407 (2001) [hereinafter Pearce, *Governing Class*] (arguing that the profession gradually shifted away from civic republicanism in the decades after 1870 but that the transformation was not complete until the 1970s and 80s); Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1194 (2009) [hereinafter Gordon, *The Citizen Lawyer*] (noting that the ideology of the lawyer as "wise counselor" gave way to the hired gun model by the 1980s, and citing a 1964 empirical study finding that Wall Street law partners internalized the "wise counselor" role); Bruce A. Green & Russell G. Pearce, *Public Service Must Begin at Home: The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1232 (2009) (noting that by 1985, "most elite lawyers no longer claimed that the public good played a major role in their everyday practice").

interests of their clients vigorously within the bounds of the law.[17] *Neutrality* requires lawyers to be morally neutral toward lawful client ends: they should not judge their clients.[18] *Nonaccountability* provides that so long as lawyers abide by the first two principles, they are not morally responsible for even the predictable consequences of their representations,[19] including any harms inflicted on third parties or the public at large.

This standard conception of legal ethics gives comfort to all of us "good attorneys" and makes it easier to suppress our pangs of conscience under a professional ideology that assures us that even when we protect sex abusers from being held accountable, we are in fact doing the right thing. And after decades of legal practice, marinating in the professional norms of that standard conception, we may no longer even recall—much less feel—those pangs.[20] Consider the comments of Weinstein's most celebrated lawyer, David Boies, a former partner of Cravath, Swaine & Moore, best known for representing presidential candidate Al Gore before the Supreme Court in *Bush v. Gore*.[21] Even after the scale of Weinstein's alleged offenses had been revealed, Boies said, "When I look back[,] I don't have any regret that I represented [Weinstein] the way I did."[22]

How can this be? As I explain in Part I, central to the most prominent defenses of the standard conception of legal ethics is the value of individual autonomy. As Fried explains, "the social nexus—the web of perhaps entirely just institutions—has become so complex that without the assistance of an expert adviser an ordinary layman

17. *See* MODEL RULES OF PRO. CONDUCT pmbl. ¶ 9 (AM. BAR ASS'N 2023) (noting "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law").

18. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 6 (2010) ("The lawyer should not consider the morality of the client's cause, nor the morality of particular actions taken to advance the client's cause, as long as both are lawful.").

19. *Id.* ("If a lawyer adheres to the first two principles, neither third-party observers nor the lawyer herself should regard the lawyer as a wrongdoer, in moral terms.").

20. This transformation takes place thanks to the psychological phenomenon of cognitive dissonance. *See, e.g.*, Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FORDHAM L. REV. 129, 136–53 (2011) [hereinafter Kim, *Naked Self-Interest?*]; David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 279–80 (2003).

21. Bush v. Gore, 531 U.S. 98 (2000); *see also* Gary Silverman, *David Boies: The Super-Lawyer Who Fell to Earth*, FIN. TIMES (Nov. 10, 2017), https://www.ft.com/content/f4e0aeb2-c560-11e7-a1d2-6786f39ef675 [https://perma.cc/QX48-23CB].

22. KANTOR & TWOHEY, *supra* note 4, at 91.

cannot exercise that *autonomy* which the system must allow him."[23] Consequently, "[t]he lawyer acts morally because he helps to preserve and express the *autonomy* of his client vis-à-vis the legal system."[24] Other commentators agree on the overriding value of autonomy.[25]

In the next three Parts, I challenge the standard conception—specifically, the critical role that "autonomy" plays in its justification. In Part II, I engage in theoretical brush-clearing around the notoriously nebulous notion of autonomy and tease out its various entailments, including the distinction between *negative* liberty, which emphasizes one's freedom from the interference of others, and *positive* liberty, which emphasizes the capacity to fulfill one's own purposes and goals. The concepts of negative and positive liberty have been integral to all modern political philosophical traditions, including the classical and contemporary liberal traditions, which have provided the intellectual grounding for the standard conception.[26] With these distinctions in hand, in Part III, I explain how the standard conception exacts an "autonomy appropriation" from lawyers to their clients in disproportionate and regressive ways. In doing so, the standard conception violates the very value used to justify its existence.

In Part IV, I look outward from the bilateral relationship between lawyer and client to think about the impact on third parties and raise what I call the "autonomy externality" problem. We all understand that clients can exercise their autonomy in ways that harm the general

23. Fried, *The Lawyer as Friend*, *supra* note 13, at 1073 (emphasis added).

24. *Id.* at 1074 (emphasis added).

25. *See, e.g.*, Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RSCH. J. 613, 613 [hereinafter Pepper, *The Lawyer's Amoral Ethical Role*] (offering a moral justification, centered on autonomy, for the standard conception); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 720–21 (1987) [hereinafter Ellmann, *Lawyers and Clients*] (developing a framework for evaluating client-centered approaches to counseling based on how well those methods maximize client autonomy); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 2 (5th ed. 2016) (appealing to the value of autonomy in defending the lawyer's role within the adversary system); Marci Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 317 (1987) (basing her efforts to reform the ethical rules governing the allocation of the lawyer-client decision-making authority on the principle of client autonomy).

26. In particular, the standard conception shares features with "liberal legalism." *See* Deborah Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 627–28 (1990) (defining "liberal legalism"). Other commentators identify "legal liberalism" as the "implicit popular jurisprudence of practicing lawyers." *See, e.g.*, William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism* 46 WM. & MARY L. REV. 127, 127 (2004).

welfare of third parties.[27] But even if we stay laser-focused on the value of autonomy alone, I argue that clients' exercise of *their* autonomy can undermine the autonomy of *others*. This negative externality, in terms of autonomy, is generally ignored or dismissed by defenders of the standard conception. To explore the autonomy externality problem in stark, real-world terms, I return to the case study of pre-filing NDAs used by lawyers to settle sexual abuse claims made against powerful clients.[28] I show how lawyers who recommend, negotiate, and draft NDAs on behalf of their clients undermine the autonomy of third persons by enabling repeat sexual abuse.

If the standard conception, which lionizes and privileges autonomy, fails on its own justificatory terms, what is the alternative? Unfortunately, the standard conception and its negative and positive liberty–based justifications situated within the liberal traditions cannot provide an answer. Their commitment to value neutrality makes it impossible to assess the autonomy tradeoff between the client and third parties. Instead, as I argue in Part V, we should draw upon the republican intellectual tradition (that is, the small-*r* republican intellectual tradition).[29] That older tradition venerated classical Rome and Greece, flourished during the Renaissance in the northern Italian republics, became prominent in Anglophone political theory in seventeenth century Britain, and influenced the framers of the U.S. Constitution only to be supplanted in the later eighteenth century by classical liberalism.[30] Although commentators have tapped the "civic virtue" aspects of this tradition to support a rival "citizen-lawyer"

27. Harm inflicted on third parties is possible because "some things autonomously done are not morally right." David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. BAR FOUND. RSCH. J. 637, 639 [hereinafter Luban, *The Lysistratian Prerogative*]. To think that all autonomous actions are morally good is to erroneously conflate the intrinsic value of autonomy as such with the value of specific actions taken pursuant to the exercise of autonomy. *Cf. id.* (noting the error of "blurr[ing] the crucial distinction between *the desirability of people acting autonomously* and *the desirability of their autonomous act*").

28. Pre-filing NDAs are NDAs that are concluded before the accuser files a complaint in court.

29. *See generally* Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988) (discussing the implications of the republican revival for constitutional theory).

30. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 5–6, 19–20, 50 (1997) [hereinafter PETTIT, REPUBLICANISM].

model of legal ethics,[31] this Article is the first to articulate a new model of legal ethics based on the distinctly republican notion of *liberty*.[32]

Republicans held a fundamentally status-based conception of liberty that distinguished the citizen from the slave.[33] A slave is a person who is *dominated*—that is, exposed to the power of another where such power can be exercised arbitrarily—freely and with impunity according to the master's will or pleasure, without regard to the perspectives or interests of the slave.[34] The opposite of a slave is a citizen—a person who is free in the sense of not being dominated—that is, one whose fundamental choices and activities are securely and effectively protected by law and social norms against another's arbitrary exercise of power.[35] Whereas liberal understandings of autonomy emphasize negative and certain positive forms of liberty, the republican conception of autonomy is the *absence of domination*. By substituting this conception, I generate a new ethical orientation that is not paralyzed by a commitment to value neutrality. Instead, it guides and empowers lawyers to decline their clients' bidding when obedience would subject others to domination. I then re-examine the problem of NDAs through the lens of republican liberty and offer suggestions on how we might rekindle the civic virtue of the legal profession around the value of republican liberty.

There are many predictable objections to my arguments. Due to space constraints, in Part VI, I address two. These objections contend that a republican conception of legal ethics (i) would perversely lead to lawyers dominating clients and (ii) is inferior to the direct regulation of autonomy externalities.

Upon reading this Introduction, many hard-nosed legal practitioners will dismiss my project as fanciful. Their instinct will be to object: "That's just not the lawyer's job."[36] Of course, this begs the

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31. *See, e.g.*, Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241 (1992); ANTHONY T. KRONMAN, THE LOST LAWYER 32–33 (1993); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 2 (1998); Pearce, *Governing Class*, *supra* note 16, at 381; Gordon, *The Citizen Lawyer*, *supra* note 16, at 1169.

32. *See infra* Part V.

33. *See infra* note 254 and accompanying text.

34. *See infra* note 256 and accompanying text.

35. *See infra* notes 257–60 and accompanying text.

36. *See generally, e.g.*, Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281 (2003) (arguing that the attorney's role is that of legal advisor to private clients and that independence *from* clients is not a legitimate aspiration for lawyers); Sung Hui

question: What *should* be the lawyer's role? The instinctual response, almost a moral reflex of partisanship, neutrality, and nonaccountability, reveals how powerfully the standard conception has shaped our understandings of the lawyer's role. But, if we are being honest, we must reckon with the fact that the standard conception has morally licensed lawyers to become handmaidens to powerful abusers like Weinstein. And we must then explain, in the face of #MeToo, why we good lawyers cannot possibly do better. In this Article, I offer an alternative ethical framework to help us see a world where lawyers do better.

I. THE AUTONOMY RATIONALE FOR THE STANDARD CONCEPTION

As noted in the Introduction, the standard conception of legal ethics identifies partisanship, neutrality, and nonaccountability as constitutive ideals of the legal profession. While state law generally accords lawyers wide discretion to accept or refuse clients as they see fit,[37] the standard conception urges that, once a lawyer-client relationship has commenced, the lawyer should never decline to help the client or exit that relationship for *moral* reasons.[38] More powerfully, the standard conception fosters a professional culture that makes it less likely that lawyers will even recognize serious moral misgivings as legitimate reasons for refusing clients' requests. Under the standard conception, lawyers are admonished to stay morally neutral vis-à-vis their clients' ends and are reminded that this neutrality makes them eligible for a form of qualified moral immunity for their actions. Under

Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 77–117 (2010) [hereinafter Kim, *Lawyer Exceptionalism*] (providing historical and empirical examples of the practicing bar's views about the lawyer's role).

37. *See, e.g.*, RENEE KNAKE JEFFERSON, RUSSELL G. PEARCE, BRUCE A. GREEN, PETER A. JOY, SUNG HUI KIM, M. ELLEN MURPHY, LAUREL S. TERRY, LONNIE T. BROWN, JR. & SWETHAA S. BALLAKRISHNEN, PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 71 (5th ed. 2023) ("In the United States, the general rule is that a lawyer has full discretion to decide whether to represent a client, subject to very limited exceptions."); Fried, *The Lawyer as Friend*, *supra* note 13, at 1062 ("Certainly it is laudable if the doctor and lawyer choose their clients among the poorest or sickest or most dramatically threatened, but the professional ideal does not require this kind of choice in any systematic way—the choice of client remains largely a matter of fortuity or arbitrary choice."); MODEL RULES OF PRO. CONDUCT r. 6.2 cmt. 1 (AM. BAR ASS'N 2023) ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.").

38. *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 13, at 1060 ("But once the client has been chosen, the professional ideal requires primary loyalty to the client whatever his need or situation.").

the standard conception, lawyers can rest assured that they will not be held morally accountable for any (lawful) acts that they facilitate or enable, no matter the moral consequences.

What is the justification for this professional ideology? Much of the commentary that either defends or assumes the validity of the standard conception of legal ethics identifies autonomy as the central value. In his seminal article, *Lawyer as Friend*, Charles Fried defends the moral worth of the standard conception by analogizing the lawyer-client relation to that of friendship.[39] He observes that the moral value of individual autonomy entitles us to be a friend to whomever we choose.[40] And respect for autonomy gives us moral permission to favor the interests of our "natural friend[s]"[41] over the interests of everyone else.[42] Likewise, as the client's special-purpose "legal friend,"[43] lawyers should have moral permission to prefer the interests of their clients over all others.[44]

According to Fried, the lawyer-client relation is not merely a business relationship but a "creature of moral right"[45]—the "right of the client to exercise his *full measure of autonomy* within the law."[46] As such, the lawyer is morally justified in adopting the client's interests as her[47] own insofar as it is necessary to foster the client's "*autonomy* within the law"[48] and, further, in placing those interests above all other valid interests of society.[49] Therefore, once the lawyer-client relation has commenced, the needs of the client should dictate the objectives of the representation, not only as a matter of law, but as a matter of morality.[50]

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39. *See* Fried, *The Lawyer as Friend*, *supra* note 13, at 1071 ("In explicating the lawyer's relation to his client, my analogy shall be to friendship . . . .").

40. *Id.* at 1074.

41. *Id.* at 1073.

42. *Id.* at 1071 (arguing that we are permitted to "hold something of ourselves in reserve, in reserve even from the universalizing claims of morality").

43. *Id.* at 1073.

44. *Id.* at 1074.

45. *Id.* at 1077.

46. *Id.* at 1084 (emphasis added).

47. To avoid confusion about the identity of the referent, I will use feminine pronouns to refer to the lawyer and masculine pronouns to refer to the client.

48. *Id.* at 1073 (emphasis added).

49. *Id.* at 1066.

50. *Id.* at 1077 ("Once the [lawyer-client] relation has been taken up, it is the client's needs which hold the reins—legally and *morally*." (emphasis added)).

As a consequence, so long as lawyers operate "strictly within the limits of the law,"[51] they should not be held personally or morally responsible for any injustice resulting from their assistance.[52] Indeed, in some cases lawyers may be *morally bound* to facilitate many wrongs to enhance their clients' autonomy.[53]

As another example, consider the influential work of Stephen Pepper. In *The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, Pepper offers a moral justification for the standard conception—what he refers to as the "current generally accepted amoral ethical role."[54] Pepper argues that law is a public good because law increases individual autonomy[55] by empowering and enabling private individuals and groups to attain their goals.[56] Further, enhancing individual autonomy is not only "morally good" but also "preferred over 'right' or 'good' conduct."[57] As for why this is the case, Pepper refers to the "belief [that] is incorporated into our legal system" that "free choice is better than constraint, that each of us wishes, to the extent possible, to make our own choices rather than to have them made for us."[58] The fact that our legal system "accommodates individual *autonomy* by leaving as much room as possible for liberty and diversity" reveals this belief.[59]

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51. *Id.* at 1081.

52. *Id.* at 1085.

53. While Fried does not suggest that lawyers must *always* be morally neutral, he insists that clients are morally *entitled* to lawyers' moral neutrality, except in rare situations. *See id.* at 1077 ("Once the [lawyer-client] relation has been taken up, it is the client's needs which hold the reins—legally and *morally*." (emphasis added)). In some cases, Fried maintains that lawyers are morally *bound* to facilitate a moral wrong and thus are required to subordinate their moral values. Lawyers are morally obligated to facilitate an "institutional" wrong if the case is significant for the client and there is no other lawyer prepared to do so. *Id.* at 1085–86. According to Fried, institutional wrongs are wrongs that do not exist and have "no meaning outside the legal framework"—such as the pleading of the statute of limitations or the statute of frauds against an otherwise valid claim; they are morally justified because "the legal system [has] authorize[d] both the injustice . . . and the formal gesture for working it[.]" *Id.* at 1084–85. By contrast, "personal wrongs"—defined as "wrongs done by his person to the person of the victim" and which are "generally harmful quite apart from the legal context in which it occurs"—such as humiliating a witness or lying to a judge—are not morally justified. *Id.* at 1084–85.

54. Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 613.

55. *Id.* at 617.

56. *Id.* at 616 ("Society . . . has created various mechanisms to ease and enable the private attainment of individual or group goals.").

57. *Id.* at 617.

58. *Id.* at 616–17.

59. *Id.* at 617 (emphasis added).

Because access to law is realistically only available with the assistance of lawyers, when lawyers provide morally unrestricted access to the law they are also promoting the "meaningful autonomy" of their clients.[60] In so doing, they support their clients' "first-class citizenship" and promote a "social good."[61] Conversely, if lawyers judge their clients' pursuits—for example, by refusing to assist in legally permissible but (what the lawyer perceives as) immoral projects, then lawyers are improperly creating morally unequal access to the law[62] by failing to support their clients' autonomy.

In fact, Pepper goes farther than most state professional codes of conduct and advocates for explicitly codifying the principle of neutrality into a disciplinary rule that would limit lawyers' discretion to opt out of clients' immoral but legally permissible plans.[63] Under this rule, while lawyers remain free to decline taking on clients for any reason, once lawyers have commenced representation, they could not resist any lawful plans of clients on grounds of moral conscience. Pepper's proposal, if adopted, would effectively empower bar disciplinary authorities to punish lawyers for deviating from the standard conception.

As outlined by the work of Fried, Pepper, and others,[64] the standard conception is grounded in respect for the client's individual autonomy. Fried sees the standard conception as derivative of the principle that "[i]ndividuals have rights over and against the collectivity."[65] Similarly, Pepper claims that the standard conception is

60. *Id.*

61. *Id.*

62. *Id.* at 618 ("[F]or the lawyer to have a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity," creating "rule by an oligarchy of lawyers.").

63. *See* Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. BAR FOUND. RSCH. J. 657, 659 [hereinafter Pepper, *A Rejoinder*] ("A background assumption accompanying the first-class citizenship model is that it can support an enforceable professional ethic, that it can be embodied in legal rules."). *But see* Stephen L. Pepper, *Integrating Morality and Law in Legal Practice: A Reply to Professor Simon*, 23 GEO. J. LEGAL ETHICS 1011, 1018 (2010) (noting that if the lawyer is unwilling to facilitate a morally wrongful result, "she can refuse to assist").

64. *See supra* note 13.

65. Fried, *The Lawyer as Friend*, *supra* note 13, at 1073 (noting that "[i]ndividuals have rights over and against the collectivity" and "the law must respect the rights of individuals"); *see also id.* at 1074 (noting that "our right to be a friend to whomever we choose is a product of our individual autonomy"); *id.* at 1077 ("The relation must exist in order to realize the client's rights

demanded by what he believes is the theory underlying our legal system—that society should "leave as much room as possible for private, individual decisions concerning what is right and wrong, as opposed to public, collective decisions."[66] Fried's and Pepper's emphasis on the rights of the individual against society at large makes clear that their defenses of the standard conception fit squarely within the classical and contemporary liberal traditions.

Readers may wonder why one should even worry about the standard conception, given that state ethics codes diverge from it by granting lawyers wide discretion to terminate engagements. True, ethics codes officially permit lawyers to withdraw from representations found to be morally repugnant.[67] Nevertheless, as historical and empirical evidence confirms,[68] the standard conception—powerfully articulated by defenders such as Fried and Pepper—wields

against society, to preserve that measure of autonomy which social regulation must allow the individual.").

66. Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 617 (citing to "individual autonomy" and noting, "The theory of our law is to leave as much room as possible for private, individual decisions concerning what is right and wrong, as opposed to public, collective decisions."); *see also id.* at 616 (citing a "societal commitment to the principle of individual autonomy"); *id.* at 618 (noting the impropriety of substituting "collective moral decision making for individual moral decision making, contrary to the principle of autonomy").

67. *See* MODEL RULES OF PRO. CONDUCT r. 1.16(b)(4) (AM. BAR ASS'N 2023) (permitting withdrawal if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement"); *id.* r. 1.16(b)(1) (permitting withdrawal if "withdrawal can be accomplished without material adverse effect on the interests of the client"); *id.* r. 1.16(b)(6) (permitting withdrawal if "the representation . . . has been rendered unreasonably difficult by the client"); *id.* pmbl. ¶ 7 (stating that "a lawyer is also guided by personal conscience"); *id.* pmbl. ¶ 16 (noting that the "Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer"); *id.* r. 1.2(c), cmt. 6 (permitting the lawyer to limit the scope of the representation under certain circumstances to exclude actions, for example, "that the lawyer regards as repugnant or imprudent"); *id.* r. 1.3, cmt. 1 (stating that the lawyer's diligence does not require "offensive tactics" or preclude treating persons with "courtesy and respect"); *id.* r. 1.6(b)(1)–(3) (providing exceptions to the confidentiality obligations under narrow circumstances); *id.* r. 2.1 (permitting referring to moral considerations in rendering legal advice); *id.* r. 6.2(c) (permitting lawyers to seek to avoid a court appointed representation if "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client"). *But see id.* r. 1.16(c) (mandating lawyer's representation, notwithstanding good cause for termination, when ordered to do so by a tribunal).

68. *See, e.g.*, ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 247–59 (1988); JOHN P. HEINZ, EDWARD O. LAUMANN, ROBERT L. NELSON & ROBERT H. SALISBURY, THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICYMAKING 186–89 (1993); Kim, *Lawyer Exceptionalism*, *supra* note 36, at 77–117 (providing historical and empirical examples of the practicing bar's views about the lawyer's role).

authoritative social influence. It is a potent cultural force that molds the ideology of a lawyer's role and the subjective sense of a lawyer's professional duties and moral code. Like all socially defined role-related ideologies, the standard conception constrains choice by leveraging social psychological pressures.[69] Roles come to us "ready-made," packaged by society, with their own scripts—"normative guidelines and values that give meaning and shape behavior."[70] With respect to the role of lawyers, the standard conception designates the purpose of the lawyer-client relationship, clarifies to whom or what the lawyer is accountable, and establishes collective expectations about what constitutes socially acceptable behavior for lawyers.[71]

To the extent that the standard conception becomes deeply ingrained in us through popular media portrayals to legal education to the early years of legal practice,[72] there will be strong psychological pressures to conform to it, rather than to one's own initial moral bearings. Moreover, these pressures will be actively reinforced by economic pressures to act in one's own financial self-interest in the context of the highly competitive market for legal services.[73] Modern law firm practices designed to maximize client revenues—such as eat-what-you-kill partnership compensation schemes, partner de-equitization, and summary dismissals—provide strong economic incentives for lawyers to accede to client demands, irrespective of their moral consequences.[74] In these ways, the standard conception is enormously influential even if it is not explicitly mandated under threat of professional discipline.[75] Indeed, the standard conception may help explain why the ABA's model ethics codes, which have been widely

69. Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1012–18 (2005) [hereinafter Kim, *Banality*].

