

Response: A Practitioner’s Perspective on *Complicity and Lesser Evils*

ERICA NEWLAND*

TABLE OF CONTENTS

I. CASE STUDY ON “LESSER-EVILISM” AT THE DEPARTMENT OF JUSTICE: 2016–2018	682
A. 2016: A DUTY TO STAY?	682
B. 2017–2018: PROFESSOR LUBAN’S FRAMEWORK IN ACTION	684
C. FALL 2018: A DUTY TO LEAVE?	687
II. SUPPLEMENTING PROFESSOR LUBAN’S FRAMEWORK	687
A. DID THE GOVERNMENT OFFICIAL WHO CHOSE TO STAY LEAVE MUCH PERSONAL <i>SPIELRAUM</i> UNUSED?	688
B. DID THE GOVERNMENT OFFICIAL’S DECISION TO STAY MAKE <i>SPIELRAUM</i> FOR THE REGIME?	689
III. CLOSING THOUGHTS: HELPING THOSE ON THE INSIDE CHOOSE THE MORAL PATH	691

I come to Professor David Luban’s incisive *Complicity and Lesser Evils* not as a historian, philosopher, legal scholar, or professional ethicist, but rather as a practitioner.

As someone whose tenure as a career attorney at the U.S. Department of Justice (DOJ) covered the first two years of the Trump administration, I read Professor Luban’s article with unsettling, if not surprising, recognition. Building on Hannah Arendt’s work, Professor Luban perceptively captures the challenges my colleagues and I faced when deciding whether to stay and work within a terrible regime or to “just go home.”¹

* Counsel at Protect Democracy, former Attorney-Adviser at the Office of Legal Counsel from 2016–2018; Yale Law School. © 2021, Erica Newland.

1. David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 *Geo. J. Legal Ethics* [insert page number after we receive printer proofs] (2021). It should go without saying that the Trump administration was not at all equivalent to the regime that Luban discusses. The questions that Luban poses, however, are universal, and the history he elucidates—like all history—is important to learn from.

In the reflections that follow, I evaluate Professor Luban's framework against the case study of my own experiences and suggest an additional set of questions to build out his work. Specifically, I suggest supplementing Professor Luban's framework with two questions: did the government official who chose to stay leave much personal *spielraum*² unused? And did the government official's decision to stay "make" *spielraum* for the regime? I argue that by adding these two questions, the Luban framework can offer a better guide for government officials who are trying to walk a moral path. Finally, I address the reality that federal workers have all types of good reasons for holding tight to their jobs, and I identify a set of counterincentives, generated *on the outside*, which can help empower civil servants to engage in a more honest and unburdened decision-making process about whether to leave or how to stay. I argue that just as moral and patriotic judgment must be actively voiced on the inside, it must be actively welcomed by the outside.

I. CASE STUDY ON "LESSER-EVILISM"³ AT THE DEPARTMENT OF JUSTICE: 2016–2018

A. 2016: A DUTY TO STAY?

When Donald Trump was elected president, I was an attorney at the Office of Legal Counsel (OLC) at DOJ. My job involved reviewing proposed presidential and agency actions, including draft executive orders, to ensure they were lawful.⁴ Some have called OLC a "Supreme Court of the Executive Branch"⁵; while this appellation overstates the Office's objectivity,⁶ it captures the Office's position as a final veto-gate for many executive branch actions and for executive orders in particular. By custom and tradition, executive orders that don't get approved by OLC don't get issued.⁷

2. Luban defines *spielraum* as "an official's maneuvering room for protest, resistance, and pushback." *Id.* at [insert page number after we receive printer proofs]. See *id.* at [insert page number after we receive printer proofs] (the availability of *spielraum* is one of the factors for considering whether it's possible to stay and do good from within).

3. *Id.* at [insert page number after we receive printer proofs].

4. For more on OLC's role within the executive branch, see Memorandum from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel to Attorneys of the Office (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/3T4A-7YC4>].

5. Steve Vladeck, Opinion, *Trump's Ukraine Whistleblower Scandal Sets a Dangerous DOJ Legal Precedent*, NBC NEWS (Sept. 27, 2019, 4:30 AM), <https://www.nbcnews.com/think/opinion/trump-s-ukraine-whistleblower-scandal-sets-dangerous-doj-legal-precedent-ncna1059371> [<https://perma.cc/S7LF-AVXD>].

6. OLC's analyses have always "reflect[ed] the institutional traditions and competencies of [the executive] branch of the Government." *Id.* When he headed the Office, Bill Barr went even further, calling this a "duty to advance the President's cause." *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 OP. O.L.C. 207, 229 (1989), <https://www.justice.gov/file/24271/download> [<https://perma.cc/C3UL-TQYT>].

7. See also Exec. Order No. 11,030, 27 Fed. Reg. 5,847 (June 19, 1962) ("If the Director of the [Office of Management and] Budget approves the proposed Executive order or proclamation, he shall transmit it to the Attorney General for his consideration as to both form and legality."); 28 C.F.R. § 0.25(b) (1988) ("The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney

I had joined OLC in August of 2016, after finishing up a federal appellate clerkship. For a brief period, it felt like I had the perfect job. I was constantly learning from my colleagues, whom I respected enormously. The work was interesting, as were the meetings. Lawyers and policymakers needed our advice and were grateful for our help. I took pride in my ability to clarify the law and help keep the wheels of government turning—even when those matters were consequential only for a few federal employees. The pay was solid and so was my work-life balance; the Office kept a steady rhythm as the administration wound down and prepared to hand over the reins to its chosen successor.

Then, the unthinkable happened. There was the flurry of frantic election night texts and calls with family and friends. The silent commute on that gray and wet morning of November 9. The older man at the metro station who held a print copy of *The New York Times*. The death watch that commenced in the halls of Main Justice.

The world had folded in on itself, but I knew I had to stay at DOJ. The wheels of government that I so proudly helped turn would need to keep spinning, and I shuddered to imagine who would replace me and the damage they would do. When friends and colleagues