70. *Id.* at 1012.

71. *Id.*

72. Kim, *Lawyer Exceptionalism*, *supra* note 36, at 98–100.

73. *Cf.* Kim, *Naked Self-Interest?*, *supra* note 20, at 135 (discussing the role of economic self-interest in defining the bar's ethical positions); *see also* Kim, *Banality*, *supra* note 69, at 1005–08 (discussing the role of self-interest in explaining unethical conduct by in-house lawyers).

74. Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 432–33 (2008) [hereinafter Kim, *Gatekeepers*].

75. As for how social imperatives, and not just legal commands, can exercise potent influence, see *infra* note 130 and accompanying text.

adopted by states, have gradually but persistently narrowed the moral discretion of lawyers.[76]

In my view, Fried and Pepper are on safe ground when they acknowledge the value of individual autonomy. But the remainder of their defense suffers from at least two sets of problems, which I call "autonomy appropriation" and "autonomy externality." Before we can discuss these problematic autonomy tradeoffs, though, we first need to unpack the meaning of autonomy.

II. UNPACKING AUTONOMY

Above, I have shown that some of the leading defenses of the standard conception identify autonomy as the central value. But what does "autonomy" really mean? Answering this question requires a necessarily philosophical inquiry. Although this Part will seem distant from the pressing problems of sexual abuse and NDAs, this theoretical brush-clearing is essential to formulating an alternative and responsive conception of legal ethics.

At the outset, it is worth noting that Fried, Pepper, and others offer no precise definition of autonomy. This omission is not surprising because—as Richard Fallon observed more than twenty years ago—autonomy is a "protean concept," meaning "different things to different people," and occasionally "chang[ing] its meaning in the course of a single argument."[77] A sensible place to start is with the word's etymology.

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76. *See, e.g.*, Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40 n.3 (1989) ("Each of the American Bar Association's three attempts at codifying the ethical obligations of lawyers has expressly promoted [the standard conception]."); Melissa Mortazavi, *The Cost of Avoidance: Pluralism, Neutrality, and the Foundations of Modern Legal Ethics*, 42 FLA. ST. U. L. REV. 151, 153–54 (2014) (arguing that the 1969 Model Code excised a moral understanding of lawyering to embrace the standard conception); John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 56 (2013) (noting that "the Model Code and the Model Rules have been widely adopted and influential in shaping the regulation of American lawyers"). Except in limited circumstances, e.g., when clients seek lawyer's assistance in a crime or fraud, lawyers are expected to defer to the client with respect to the objectives of the representation, even where third party interests are implicated. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2023) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); *id.* r. 1.2 cmt. 2 ("lawyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected . . . .").

77. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994).

The English word "autonomy" derives from the Greek terms *autos* or "self" and *nomos* or "rule" to mean "self-rule."[78] In the broadest sense, self-rule can be understood as having the ability to determine the shape of one's life. According to Gerald Dworkin, this ideal state of affairs requires the "capacity to reflect upon and adopt attitudes toward [one's] desires, wishes, and values,"[79] including the "capacity to reflect upon one's motivational structure and to make changes in that structure."[80] As he observes, "By exercising such a capacity we define our nature, give meaning and coherence to our lives, and take responsibility for the kind of person we are."[81]

But self-rule also entails the practical ability to translate one's preferences, values, or decisions into action—the core notion of "liberty."[82] Hence, the enjoyment of liberty is commonly seen as a necessary condition for autonomy[83] and, accordingly, infringements on liberty also constitute infringements on autonomy. In other words, one cannot attain autonomy without *enjoying* some measure of liberty. Given the tight connection between liberty and autonomy, courts and commentators tend to treat those concepts interchangeably.[84] For our purposes, I shall treat liberty as a critical and necessary prerequisite for autonomy such that an impairment of liberty qualifies as an impairment of autonomy.[85] Of course, any discussion of liberty must start with Isaiah Berlin's groundbreaking essay, *Two Concepts of*

78. LAWRENCE HAWORTH, AUTONOMY: AN ESSAY IN PHILOSOPHICAL PSYCHOLOGY AND ETHICS 11 (1989).

79. GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 106 (1988).

80. *Id.* at 108.

81. *Id.*

82. *Id.* at 105 (noting that the "core notion of liberty is the ability of a person to effectuate his decisions in action").

83. *Id.* at 108 (noting that liberty may be a necessary condition for "individuals to develop their own aims and interests, and to make their values effective in the living of their lives"); HAWORTH, *supra* note 78, at 139 (noting that liberty is a necessary condition for the autonomous life).

84. *See, e.g.*, Fallon, *supra* note 77, at 880–85 (describing academic commentary equating autonomy with either negative or positive liberty); Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote Autonomy*, 91 IND. L.J. 1143, 1160 (2016) (describing judicial decisions and academic commentary equating autonomy with either negative or positive liberty).

85. This does *not* suggest the reverse—that an impairment of autonomy constitutes an impairment of liberty. *See* DWORKIN, *supra* note 79, at 105 (observing that self-determination can be limited without limiting liberty).

Liberty,[86] which introduced an enduring distinction between negative and positive liberty.[87]

A. Negative Liberty

Self-rule can involve enjoying what Berlin called *negative liberty*,[88] which is strongly associated with the classical and contemporary liberal traditions,[89] all of which place individual liberty at the heart of politics.[90] Berlin argued that "social or political freedom" consists of "the absence of obstacles not merely to my actual" choices but also to my potential choices.[91] Accordingly, "I am normally said to be free to the degree to which no man or body of men interferes with my activity"[92]—that is, no one interposes obstacles to my choosing among a range of options. Because negative liberty emphasizes the absence of coercive interference in one's choices, it is sometimes referred to as *freedom as noninterference*.[93]

Negative liberty is value-neutral vis-à-vis the ends pursued by any individual—that is, it generally makes no substantive judgments about competing conceptions of the good life.[94] But this does not mean that

86. ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118 (1969).

87. *See, e.g.*, PETTIT, REPUBLICANISM, *supra* note 30, at 17 ("Contemporary discussions of social and political organization are dominated by a distinction [negative and positive liberty] which Isaiah Berlin . . . made famous."); QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 113 (1998) [hereinafter SKINNER, LIBERTY] (referring to Berlin's essay as the "single most important discussion of these issues [including liberty, equality, independence] published in our time").

88. BERLIN, *supra* note 86, at xxxvii.

89. On the relationship between classical liberalism and contemporary liberal traditions, such as libertarianism and constitutional liberalism, see David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 LAW & CONTEMP. PROBS. 43, 43 (2014). *See also* David Singh Grewal & Jedidiah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 15 (2014) (noting neoliberalism's "exclusive concern with the negative liberty" of individuals or corporations).

90. *See* GERALD F. GAUS, POLITICAL CONCEPTS AND POLITICAL THEORIES 47 (2000) (observing that "[a]ll liberal theories, regardless of their disagreements, place individual liberty (or freedom) at the heart of politics").

91. BERLIN, *supra* note 86, at xl. The terms "liberty" and "freedom" are normally used interchangeably by political and social philosophers.

92. *Id.* at 122.

93. *See, e.g.*, PETTIT, REPUBLICANISM, *supra* note 30, at 9, 41–50.

94. Berlin believed that there was no uniform ideal way of life and that negative liberty was superior to positive liberty because it afforded the freedom of each to arrive at their own ideal. *See* BERLIN, *supra* note 86, at 171 ("Pluralism, with the measure of 'negative' liberty that it entails . . . is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that all values can be graded on one scale . . . seems to me to falsify our knowledge that men are free agents . . . .");

the concept of negative liberty is free from value-laden normative judgments. To count as freedom-reducing, the restraint must not only originate from forces external to the individual but must also emanate, rather deliberately, from human agents.[95] According to Berlin, "You lack political liberty or freedom only if you are prevented from attaining a goal by [other] human beings."[96] So, for example, even though gravity prevents me from flying, gravity does not make me unfree, because gravity was not created by humans. Hence, financial, cognitive, and physical incapacity, though they all can seriously frustrate a person's ability to access a myriad of options, are not seen as compromising negative liberty.[97] These exclusions betray a value judgment that those incapacities are less concerning.

Importantly, Berlin believed that the freedom to make a choice does not ever entail the capacity to exercise that choice; in other words, negative liberty does not require the presence of resources to make choices feasible for the individual.[98] Thus, according to theories of negative liberty, a person who is too poor to attend university still retains the freedom to attend the university even if that formal freedom cannot be practically realized.[99] In this sense, negative liberty is a formal *opportunity-concept*.[100] It is principally concerned with the presence of opportunities—that doors remain formally open to the individual, rather than having any one of them slammed shut by other people.[101]

GAUS, *supra* note 90, at 58. Accordingly, most classical and contemporary liberal traditions, which emphasize negative liberty, embrace value neutrality. *See* Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113, 114 (Stuart Hampshire ed., 1978) (noting that neutrality is a constitutive component of liberalism). *But see* Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 684–701 (1985) (casting doubt on the assumption that liberalism has always embraced value neutrality).

95. BERLIN, *supra* note 86, at 122 ("Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act.").

96. *Id.*

97. *Id.*

98. *Id.* ("Mere incapacity to attain a goal is not lack of political freedom.").

99. GAUS, *supra* note 90, at 102.

100. 2 CHARLES TAYLOR, *What's Wrong with Negative Liberty?*, *in* PHILOSOPHY & HUMAN SCIENCES 211, 213 (1985).

101. *Cf.* BERLIN, *supra* note 86, at xxxix–xl (noting that "freedom ultimately depends . . . on how many doors are open, how open they are, . . . even though it may be impossible literally to measure this in any quantitative fashion").

B. Positive Liberty

On the other hand, self-rule may require the enjoyment of what Berlin called positive liberty.[102] While positive liberty also acknowledges a necessary link between freedom and the absence of human-inflicted obstacles, positive liberty denies that the absence of such obstacle is sufficient for the enjoyment of freedom.[103] For advocates of positive liberty, negative liberty's exclusive focus on the absence of interference and its indifference to the lack of resources seems impoverished. To them, noninterference is only valuable insofar as it facilitates the voluntary choice of an individual. So, for example, persons who lack the financial resources to pay rent or act under the heavy influence of drugs may be "free" from the interference of others, but they are hardly free in ways that truly matter. Theories of positive liberty are thus concerned about the actual capacity of individuals to exercise options and not merely their formal opportunity to do so. Thus, positive liberty is said to be an *exercise-concept*.[104] Positive liberty asks not just how many doors are formally open to persons but whether those persons have the cognitive, physical, and material wherewithal to actually walk through the one they have chosen. In other words, positive liberty consists not merely in the *possibility* of doing certain things (that is, being free of the external obstacles to doing them), but in actually doing or becoming those things.

To complicate matters, there are both thin and thick accounts of positive liberty. The thin account understands freedom straightforwardly as the *effective power to act on one's desires, goals and ends*.[105] "Effective power" means having the skills, resources, or whatever one needs to perform an act and not just being free of another's obstruction. On this understanding, what one is not able to do, one is not free to do. Hence, a person who is too poor to attend a university is simply not free to do so.[106] *Positive freedom as effective power* often emphasizes the importance of material and financial resources to act on one's goals.

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102. BERLIN, *supra* note 86, at xxxvii.

103. Philip Pettit, *Free Persons and Free Choices*, 28 LIBERTY & SOVEREIGNTY 709, 711 (2007) [hereinafter Pettit, *Free Perrsons*].

104. *See* TAYLOR, *supra* note 100 at 213.

105. *See* GAUS, *supra* note 90, at 101 (referring to this type of freedom as "liberty as power to act").

106. *See id.* at 102.

The thick account of positive liberty appeals to a more wholistic conception of autonomy, suggested by the word's etymology, that centers on the idea of a free person.[107] Freedom is "the ability to fulfil [one's own] purposes,"[108] and a free person is one guided by her *real* will[109]—her settled goals and desires. Contemporary theories of positive liberty highlight the need for individuals to develop their capacity for self-determination and self-realization, so that they can become rational authors of their higher-order plans of action.[110] This, in turn, requires confronting various hindrances that have traditionally fallen outside of the purview of negative liberty theories. Those hindrances include mental obstacles, such as fear, passion, prejudice, impulse, false consciousness, dependency, superstition, custom, or ignorance—hindrances that stand in the way of a self-ruled life even if they are not externally imposed. *Positive freedom as self-realization* emphasizes persons' capacity to be in command of their own destiny.

C. The Standard Conception Relies on Positive Liberty

The analytical distinctions I have clarified between negative and positive liberty[111] help reveal that the standard conception of legal ethics, which mandates lawyers' morally neutral assistance, cannot rely on a conception of negative liberty. Recall that negative liberty is an *opportunity*-concept: it is a matter of whether the individual enjoys the formal opportunity, regardless of whether that individual can

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107. *See id.* at 82–83 (referring to this type of freedom as "liberty as autonomy"); T.H. GREEN, *On the Different Senses of 'Freedom' as Applied to Will and to the Moral Progress of Man*, *in* LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION AND OTHER WRITINGS 228, 229 (Paul Harris & John Morrow eds., 1986).

108. TAYLOR, *supra* note 100, at 229.

109. *Cf.* GREEN, *supra* note 107, at 235 (defining freedom as "the power of acting according to his will or preference").

110. *See, e.g.*, DWORKIN, *supra* note 79, at 108 ("Autonomy is a second-order capacity to reflect critically upon one's first-order preferences and desires, and the ability either to identify with these or to change them in light of higher-order preferences and values.").

111. There are skeptics of the distinction between negative and positive liberty. MacCallum, for example, points out that almost every instance of negative liberty can be recharacterized as positive liberty. *See, e.g.*, Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312, 321 (1967); Eric Nelson, *Liberty: One Concept Too Many?*, 33 POL. THEORY 58, 59 (2005). For defenses of the distinction between negative and positive liberties, see, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864–68 (2001) (defending the distinction); CHARLES FRIED, RIGHT AND WRONG 110 (1978) ("A positive right is a claim to something . . . while a negative right is a right that something not be done to one."); BERLIN, *supra* note 86, at 118 (distinguishing "positive" rights (those that potentially require state action) and "negative" rights (those that protect individuals from state action)).

practically exercise that opportunity.[112] Thus, a lawyer's refusal to cooperate with the client on moral grounds (indeed *any* grounds)—in derogation of the standard conception—cannot interfere with the client's negative freedom to pursue his plans. After all, the client still retains the formal opportunity to have those plans executed by other (more morally pliable) lawyers.

Relatedly, the standard conception cannot be defended on a theory of negative liberty because *omissions*, without more, do not ordinarily qualify as constraints on freedom as noninterference. Under standard definitions of negative liberty, the mere failure to remove an obstacle to fulfilling one's wishes cannot constitute a freedom-reducing restraint. Rather, a freedom-reducing restraint requires an affirmative act of another.[113] Accordingly, lawyers' failure to cooperate with their clients and remove the obstacle of clients' incapacity to reach their goals on their own cannot, without more, count as a coercive interference in clients' negative freedom. Lawyers' mere refusal to help clients implement their goals does not itself block clients from having their goals realized; lawyers are merely omitting an action, and affected clients just need to find other service providers. Indeed, if one were to adopt the view that another person's failure to provide us assistance counts as freedom-reducing, then our freedom would be compromised every time we confront an obstacle that *could* be removed by another but is not removed. So, for example, if Jeff Bezos or Elon Musk, whoever might be richer today, declines to buy you something you want but cannot afford, you would not be free. On this interpretation, no one would ever be free.[114]

Notwithstanding ample rhetoric suggesting that negative liberty is what is at stake,[115] the standard conception actually relies on a theory

112. *See supra* notes 100–01 and accompanying text.

113. *See supra* note 95 and accompanying text.

114. *See* GAUS, *supra* note 90, at 79 ("If we adopt this notion of freedom, it seems that we are never really free.").

115. By emphasizing the importance of the absence of external restraints on the client's choices, Pepper, Fried, and others imply that the client's freedom as noninterference—negative liberty—is what's at stake. *See, e.g.*, Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 616–17 ("*[F]ree choice* is better than constraint, that each of us wishes, to the extent possible, to make our own choices rather than to have them made to us . . . . The theory of our law is to *leave as much room as possible* for private, individual decisions . . . ." (emphasis added)); Fried, *The Lawyer as Friend*, *supra* note 13, at 1073 (arguing that the "system must *allow*" ordinary laypersons to exercise their autonomy (emphasis added)); Ellmann, *Lawyers and Clients*, *supra*

of thin positive liberty as effective power.[116] Recall that positive liberty is an *exercise*-concept and, accordingly, theories of positive liberty are concerned about the capacity of individuals to exercise options of their choosing and not merely having the formal opportunity to do so.[117] The issue of whether individuals can find willing partners or service providers (such as lawyers, plumbers, doctors) to assist them in reaching their stated goals poses the question of whether individuals have the *capacity*, rather than the opportunity, for choice. With respect to the specific option of effectuating one's specific plans, clients' lack of capacity to execute those plans on their own—constituted by their lack of legal training, expertise, and perhaps time[118]—generates the need for lawyers' assistance much in the same way that other forms of incapacity, such as blindness or the inability to "understand darker pages of Hegel"[119] generate the need for the assistance of a reader or a philosophy teacher.[120]

To recap, a careful unpacking of the concept of autonomy reveals that the standard conception cannot reasonably be based on a theory of negative liberty. To the contrary, it relies on thin positive liberty.[121]

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note 25, at 717 ("Men and women . . . have the right to choose their own fates . . . [and are] competent to run their own lives.").

116. The defenses do not rely on thick positive liberty as self-realization. They are merely concerned about the capacity of clients to act on their plans and *not* about whether clients are making choices that reflect their deeply held values and commitments.

117. *See supra* note 104 and accompanying text.

118. Importantly, no law requires that individuals must have the formal license to practice law in order to have their *own* plans executed, as pro se representation is permitted. For example, an individual can draft and enter into a contract without having to retain a lawyer.

119. BERLIN, *supra* note 86, at 122 ("If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced.").

120. Fried and Pepper seem to acknowledge that capacity, rather than opportunity, drives the client's need for morally neutral lawyering. For example, Pepper analogizes law to a "very large and very complicated machine (with lots of whirring gears and spinning data tapes) that [a client] can't get to work." Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 623. Fried explains that "the social nexus . . . has become so complex that without the assistance of an expert adviser an ordinary layman cannot *exercise* that autonomy which the system must allow him." Fried, *The Lawyer as Friend*, *supra* note 13, at 1073 (emphasis added).

121. As clarification, to realize the client's purported right to morally neutral legal services under the standard conception requires no subsidy in the form of *financial* resources from the public fisc. Indeed, neither the standard conception nor its defenders recognize a positive universal right to legal assistance per se, including for those unable to pay. *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 13, at 1078 ("The lawyer's liberty—moral liberty—to take up what kind of practice he chooses and to take up or decline what clients he will is an aspect of the moral liberty of self to enter personal relations freely."); Pepper, *The Lawyer's Amoral Ethical Role*,

The question of whether clients can find or persuade lawyers to help them reach their stated goals is more reasonably characterized as a question of whether clients can garner the necessary resources to carry out their plans. Hence, it is clients' capacity to exercise their choices, rather than the mere opportunity for choice, that is at issue. Because positive liberty theories are concerned about the capacity, and not the opportunity, for choice, it seems clear that clients' purported right to morally unrestricted legal services is a thin positive liberty right. This clarification will bear analytical fruit as we start struggling with multiple tradeoffs, including autonomy appropriation.

One final concern deserves a response. If I am correct that the standard conception trades on a concept of positive liberty, have I not walked into some internal contradiction? After all, I described Fried and Pepper's defense of the standard conception to be situated within the liberal political traditions that emphasize both individual rights against the collective[122] and value neutrality.[123] By contrast, theories of positive liberty are generally associated with those political traditions known to emphasize the collective welfare[124] and to depart from value neutrality.[125] For example, in the socialist traditions, where the general object of the state is to distribute the goods of society such that all citizens live the best lives possible,[126] the state breaks neutrality and chooses which ends are deserving of state subsidization.[127]

But, in truth, ideas sounding in *thin* positive liberty have long been smuggled into the value-neutral classical and contemporary liberal traditions. For example, most liberals endorse "freedom of contract," but that freedom shares features of both negative and thin positive rights. Freedom of contract not only entails that the state (and others) refrain from interfering in private consensual relations but also

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supra note 25, at 634 ("[T]he lawyer has the choice of whether or not to accept a person as a client.").

122. *See supra* notes 65–66 and accompanying text.

123. *See supra* note 94 and accompanying text.

124. *See, e.g.*, GAUS, *supra* note 90, at 29–30 (referring to the socialist conception of justice as "collectivist").

125. *See* Aragaki, *supra* note 84, at 1152 (observing that "positive liberty theories cannot claim to be value neutral").

126. *See* GAUS, *supra* note 90, at 30.

127. *See, e.g.*, West, *supra* note 94, at 705 ("The socialist has no commitment to . . . the state neutrality toward value which [the market] permits. The socialist therefore feels free to dicker with the market economy in order to achieve a resource distribution which reflects his principled vision of the good life. . . .").

contemplates the *positive* right to enlist the state's assistance to compel the performance of contracts *against* the wishes of the unwilling party.[128] Similarly, liberalism's right to property, which is understood as a necessary bulwark against state oppression, shares features of negative and positive rights. Property rights not only oblige the state to refrain from interfering in the private accumulation of wealth but also oblige the state to affirmatively allocate economic rights among competing claimants.[129] Indeed, one can construe Fried's and Pepper's entreaties as an attempt to establish a property right in morally neutral legal assistance for pay. Hence, the standard conception's reliance on thin positive liberty is entirely compatible with the value neutrality ostensibly embraced by the classical and contemporary liberal traditions.

In sum, the standard conception of legal ethics is underwritten by the value of individual autonomy, which is strongly associated with the negative liberty championed by the classical and contemporary liberal traditions. But a careful explication of autonomy reveals that the standard conception actually depends on a thin conception of positive, not negative, liberty.

III. AUTONOMY APPROPRIATION

So far, I have demonstrated that some of the leading defenses of the standard conception are premised on the assumption that autonomy requires thin positive liberty. Because we tend to believe that increasing autonomy is good, we easily accept that the standard conception is an unqualified good. The problem is that, for society to effectuate the client's positive liberty right, a cost to the lawyer's negative liberty must be imposed. In other words, the standard conception countenances, and indeed encourages, a form of autonomy appropriation.

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128. *See* Lea Brilmayer, *Lonely Libertarian: One Man's View of Antidiscrimination Law*, 31 SAN DIEGO L. REV. 105, 109–10 (1994) (describing the freedom of contract position as "impos[ing] upon the government the obligation to step in and enforce contracts that have been made," which is a positive right). Such compulsion, of course, compromises the negative liberty of the unwilling party. For an argument the enforcement of contracts does not necessarily follow from negative liberty, see Aragaki, *supra* note 84, at 1164.

129. *See* Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1042 (1996) ("Property rights are, by nature, *positive* rights, *allocative* rights."); *cf.* Grewal & Purdy, *supra* note 89, at 18 (arguing that "neoliberal policies are *always* distributive decisions, yet ones in which distributive choices get couched in the neutral-sounding language of efficiency, liberty, and responsibility").

As it turns out, the only way to realize the client's purported right to morally neutral legal services is by pressuring private lawyers to render assistance to an existing client *even when they morally object to their clients' goals*. Stated differently, once a lawyer-client relationship has begun, the standard conception advises lawyers against withdrawing their assistance on moral grounds as long as the client's ends are not technically illegal. Admonishing lawyers that they should subordinate their moral values to those of the client's may infringe on the lawyer's negative liberty.

Because negative liberty assumes that parties are and should be free to enter into *or abstain* from entering into consensual relationships, any physical or deontic restriction of the lawyer's option to abstain from assisting a client on moral grounds, including authoritative but informal moral imperatives embraced by the relevant community,[130] amounts to a restriction of the option set that would otherwise normally be available to the lawyer.[131] As a result, the social imperative to participate in what the lawyer personally regards as immoral conduct undercuts the lawyer's negative freedom. Therefore, under the standard conception, while the client stands to gain this *positive* liberty right, the lawyer stands to lose her *negative* liberty.

Why does the negative versus positive specification matter? Recall that thin positive liberty understands freedom as the effective power to act on one's goals and not just being free from another's obstruction.[132] Having the power to achieve what you desire obviously requires gaining access to the necessary resources.[133] One way to gain access to

130. Under theories of negative liberty, freedom-reducing restraints on choice can be *physical* or *deontic*. Deontic restraints, such as legal mandates, reduce freedom. But moral imperatives, social norms and institutional rules can also reduce freedom to the extent they effectively remove an option otherwise available to an individual. Matthew H. Kramer, *Freedom and the Rule of Law*, 61 ALA. L. REV. 827, 836 (2010). To illustrate this intuition, consider, for example, how the social stigma against LGBTQ people in strongly heteronormative communities can effectively remove the option to identify oneself as LGBTQ or to have nonheteronormative relationships, *even in the absence of a formal legal ban*. Analogously, to the extent that the standard conception is widely shared and perceived as morally binding by lawyers, it can effectively foreclose an option otherwise available to the lawyer.

131. *See, e.g.*, S.I. Benn & W.L. Weinstein, *Freedom as the Non-Restriction of Options: A Rejoinder*, 83 MIND 435, 435 (1974) (explaining reductions in negative freedom as the restriction of options that would be otherwise available).

132. *See supra* Part II.B.

133. By contrast, endorsing a negative freedom is usually not as resource-intensive. For example, the negative right to attend law school typically requires others to refrain from interfering in a person's choice whether to attend a law school. A positive right to attend law

the necessary resources is by exercising power over others—the ability to push others into helping you pursue your goals. But whenever one person's thin positive liberty is enhanced by impelling the assistance of others, then that person's positive freedom inherently limits the negative freedom of those whose assistance is urged. In other words, the flip side of construing a thin positive liberty right is the infringement of another's negative liberty. Since everyone can theoretically serve as a tool to effectuate others' wishes, robust recognition of thin positive liberty rights can potentially undermine the very ideal of a society of free persons.[134] In sum, the standard conception requires trading off the lawyer's autonomy as negative liberty for the client's autonomy as thin positive liberty.

Let's be clear about the nature of this autonomy appropriation. First, by advising lawyers against opting out of existing relationships on grounds of moral conscience, the standard conception differs from the general norm that private parties, including agents, are normally entitled to specify and negotiate the conditions of their own assistance and cooperation, including the conditions for terminating their relationships.[135] If, for example, a lawyer conditions her legal assistance on charging clients $1000 per hour, people generally accept that it is the lawyer's prerogative to charge what she wishes. Also, no one winces about lawyers exercising their right to fire clients midstream if bills go

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school, on the other hand, may easily require a guarantee of admission and access to the financial resources necessary to enable the person to actually attend law school. That said, the full realization of both negative and positive rights would require the deployment of the state's judicial resources. *See supra* notes 128–29 and accompanying text.

134. *See* GAUS, *supra* note 90, at 110 ("Insofar as freedom is sought through power over others, it is inherently competitive . . . . [W]e cannot even contemplate the ideal of a society of free people.").

135. This general norm is also reflected in an established legal principle. Under both contract law and agency law, lawyers and clients are free to negotiate the conditions of their termination, including negotiating moral conditions. With respect to agency law, the Third Restatement states:

> An agent's actual authority terminates (1) *as agreed by the agent and the principal*, subject to the provisions of § 3.10; or (2) upon the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf.

RESTATEMENT (THIRD) OF AGENCY § 3.09 (AM. L. INST. 2006) (emphasis added); *see also* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 195 (4th ed. 1851) ("[I]f the instructions require the agent to do an illegal or immoral act, he may violate his instructions with impunity; for the law will not tolerate either party in violating any moral or legal duties."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32(3)(a), (f) (AM. L. INST. 2000) (providing for the right of the lawyer to withdraw if, *inter alia*, "withdrawal can be accomplished without material adverse effect on the interests of the client" or if "the client insists on taking action that the lawyer considers repugnant or imprudent").

unpaid. And yet advocates of the standard conception do not give comparable deference to a lawyer's *moral* conditions.[136] In doing so, they betray a value judgment that moral concerns deserve less respect than financial ones.

Second, appropriating the lawyer's autonomy (as negative liberty) to fuel the client's autonomy (as positive liberty) seems regressive. For the lawyer, the standard conception potentially tolerates a form of indentured servitude of conscience. Under the standard conception, once the representation has commenced,[137] the lawyer is discouraged from *ever* withdrawing on moral grounds. Therefore, unless the representation is limited in scope[138] with a predetermined termination date or unless the client exercises his unfettered legal right to fire the lawyer for any reason,[139] the lawyer is expected to continue what she regards as a morally objectionable engagement *indefinitely*. If the client is a corporation with a perpetual life and interminable legal demands, then the lawyer may be expected to cede her autonomy for a lengthy time.

By contrast, if the lawyer declines to facilitate the client's plans, the client suffers less; the client's plans are rarely upended and merely delayed. After all, clients are free to seek other counsel willing to abide by the strictures of the standard conception,[140] and it should not be hard

136. Another example of the bar's double standard was the ABA's longstanding refusal to create an exception to the confidentiality duty that would permit lawyers to blow the whistle on clients' lawbreaking that financially impacted third persons, while allowing lawyers to breach client confidences simply to collect their fees. For a discussion, see Kim, *Lawyer Exceptionalism*, *supra* note 36, at 87. Eventually, however, in 2003, the ABA amended its Model Rules to expand the lawyer's discretion to disclose to protect third persons from client fraud. *Id.* at 92 & n.133.

137. *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 13, at 1077 ("[*O*]*nce the relation has been contracted*, considerations of efficiency or fair distribution cannot be allowed to weaken it. . . . Once the relation has been taken up, it is the client's needs which holds the reins—legally and morally."); *id.* at 1078 ("[T]he individual lawyer . . . is bound to follow through once he has begun to serve."); Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 614 ("Once a lawyer has entered into the professional relationship with a client, the notion is that conduct by the lawyer in service to the client is judged by [the standard conception].").

138. MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2023) (discussing limited scope representations).

139. *Id.* r. 1.16(a)(3) (providing that the lawyer shall withdraw from representation if discharged by the client).

140. *See* RESTATEMENT (THIRD) OF AGENCY § 8.11 cmt. b (AM. L. INST. 2006) (noting that if an agent "will be unable to perform as previously directed, the principal may choose another agent or take action directly").

for well-resourced, socially powerful clients[141] to find substitute counsel,[142] given the highly competitive market for legal services and the common practice of contracting with multiple law firms at one time.[143] There is also no legal rule that prohibits lawyers from providing morally unrestricted legal services.[144] In fact, the ABA Model Rules of Professional Conduct insist that representing clients does not constitute an endorsement of the clients' views or activities[145] and that lawyers are free to offer clients "purely technical advice," devoid of any discussion of moral considerations.[146] There is also ample evidence to support that lawyers are generally eager to provide morally neutral help for pay,[147] including sociological evidence finding that lawyers tend to agree with their clients on matters of policy.[148] Even Pepper is skeptical that the moral predilections of clients and their lawyers differ much at all.[149] An objective evaluation of the situation indicates that the *door still remains open* for the client; the client just has to look elsewhere to have those plans realized.

While the client's costs of finding an alternate lawyer may not be negligible, those "switching costs"[150] will usually not be so significant as

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141. The types of representations that are the subject of this Article involve socially powerful clients, such as Weinstein and his companies, who have the capacity to dominate the less powerful. *See infra* Part V.B.

142. *See* JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 279 (2005).

143. *See* Kim, *Gatekeepers*, *supra* note 74, at 458 (discussing multiple contracting).

144. Indeed, there is no rule that *requires* lawyers to provide moral input whatsoever. *See* MODEL RULES r. 2.1 ("In rendering advice, a lawyer *may* refer . . . to other considerations such as moral . . . factors, that may be relevant . . . .") (emphasis added); *id.* r. 2.1 cmt. 5 ("In general, a lawyer is not expected to give advice until asked by the client . . . . A lawyer ordinarily has no duty . . . to give advice that the client has indicated is unwanted . . . .").

145. *Id.* r. 1.2(b) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

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

147. *See supra* note 15 (citing the empirical literature on the standard conception's influence).

148. *See, e.g.*, HEINZ ET AL., *supra* note 142, at 181–85, 184 fig.8.2 (marshalling empirical evidence showing substantial alignment in political and social attitudes between lawyers and their clients).

149. *See* Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 620 ("[T]here is little likelihood of a large difference in moral perception between lawyers and their 'in' clients.").

150. Switching costs are the costs of finding a replacement lawyer—in this context someone who happens to be more pliable. *See* Kim, *Gatekeepers*, *supra* note 74, at 458.

to effectively eliminate the client's option to have his plans realized.[151] More importantly, any switching costs incurred by the client would likely pale in comparison to the loss suffered by the lawyer in performing an act that compromises the lawyer's own sense of moral integrity.[152]

Of course, the suggestion that there are plenty of morally pliable lawyers, waiting in the wings to volunteer their services to the client, invites the following objection: If most lawyers actually prefer abiding by the standard conception, then how can it infringe on their negative liberty? I concede that many, perhaps most, lawyers will not subjectively *feel* that their freedom has been encroached upon. Nonetheless, on a standard negative liberty analysis, that subjective feeling does not matter. Because negative liberty is an *opportunity* concept,[153] it is not compromised only when a person's actual preferences happen to be frustrated. Rather, negative liberty is compromised when "obstacles to *possible* choices and activities" are interposed—that is, when there are "obstructions on roads along which a man can decide to walk."[154] Negative liberty resists deferring to actually held individual preferences because, otherwise, merely

151. That said, to the extent that the client has already invested substantial resources in the particular lawyer-client relation and thus has higher switching costs, lawyers may be obliged to make efforts to mitigate these switching costs. This can usually be done by giving sufficient advance notice of resignation and by cooperating in transitioning the replacement lawyer. *See* MODEL RULES OF PRO. CONDUCT r. 1.16(d) (AM. BAR ASS'N 2023) (requiring the withdrawing lawyer to "take steps to the extent reasonably practicable to protect a client's interests").

In the unlikely scenario that the client's switching costs are prohibitively high—for example, if a neorepublican approach (as explained in Part V below) comes to dominate the social norms of lawyers—the client would suffer a significant impairment in his positive freedom. But, for the vast majority of legal representations, I am generally not bothered by private noncooperation based on moral grounds. To invoke an analogy, if a pornographer cannot find a single cinematographer willing to film a particularly distasteful (but lawful) scene, why is that a serious social problem? Should we morally shame cinematographers for betraying their professional values by refusing to assist? I don't think so. *See also* Luban, *The Lysistratian Prerogative*, *supra* note 27, at 642 ("I do not see why a lawyer's decision not to assist a client in a scheme that the lawyer finds nefarious is any different from these other instances of social control through private noncooperation.").

152. Indeed, the standard conception would require the lawyer to violate her own moral duty to remain true to her own moral commitments. *See* Samuel J. Levine, *Taking the Ethical Duty to Self Seriously: An Essay in Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 285, 293–94 (2011).

153. *See supra* note 100 and accompanying text.

154. BERLIN, *supra* note 86, at xxxix (emphasis added); *see also id.* at xl ("The extent of my social or political freedom consists in the absence of obstacles not merely to my actual, but my potential choices to my acting in this or that way if I choose to do so.").

adapting one's preferences ("killing [one's] desires"[155]) would confer freedom. So, for example, slaves who have come to find pleasure in their bondage might rightly describe themselves as satisfied, but they are not free.[156]

More controversially, to the extent that lawyers have been socialized into replacing their own moral codes with a prepackaged set offered by the standard conception, there is a genuine question of whether their autonomy as *thick* positive liberty has *also* been appropriated. Recall that thick positive liberty theories interrogate whether individuals' chosen values and actions reflect their "real selves"[157]—that is, the rational consideration of their higher-order values and life plans—or instead reflect encumbrances on their real will, such as fear and false consciousness. If the latter, then the standard conception will not only have impaired the lawyer's negative liberty but also the lawyer's thick positive liberty. To be sure, any allegation that lawyers have succumbed to "false consciousness" by way of socialization is inherently contestable. Still, if we care about individuals acting based on their own moral commitments, then this point should at least give us some pause.

The leading defenses of the standard conception justify the client's right to morally unrestricted legal services by appealing to the moral value of individual autonomy.[158] Because the only way this positive liberty right of the client can be realized is through the morally unfettered assistance of lawyers, it necessarily impinges on lawyers' negative liberty. In other words, the only way to enhance the client's autonomy is to appropriate the lawyer's autonomy.[159] Perversely, advocates of the standard conception claim precisely the opposite: they characterize what is plainly an appropriation of the lawyer's autonomy as an appropriation of the client's autonomy.[160]

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155. *Id.* at xxxix.

156. The controversial claim that such a slave could be free was famously made by Epictetus. *See id.* at xxxviii.

157. *See supra* note 107 and accompanying text.

158. *See supra* Part I.

159. *See supra* notes 132–34 and accompanying text.

160. On their account, lawyers who object on moral grounds are usurping the client's rightful authority. For example, Pepper derides the lawyer who assumes "a moral responsibility role" as one who has transformed into a "policeman" or a "judge." Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 629–30. Similarly, Stephen Ellmann, an advocate of client-centered legal practices, complains that when lawyers urge conduct that "would be wise, or even right," clients are somehow being *compelled*. *See* Ellmann, *Lawyers and Clients*, *supra* note 25, at 759–60

So far, I have shown that an autonomy appropriation is unavoidable. The next question is whether that appropriation is somehow acceptable because, for example, doing so balances the unequal bargaining power between sophisticated lawyers and their unschooled clients.[161] But this oft-raised argument conveniently ignores how other forms of power, such as the economic leverage that high-net-worth clients exercise over lawyers[162] (or other third parties[163]) may impact any analysis of the lawyer's moral obligations. It also ignores the fact that many clients are not so unsophisticated, as the vast majority of legal representations involve corporate clients,[164] many of whom delegate the handling of their legal affairs to sophisticated in-house counsel.[165]

(quoting JOHN STUART MILL, ON LIBERTY 9 (Alburey Castell ed., Croft Classics 1947) (1859)). These arguments are overblown. Lawyers who decline to help clients' plans simply lack the legal authority to compel clients to do anything, though they may have some leverage by threatening to resign or perhaps making a disclosure in some cases. Ellmann strangely refers to any attempt by the lawyer to persuade the client or otherwise guide client decisionmaking based on values not specifically embraced by the client as "manipulation." *Id.* at 726; *see also* Stephen Ellmann, *Manipulation by Client and Context: A Response to Morris*, 34 UCLA L. REV. 1003, 1017–18 (1987). Ellmann's position infantilizes and disrespects the client as a moral agent by assuming that the client is incapable of moral growth and change through moral dialogue and reason. Finally, Ellmann, like Pepper, privileges an unduly narrow understanding of the power relationship between lawyers and clients while entirely ignoring the power relationships between clients and third parties. *See infra* notes 161–65 and accompanying text.

161. *See, e.g.*, Fried, *The Lawyer as Friend*, *supra* note 13, at 1073 ("[W]ithout the assistance of an expert adviser an ordinary layman cannot exercise that autonomy which the system must allow him."); Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 615 ("The [client] *needs* the service but is unable to evaluate it, and therefore the [client] is *vulnerable* in relation to the professional."); Ellmann, *Lawyers and Clients*, *supra* note 25, at 718 ("Attorneys . . . wield technical expertise, enjoy exclusive or privileged access . . . .").

162. *See, e.g.*, Geoffrey Miller, *From Club to Market: The Evolving Role of Business Lawyers*, 74 FORDHAM L. REV. 1105, 1124 (2005) (noting that the increasingly competitive nature of the market for legal services increases the bargaining power of clients vis-à-vis their lawyers, which makes it more difficult for lawyers to act as an independent "conscience" for their clients).

163. *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 125 (1974).

164. *See* John P. Heinz, Edward O. Laumann, Robert L. Nelson & Ethan Michelson, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 767 (1998) (finding that 64 percent of total legal effort is devoted to corporate clients, while only 29 percent is devoted to personal/small business clients).

165. *See, e.g.*, Miller, *supra* note 162, at 1117 ("Most major companies have significant in-house legal offices which can perform sophisticated work to control costs and monitor the quality of services performed."); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 901–03 (1990) (exploring the power dynamic between law firms and their corporate clients who are increasingly staffed by sophisticated in-house counsel). To be sure, the emergence of in-house counsel introduces another locus of the lawyer-client

Another justification for appropriating the autonomy of the lawyer posits that lawyers are not ordinary private parties and should be regarded as quasi-public officials.[166] Arguments of this ilk maintain or imply that the state licensing of lawyers[167] confers on lawyers a form of quasi-public status, which in turn mandates a neutral, non-judgmental stance when providing clients access to the public good of law. But these arguments prove too much. For example, public streets and freeways are also public goods accessible only by licensed drivers, but no one thinks of licensed drivers as quasi-public officials. Moreover, even if we accept that lawyers are quasi-public actors, then this classification would seem to justify greater, and not less, state regulation of lawyers in the public interest.[168] In regulating lawyers to

relationship, which is not addressed in this Article: the relationship between in-house lawyers and business managers, a relationship that has traditionally been characterized as one in which the (in-house) lawyers are economically vulnerable vis-à-vis their de facto client (business managers). *See, e.g.*, JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 195 (2006); Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 967 (2005).

166. *See, e.g.*, Stephen L. Pepper, *A Rejoinder*, *supra* note 63 at 665 ("The lawyer, unlike the spouse or friend, is part of the *formal* system of law *imposed* by the community (through its government), and therefore has different obligations from those of the spouse or friend."); *see also id.* at 666 (noting that "access to the law can be had *only with the help of a lawyer*" and that "the lawyer is the only instrument for access to the system, the only instrument through which law becomes actually accessible. Lawyers are therefore more appropriately thought of as part of the formal legal system than as part of the informal social web surrounding each of us.").

167. *See* Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 615 (noting that "[t]he profession holds a monopoly on a service frequently needed by individuals, and as a result wields significant economic power" and advocating for the standard conception); *see also* Ellmann, *Lawyers and Clients*, *supra* note 25, at 718 (observing that "[a]ttorneys . . . wield technical expertise, enjoy exclusive or privileged access . . ." and advocating for a deferential client-centered approach to lawyering).

168. Quasi-public status could conceivably justify *more* intrusive state regulation—such as the regulation of fee-setting, the mandatory posting of fees, and a duty to serve the entire public indiscriminately—that is, a duty to accept all clients. Take, for instance, common carriers, which are legally classified as being "affected with a public interest." Common carriers must serve the entire public indiscriminately, must post rates, and are subject to extensive direct government regulation. *See* JERRY KANG, COMMUNICATIONS LAW AND POLICY: CASES AND MATERIALS 69–70 (4th ed. 2012); 47 U.S.C. § 203(a) ("Every common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . . .").

Of course, a legal system in which some lawyers effectively act as common carriers is imaginable. For example, English barristers are subject to the "cab-rank rule," which "generally requires barristers to accept any case given by a solicitor, thereby undertaking the representation of a particular client without passing judgment on the merits or public appeal." William C. McMahon III, *Declining Professionalism in Court: A Comparative Look at the English Barrister*, 19 GEO. J. LEGAL ETHICS 845, 851–52 (2006). But English barristers are materially different from

advance the public interest, the state would be merely placing conditions on the privilege of invoking the public machinery of lawyers, just as the state imposes speed limits on public streets and freeways. Of course, defenders of the standard conception would resist any such effort.[169]

Perhaps the most direct justification proffered for the autonomy appropriation is that lawyers are simply being paid to give up their autonomy for the client's and, accordingly, the standard conception merely reflects the efficient terms of a bargained-for exchange. But if that is truly the most direct and honest explanation, then it is unclear what remains of an *ethical* justification of the standard conception. Instead of a noble defense grounded in the moral goodness of autonomy, we are left with a slightly meretricious market transaction that cares not so much about autonomy but about the money.[170]

IV. AUTONOMY EXTERNALITY

In this Part, I explicate a more profound problem with the autonomy-based defenses of the standard conception. On their own terms, these defenses appeal to the crucial value of "autonomy." But they fail to take seriously that the lawyer can inflict enormous autonomy losses on third parties, and they fail to explain why the infliction of such losses does not violate the very value that they claim to embrace. Although many legal practices can be proffered as examples, I return to discuss NDAs in settlement agreements of sexual abuse allegations.

U.S. lawyers. Barristers have little involvement in the preparation of the client's case (most of which is handled by solicitors), and their activities are confined to "selecting the oral tactics and executing the prepared argument in court." *Id.* at 846. Barristers are also expected to maintain distance and detachment from the client, and "[t]he client is precluded from contacting a barrister directly." *Id.* at 851. Indeed, "a majority of criminal defendants will first meet their representing barrister on the day of the trial." *Id.* Also, it is likely that most American lawyers would strongly resist the cab-rank rule's duty to accept all clients. *See supra* note 121 and accompanying text.

169. The standard conception's mandate that lawyers promote the interests of their clients vigorously within the bounds of the law, without regard to the predictable consequences of their representation, including any harms inflicted on third parties or the public-at-large, would naturally be in tension with a more public-spirited understanding of the lawyer's role, which would presumably require lawyers to consider the impact on the public.

170. *See* Simon, *supra* note 15, at 108 (noting that "if Fried's definition is amplified to reflect the qualification . . . that the lawyer adopts the client's interests for money, it becomes apparent that Fried has described the classical notion, not of friendship, but of prostitution" (emphasis omitted)).

A. Nondisclosure Agreements: A Case Study

Investigative journalists have spotlighted the central role that lawyers have played in concealing the sexual harassment and sexual assault (both of which I will refer to here as "sexual abuse") of women by powerful men in the workplace.[171] As one reviewer commented about Ronan Farrow's account of Weinstein's sexual abuse while heading Miramax and The Weinstein Company, "without the involvement of lawyers, often acting at or beyond the boundary of ethical conduct, Weinstein and other predators would have been exposed years earlier."[172] While all of the unlawful or unethical conduct of the lawyers portrayed in Farrow's account warrant scrutiny, my case study focuses narrowly on their use of NDAs. Specifically, this Article examines NDAs recommended, negotiated and drafted by lawyers on behalf of powerful executives like Weinstein to settle sexual abuse allegations made by subordinate victims (employees and nonemployee associates in the professional context) before any claim is filed in court.[173] Although some courts have declined to enforce NDAs in a few

171. *See, e.g.*, FARROW, *supra* note 6, at 234–36; KANTOR & TWOHEY, *supra* note 4, at 53.

172. Neil Fulton, *All the News That's Fit To Hide: Sexual Assault and Silence in Hollywood and the Lawyers Who Let It Happen*, 40 LOY. L.A. ENT. L. REV. 395, 396 (2020) (reviewing RONAN FARROW, CATCH AND KILL (2019)).

173. For an overview of the problematic nature of NDAs, see generally David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019). For discussion of lawyers' role in secret settlements, see Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 486 (2008) ("Lawyers frequently negotiate settlements that suppress evidence . . . ."); Richard A Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know* Can *Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 118–21 (1999) (arguing against secrecy in settlements); Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 3 (2002). NDAs are problematic in many contexts beyond the settlement of sex abuse allegations. *See, e.g.*, Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 113 n.4 (2007) (noting prevalence of secret settlements of employment discrimination cases); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 511 (1994) (noting that "it is almost impossible to settle many mass tort cases without a secrecy agreement"); Daniel J. Givelber & Anthony Robbins, *Public Health Versus Court-Sponsored Secrecy*, 69 LAW & CONTEMP. PROBS. 131, 136 (2006) (discussing secret settlements of Dalkon Shield injury claims); Susan P. Koniak, *Are Agreements To Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 783–85 (2002) (discussing secret settlements of Firestone tires liability claims). Data suggest that over one-third of the U.S. workforce is bound by an NDA. *See* Orly Lobel, *NDAs Are Out of Control. Here's What Needs To Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/Z7YC-NRA2].

contexts,[174] under standard interpretations of the professional ethics rules, lawyers are generally permitted to arrange them[175] and, when requested by the client, are obliged to do so.[176] As will be argued in detail below, NDAs undermine the autonomy of third persons by suppressing probative evidence relating to survivors' claims, which in turn creates an environment in which protected abusers are underdeterred and thus more likely to coerce new victims.[177]

1. *Advancing the Abuser's Autonomy.* As suggested by the Introduction, these NDAs are ingeniously designed by lawyers to suppress any further disclosure of the claims or evidence relating to sexual abuse. They may require the survivor, in exchange for a cash payout, to refrain from disclosing information relating to the sexual abuse, including concealing the nature of the settlement payout to the survivor's accountant[178]; to refrain from making any disparaging remarks about the abuser or the firm[179]; to provide prompt notice to the abuser's lawyers before making any disclosure pursuant to any criminal legal process involving the abuser or the company[180]; when providing disclosure in response to a legal process, to "use all

174. Courts have declined to enforce NDAs that prohibit voluntary disclosures to the EEOC or other agencies, disclosures about past child abuse allegations made in connection with a judicial proceeding or investigation, disclosures made by public employees to private litigants, disclosures made in response to a subpoena, and *ex parte* disclosures made in witness interviews where formal discovery was not yet available in securities litigation. *See* Bauer, *supra* note 173, at 528–32.

175. *Id.* at 498 (reporting that the "ABA and state ethics opinions, and most commentators, have concluded that it is ethically permissible for lawyers to agree to keep the underlying facts of a case confidential as part of a settlement"). However, lawyers are not ethically permitted to promulgate NDAs that are highly likely to violate criminal statutes, especially "those that make no exception for disclosures in response to a subpoena or court order, forbid voluntary disclosures to a court or government agency when an official proceeding is known to be pending or imminent, or prohibit informing law enforcement authorities about criminal conduct (under certain circumstances)." *Id.* at 508.

176. *Id.* at 503 (concluding, after an analysis of the relevant ethical rules, that "the lawyer has little choice but to assist the client in settling on any terms that the client deems acceptable . . . ."); *see also id.* at 506 ("Lawyers who would like to 'just say no' to secret settlements because of their public harms, without violating the rules themselves, are largely stuck.").

177. For the detailed argument, see *infra* Part IV.A.2.

178. KANTOR & TWOHEY, *supra* note 4, at 66.

179. *Id.* at 52.

180. *See, e.g.*, Garrahan, *supra* note 1 (noting requirement of 48 hours' notice before disclosures); Benjamin David Williams, *Separation Anxiety: Best Practices for Employee Severance Agreements*, EMP. L. COMMENT., Feb. 2016, at 1, 3 (noting requirement of prompt notice "if the employee receive[s] a subpoena, deposition notice, interview request, or other inquiry related to a civil, criminal, or administrative suit or investigation").

reasonable endeavours to limit the scope of the disclosure as far as possible"; "to give 'reasonable assistance'" to the company "if it elects to contest such process"[181]; to destroy any and all copies of recorded admissions made by the abuser[182]; to surrender the survivor's phone or any other devices with recording capability to a private security firm retained by the abuser[183]; to surrender diaries, backup files,[184] and passwords to email and other digital media accounts[185]; to sign a sworn statement declaring the abuser's nonculpability to be used by the abuser in the event that the survivor breaches the NDA[186]; and to disclaim any publicized evidence of the abuser's guilt "as counterfeit or forgeries."[187] Stunningly, the NDAs may also prohibit the survivor from even retaining a copy of the NDA itself.[188] Some NDAs take the additional step of imposing financial penalties on accusers for breaching confidentiality. For example, the NDA negotiated by USA Gymnastics that bound McKayla Maroney, one of many gymnasts abused by medical doctor Lawrence G. Nassar, imposed a $125,000 penalty if Maroney disclosed.[189] Although NDAs often contain an exception for disclosures required by subpoena or court order, some are reported to lack this exception.[190]

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181. Garrahan, *supra* note 1.

182. *See* FARROW, *supra* note 6, at 63 ("The contract ordered the destruction of all copies of audio recordings of Weinstein admitting to the groping.").

183. *See id.* (noting that, according to the contract, "Gutierrez agreed to give her phone and any other devices that might have contained evidence to Kroll, a private-security firm retained by Weinstein").

184. KANTOR & TWOHEY, *supra* note 4, at 52.

185. *See* FARROW, *supra* note 6, at 63 ("[Gutierrez] also agreed to surrender the passwords to her email accounts and other forms of digital communication . . . .").

186. *See id.* at 64 ("A sworn statement, pre-signed by Gutierrez, was attached to the agreement, to be released in the event of any breach. It stated that the behavior Weinstein admitted to in the recording never happened.").

187. Tom Kludt, *Terms of Bill O'Reilly Settlements Revealed for First Time*, CNN MONEY (Apr. 4, 2018, 7:55 PM), https://money.cnn.com/2018/04/04/media/bill-oreilly-defamation-suit-denied-settlement-under-seal/index.html [https://perma.cc/5R8U-PRHH].

188. FARROW, *supra* note 6, at 93; Garrahan, *supra* note 4.

189. Elizabeth A. Harris, *Despite #MeToo Glare, Efforts To Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html [https://perma.cc/D898-R2MF]; *see also* FARROW, *supra* note 6, at 72 (noting that NDAs may include a "financially devastating liquidated damages" penalty for breach).

190. Bauer, *supra* note 173, at 492 n.21 (citations omitted).

When lawyers draft and conclude NDAs for their clients,[191] they are not only discharging their professional obligations to carry out their clients' objectives,[192] they are also fostering their clients' autonomy as thin positive liberty by conferring on their clients the *effective power* to realize their goals. Those goals are many, and their corresponding benefits to the clients are undeniable. NDAs suppress bad publicity. For the organizational client, these agreements enable the firm to maintain its reputation as a woman-friendly workplace and potentially reduce its civil liability for sexual harassment claims under Title VII of the 1964 Civil Rights Act. For those organizational clients who are public corporations, these agreements also help maintain investor confidence in the company with implications for the stock price. For executives accused of sexual abuse, these agreements enable them to retain their privacy and reputation, both of which are instrumental to their careers.

NDAs are especially valuable for repeat offenders whose serial predation is kept in the shadows.[193] To be fair, NDAs do protect the privacy of executives who are falsely accused.[194] That said, it is unclear how widespread the phenomenon of false accusation is.[195] And some

191. With respect to NDAs, although simultaneous representation of individual executives and their corporate employers by the same lawyer presents a conflict of interest, such representations do occur and are permitted, provided that the necessary conditions are satisfied, including obtaining the informed consent of both clients. *See* MODEL RULES OF PRO. CONDUCT r. 1.7, 1.13(g) (AM. BAR ASS'N 2023).

192. The standard view is that the decision of whether to enter into an NDA as part of a settlement of claims is the client's. *See* WILLIAM H. FORTUNE, RICHARD H. UNDERWOOD & EDWARD J. IMWINKELRIED, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK 580 (1996) (noting "the ultimate decision to participate or not to participate in a settlement coupled with a 'gag order' is the client's").

193. Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 78 (2018).

194. *Id.* at 77 ("NDAs may also help protect those who are falsely accused or have a valid legal defense from the negative reputational consequences of having been accused and having paid to settle an accusation of sexual misconduct.").

195. *See, e.g.*, *False Reports*, NAT'L SEXUAL VIOLENCE RES. CTR. (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf [https://perma.cc/C5SH-2QY4] (noting that beliefs and biases about sexual assault can explain why rates of false allegations tend to be inflated); Katie Heaney, *Almost No One Is Falsely Accused of Rape*, N.Y. MAG. (Oct. 5, 2018), https://www.thecut.com/article/false-rape-accusations.html [https://perma.cc/5PRP-L3A6] (explaining that while only five percent of reported rapes are unconfirmed, only eight to ten percent of rapes are reported; thus, false accusations account for only an estimated half of a percent of all rapes).

commentators have suggested that NDAs may actually incentivize the making of false accusations.[196]

2. *Undermining the Autonomy of Others. Autonomy as negative liberty*. While enhancing the autonomy of their clients, lawyers who secure NDAs facilitate the impairment of the autonomy as negative liberty of third persons[197] by undermining the specific and general deterrence of sex abusers.[198] Even without judicial enforcement,[199]

196. *See, e.g.*, Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 334 (2018) (noting that "[t]he prospect of profit as well as protection of (the complainant's) privacy raises the danger of a false claim"). Others have argued that the prospect of settlement reduces the plaintiffs' incentives to invest efforts in trial preparation (the "underinvestment" thesis), which in turn decreases the difference between the expected liability of culpable and blameless defendants, which in turn makes it more difficult to deter harmful activities without also chilling legitimate activities. *See* Ezra Friedman & Abraham L. Wickelgren, *No Free Lunch: How Settlement Can Reduce the Legal System's Ability To Induce Efficient Behavior*, 61 SMU L. REV. 1355, 1366–69 (2008) [hereinafter Friedman & Wickelgren, *No Free Lunch*]; Ezra Friedman & Abraham L. Wickelgren, *Chilling, Settlement, and the Accuracy of the Legal Process*, 26 J.L. ECON. & ORG. 144, 144 (2010). Because the expected liability faced by blameless defendants increases due to the prospect of unrestricted settlement, the specter of false accusations arises. That said, empirical evidence on the issue of plaintiffs' lawyers' efforts is conflicting. *See* Herbert M. Kritzer, William L.F. Felstiner, Austin Sarat & David M. Trubek, *The Impact of Fee Arrangement on Lawyer Effort*, 19 LAW & SOC'Y REV. 251, 253, 272 (1985) (citing a study that supports the underinvestment thesis but finding evidence of reduced effort in contingency fee cases only in small cases involving less than $10,000).

197. To be clear, my argument is not that *lawyers themselves* directly interfere with the negative liberty of third-party victims—only that they *facilitate* such interference. There are two reasons. First, to qualify as a direct interference, it must be *deliberate*. While the lawyer's assistance will increase the probability of harm to new victims by lowering the sex offender's costs of perpetrating coercion, it is tough to argue that lawyers *deliberately* coerce them. Here, the sex abuser best qualifies as the interfering agent.

Second, in order to qualify as direct interference in another's negative liberty, the freedom-reducing restraint must make an option significantly less eligible for choice by raising the costs of accessing an option *so high* that it ceases to remain a real option. So, for example, the threat of bodily harm ("your money or your life") is generally understood as effectively eliminating a generally available option (the option of having *both* one's money *and* one's life). While NDAs certainly make it *more likely* that victims will suffer coercion in the form of sexual abuse, it may be tough to argue that victims will *invariably* suffer coercion. *See* GAUS, *supra* note 90, at 80.

198. Specific deterrence happens when an offender, who has already been punished, is deterred from committing future offenses because he wants to avoid future punishment. General deterrence is achieved when the general public is deterred from offending through awareness of others being apprehended and punished. *See* Athula Pathinayake, *Should We Deter Against General Deterence?*, 9 WAKE FOREST J.L. & POL'Y 63, 78 (2018) ("Whereas general deterrence targets the decision-making processes of potential offenders, specific deterrence applies after an offender has already experienced a given punishment.").

199. A contract need not be judicially enforceable in order to induce parties to abide by its terms. *Cf.* Bauer, *supra* note 173, at 495 ("The prospect that a noncooperation agreement will be

NDAs may hinder relevant evidence from ever reaching plaintiff-side lawyers who need to conduct factual investigations either to vet or vindicate the valid claims of survivors.[200] After all, the survivor who settles one case may be a potential witness in another.[201] Because NDAs may suppress probative evidence relevant to a survivor's claims,[202] they make it more difficult for similar claims to be filed[203] and for those who bring claims to prove their cases.[204] As a result, firms are more likely to retain abusers in their positions, as long as those abusers remain profitable to their firms.[205] It is telling, for example, that only *after* sexual abuse allegations against Roger Ailes and Bill O'Reilly went public did Fox News finally take steps to terminate these reoffending executives.[206] Undeterred or underdeterred abusers are

found unenforceable if challenged by a third party seeking information does not prevent settling parties from entering into one."); *see infra* note 377 and accompanying text.

200. Before plaintiffs' lawyers accept the representation of a survivor's case, they must conduct preliminary factual investigations, which may include witness interviews, to evaluate the strength of survivors' claims and to discharge their investigatory duties under state and federal civil procedural rules and state ethics codes. *See, e.g.*, FED. R. CIV. P. 11 (imposing a duty on the attorney of record to undertake "an inquiry reasonable under the circumstances" to determine whether the legal and factual contentions in the filing are meritless); MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS'N 2023) ("What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."). Once representation has commenced, plaintiffs' lawyers often rely on informal witness interviews to build their cases and determine whether a deposition makes economic sense in light of the substantial costs of formal discovery. Bauer, *supra* note 173, at 496.

201. Bauer, *supra* note 173, at 493.

202. Although under the Federal Rules of Evidence prior bad acts are inadmissible to prove "the character of a person in order to show action in conformity therewith[,]" there are exceptions for proving, for example, "motive, opportunity, intent, knowledge, or propensity to engage in sexual abuse." Bauer, *supra* note 173, at 492–93 (citations omitted); *see* FED. R. EVID. 404, 413. As such, evidence of past similar conduct is routinely admitted and within the scope of discovery. Bauer, *supra* note 173, at 492–93.

203. *See* Levmore & Fagan, *supra* note 196, at 314 (describing the view that a promise of confidentiality may under-deter the wrongdoer because "similarly situated victims will not know that they can bring suits").

204. Bauer, *supra* note 173, at 491.

205. Another reason why firms retain abusers is that high-level executives are often protected by favorable employment agreements that impose draconian penalties on firms for terminating executives outside of specified reasons. For example, in 2005, when Weinstein left Miramax to form The Weinstein Company, his lawyer, David Boies, helped secure contracts for Weinstein and his brother protecting them from termination unless they were convicted of a felony. KANTOR & TWOHEY, *supra* note 4, at 89.

206. *Id.* at 24.

more likely to coerce new victims, impairing their autonomy in the process.[207]

Further, because the fear of bad publicity and attendant reputational harm are important drivers of workplace reform, firms are more likely to leave in place the policies and the workplace culture that permitted sexual abuse to happen in the first place,[208] thus enabling future sexual abuse by both repeat and new offenders. One could imagine, for example, that in the absence of NDAs, Miramax might have felt compelled to adopt new, more aggressive policies, such as a blanket prohibition against "business" meetings taking place in hotel rooms (a common pretext for Weinstein[209]), which might have partially stymied Weinstein's abuses.

Unfortunately, because NDAs are so effective in silencing survivors, we lack empirical evidence and analyses of the relationship between NDAs and the perpetuation of sexual abuse. But we do have damning anecdotal evidence. Harvey Weinstein of Miramax and The Weinstein Company settled eight to twelve cases and was the target of at least eighty-seven allegations.[210] And multiple allegations of sexual misconduct have been lodged against Charlie Rose, a former co-anchor of CBS This Morning (eight allegations[211]); Leslie Moonves, the former

207. The harms to new victims facilitated by NDAs goes beyond coercive sexual abuse. Those harms include career disruption, such as job loss and sick leave, as well as harder-to-measure costs, such as diminished productivity resulting from the victim's having to shift cognitive resources away from work-related tasks toward coping with a hostile workplace. *See* EEOC, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 22 (2016) [hereinafter, EEOC REPORT], https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [https://perma.cc/W6L5-CNVV].

208. A sexually hostile workplace may be characterized as one that doesn't take allegations of sexual abuse seriously or one that has adopted a culture of silence. For indicators of sexually hostile workplaces, see FARROW, *supra* note 6, at 38–39 (reporting statement of former Miramax marketing executive, admitting that no one who witnessed sexual abuse spoke up against it); *id.* at 108 (reporting that employees of The Weinstein Company claimed that "the human resources office at the company was a sham, a place where complaints went to die"); *see also* KANTOR & TWOHEY, *supra* note 4, at 124 (noting that the human resources operation of The Weinstein Company was "weak").

209. Brooks Barnes, *Harvey Weinstein Ousted from Motion Picture Academy*, N.Y. TIMES (Oct. 14, 2017), https://www.nytimes.com/2017/10/14/business/media/harvey-weinstein-ousted-from-motion-picture-academy.html [https://perma.cc/9FCV-TDQG] (reporting that Weinstein "often used the pretext of meetings . . . to lure women to hotel rooms").

210. *See supra* note 11.

211. John Koblin & Michael M. Grynbaum, *Charlie Rose Fired by CBS and PBS After Harassment Allegations*, N.Y. TIMES (Nov. 21, 2017), https://www.nytimes.com/2017/11/21/business/media/charlie-rose-fired-cbs.html [https://perma.cc/3T2U-3UBS].

chairman of CBS (seventeen allegations[212]); Bill O'Reilly, a former host of Fox News' The O'Reilly Factor (five allegations[213]); and Roger Ailes, former chairman and chief executive of Fox News (ten allegations[214]). All of the aforementioned companies used NDAs to settle sexual abuse allegations.[215] NDAs are also known to have been used at USA Gymnastics,[216] the Catholic Church,[217] and NBC.[218] It is possible that, for example, NDAs allowed Weinstein's predation to last approximately twenty years.[219]

Autonomy as thin positive liberty. Lawyers also impair the autonomy of settling survivors in subtler ways, sounding in terms of positive liberty. NDAs make it less likely that the survivors' very intentions for coming forward will be honored. Survivors of sexual abuse who report their allegations profess that they do so out of a desire to stop the abuser. For example, one of Weinstein's victims, Ambra Gutierrez, wore a wire supplied by the New York Police

212. Edmund Lee & Rachel Abrams, *CBS Says Les Moonves Will Not Receive $120 Million Severance*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/business/media/les-moonves-cbs-severance.html [https://perma.cc/SVJ6-Z2SC].

213. Emily Steel & Michael S. Schmidt, *Bill O'Reilly Is Forced Out at Fox News*, N.Y. TIMES (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/business/media/bill-oreilly-fox-news-allegations.html [https://perma.cc/ST8T-JFKV].

214. John Koblin, Emily Steel & Jim Rutenberg, *Roger Ailes Leaves Fox News, and Rupert Murdoch Steps In*, N.Y. TIMES (July 21, 2016), https://www.nytimes.com/2016/07/22/business/media/roger-ailes-fox-news.html [https://perma.cc/U6UM-9E8W].

215. Steel & Schmidt, *supra* note 213. Fox News entered into five NDAs relating to Bill O'Reilly. Two additional women made allegations but were not party to NDAs.

216. Victor Mather, *McKayla Maroney Says USA Gymnastics Forced Confidentiality in Sexual Abuse Settlement*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/sports/olympics/mckayla-maroney-usa-gymnastics-confidentiality-agreement.html [https://perma.cc/88C8-27DU]; *see also* Complaint for Damages at 28, *Maroney v. Mich. State Univ.*, No. C-687396 (Cal. Super. Ct., Dec. 20, 2017).

217. Adam Liptak, *Price of Broken Vows of Silence*, N.Y. TIMES (May 26, 2002), https://www.nytimes.com/2002/05/26/us/price-of-broken-vows-of-silence.html [https://perma.cc/F483-PJDT]; Matt Carroll, Sacha Pfeiffer, Michael Rezendes, Stephen Kurkjian & Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue Out of Public Eye*, BOSTON GLOBE (Jan. 31, 2002), https://www.bostonglobe.com/news/special-reports/2002/01/31/scores-priests-involved-sex-abuse-cases/kmRm7JtqBdEZ8UF0ucR16L/story.html [https://perma.cc/DM5L-BQTY] (discussing use of secrecy clauses to settle child sex abuse claims against approximately 70 priests over a decade).

218. FARROW, *supra* note 6, at 206, 213–14, 372–77, 390–91 (referring to various NDAs at NBC).

219. *Id.* at 221.

Department to extract a recorded admission from Weinstein.[220] She explained that she was willing to risk "legal and professional annihilation" to stop Weinstein.[221] Similarly, Perkins, as noted in the Introduction, said that her principal motivation for coming forward was to press the organization to take action to protect present and future employees. However, again, once an NDA is signed, it is less likely that firms will take forceful measures to restrain the abuser and address their sexually hostile climate.

Now let's address one objection to my argument that NDAs undermine the deterrence of sex abusers, thus impairing the autonomy of third persons and settling survivors. That objection contends that any negotiated settlement between two represented parties should reflect the expected value of the claim, adjusted for the savings in parties' litigation costs,[222] which should in turn generate a socially optimal or efficient amount of deterrence.[223] And even if NDAs erode deterrence via publicity, surely there is deterrence via monetary payouts.[224] But there are at least four reasons why the dollar amount of the settlement may insufficiently deter offenders.

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220. *See id.* at 59 (reporting that "Weinstein copped to groping [Gutierrez] the previous day: a full, dramatic confession, caught on tape").

221. *Id.* at 58. The prosecutors in the office of Manhattan district attorney Cyrus Vance, despite having taped evidence of Weinstein's admission of sexual assault, declined to prosecute. Outmaneuvered by Weinstein and his lawyers, Gutierrez complied with her lawyers' advice and signed an NDA in return for a million-dollar payment. *See id.* at 62.

222. According to economic theory, if represented parties have assessed the outcome of a trial correctly, then they will settle for an amount equal to the expected value of the claim, adjusted for litigation costs. *See* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 874–75 (2007) (explaining that the different perception in expected probability of plaintiff's verdict and the monetary amount of such a verdict can inhibit settlement). Moreover, even if the parties cannot perfectly estimate their liability at trial, they should still settle as long as the difference in parties' expectations is not greater than their total litigation costs. *Id.* at 877.

223. This argument is premised on the simplifying (albeit contestable) assumption that legal sanctions have been optimally set—that they neither underdeter nor overdeter—that is, incentivize excessive cautiousness that could have unintended consequences or otherwise chill socially desirable behavior. According to economic theory, a rational defendant will choose to engage in the liability-generating activity if, and only if, the benefit derived from the activity (economic or otherwise) exceeds his expected liability. *See* Friedman & Wickelgren, *No Free Lunch*, *supra* note 196, at 1356, 1361; *see also* Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067, 1069 (1989).

224. In theory, the promise of confidentiality can be priced and should enable the survivor to extract a higher financial payout in settlement than she otherwise would for promising secrecy. *See* Moss, *supra* note 222, at 878–80 (quoting Richard Posner's explanation of the traditional economic argument for confidentiality). In turn, a higher monetary penalty should incrementally

First, the settlement amounts—even if they seem large to the survivors—are often trivial to the powerful executives who have committed the abuse and to their employers.[225] Second, for settlements to efficiently deter the abuser, the settlement amounts must approximate the abuser's expected liability at trial, adjusted for litigation costs.[226] But NDAs hinder an accurate assessment of the abuser's expected liability by obscuring survivors' access to probative evidence.[227] Survivors cannot negotiate terms that reflect, for example, a perpetrator's history of serial abuse if they never learn of that history in the first place.[228] As we now know, the pattern in at least some repeat

deter the abuser from reoffending (especially if the abuser pays the penalty out of pocket) or raise the firm's incentive to police and discipline its employees (if the firm pays). *See* Levmore & Fagan, *supra* note 196, at 317 (arguing that a confidential settlement "does not entirely let [the defendant] escape the consequences of its actions, and may even deter [the defendant] just as well as any other tort-and-settlement regime"). In some cases, abusers, rather than their firms, make settlement payouts directly to survivors. For example, Weinstein reportedly paid off Zelda Perkins and Rowen Chiu using personal checks. KANTOR & TWOHEY, *supra* note 4, at 89, 123, 130. In such cases, firms may not internalize the settlement costs.

225. One study cited by the EEOC and conducted by a national liability insurance provider revealed that "19% of the matters resulted in defense and settlement costs averaging $125,000 per claim." EEOC REPORT, *supra* note 207, at 19. In one rare, six-year study of sexual harassment cases settled in Chicago, researchers found that claimants recovered on average less than $60,000 each. Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 148 (2007).

Perkins and a colleague settled with Weinstein for £250,000 to be divided equally between them. Garrahan, *supra* note 1. Ashley Matthau settled with Weinstein for $125,000. KANTOR & TWOHEY, *supra* note 4, at 77. In 1997, Rose McGowan settled with Weinstein for $100,000 but the one-page agreement inexplicably did not contain a confidentiality clause. Later, Weinstein offered McGowan $1 million to buy her silence. *Id.* at 147. Ambra Gutierrez, who had a taped confession from Weinstein, settled for $1 million. *See* FARROW, *supra* note 6, at 62.

Also, the survivor may be compelled to accept a settlement that is less than the abuser's expected liability, adjusted for litigation costs, because she is in financially tenuous circumstances. *See* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) ("[T]he distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.").

226. *See* Friedman & Wickelgren, *No Free Lunch*, *supra* note 196, at 1363 (explaining that if the defendant expects to receive a settlement offer that is lower than the expected value of the claim, adjusted for litigation costs, then the defendant will not have an efficient incentive to avoid the liability-generating activity).

227. Information about the abuser's culpability, for example, as might be indicated by evidence of serial predation, would be relevant to an assessment of liability because it would impact the probability of finding liability at trial. *See supra* note 202 and accompanying text.

228. *See* Levmore & Fagan, *supra* note 196, at 322 (noting that a victim of sexual abuse from a serial predator who does not know that the abuser is a serial wrongdoer is "often unable to extract a high settlement" and, as a result, the abuse is insufficiently deterred).

offender sex abuse cases has been that once allegations from one victim are made public, more survivors come forward with similar stories of victimization. NDAs suppress these stories. And pretrial discovery will be of little help to many survivors, given the common practice of *pre-filing* settlements.

Third, even if the survivor is legally represented, the economic incentives of their lawyers are skewed to favor quick settlement, regardless of whether that option is in the best interest of their clients. After all, lawyers keep more profit by avoiding the substantial costs (and risks) of discovery, motion work, and trial, and simply collecting their contingency fee[229] as a share of the settlement[230]—a fee that can be as high as 40 percent of the settlement award.[231] Finally, it is important to underscore that even survivors who are legally represented often choose to settle out of fear[232]—fear that their own reputations will be tarnished, that they will be forced to defend themselves against lawsuits filed by opposing lawyers, and that their

229. Plaintiffs' lawyers are typically paid on a contingency fee basis. KANTOR & TWOHEY, *supra* note 4, at 53.

230. It should be emphasized that trials carry not only high opportunity costs but pose the risk of losing altogether and not collecting any (contingency) legal fees. On the skewed incentives of plaintiffs' lawyers, see, e.g., Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 190 (1987); Terry Thomason, *Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process*, 20 J. LEGAL STUD. 187, 190 (1991); Hugh Gravelle & Michael Waterson, *No Win, No Fee: Some Economics of Contingent Legal Fees*, 103 ECON. J. 1205, 1218–20 (1993).

231. For example, Gloria Allred, who has negotiated "breathtakingly restrictive" NDAs on behalf of survivors with Fox News (2011), the US Olympic Women's Gymnastics Team doctor Larry Nassar (2016), and Weinstein (2004), fetched 40 percent of the $125,000 settlement. KANTOR & TWOHEY, *supra* note 4, at 76–77. *See also id.* at 98 (reporting that Lisa Bloom, Allred's daughter, took $1 million in fees from a $2.5 million settlement).

232. Although survivors' formal assent to an NDA is unlikely to be invalidated under the common law doctrine of duress, there is a genuine question as to whether their assent is meaningful, given how survivors' allegations are often met by threats from the opposing party and given that their own lawyers may push for settlements that are not in the interests of survivors.

To be sure, some survivors may legitimately wish to move past the sexual abuse and seek compensation and privacy. "But," as Ian Ayres has noted, "while settling employees are free to trade via settlement their right to be compensated for a claim, these employees cannot trade the public's interest in having a right to hear from any employee or ex-employee information about civil rights violations." Ayres, *supra* note 193, at 80–81. Also, while some survivors may reasonably want to bind the abuser to secrecy as a way of preventing the abuser from damaging the survivor's reputation, in reality, abusers (and their corporate principals) already have strong incentives to keep the allegations confidential and, accordingly, mutually binding NDAs tend to benefit abusers more than they benefit survivors.

families will suffer as a result.[233] For example, Perkins acquiesced to the NDA in part because her own lawyers warned her that Weinstein would destroy her and her family. Reflecting on her decision to settle, Perkins recounted:

> "I wanted to expose him [and] thought that we could go to Disney [which was planning to acquire Miramax] . . . . But the lawyers were reluctant. They said words to the effect of: 'they are not going to take your word against his with no evidence'."
>
> . . . "I was very upset because the whole point was that we had to stop him by exposing his behavior. I was warned that he and his lawyers would try to destroy my credibility if I went to court. They told me he would try to destroy me and my family."[234]

In sum, the standard conception promotes the client's autonomy at the expense of the autonomy of third parties harmed by the legal representation. Specifically, lawyers who conclude NDAs on behalf of abusers and their firms may be facilitating the impairment of the negative liberty of third persons who are made more likely to suffer coercion in the form of sexual abuse not only at the hands of the alleged abuser but also by other undeterred offenders not yet known. Lawyers also impair the positive liberty of survivors by making it less likely that their intentions to restrain the abuser will be honored. We should not praise autonomy for our clients and remain willfully blind to the autonomy losses inflicted on others.

To be sure, Fried and Pepper fully recognize that lawyers inflict externalities on third parties.[235] However, they generally resist the implication that the presence of externalities should temper the

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233. For example, Weinstein, aided by tabloid newspapers, engineered a public smear campaign to tarnish Gutierrez's image. On at least one occasion, reporters approached Gutierrez's brother at work. *See* FARROW, *supra* note 6, at 61–62; *see also* KANTOR & TWOHEY, *supra* note 4, at 120–21 (recounting the role of Weinstein lawyers in the Gutierrez matter).

234. Garrahan, *supra* note 1. Similarly, after Rose McGowan was allegedly raped by Weinstein, she considered pressing criminal charges. Her criminal lawyer advised her to settle her claim because the lawyer predicted that no juror would believe her story based on the fact that McGowan had previously acted in a sex scene. FARROW, *supra* note 6, at 47.

235. *See, e.g.*, Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 614 (citing examples of harm to others); *id.* at 627–28 (acknowledging that what the lawyer does for the client—consistent with the amoral professional duties of lawyers—"may be evil" and providing an example); Fried, *The Lawyer as Friend*, *supra* note 13, at 1062, 1064–65 (citing examples of harms to others).

lawyer's client-centered obligations.[236] Instead, they suggest or imply that the only (or most) acceptable solution to the problem of externalities is for *all* interests to be legally represented.[237] Such an argument is akin to the claim that the only morally proper way to reduce gun violence is for all persons to carry their own guns. Of course, in the real world, only criminal defendants are guaranteed the right to counsel and most people cannot afford lawyers. Indeed, the 2021 World Justice Project ranked the United States among the bottom fourteen countries in terms of accessibility and affordability of civil justice.[238] And even if an individual can access lawyers, there are practical limitations to what lawyers can do to protect clients from unjust harms inflicted by other lawyers who represent the powerful. No matter how skillful or adept, lawyers representing ordinary individuals cannot neutralize the economic power wielded by high-net-worth clients and their counsel.[239]

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236. *See* Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 618, 623 (arguing that if the conduct in question is "sufficiently 'bad,'" it should be made "explicitly unlawful" and that lawyers should not act as "moral screen[s]"); *id.* at 618–30; Fried, *The Lawyer as Friend*, *supra* note 13, at 1080–87. That said, Pepper concedes that (i) lawyers should be allowed to provide moral input through dialogue with the client and (ii) lawyers may be morally obligated to engage in conscientious objection against the client's interests in extreme and rare cases, such as when the life of a victim of the client's is at risk. *See* Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 630–33. Fried concedes an exception for wrongs categorized as "personal wrongs," as opposed to "institutional wrongs." *See supra* note 53 and accompanying text (on the distinction between personal and institutional wrongs); Fried, *The Lawyer as Friend*, *supra* note 13, at 1082–87.

237. *See e.g.*, Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 623 (suggesting that retaining a lawyer is a better solution for equalizing power asymmetries than obliging the lawyer of the more powerful party to function as a moral screen and filter); Fried, *The Lawyer as Friend*, *supra* note 13, at 1079–80 (arguing that the obligation to do justice is "an obligation of society as a whole" and suggesting that society should be willing to subsidize (through tax revenues) legal representation for those too poor to pay).

238. *See* WORLD JUST. PROJECT, CIVIL JUSTICE FOR UNITED STATES, 2021, https://worldjusticeproject.org/rule-of-law-index/factors/2021/United%20States/Civil%20Justice [https://perma.cc/BHC9-Q5HJ] (ranking the U.S. 126th out of 139 countries); Eli Wald, *The Access and Justice Imperatives of the Rules of Professional Conduct*, 35 GEO. J. LEGAL ETHICS 375, 404 (2022).

239. *See, e.g.*, Galanter, *supra* note 163, at 149–51; Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 360–63 (1999); Sung Hui Kim, *Economic Inequality, Access to Law, and Mandatory Arbitration Agreements: A Comment on the Standard Conception of the Lawyer's Role*, 88 FORDHAM L. REV. 1665, 1666 (2020) [hereinafter, Kim, *Economic Inequality*].

B. The Limits of Understanding Autonomy Through the Lens of Negative and Positive Liberty

I have demonstrated that autonomy-based defenses of the standard conception suffer a blind spot by ignoring the autonomy losses of others. But I have not specifically established that the autonomy losses to victims necessarily *outweigh* the autonomy gains of sex abusers such that lawyers should refrain from concluding NDAs for their clients. While we may intuitively sense that the autonomy losses outweigh the gains,[240] we lack a metric with which to measure. Indeed, the concepts of negative and thin positive liberty offer no common currency or yardstick by which to measure the importance of any two ends chosen by individuals.[241] Berlin himself, for example, is skeptical that liberty can be measured "in any quantitative fashion."[242]

The reason there is no common currency to evaluate autonomy gains and losses is that negative liberty and the thin positive liberty of the classical and contemporary liberal traditions are generally associated with "value pluralism"—the view that "there are many values or good things in life, and there is no rational basis for concluding that one is best."[243] Berlin, for example, believes that pluralism was a "truer" ideal because it recognizes "the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another."[244] He explains:

> To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral

240. To be clear, neither Fried nor Pepper seem to advance utilitarian arguments, which would entail comparing autonomy losses with autonomy gains. A utilitarian with the goal to maximize the total amount of benefit to society at large, without regard to distributional concerns, would seek to compare the gains and losses to determine whether there is a net gain in a Kaldor-Hicks sense.

241. This is not to say that philosophers have not offered theories about how to measure liberty. *See, e.g.*, IAN CARTER, A MEASURE OF FREEDOM 3 (1999); Robert Sugden, *The Metric of Opportunity*, 14 ECON. & PHIL. 307, 308 (1998); Prasanta K. Pattanaik & Yongsheng Xu, *On Ranking Opportunity Sets in Terms of Freedom of Choice*, RECHERCHES ECONOMIQUES DE LOUVAIN 383, 383 (1990); David Miller, *Constraints on Freedom*, 94 ETHICS 66, 67–68 (1983).

242. That said, Berlin concedes that the amount of negative liberty may be a function of "how many doors are open, how open they are," and "their relative importance in [one's] life." BERLIN, *supra* note 86, at xxxix–xl; *see also id.* at 130 n.1.

243. GAUS, *supra* note 90, at 58.

244. BERLIN, *supra* note 86, at 171.

> decision as an operation which a slide-rule could, in principle, perform.[245]

Because there is no single correct answer as to how each should live her own life, Berlin believes that society must ensure that each has the liberty to arrive at her own answer. In other words, the fact of pluralism justifies guaranteeing everyone a "measure of 'negative liberty.'"[246] He readily acknowledges, however, that people's negative "liberty to choose to live as they desire" is not unlimited and thus "must be weighed against the claims of many other values," including "equality, or justice, or happiness, or security, or public order."[247] And advocates of negative liberty generally agree that we must all accept certain restraints on our freedom—such as criminal laws that prevent and punish physical coercion (including sexual abuse)—in order to provide security for our negative freedoms.[248]

The central problem with any ethical model grounded in concepts of autonomy emphasizing negative liberty or the thin variant of positive liberty is that it is ill-equipped to compare the autonomy gains of one party against the autonomy losses of others. In order to do so, we must inevitably reference *other values*, which the standard conception is wary of doing.

V. TOWARD A NEOREPUBLICAN CONCEPTION OF AUTONOMY

To derive a new model of legal ethics that better comports with our intuition that certain losses of autonomy are more serious than others and that can serve as a morally palatable guide to inform how lawyers ought to conduct their legal practices, we need a new conception of autonomy that can be usefully applied to lawyers, clients and third parties alike. In this Part, I offer *autonomy as republican liberty* as that conception and then apply it to the case study of NDAs used to settle sexual abuse allegations. Finally, I sketch out the broad implications of this understanding of autonomy for the legal profession.

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245. *Id.* at 171–72.

246. *Id.* at 171.

247. *Id.* at 170.

248. *See* GAUS, *supra* note 90, at 116; JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). That said, certain advocates of negative liberty are skeptical about interfering in contracts, such as NDAs, even if doing so might reduce the risk of physical coercion.

A. Autonomy as Republican Liberty

My alternative understanding of liberty draws from the republican intellectual tradition—specifically, the older, Italian-Atlantic tradition, which venerated classical Rome and Greece. Taking their name from the Latin *res publica*, literally the "public thing," republicans believed that true freedom could only be guaranteed in a "commonwealth"—a self-governing polity dedicated to promoting the common good and protecting the basic liberties of citizens. Such a commonwealth had to be carefully constructed according to well-balanced constitutional frameworks to resist corruption by sectarian forces that would trample the equal freedom of citizens. To ensure the prosperity and survival of the freedom-securing commonwealth, republicans believed that citizens had to eschew corruption and demonstrate "public virtue"—"[t]he sacrifice of individual interests to the greater good of the whole."[249]

Republican ideas flourished during the Renaissance in the northern Italian republics, rose to prominence in Anglophone political theory in seventeenth-century Britain during the disputes between the Crown and Parliament, and became influential to the American and French Revolutions, among other mass social movements.[250] More recently, historians, legal scholars, and political philosophers have resuscitated this republican tradition, adapting and revising its ideas to develop a *neo*republican research program applicable to contemporary settings.[251] Of course, there is not a single, monolithic republican tradition, and various strands of republican theory have emerged to stake a claim to its heritage.[252] For my explication of republican liberty, I rely heavily on the conception articulated by Philip Pettit.[253]

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249. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 53 (1969).

250. Quentin Skinner, *A Third Concept of Liberty*, LONDON REV. BOOKS, Apr. 4, 2002, at 17 [hereinafter Skinner, *Third Concept*]; PETTIT, REPUBLICANISM, *supra* note 30, at 5–6, 19–20.

251. *See* Frank Lovett & Philip Pettit, *Neorepublicanism: A Normative and Institutional Research Program*, 12 ANN. REV. POL. SCI. 11, 12 (2009).

252. *See, e.g.*, SKINNER, LIBERTY, *supra* note 87, at 96–98; Philip Pettit, *Keeping Republican Freedom Simple: On a Difference with Quentin Skinner*, 30 POL. THEORY 339 (2002) [hereinafter Pettit, *Keeping Republican Freedom Simple*]; MAURIZIO VIROLI, REPUBLICANISM 4–6 (2002); ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 9–10 (2015).

253. For Pettit's original articulations of republican liberty, see generally PETTIT, REPUBLICANISM, *supra* note 30; PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012) [hereinafter PETTIT, ON THE PEOPLE'S TERMS].

Republicans did not understand liberty through the key opposition of negative and positive. Instead, they understood freedom "in terms of the opposition between *liber* and *servus*, citizen and slave."[254] Slavery, the quintessence of unfreedom, is a status that arises from domination. A slave is one who lives *in potestate domini*—within the master's power[255]—and is thus subject to the power of another where such power can be exercised arbitrarily—that is, freely, with impunity, according to another's will or pleasure, without regard to the interests and perspectives of those affected by such power.[256] The opposite of a slave is a *liber*—a full citizen who is autonomous in the sense of not being dominated—that is, someone who is "not obliged to live at the mercy of anyone else" because she is "capable of acting in [her] own right."[257] Unlike the slave, the free citizen is protected by law against another's arbitrary exercise of power over those choices and activities deemed fundamental for securing her equal civic status in the polity (referred to as the "basic liberties").[258] In short, republicans understand freedom to be the *absence of domination*.[259] And law, to the extent that it robustly protects citizens from and provides recourse against arbitrary exercises of power, plays a principal, though not exclusive, role in securing this freedom.[260]

The notion of freedom as nondomination, though Roman in origin, appears to reclaim the gist of the ancient Greek understanding of autonomy. The term *autos* ("self") and *nomos* ("rule"), which the

254. PETTIT, REPUBLICANISM, *supra* note 30, at 31.

255. Phillip Pettit, *Law and Liberty*, *in* LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 51–52 (Samantha Besson & José Luis Martí eds., 2009).

256. *See* PETTIT, REPUBLICANISM, *supra* note 30, at 55. An arbitrary exercise of power is one that violates the principle of equal regard. One way in which the principle of equal regard is violated is if the exercise of power is the product of "devaluative" attitudes. *See* Mark Greenberg & Larry Sager, *Religious Freedom: A Moral Theory of Mandatory Exemptions* 18 (draft manuscript dated Nov. 29, 2022 on file with author) (defining a "devaluative attitude" as an "attitude that involves taking the interests of a group or an individual to be less important than the comparable interests of others").

257. Skinner, *Third Concept*, *supra* note 250, at 17. A *liber* is *sui iuris* (within his own jurisdiction or right). SKINNER, LIBERTY, *supra* note 87, at 40–41.

258. Lovett & Pettit, *supra* note 251, at 17.

259. PETTIT, REPUBLICANISM, *supra* note 30, at 21 *et seq.*

260. *See id.* at 36–41. Social norms also play a role in protecting citizens against arbitrary exercises of power. *See* PHILIP PETTIT, JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD 58–59 (2014) ("But the republican tradition did not rely solely on laws to provide the security required for freedom. Social norms have always been assumed to play a vital, supportive role in making laws effective.").

Greeks applied to city-states, emphasized the condition of living according to laws one gives oneself, rather than having them handed down by foreign powers.[261] So understood, the Greeks regarded autonomy as the condition of independence from others.[262] Republicans adopted the broad contours of this concept to describe the condition of free persons in a free society.

Republican liberty shares features with positive and negative liberty.[263] For instance, if we compare republican liberty to positive liberty, we see that republicans also worry about material obstacles, such as financial incapacity, that affect the range over which, or the ease with which, freedom can be enjoyed. But republicans worry not because they believe that individuals should have the capacity to do whatever their hearts desire, but principally out of concern that destitution may render persons acutely vulnerable to arbitrary power.[264] If we compare republican liberty to negative liberty, we see that republicans similarly define freedom by reference to that which would take it away. But republican liberty departs from the negative liberty of liberalism—freedom as noninterference—in at least three significant ways.

First, republicanism does not share liberalism's general faith that market interactions epitomize autonomous behavior. Republicans regard both public and private sources of domination as threatening to freedom. For example, republicans of the American founding generation were wary about the rise of an oligarchy that could not only control markets but also exert disproportionate political power; hence, they insisted that the state had a duty to cultivate a political economy that curbed agglomerations of economic power that could lead to vast

261. Aragaki, *supra* note 84, at 1150 n.51.

262. *See* SKINNER, LIBERTY, *supra* note 87, at 46.

263. There is disagreement about whether republican liberty is better classified as a negative or positive species of liberty. *Compare* David Miller, *Introduction*, *in* THE LIBERTY READER 6 (David Miller ed., 2006) (arguing that republican freedom cannot be *purely* negative because it presupposes that a free person is a member of a self-governing state), *with* Quentin Skinner, *The Idea of Negative Liberty*, *in* PHILOSOPHY OF HISTORY 204–07 (R. Rorty, J.B. Schneewind, & Q. Skinner eds., 1984) (distinguishing between the concept of republican freedom and the necessary conditions for maintaining such freedom, emphasizing the negative character of republican freedom), *and* Pettit, *Keeping Republican Freedom Simple*, *supra* note 252, at 341–42 (agreeing that republican freedom has a negative character but distinguishing his own interpretation from Skinner's).

264. Philip Pettit, *Agency-Freedom and Option-Freedom*, 15 J. THEORETICAL POL. 387, 396 (2003).

inequalities of wealth.[265] Also, contemporary neorepublicans have highlighted certain categories of private relationships, commonly characterized by power asymmetries, as salient sources of domination—such as those of wife and husband, employee and employer, and debtor and creditor—deserving of the attention and efforts of republican reformers.[266] By contrast, exponents of negative liberty are mostly unperturbed by disparities in privately accumulated wealth and endorse a mostly unfettered free market where private property can be put to its highest valued use.

Second, republican freedom as nondomination does not promise blanket exemption from interference. Instead, it offers protection against another's capacity to interfere *in an arbitrary manner*.[267] In other words, it is not interference per se that is objectionable but its arbitrariness. Thus, on the republican understanding, it is possible—in fact, quite likely—to have interference without domination. So, for example, a slave who bows to the will of the master and a citizen who must bow to the force of the law both suffer interference, but the latter is not unfree to the extent that the law is nonarbitrary[268]—that is, implemented pursuant to a reliable system of democratic controls in such a way that the law is necessarily constrained by the common interests of citizens,[269] consistent with their free and equal status in the polity. As such, freedom as nondomination is compatible with a reasonably extensive system of choice-restricting nonarbitrary laws. Indeed, nonarbitrary laws are a key element of the republican "empire

265. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 8 (2009); Jack M. Balkin, *Which Republican Constitution?*, 32 CONST. COMMENT. 31, 53 (2017).

266. *See* PETTIT, ON THE PEOPLE'S TERMS, *supra* note 253, at 114.

267. Philip Pettit, *Republican Theory and Criminal Punishment*, 9 UTILITAS 59, 61 (1997); *see also supra* note 258 and accompanying text.

268. Richard Dagger, *Autonomy, Domination, and the Republican Challenge to Liberalism*, *in* AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS 177, 184 (John Christman & Joel Anderson eds., 2005).

269. *Cf.* Pettit, *Keeping Republican Freedom Simple*, *supra* note 252, at 344–45 (arguing that a rule of law is nonarbitrary "to the extent that those who make the law are forced to track the avowable common interests—and only the avowable common interests—of those who live under the law"); *see also* PETTIT, REPUBLICANISM, *supra* note 30, at 36 ("The laws only [create freedom] so long as they respect people's common interests and ideas and conform to the image of an ideal law: so long as they are not the instruments of any one individual's, or any one group's, arbitrary will."); Lovett & Pettit, *supra* note 251, at 14 n.2 (explaining disagreement on the meaning of arbitrariness).

of laws, and not of men."[270] By contrast, liberals (such as libertarians) who value unrestricted choice above all regard almost all laws as jeopardizing freedom: freedom, as Hobbes described it, exists only in the "silence of the law."[271]

The third way in which republican liberty differs from negative liberty is that republicanism recognizes that unfreedom arises by virtue of the mere subjection to unaccountable power—power that is unchecked and uncontrolled. On this view, if power inequalities are not robustly restrained by law and social norms,[272] one can be dominated without suffering interference. Domination only requires that another "have the capacity to interfere arbitrarily in your affairs; no one need actually interfere."[273] Accordingly, republican freedom is incompatible with authoritarian governments where political power is unduly concentrated in one person or one faction, no matter how beneficent the autocrat or ruling faction happens to be. In such states, citizens remain vulnerable to the *arbitrium*—the unconstrained will of the state, even if the state chooses not to exercise its capacity to interfere arbitrarily in citizens' lives. Indeed, republicans argue that one can only be free in a free state—a democratic polity in which citizens rule themselves—either directly or through their authorized representatives—on an equal basis.[274] By contrast, freedom as noninterference is theoretically compatible with authoritarian governments committed to *laissez faire* policies.[275]

Republicans' alternative understanding of unfreedom in this respect reflects an acknowledgment that so long as one's basic liberties can be taken away with impunity by any one person or faction, then those liberties do not have the status of "rights," but, rather, are mere

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270. *See* JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 8 (J.G.A. Pocock ed., 1992) (1656) ("[A] civil society of men . . . instituted and preserved upon the foundation of common right or interest . . . is the empire of laws and not of men.").

271. THOMAS HOBBES, LEVIATHAN 143 (Edwin Curley ed., 1994) (1668).

272. *See supra* note 260.

273. *See* PETTIT, REPUBLICANISM, *supra* note 30, at 23.

274. *See* SKINNER, LIBERTY, *supra* note 87, at 60 (referring to the "radical thesis" of republicans that "it is only possible to be free in a free state"). Moreover, each individual citizen ought to exercise an equal right of participation in the making of laws. *See id.* at 30, 76–77 (noting that Harrington believed that only if every citizen remains equal in the making of the laws will the liberty of the commonwealth and "every private man" be secured).

275. *See* BERLIN, *supra* note 86, at 129 (noting that negative liberty "is not incompatible with some kinds of autocracy"); *see also* SKINNER, LIBERTY, *supra* note 87, at 77, 81 (reviewing the positions of Hobbes and Paley).

licenses or privileges.[276] On this view, slaves lucky enough to have a kind-hearted master are as unfree as slaves who have an abusive master: they are equally slaves and equally subject to the arbitrary will of their respective masters.[277] Of course, the first group is better off in terms of welfare than the latter, but that does not mean that those slaves enjoy greater freedom or have greater civic or social status.

Importantly, status is not only represented by one's formal rights (or lack thereof) under the law but also experienced "in the presence of other people."[278] Status is manifested in how persons are treated by others—whether persons are habitually esteemed as persons of equal moral worth or systematically excluded or diminished as homeowners, renters, employees, students, patients, patrons, spouses, or consumers due to their membership in a particular social category. And status will ordinarily be reflected in how persons conduct themselves—whether one can confidently "walk tall[] and look others in the eye"[279] or must resort to strategies of ingratiation, self-censorship, and self-abasement to placate the powerful. Therefore, both freedom and unfreedom are constituted not only by the legal status accorded by the state but also actively constituted in one's social interactions with other members of the polity.

Historically, republicans did not embrace the more capacious sense of equality on which modern democracies now operate.[280] One commentator has even observed that "the republican conception of liberty seems originally to have presupposed slavery," as the labor of slaves was what generated the economic surplus that enabled citizens to have the free reign to participate fully in political life.[281] Classical and early modern republicans believed that citizenship entailed civic responsibilities—the deliberation and making of moral choices in the public arena—and did not regard every member of society as suitable for discharging those high-minded responsibilities.[282] In their view,

276. Skinner, *Third Concept*, *supra* note 250, at 17.

277. Lovett & Pettit, *supra* note 251, at 14.

278. Alex Gourevitch, *Labor and Republican Liberty*, 18 CONSTELLATIONS 431, 436 (2011).

279. PETTIT, ON THE PEOPLE'S TERMS, *supra* note 253, at 82.

280. That said, the Roman republic was more expansive than other polities because they extended citizenship to some associated and conquered territories, including freed slaves. *See* M.M. Goldsmith, *Republican Liberty Considered*, 21 HIST. POL. THOUGHT 543, 557 (2000).

281. Gourevitch, *supra* note 278, at 431, 438.

282. John M. Murrin, *Gordon S. Wood and the Search for Liberal America*, 44 WM. & MARY Q. 597, 599 (1987).

liberty derived from economic independence, which they understood was only possible through the secure possession of landed property.[283] Accordingly, only propertied, adult male heads of households were traditionally seen as eligible for citizenship.[284] But we need not confine ourselves to this obsolete notion of equality. Contemporary *neo*republicans have adapted the republican notion of equal civic status by embracing the extension of equal citizenship rights to all adult, effectively permanent residents of society.[285]

B. Re-Examining the Problem of NDAs for Legal Ethics Through a Neorepublican Lens

In Part IV.B, I explained how autonomy understood in traditional terms (associated with the standard conception) seemed unable to differentiate between trivial incursions versus deeper assaults to autonomy. Below I examine whether republican liberty can do a better job by returning to my case study. In revisiting this case study, I do not suggest that NDAs are somehow unique in their ability to undermine autonomy as republican liberty. For example, in prior work I have suggested that predispute mandatory arbitration agreements in the nonunion employment context may also undermine the republican liberty of those employees subject to them.[286] NDAs are just one powerful and illustrative example.

As explained in Part IV.A, when lawyers promulgate NDAs on behalf of their clients, they undermine the negative liberty of victims by making it more likely that they will be coerced. They also undermine the positive liberty of victims by making it less likely that their very intentions for coming forward will be honored. But lawyers and their clients assault the autonomy of victims and those similarly situated in one more fundamental way.

As explained above, by suppressing negative publicity about sexual abuse, NDAs erode the incentives of firms to hold abusers accountable and to reform their workplace culture to reduce the incidence of sexual abuse. But if we examine the situation through a

283. *Id.*

284. *See* Goldsmith, *supra* note 280, at 558.

285. *See, e.g.*, Lovett & Pettit, *supra* note 251, at 17; PETTIT, ON THE PEOPLE'S TERMS, *supra* note 253, at 87.

286. *See* Kim, *Economic Inequality*, *supra* note 239, at 1680–81; Sung Hui Kim, *Reimagining the Lawyer's Duty To Uphold the Rule of Law*, 2023 U. ILL. L. REV. 781, 816–18 [hereinafter Kim, *Rule of Law*].

republican lens, we also see that NDAs place victims and those similarly situated in a position of domination—that is, systematic vulnerability to the arbitrary exercise of power. Recognizing their diminished risk of punishment for sexual misconduct, serial and would-be abusers will feel emboldened to subject prior or new victims to sexual abuse or threats of sexual abuse. And given the unlikelihood that abusers will be held accountable by their firms or the law, abusers gain the capacity to interfere arbitrarily in the lives of victims: they come to resemble unaccountable masters—agents of domination not only over their actual victims but also over all persons on the same footing as such victims, whether or not molested by the abuser. After all, abusers *can* interfere without impunity in the lives of *all* vulnerable women, even if abusers ultimately choose not to interfere in the life of a particular woman.

To the extent that rumors of unpunished sexual abuse become an "open secret" among employees of the firm, research confirms that employees will perceive reporting sexual abuse as futile and will be even less likely to report their own or others' experiences of sexual abuse.[287] NDAs thus aggravate the perception in many workplaces that reporting sexual abuse will not lead to the abuser being held accountable and may even result in professional retaliation against the accuser.[288] According to the Report of the U.S. Equal Employment Opportunity Commission Select Task Force on the Study of Harassment in the Workplace ("EEOC Report"), "[r]oughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct," and approximately 90 percent of individuals claiming to have been harassed never take formal action, such as filing a charge or complaint.[289]

Some of these silent employees might be able to escape domination by exiting to firms that do not use NDAs to settle sexual abuse allegations and have strong norms intolerant of sexual abuse. But others with fewer viable employment options may feel pressured

287. *See* Insiya Hussain & Subra Tangirala, *Why Open Secrets Exist in Organizations*, HARV. BUS. REV. (Jan. 14, 2019), https://hbr.org/2019/01/why-open-secrets-exist-in-organizations [https://perma.cc/6PZD-D9AK].

288. *See* EEOC REPORT, *supra* note 207, at v (explaining that victims fail to report "because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation").

289. *Id.* (emphasis removed).

to remain—either to endure ongoing and demeaning sexual abuse or to resort to a strategy of servile deference as the only feasible way to keep their jobs, to avert further sexual abuse, and to placate their abusers on whose grace and mercy they depend. In the conventional language of republican denigration, all those left behind will feel compelled "to bow or scrape, toady or kowtow, fawn or flatter."[290] Whether they suffer sexual abuse or not, their persistent vulnerability means that they remain subject to the arbitrary exercise of power by others.

More generally, when evidence of sexual abuse is routinely suppressed by NDAs, the ability of the civil and criminal laws to deter and redress sexual abuse and hold predators accountable for their arbitrary acts dramatically erodes. As a result, victims and those similarly situated are systematically divested of their legal rights to be free from sexual abuse. These laws are designed to safeguard the equal dignity and equal status of citizens in their day-to-day lives. By incapacitating these laws, NDAs effectively create a law-free zone in which a class of persons become vulnerable to the arbitrary exercise of power vis-à-vis their fundamental right to be free from bodily incursions—clearly, a basic liberty. And lawyers who recommend, negotiate, and draft NDAs on behalf of their powerful clients not only increase the likelihood that offenders will assume and exercise dominion over their victims, but they also place victims and all those on the same footing in a condition of domination.

Notice how the foregoing analysis differs from one based on negative or positive liberty. Recall that negative and thin positive liberty tended to spotlight the freedom of making *choices*—that is, whether persons' choices to perform acts will be obstructed by another (negative liberty) or whether they can gain the capacity to effectuate their choices (positive liberty).[291] By contrast, the republican analysis refocuses our attention on the freedom of *persons*—whether persons enjoy equal or subordinated status by virtue of the presence or absence of robust protections from those with the power to interfere.[292]

There are at least two significant implications of emphasizing a person-based, as opposed to a choice-based, understanding of freedom. One is that a person-based conception will necessarily prioritize the need to secure an individual's independence and social

290. PETTIT, ON THE PEOPLE'S TERMS, *supra* note 253, at 82.

291. *See supra* Parts II.A and II.B.

292. Pettit, *Free Persons*, *supra* note 103, at 715.

status over the need to protect mere choices that do not raise such pressing concerns. As a result, republican liberty is better able than its counterparts to differentiate between trivial and more serious incursions on autonomy and offer some guidance about which types of autonomy tradeoffs are acceptable. For example, if the state were to study the issue and ban formally pre-filing NDAs on antidomination grounds,[293] then both accusers and accused would suffer an obstruction of their choices. But the loss of their *negative* liberty to bind one another to silence may be outweighed by the fact that many third persons would stand to gain or retain their *republican* liberty—that is, third persons may avoid domination by sex abusers and thus retain or enhance their independence consistent with their free and equal status. Stated another way, the loss of a weaker form of autonomy by some may be outweighed by the gain or retention of a more critical form of autonomy by others. Hence, a republican conception of liberty could endorse the necessary autonomy trade-off occasioned by a formal ban on pre-filing NDAs. Similarly, a republican conception of legal ethics could also countenance the lawyer's refusal to implement the client's NDA to settle a credible claim of sexual abuse on the ground that NDAs increase domination.[294] By contrast, the standard conception, which worries (almost exclusively) about the frustration of the client's lawful choices and declines to take seriously all other moral consequences of those choices, including their impact on third persons, simply ignores these autonomy tradeoffs.

Another implication is that a person-based conception indicts the mere presence of unchecked power as inimical to freedom, even if that power has not yet acted to obstruct another's free choice. Hence, domination can befall not only those who have already been victimized but also those who, by dint of their cunning or luck, have not yet been victimized but who nevertheless remain vulnerable. Therefore, a neorepublican approach to legal ethics worries not only about those persons most likely to be victimized but also, more generally, the broader impact that unaccountable masters can have on the social status of citizens, whether victimized or not. By contrast, the standard conception, a formalistic doctrine that is insensitive to the power

293. *See infra* Part VI.B for a discussion on the banning of NDAs.

294. Lawyers representing the alleged sex abusers are not the only ones recommending NDAs. As suggested in Part IV.A.2 above, lawyers representing *survivors* are also known to recommend NDAs. Because NDAs increase the domination of existing victims of sexual abuse and those similarly situated but not yet victimized, a republican conception of legal ethics would suggest that lawyers for survivors should also decline to implement NDAs.

asymmetries that inhere in many contexts, is ill-equipped to consider these broader social consequences.

To be sure, republicans regard the obstruction of choice inherent in any particular commission of a crime and any failure to vindicate the victim (by capturing and convicting the offender) as serious failures for a republic that seeks to manifest freedom. But republican unfreedom arises when laws and communities fail to protect citizens in a *systematic* way. Systematic failures are distinctive because they can render citizens vulnerable in ways that can affect their social status and, hence, can impact their capacity to be free.[295] The sobering statistics on the sexual abuse of women suggest that, at least in certain segments of society, there may be a systematic failure to protect women from arbitrary exercises of power. Reporting on a meta-analysis of studies that employed randomly representative and probability samples, the EEOC Report found that 25 percent of women reported sexual harassment, 40 percent of women reported unwanted sexual attention or sexual coercion, and 60 percent of women reported gender harassment (such as sexually crude language, commentary or displays).[296]

To the extent that our laws and our communities systematically fail to protect women's bodies, women will be denied the equal protection of the laws—laws that are necessary to secure their free and equal status as citizens. Such a systematic failure also conveys the message that sexual abuse can be swept under the rug and abusers will not be held accountable for their misconduct. These messages generate dignitary harms: they communicate the view that the bodily integrity of women, who are the most common (but by no means exclusive) victims associated with those firms and executives that rely on NDAs, is of little concern to those in power. These messages feed into a shared awareness—in a particular workplace, industry, or more broadly—that past and future victims and all those similarly situated have less moral worth than powerful abusers and that women in our society do not enjoy the standing of free agents. In short, these messages are capable of relegating women to a form of second-class citizenship.

We should not be surprised that lawyers can facilitate domination through contracting. Contracts, after all, are essentially instruments of governance: they, along with bylaws, charters, wills, and trusts, constitute frameworks that define the terms of the collaborative efforts

295. *Id.* at 716.

296. EEOC REPORT, *supra* note 207, at 8–9.

of the parties involved. When lawyers draft contracts, they function as quasi-legislative drafters of instruments that govern the parties' own relations—not materially different from the drafters of constitutions or treaties. When contracts are drafted to diminish the capacity of laws to deter or redress arbitrary exercises of power, lawyers inflict assaults on the autonomy of those who would be subject to such power.

But contracting is not the only way in which domination can transpire. To discuss briefly a few examples outside of my case study, lawyers can facilitate domination through litigation tactics, such as delay and discovery abuse, which help powerful defendants escape accountability for their arbitrary exercises of power: for example, when the lawyers for R. J. Reynolds Company tried to force plaintiffs to drop their tobacco-related cases.[297] Lawyers can also facilitate domination by lobbying for bad laws and rulings that deprive categories of citizens of their basic liberties, such as voter identification and voter suppression laws designed to diminish the voting power of certain minority groups.[298] They can assist domination by failing to object to their clients' decisions to infringe on the basic liberties of a category of citizens, such as when a corporation decides to pollute a community's water source.[299] They can facilitate domination by helping a would-be autocrat cling to power and dominate its citizens despite having legitimately lost a free and fair election.[300] There are, in short, myriad ways, other than through NDAs, to place others under domination.

297. *See* Gordon, *The Citizen Lawyer*, *supra* note 16, at 1171; SOL M. LINOWITZ, THE BETRAYED PROFESSION 14 (1994).

298. *See* Maggie Astor, *A Look at Where North Dakota's Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html [https://perma.cc/2M2C-HQUX] (describing the facially neutral Voter ID law, which requires residential addresses for voter registration, even though many Native American residents do not have addresses).

299. *See, e.g.*, Daniel T. Ostas & Gastón de los Reyes, *Aristotelian Decency as a Corrective for Compliance-Induced Environmental Racism*, 34 GEO. ENV'T L. REV. 33, 36 (2021) (arguing that prevailing approaches to risk management and corporate compliance provide "an economic incentive to place toxin-emitting industrial plants in low income communities along the Mississippi River, disproportionately affecting people of color"); Steven Vaughan, *Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms*, 20 CURRENT LEGAL PROBS. 1 (2023).

300. *See* Kim, *Rule of Law*, *supra* note 286, at 824–30 (discussing the conduct of Trump's private lawyer, John Eastman).

C. Rekindling Civic Virtue in the Legal Profession

So far, I have shown how lawyers, by recommending and implementing NDAs in accordance with the standard conception, can facilitate the domination of fellow citizens, especially women. I have also argued that the republican notion of liberty better captures the troubling nature of this domination. This case study of domination should cast doubt on the profession's faith, more or less constant throughout our history, that good lawyers automatically serve the public interest and advance justice "by just doing their regular day jobs, zealously serving their clients."[301]

So, what, if anything, can and should be done?

Traditionally, republicans believed that both formal and informal networks of citizens striving to hold one another reciprocally accountable for arbitrary exercises of power were necessary for preserving freedom and reducing domination in the polity.[302] The robustness of these networks would depend on the degree to which participating individuals displayed public virtue.[303]

This Article calls on lawyers to come together to embrace republican liberty as a central value of the profession. At the very least, lawyers should qualify their partisan representation of clients by refraining from exercising legal power in ways that place others in positions of domination—of being vulnerable to the arbitrary exercise of power.[304] More proactively, lawyers should activate their networks

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301. Gordon, *The Citizen Lawyer*, *supra* note 16, at 1169.

302. The formal networks of reciprocal accountability were reflected in republican models of balanced government in which the power to make, administer, and adjudicate the laws would be dispersed. *See* PETTIT, REPUBLICANISM, *supra* note 30, at 177–80; PETTIT, ON THE PEOPLE'S TERMS, *supra* note 253, at 220–25. The informal networks of accountability consisted of citizens and institutions of civil society demonstrating their civic virtue by striving to hold themselves, their governments, and their fellow citizens accountable. *See id.* at 225–29; Gerald J. Postema, *Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, *in* BENTHAM'S THEORY OF LAW AND PUBLIC OPINION 7, 29–32 (Xiaobo Zhai & Michael Quinn eds., 2014). For a discussion on the different republican views about how civic virtue ought to be cultivated, see generally Shelley Burtt, *The Good Citizen's Psyche: On the Psychology of Civic Virtue*, 23 POLITY 23 (1990).

303. *See supra* note 249 and accompanying text.

304. Alternatively and more ambitiously, the profession could jettison the principle of partisanship altogether and seek to increase the expected value of freedom as nondomination, which would be different from merely avoiding the facilitation of domination. *See* Andreas T. Schmidt, *Domination Without Inequality? Mutual Domination, Republicanism, and Gun Control*, 46 PHIL. & PUB. AFFS. 175, 175–81 (2018) (distinguishing between weak republicanism and strong republicanism). But, in the spirit of not throwing the baby out with the bathwater, it is possible that the principle of partisanship may be weakly justified and thus should play some ongoing role

of accountability to work together on the collective civic project of safeguarding republican freedom and reducing domination wherever it arises. These efforts will require affirmative initiatives by the organized bar associations, individual efforts of lawyers and small groups of lawyers, and curricular reforms undertaken by academic lawyers. The next three subparts sketch out what I believe are some steps necessary to rekindle the civic virtue of the legal profession around the value of freedom as nondomination.

Before expounding on these recommendations, let me address one predictable, immediate objection: Why lawyers? The classic republican response would be to remind skeptics that *all* citizens, and not just lawyers, owe civic responsibilities to hold power accountable to those affected by such power. Hence, the better question is: Why exempt lawyers from their civic duties, especially if they often function as the handmaidens of domination? As I have argued elsewhere, the claim that lawyers are exceptional and thus should be afforded a form of immunity from general obligations is weak.[305] Indeed, there may be strong support for the opposite claim—that the professional community of lawyers is specially situated to transcend self-interest and foster civic responsibility.

As David Wilkins once observed, "[l]awyers are more than ordinary citizens; they have been given a monopoly by the state to occupy a position of trust both with respect to the interests of their clients and the public purposes of the legal framework."[306] Lawyers are crucial participants in the development of the infrastructure of civil society, which stands as an important counterweight both to state power and concentrated private power. As judges, prosecutors, and government legal counsel, public sector lawyers occupy key positions in the *formal* networks of accountability vested with the constitutional authority to articulate, administer, and enforce laws.

Private sector lawyers operating in the realm of civil society also serve as crucial nodes in the more *informal* networks of accountability[307] that republicans believed were so important to

in defining lawyers' presumptive obligations in the absence of serious and countervailing moral obligation (such as the obligation not to facilitate domination).

305. *See* Kim, *Lawyer Exceptionalism*, *supra* note 36, at 93.

306. David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty To Obey the Law*, 38 WM. & MARY L. REV. 269, 274 (1996).

307. *See* Kim, *Rule of Law*, *supra* note 286, at 809–13.

safeguarding freedom and the rule of law. As Lon Fuller recognized, private lawyers are the "architects of social structure," not only "where great affairs of state are involved and constitutions or international treaties are being brought into existence, but in the most commonplace arrangements," such as when lawyers draft contracts, incorporate businesses, or write bylaws for organizations.[308] Lawyers have a unique capacity to inculcate (or derogate) important civic values by virtue of their role as society's explainers of legal norms. Lawyers' critical station in society's formal and informal networks of accountability and lawyers' special relationship to law—a crucial repository of civic values—suggest that lawyers are well-positioned to discharge their civic obligations to actively support and check these networks to ensure a reasonable prospect of accountability for all.

Moreover, the notion that lawyers have *some* civic responsibilities to promote justice is not as alien as it may seem. Indeed, the bar has historically acknowledged this notion in its official pronouncements. For example, the 1908 ABA Model Canons of Professional Ethics (the "Canons") addressed the (sometimes yawning) gap between legality and morality, imploring the "lawyer [to] use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do"[309] and "impress upon the client and his undertaking exact compliance with the strictest principles of moral law."[310] It further cautioned that "[i]f a client persists in such wrong-doing the lawyer should terminate their relation."[311] The 1958 joint report of the ABA and the Association of American Law Schools distinguished courtroom advocacy from office counseling and warned that the reasons justifying partisan advocacy in litigation "do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality."[312] The ABA Model Code of Professional Responsibility, which replaced the Canons in 1969, and the 1983 ABA Model Rules of Professional Conduct both

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

309. CANONS OF PROFESSIONAL ETHICS Canon 16 (AM. BAR ASS'N 1908).

310. *Id.* Canon 32.

311. *Id.* Canon 16.

312. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958). *But see* Green & Pearce, *supra* note 16, at 1208 (criticizing the report for failing to call for sacrifice for the greater good).

highlighted the lawyer's crucial role in the preservation of civil society in their preambles.[313]

None of the foregoing is to suggest that the profession has ever fully espoused civic responsibilities that meaningfully alter lawyers' day-to-day professional work for clients.[314] As Eugene Gaetke concluded after an extensive analysis of the ostensibly public-spirited duties imposed by the latter two model codes, "[l]awyers, frankly, are not obligated to serve as officers of the court in any meaningful sense."[315] But we should not be too skeptical. As Robert Gordon argues, while the notion of the republican "citizen-lawyer" has "fallen out of favor with the modern profession, or at least with its elite practitioners,"[316] "some versions of the citizen lawyer ideal are very much alive, and even if not exactly flourishing everywhere, they are . . . more vigorous than they ever used to be."[317] While it is true that the standard conception's prescription of moral indifference has a gravitational hold on lawyers' psyche, it is also true there has been a rich tradition of civic activism among certain segments of the American bar. In the paragraphs that follow, I offer some preliminary recommendations as to how to build on this rich civic tradition to reach all segments of the legal profession in the service of advancing republican liberty.

1. *The Organized Bar.* Our national, state, and local bar associations must assume a leadership role and commit to the civic project of reducing domination. As a starting point, they must employ extensive efforts to identify pockets of domination and to understand how the legal profession may be contributing to domination—a complex, highly contextual undertaking that is not capable of a priori resolution. Such tasks entail rigorous empirical study and debate

313. *See* MODEL CODE OF PRO. RESP. pmbl. (AM. BAR ASS'N 1980) ("Lawyers, as guardians of the law, play a vital role in the preservation of society."); MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 12, 13 (AM. BAR ASS'N 2023) ("The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. . . . Lawyers play a vital role in the preservation of society.").

314. *Cf.* Green & Pearce, *supra* note 16, at 1212 (observing that the conception that lawyers are obliged to convey to clients an understanding of proper civic conduct as part of lawyers' everyday private practice "has largely dropped out of the legal profession's conversation about lawyers' obligations to serve the public").

315. Gaetke, *supra* note 76, at 76.

316. Gordon, *The Citizen Lawyer*, *supra* note 16, at 1173.

317. *Id.* at 1180.

among those whose interests are at stake (lawyers, clients, and the public) about what conditions and contexts, particularly those characterized by stark power asymmetries, pose risks of domination. Smaller groups of appointed representatives focused on this work, such as commissions or task forces, may be better up to task than large organizations or individual lawyers acting in an ad hoc fashion. Moreover, smaller, organized groups may be better able to overcome collective action problems that routinely afflict individual decisionmaking in economically competitive environments, such as the market for legal services.[318]

Once these organized research groups have reached conclusions about whether and how lawyers have become instruments of domination, bar associations should take the lead in further debating, formulating, and issuing carefully crafted guidelines to law firms and individual lawyers about how to ensure that lawyers do not reflect or exacerbate arbitrary exercises of power when providing legal services to their clients. If republican liberty is an important value for the legal profession, then bar associations must commit to treating freedom as nondomination as an independent moral constraint on what lawyers may do on behalf of their clients. More concretely, the civic duty to avoid placing others in domination must supersede the standard conception's principle of partisanship[319] and the financial interests of lawyers and their clients.[320]

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318. *See* Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1082–84 (2005) (explaining the collective action problem among individual lawyers).

319. To be clear, the principle of partisanship may still have a place in a neorepublican conception of legal ethics, as the principle may be justified in the absence of serious and countervailing moral obligations. *See supra* note 304.

320. Publicized guidelines, rather than enforceable disciplinary rules, may be better mechanisms for shaping lawyers' behavior. A disciplinary rule that sanctions lawyers for facilitating domination, for example, may not be administrable due to the highly contextual and complex nature of domination. It may also run into "void for vagueness"-type challenges, especially if the behavior sanctioned has not historically been punished. *See* Bauer, *supra* note 173, at 544 (observing that an ethical rule can be upheld in the face of void-for-vagueness challenges if lawyers are "charged with knowledge of what is expected of them based on the guidance provided in case law and the legal profession's traditions"). Also, a disciplinary rule would likely have the perverse effect of discouraging bar associations from taking positions against specific instances of domination out of fear of additional liability. *See* Gordon, *The Citizen Lawyer*, *supra* note 16, at 1197 (noting that fear of liability has historically led lawyers to "shy away from any statements of duties other than clear penal rules"). That said, it is possible to amend or interpret specific ethical rules to target specific instances of domination, such as NDAs.

To be effective, the guidelines promulgated by bar associations must not consist of vague and generalized exhortations to act more ethically or to serve the public interest. We know, after all, that decades of nebulous entreaties from bar commissions or task forces have effected little change in many quarters of the profession.[321] Those guidelines must identify the specific context and the specific type of conduct that may give rise to domination and delineate how law firms and individual lawyers should act to avoid facilitating domination. Even better, bar associations must leverage the power of peer pressures[322] and actively encourage law firms to promulgate firm policies to target specific behaviors, including actions affecting both employees and clients of the firm, as unacceptable.

This type of intercession by bar associations, though rare, is not without precedent. In 1995, a task force of representatives of the ABA and other organizations studied the topic of arbitration and mediation for statutory employment disputes. This task force eventually proposed a set of specific guidelines, known as the Due Process Protocol, designed to ensure certain minimum rights for employees subject to predispute binding arbitration imposed by employers.[323]

For an example of such a proposal that targets secret settlements, see Bauer, *supra* note 173, at 533–66 (proposing interpretations of Model Rules 3.4(f) and 8.4(a) and (d)).

321. For a few examples of ethical failures of lawyers, see Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 685 (1981) (noting that, despite exhortations, every study that has investigated pro bono efforts of lawyers has reconfirmed that "these efforts are trivial—in comparison to the work a lawyer does for pay, in comparison to the need for pro bono services" and citing studies); DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 147 (2015) (concluding that "[t]he current plight of indigent criminal and civil litigants is an embarrassment to any civilized nation, let alone one that considers itself a world leader on the rule of law"); *id.* (criticizing "the bar's inadequate levels of pro bono service, particularly at the nation's leading law firms" and stating, "[a]t minimum, every lawyer should meet the ABA's modest standard of an hour a week or the financial equivalent"); *id.* at 18 ("Voluntary civility codes have proven ineffectual in curbing abuse, and the increasing size of the bar has eroded the power of informal sanctions."); *id.* at 152 n.3 (citing studies about the decline in lawyer civility); Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 195 (2003) ("The hidden dirty secret of corporate scandals is that without lawyers, few corporate scandals would exist and fewer still would succeed long enough to cause any significant damage."); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (discussing lawyers' role in the savings and loan crisis of the 1990s); Kim, *Lawyer Exceptionalism*, *supra* note 36, at 78–88 (recounting historical examples of lawyers' failures to stop securities fraud).

322. Kim, *Banality*, *supra* note 69, at 1019–22 (discussing the role of conformity pressures for lawyers' ethics).

323. *See, e.g.*, John D. Feerick, *Standards of Conduct for Mediators*, 79 JUDICATURE 314, 314 (1996); Christopher A. Barreca, Max Zimny & Arnold Zack, Document, *A Due Process Protocol*

These guidelines were quickly adopted by the leading providers of dispute resolution services.[324] While the Due Process Protocol guidelines have since proven to be insufficient amidst the changing legal and policy landscape, this example of the bar's intervention should remind us that real action is possible.

To recall another early and prescient example, one segment of the organized bar took a public position against NDAs, albeit in a narrow context. Citing the dangers posed to public health and safety, the proper functioning of the civil justice system, and the interests of individual victims, in 1989, the Board of Governors of the Association of Trial Lawyers of America issued a resolution denouncing post-filing secret settlements for tort cases,[325] in particular secret settlements that barred the disclosure of pleadings, motions and discovery materials and the underlying facts of the settled cases.[326] The resolution also encouraged courts to refrain from issuing secrecy orders and enforcing such secret settlements in the absence of "good cause" and discouraged individual lawyers from agreeing to secret settlements.[327] Unfortunately, the impact of this resolution may have been limited. Decades after the resolution, reports indicated that defense lawyers tended to endorse the view that they were free to negotiate any lawful settlement terms, including secrecy, that would benefit their clients and that some plaintiffs' attorneys continued to use the promise of secrecy as leverage to extract larger recoveries for their clients, which translated into larger contingent fees for themselves.[328] Nevertheless, this example reminds us that organized groups of lawyers are specially positioned to lead the profession's commitment to republican liberty.

2. *Individual Lawyers.* If the legal profession is to take this civic project seriously, individual lawyers are not relieved of their own obligations simply because bar leadership is better equipped to conduct

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for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, DISP. RESOL. J., Oct.-Dec. 1995, at 37, 37–39.

324. For example, the American Arbitration Association and JAMS/ENDISPUTE have endorsed the Due Process Protocol. *See* Susan A. FitzGibbon, *Arbitration, Mediation, and Sexual Harassment*, 5 PSYCH., PUB. POL'Y, & L. 693, 722 (1999).

325. *See* ASS'N OF TRIAL LAWYERS OF AM., RESOLUTION ON PROTECTIVE ORDERS (May 6, 1989), *reprinted in* James E. Rooks Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 876 (2004). The Association of Trial Lawyers of America has since been renamed as the American Association of Justice.

326. *Id.*

327. *Id.* at 877.

328. *See* Bauer, *supra* note 173, at 498–99.

research into the legal profession's role in intensifying domination. Individual lawyers and small informal groups of lawyers do have responsibilities for the quality of justice that results from legal assistance. They can still summon the attention of firm management and bar leadership to potential instances of domination and advocate for meaningful legal and policy reforms aimed at reducing domination.

Take, for example, the recent controversy over law firms' attempts to impose predispute mandatory arbitration agreements ("MAAs"), often bundled with NDAs, as a condition of new or continuing employment on their job candidates and employees. In March 2018, a Harvard Law School lecturer took to Twitter to criticize the law firm of Munger Tolles & Olsen LLP ("Munger Tolles") for requiring its summer associates to sign MAAs covering sex and race discrimination claims.[329] Almost instantaneously, a chorus of law students, academics, and legal observers and organizations denounced the firm's policy. Within 48 hours, Munger Tolles announced that it would end the use of MAAs for all employees.[330]

By May 2018, fifty law schools, including Harvard, Yale, and Stanford, requested information from member law firms of the National Association for Law Placement about their use of MAAs and NDAs.[331] Soon thereafter, fourteen of the nation's highest-ranked law schools adopted policies *requiring* law firms that interview their graduates to disclose their MAA and NDA practices.[332] By November 2018, a Harvard Law School student group, the Pipeline Parity Project, initiated a social media campaign, urging its peers to boycott specific

329. In prior work, I suggested that MAAs place employees under domination by their employers by incapacitating fundamental laws designed to protect citizens' basic liberties and secure their free and equal status. *See* Kim, *Economic Inequality*, *supra* note 239, at 1680–81; Kim, *Rule of Law*, *supra* note 286, at 817.

330. Brandon Lowrey, *How Law Firms Are Adapting to #MeToo Era*, LAW360 (Mar. 25, 2018, 9:19 PM), https://www.law360.com/articles/1025624/how-law-firms-are-adapting-to-metoo-era [https://perma.cc/JH6G-4EUQ].

331. *Id.*

332. Aidan F. Ryan, *HLS Will Require Firms To Disclose Agreements Governing Harassment Allegations*, HARV. CRIMSON (May 16, 2018), https://www.thecrimson.com/article/2018/5/16/t14-law-nda-recruiting [https://perma.cc/6DV8-DLBF].

firms known to use MAAs.[333] Subsequently, a number of law firms renounced their use of MAAs and NDAs.[334]

This student-led crusade against MAAs may have provided the necessary impetus for Congress to refocus its attention on predispute mandatory arbitration, specifically as it relates to sexual misconduct claims. In March 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which voids predispute arbitration or joint-action waiver clauses in cases involving sexual misconduct allegations, was signed into law.[335] This example demonstrates how social movements, often launched by a small number of civically engaged individuals, are crucial to informal networks of accountability in challenging domination wherever it may arise.

Importantly, the lawyer's civic obligation should not be relegated to the margins of law reform or pro bono work but must play a more central role in the lawyer's day-to-day legal practice. Bruce Green and Russell Pearce argue that lawyers have an "obligation to convey to clients the lawyer's understanding of proper civic conduct."[336] They suggest that when counseling clients, lawyers should raise concerns "about rights and obligations in a civil society that may not be established by enforceable law—including ideas about fair dealing, respect for others, and, generally, concern for the public good,"[337] as well as questions of "systemic or distributive justice."[338]

Of course, some clients will balk at the notion that they have civic responsibilities to consider the public good in their legal decisions. But

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333. Chris Villani, *Kirkland Ends Forced Arbitration After Harvard Group Boycott*, LAW360 (Nov. 21, 2018, 12:51 PM), https://www.law360.com/articles/1104272/kirkland-ends-forced-arbitration-after-harvard-group-boycott [https://perma.cc/3EG2-PZQE].

334. *See id.*; Chris Villani, *Venable Next for Students Pushing To End Forced Arbitration*, LAW360 (Feb. 4, 2019, 2:42 PM), https://www.law360.com/articles/1125070 [https://perma.cc/ZUK6-TC3E].

335. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified as amended in scattered sections of 9 U.S.C.); *see* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1, 11 (2022). Also, in 2021, three additional congressional bills were introduced but not yet enacted. Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. (2022); Forced Arbitration Injustice Repeal Act, S. 505, 117th Cong. (as referred to S. Comm. on the Judiciary, Mar. 1, 2021); Restoring Justice for Worker Act, H.R. 4841, 117th Cong. (as referred to H. Comm. on Antitrust, Com., & Admin. L., Nov. 1, 2022).

336. Green & Pearce, *supra* note 16, at 1212.

337. *Id.*

338. *Id.* at 1216.

other clients may be open to moral suasion. One San Francisco plaintiffs' firm, for example, reported much success in getting their clients to agree from the beginning to abide by the firm's policy of "no secret settlements" and in having them follow through on that commitment once settlement negotiations are underway.[339]

In situations where clients resist moral suasion and insist that their lawyers facilitate domination, lawyers should decline.[340] Specifically, for example, lawyers should decline to promulgate predispute MAAs binding employees in their prevailing, draconian forms and decline to conclude pre-filing NDAs as part of a settlement of credible claims of sexual abuse.[341] By refusing to cooperate in placing other citizens in positions of domination, lawyers display civic virtue and teach by example.[342] More generally, lawyers discharge their civic responsibilities when they consider the consequences of their professional acts in realistic social contexts where not all interests are adequately represented and acknowledge their own personal moral responsibility for those consequences.

3. *Legal Education.* Of course, observing civic obligations to protect freedom as nondomination will not be easy unless individuals are suitably motivated and trained. Sadly, lawyers receive almost no formal training on moral counseling and decisionmaking, and law school curricula generally neglect the topic of lawyers' public responsibilities. In 2007, the Carnegie Foundation concluded in its overview of legal education that "[i]ssues such as the social needs or

339. *See* Bauer, *supra* note 173, at 501 n.60 (quoting Maja Ramsey, Justine Durrell & Timothy W. Ahearn, *Keeping Secrets with Confidentiality Agreements*, TRIAL, Aug. 1998, at 38, 40).

340. To be sure, in some cases, withdrawal may not be feasible if the lawyer is involved in a pending judicial proceeding and the tribunal denies permission to withdraw. MODEL RULES OF PRO. CONDUCT r. 1.16(c) (AM. BAR ASS'N 2023) ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

341. The latter will, of course, require the lawyer's disinterested evaluation of the facts of the case, consistent with the lawyers' obligations under ethics codes and court rules. *See* MODEL RULES r. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); FED. R. CIV. P. 11(b).

342. *Cf.* Green & Pearce, *supra* note 16, at 1215–17 (describing different ways in which lawyers teach their clients about civic obligations both under the law and beyond the law by example).

matters of justice involved in cases do get attention in some case-dialogue classrooms, but these issues are almost always treated as addenda."[343] Sites where such training could theoretically take place, such as in professional responsibility courses, often dedicate trivial amounts of time to moral counseling.

Professional responsibility is a mandatory requirement for law school accreditation.[344] In many law schools, the course is frequently taught by junior or part-time faculty and is often assigned minimal credit.[345] Given the limited space in the curriculum, the course typically focuses on learning the rules of professional conduct that are tested on the bar's multiple-choice exam[346] and thus neglects to explore the different frameworks for considering the moral implications of legal practice.

These practices convey the message to students that the subject is of limited importance to their future careers[347] and that legal ethics is not about ethics. The failure to devote meaningful classroom time for

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343. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 187 (2007).

344. STANDARDS & RULES OF PROC. FOR APPROVAL OF LAW SCHS. Standard 303(a)(1) (AM. BAR ASS'N 2023–2024) (requiring law schools to offer a mandatory ethics course "that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members").

345. *See, e.g.*, Mary C. Daly, Bruce A. Green & Russell G. Pearce, *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193, 195 (1995) (observing that law schools "signaled the course's second-class status within the curriculum by assigning it minimal credit, by making it a rite-of-passage course for junior faculty, or by hiring local attorneys as adjunct faculty members to teach the course"); *id.* at 199 (noting that until 1987 professional responsibility at Fordham Law School was a one-credit course); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 40 (1992) ("In most institutions, required ethics courses meet for minimal time; in many others, they are treated as intellectual interlopers, staffed by a reluctant, rotating cadre of junior faculty and outside lecturers."); Edmund B. Spaeth, Jr., Janet G. Perry, & Peggy B. Wachs, *Teaching Legal Ethics: Exploring the Continuum*, 58 LAW & CONTEMP. PROBS. 153, 155 (1995) (observing that the professional responsibility course "was assigned to a junior faculty member who did not have the clout to refuse, or to a practicing lawyer recruited as an adjunct who was unlikely to know the cases and prone to resort to war stories"); Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U. L.J. 1043, 1047 (2007) (observing that some schools provide "insufficient units, curricular choices, or manageable class sizes to minimize student resistance and reinforce the importance of the topic").

346. *See* RHODE, *supra* note 321, at 131.

347. *See, e.g.*, Sanford Levinson, *What Should Citizens (as Participants in a Republican Form of Government) Know About the Constitution*, 50 WM. & MARY L. REV. 1239, 1240 n.3 (2009) (observing that most professional responsibility courses have "very low status" and "would almost certainly be shunned, were they not compulsory, by most law students").

sustained ethical analysis conveys the misimpression that an ethical lawyer is one who simply complies with the formal rules. It also leaves students bereft of the moral vocabulary with which to articulate their own moral values and stunts the development (at a crucial phase in their lives[348]) of their own moral identities from which they may draw when they assist future clients in navigating real-world ethical dilemmas.

The proper response, however, is not to throw up one's hands in despair but to urge legal education reform. As Wilkins observed more than twenty years ago:

> [T]he legal academy must become an active participant in developing . . . [the] knowledge about legal practice that will allow us to construct a vision of legal professionalism fit for the twenty-first century . . . . We have an ethical obligation to use this privileged position to help society create and sustain legal institutions, norms, and practices that promote the wise political, social, and economic goals of citizens.[349]

Specifically, academic lawyers who run and teach in the nation's law schools must educate students about the injustices of our legal system, including those injustices inflicted by lawyers themselves—both in their capacities as individual practitioners and as constituents of a powerful interest group that has repeatedly sided with well-resourced, bill-paying clients and lobbied to prevent injustices from being addressed and rectified.[350] Concomitantly, law schools must foster in students an appreciation for their civic responsibility to ameliorate and not contribute to those injustices. Such appreciation is more readily achieved with a deep understanding of how our legal system supports our republican form of government.

For inspiration and guidance about curricular priorities, law schools might look to Thomas Jefferson, an ardent republican who founded our nation's first law school. Jefferson believed that law schools were in the business of training public citizens and future political leaders and thus needed to teach not just legal doctrine but those subjects necessary for providing "wisdom and perspective

348. *See* RHODE, *supra* note 321, at 132 (noting "[a] substantial body of evidence indicates that significant changes occur during early adulthood in individuals' basic strategies for dealing with moral issues" and citing sources).

349. David B. Wilkins, *The Professional Responsibility of Professional Schools To Study and Teach About the Profession*, 49 J. LEGAL EDUC. 76, 77, 86 (1999).

350. *See, e.g.*, Kim, *Naked Self-Interest?*, *supra* note 20; Macey, *supra* note 318, at 1093.

necessary for governance"—such as ancient and modern political theory, history, and ethics.[351] For example, the first U.S. law school allocated curricular space to the legislative process and political theory—including the *principles of republicanism*. Law schools should consider reflecting these renewed priorities widely throughout their curricula with emphasis on students' first year of study during which nascent role ideologies take root.

Meaningful change will be challenging because efforts to highlight the failings of the legal profession are unpopular and run against the institutional interest of the legal academy. As Macey has argued, American law schools are incentivized to provide a distorted view of the role of lawyers in society—one that emphasizes the benefits of legal representation far more than the costs.[352] But law schools cannot ignore those costs simply because they may dampen student enthusiasm about the profession they are about to enter. Also, the legal academy is well-positioned to assume a leadership role in cultivating civic virtue. As Justice Harlan Stone once noted, legal academics are the segment of the profession most "detached . . . from those pressures of the new economic order which have so profoundly affected their practicing brethren."[353]

VI. ANSWERING OBJECTIONS

I have offered an alternative account of legal ethics that advises lawyers to resist being handmaidens to domination. I have also sketched out a framework for how the legal profession can rekindle civic virtue within the profession. Due to space constraints, I answer only two major objections to my arguments.

A. Domination by Lawyers

One might object that if lawyers feel entitled to decline clients' commands on antidomination grounds, then we will live in a society in which citizens will be dominated by lawyers. Indeed, Pepper expresses

351. Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 199, 201–02 (2001).

352. Jonathan R. Macey, *Civic Education and Interest Group Formation in the American Law School*, 45 STAN. L. REV. 1937, 1948 (1993).

353. Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 11 (1934).

similar fears about a so-called "oligarchy of lawyers."[354] This objection casts lawyers' refusal to be an instrument of domination as (ironically) a form of domination itself.

This objection misunderstands the meaning of domination under republican theory. Recall that domination is the capacity to exercise arbitrary power over another vis-à-vis citizens' basic liberties—that is, a core set of common choices determined to be essential for securing a citizen's free and equal status in the polity.[355] So long as the lawyer's refusal to cooperate is soundly grounded in the concern that the execution of the client's plan would subject others to the arbitrary exercise of the client's power vis-à-vis citizens' basic liberties, then such refusal should not itself amount to domination. If the client's plan would render others in the position of being dominated, then that plan would derogate the free and equal status of citizens—that is, the plan would improperly elevate the client's status while simultaneously denigrating the status of other citizens affected by the plan. A refusal to implement such a plan, motivated by the desire to preserve and secure the free and equal status of citizens, should not be arbitrary so long as such refusal is based on reasons consistent with the free and equal status of citizens.[356] Accordingly, the lawyer's refusal to abide by the client's plan to dominate others should not itself constitute domination.

Another reason why the lawyer's refusal should not result in domination is that domination transpires only when choices necessary for citizens to live with equal dignity are being obstructed. As Pettit

354. Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 25, at 617. For a reply to Pepper's argument, see Luban, *The Lysistratian Prerogative*, *supra* note 27, at 641–43.

355. *See supra* notes 254–60 and accompanying text.

356. Of course, there remains the possibility that an individual lawyer might *unreasonably* determine that the client's plan would place others under domination. As suggested in Part V.C.1, determining whether a given situation qualifies as domination can be a complex and highly contextual exercise that is not capable of a priori resolution. That said, the mere possibility that a particular lawyer might be mistaken about the impact of the client's plan is insufficient to justify the position that lawyers should assist their clients' plans, regardless of their morality, and the concomitant claim that lawyers will not be held morally accountable for doing so. After all, all moral agents should exercise moral judgments and conform their behavior with their best moral judgments; becoming a lawyer does not magically exempt one from the responsibilities of all moral agents. Also, as a general matter, I am not bothered by informal social filters of people's legally permissible projects. *See* Luban, *The Lysistratian Prerogative*, *supra* note 27, at 641. Finally, it seems to me that conferring on private actors (such as lawyers) greater social and psychological freedom to refuse to participate in conduct that they perceive as immoral is *more* consistent with the value pluralism of the liberal intellectual traditions.

noted, "[F]ree persons are free in virtue of being secured in the exercise of a specific class of choices, not in making just any old choices."[357] Those protected choices will not include, for example, the choice to appropriate as much land as possible, to exploit one's workers to maximize profits, to be immune from the reach of a nonarbitrary tax law, or to hire mercenaries to quell a slave rebellion. Typically, the client's choice to dominate others will not qualify as a protected choice because citizens generally need not dominate other citizens in order to secure their own free and equal status. Stated another way, one need not render others unfree in order to secure one's own freedom.[358]

While the client's choice may be a legal right, it would not be classified as a basic liberty (and accordingly deserving of heightened protection by the state) under republican theory. So, for example, if the lawyer declines to implement (on behalf of an alleged sex offender) an NDA binding the survivor to silence, the client's choice and legal right may be obstructed; but it is unlikely that the failure to implement such an NDA will subject that client to domination. This point demonstrates how republican liberty departs from the value neutrality of negative and thin positive liberty theories of the classical and contemporary liberal traditions.[359]

To be sure, lawyers, by virtue of their specialized expertise, do exercise some social power over their clients and this leverage can be abused in some cases such that there may be a genuine risk of domination by lawyers. Suffice it to say that, as discussed above in Part V.C.1, the profession should examine domination through rigorous empirical study and debate and redress it in whatever context that it arises—such as in the case of legal representations that defraud or exploit unsophisticated individual clients of less financial means.

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357. PETTIT, ON THE PEOPLE'S TERMS, *supra* note 253, at 83.

358. There may possibly be one category of scenarios in which dominating others may be the only way to avoid domination oneself, such as in mutually assured destruction scenarios, e.g, where everyone else has guns and the laws fail to deter improper gun use such that having a gun may be the only way to avoid being dominated by others. In such scenarios, however, there is likely also a question about whether citizens are being dominated by a state that has been corrupted by sectarian forces in derogation of the principle of free and equal citizenship. Evaluating such scenarios under republican theory is beyond the scope of this Article. *See* Schmidt, *supra* note 304, at 175 (discussing the situation of "mutual domination," where "agents hold roughly equal power over each other but still precariously depend on each other's will").

359. *See supra* Part IV.B.

B. Direct Regulation of Externalities

One might object that the proper way to address autonomy externalities is not by transforming the ethics of lawyering but through direct regulation of those externalities. These strategies are not, however, mutually exclusive. Direct regulation of externalities is important, and legislators and regulators should begin by considering some of the proposals already advanced by commentators.[360] But direct regulation should supplement, rather than displace, efforts to reconceptualize legal ethics.

First, legislative attempts to regulate externalities will often be piecemeal, incomplete, and ineffective, which means that third parties will continue to be harmed unless and until legislatures recognize the dismal state of affairs or the insufficiency of their prior efforts. Recent state and federal legislative efforts to address NDAs confirm that legislation will never be the panacea for the problem of domination.

Since the #MeToo movement swept through the United States in 2017, at least twelve states have passed laws regulating the use of NDAs.[361] Unfortunately, most of these laws target a narrow category of NDAs and thus permit their continued use in many circumstances. For example, in 2018 and 2021, the California legislature banned the use of NDAs by employers and owners of housing accommodation to settle civil or administrative complaints alleging sexual assault and all forms of unlawful harassment, discrimination, and related retaliation—including those based on sex, as well as nondisparagement agreements under certain circumstances.[362] But because this ban only applies to settlements concluded *after* a formal civil or administrative agency

360. *See, e.g.*, Ayres, *supra* note 193, at 189; Samuel Estreicher, *How To Stop the Next Harvey Weinstein*, BLOOMBERG (Nov. 12, 2017, 10:00 AM), https://www.bloomberg.com/view/articles/2017-11-12/how-to-stop-the-next-harvey-weinstein [https://perma.cc/C8G5-TENE]; Hoffman & Lampmann, *supra* note 173, at 189–215 (arguing that executory "hush" contracts should be made unenforceable on public policy grounds).

361. Harris, *supra* note 189. For a listing of state legislative efforts, see IRIS HENTZE & REBECCA TYUS, NAT'L CONF. OF STATE LEGISLATURES, SEXUAL HARASSMENT IN THE WORKPLACE, (Aug. 12, 2021), https://www.ncsl.org/labor-and-employment/sexual-harassment-in-the-workplace [https://perma.cc/9Q44-L92P].

362. *See* Stand Together Against Non-Disclosure Act (STAND Act), S.B. 820, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (enacted) (codified at CAL. CIV. PROC. CODE § 1001); Silenced No More Act, S.B. 331, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (enacted) (codified at CAL. CIV. PROC. CODE § 1001 and CAL. GOV. CODE § 12964.5). Curiously, this ban provided that attorneys who include an NDA as part of a settlement of a civil action alleging a felony sex offense would be subject to professional discipline. CAL. CIV. PROC. CODE § 1002(e) (West 2023).

action has been filed, pre-filing NDAs will continue to have legal effect. As noted in Part IV.A, pre-filing NDAs are especially problematic because they can prevent information relating to an abusive incident from ever reaching public officials.

While California's ban only covers *post*-filing NDAs, the federal Speak Out Act, which was signed into law on December 7, 2022, only bans *predispute* nondisclosure or nondisparagement agreements relating to claims of sexual assault or sexual harassment in violation of federal or state law.[363] Because the ban only covers NDAs concluded prior to a dispute arising, NDAs concluded for the specific purpose of settling a known sexual abuse claim will not be impacted. Notably, the California and federal statutes would likely not have affected the most notorious claims against Weinstein, Bill O'Reilly, and R. Kelly,[364] many of which were settled *after* the claims arose but *before* formal complaints with courts or administrative agencies were filed.

Taking a different path, New Jersey's law appears to ban NDAs in a more comprehensive manner such that effective deterrence of serial sex abuse may be possible. Despite vocal opposition from the New Jersey State Bar Association,[365] the New Jersey state legislature amended its anti-discrimination law in March 2019 to void NDAs in connection with many employment-related claims. The new law provides that nondisclosure provisions contained in employment contracts or settlement agreements are unenforceable against employees if they have the "purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment."[366] While this legislation seems promising, we know all too well that lawyers do include unenforceable clauses in their legal instruments.[367] For example, even after the U.S. Supreme Court in 1948 held in *Shelley v. Kramer*[368] that racially restrictive covenants were void and unenforceable, lawyers continued to draft them and have them

363. Speak Out Act, Pub. L. No. 117-224, 136 Stat. 4421 (2022) (codified as amended in scatted sections of 42 U.S.C.).

364. Harris, *supra* note 189 (noting that R. Kelly, Harvey Weinstein, and Bill O'Reilly "all used [NDAs] to settle accusations of sexual harassment").

365. *See infra* note 372 and accompanying text.

366. N.J. STAT. ANN. § 10:5-12.8 (West 2023).

367. *Cf.* Bauer, *supra* note 173, at 495 ("The prospect that a noncooperation agreement will be found unenforceable if challenged by a third party seeking information does not prevent settling parties from entering into one.").

368. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

recorded—at least until they were formally banned under the Fair Housing Act of 1968.[369] And unenforceable agreements can still elicit the intended effect, especially if they are backed by (frivolous) threats of litigation.[370] Just as racial minorities may have been discouraged from moving into covenanted white neighborhoods because of unenforceable covenants, at least some survivors will be deterred from speaking out by virtue of unenforceable NDAs.

The battle over New Jersey's law should remind us of another reason why direct efforts to regulate externalities cannot alone ameliorate the problem of domination. Lawyers represent a powerful lobbying group and they have historically acted in ways that advance the profession's economic self-interest at the expense of the public.[371] Therefore, any efforts to regulate externalities are likely to run into the predictable opposition from the bar. Indeed, the New Jersey State Bar Association ("NJSBA") formally opposed the passage of New Jersey's anti-NDA law. Appealing to negative liberty, it made the somewhat specious argument that victims should be able to choose for themselves whether or not to disclose their experience.[372] The NJSBA reportedly worried that the new law "could remove the impetus for defendants to settle sexual misconduct lawsuits."[373] Similarly, in 2017, when attorney Gloria Allred learned of a California state legislator's interest in sponsoring legislation that would ban NDAs for sexual harassment

369. *See* RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 6 (2013).

370. *See* Lobel, *supra* note 173 (observing that "employers threaten litigation even under those circumstances in which NDAs would be void" and noting that "empirical studies show that employees are largely uninformed about" their unenforceability).

371. For discussions of the bar's self-interested lobbying, see, for example, Macey, *supra* note 318, at 1085, 1098; Kim, *Naked Self-Interest?*, *supra* note 20, at 140; Kim, *Lawyer Exceptionalism*, *supra* note 36; Deborah L. Rhode & Benjamin H. Barton, *Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity*, 20 CHAP. L. REV. 267 (2017); and Bryant G. Garth & Carole Silver, *The MDP Challenge in the Context of Globalization*, 52 CASE W. RSRV. L. REV. 903, 909 (2002).

372. *See* Statement, *New Jersey State Bar Association Proposes Employee Choice Amendments to S-121/A-1242* (copy on file with author) ("Those who wish to settle must be allowed to decide for themselves whether to do so with enforceable confidentiality restrictions or with the right to make further public disclosure."). This argument is misleading because the issue is not whether survivors may choose to disclose or remain silent, but whether they choose to be *bound* to silence under pain of penalty. It is contestable that a mutual nondisclosure covenant is in the survivor's best interest. *See supra* note 232.

373. Jeannie O'Sullivan, *NJ Bar Fights Ban on NDAs in Sex Harassment Cases*, LAW360 (June 8, 2018, 8:05 PM), https://www.law360.com/employment-authority/articles/1052086 [https://perma.cc/9WTP-Z937].

settlements, Allred threatened to oppose it on the ground that such a ban would make settlements impossible.[374] Unless change comes from within the legal profession, we can expect lawyers to oppose efforts to directly regulate externalities.

Finally, even if there is meaningful regulation of externalities through laws that target domination, we can bet that hired guns will act to undermine those laws. From their perspective, the "law is only an instrument—a bundle of opportunities for, or obstacles in the way of, realizing [the] clients' ends."[375] As long the standard conception remains the benchmark for guiding legal practice, lawyers will feel morally permitted—perhaps even obliged—to "bend; stretch; punch loopholes in; and nullify by obstruction, concealment, and delay the legal and regulatory constraints" that limit clients' plans.[376] For example, lawyers have been known to embrace other contractual mechanisms, such as liquidated damages provisions and staggered payment schedules that make future payments contingent on continued silence, to discourage disclosures notwithstanding an unenforceable NDA.[377] Also, it is possible, as suggested by commentators, that banning NDAs may have the unintended consequence of driving the practice underground and encouraging an *increase* in pre-filing NDAs, which are inherently more difficult for regulators to reach.[378] These strategies or behaviors not only circumvent the purpose of laws but also lead to further externalities by eroding respect for the rule of law.

We should also remember that NDAs are just one way in which lawyers have facilitated the domination of citizens. News reports suggest that the problematic behavior of Weinstein's lawyers extended beyond promulgating NDAs. According to these reports, lawyers helped wage pressure campaigns against reporters and media companies, including sending cease and desist letters threatening

374. KANTOR & TWOHEY, *supra* note 4, at 78.

375. Gordon, *The Citizen Lawyer*, *supra* note 16, at 1176.

376. *Id.* at 1175.

377. *See* Bauer, *supra* note 173, at 495 n.35 (citing sources); *see also* Moss, *supra* note 222, at 884 (describing partially deferred settlement payouts).

378. *See, e.g.*, Levmore & Fagan, *supra* note 196, at 342 ("Any disclosure requirement, whether partial or complete, runs the risk of driving bargains earlier in time or further underground."); Moss, *supra* note 222, at 883–86 (arguing that banning confidential settlements could not reliably prevent the confidentiality of *pre-filing* settlements and may actually increase the occurrence of confidential pre-filing settlements, but opining that this result may be beneficial).

litigation[379]; failed to disclose to reporters in private conversations that they were representing Weinstein[380]; retained espionage firms (reputed to have deployed illegal tactics[381]) to investigate and conduct surveillance on victims and reporters who were investigating Weinstein[382]; advocated for Weinstein in corporate boardrooms when board members were trying to hold Weinstein accountable[383]; and may have facilitated the destruction of evidence of a crime.[384] Unless we address the common moral denominator underlying all lawyer-facilitated externalities, we can expect externalities to continue to proliferate.

CONCLUSION

Two decades after her settlement, Zelda Perkins has shifted her attention from Weinstein, the rapist, to the settlement system, which pressures women into signing away their rights. "For me, the bigger trauma was what had happened with the lawyers . . . . I wanted Harvey to be exposed, but what broke my heart is what happened when I went to the lawyers."[385] After speaking publicly to lawyers, regulators and the British Parliament about the system, Perkins observed, "[W]hen you go to the law, you discover the law essentially protects and enables the perpetrator, that was the most earth-shattering discovery for me."[386]

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379. FARROW, *supra* note 6, at 213–14 (describing Boies' contact with Andy Lack at NBC regarding Farrow's story); *id.* at 234–36 (describing the cease-and-desist letter against Farrow); *id.* at 328–29 (describing legal threats against reporters).

380. *Id.* at 237 (describing interactions with Weinstein's counsel, Lisa Bloom, who failed to disclose that she represented Weinstein while promising to Farrow that she would not disclose anything he told her). Bloom's conduct appears to have violated ethical rules. *See* Fulton, *supra* note 172, at 404 (detailing the potential ethical violations).

381. One expert that Farrow interviewed noted about Black Cube, one of the espionage firms, that "[i]t's impossible to do what they do without breaking the law." FARROW, *supra* note 6, at 315. Another private intelligence firm told Farrow, "More than fifty percent of what they [Black Cube] do is illegal." *Id.*

382. *Id*. at 12–13, 95–96, 314–17, 326–27 (describing connections between lawyers and the espionage firms).

383. *Id.* at 273–74.

384. In connection with the Ambra Gutierrez investigation, a Weinstein representative asserted that there was an agreement with the district attorney's office that all copies of Weinstein's taped admission would be destroyed. But district attorney's office personnel denied that claim. *Id.* at 285.

385. KANTOR & TWOHEY, *supra* note 4, at 68.

386. Harris, *supra* note 189.

Perkins' realization rings as true in the United States as it does in the United Kingdom. Our legal system often enables the powerful to exploit the weak, because lawyers, to varying degrees, have internalized the standard conception, which tells them that lawyers should not judge the morality of their clients' cause and that maximizing their clients' autonomy within the law is an unalloyed good. This Article challenges the autonomy-based justifications of the standard conception and urges a new understanding of autonomy as being constituted by republican liberty. It calls for the legal profession to adopt freedom as nondomination as a central value and urges lawyers to come together to hold themselves and others accountable for protecting freedom as nondomination. By working together on the collective civic project of safeguarding republican liberty, we can finally take autonomy seriously, for all persons, including those who would otherwise be abused, then silenced, at the hands of "good lawyers."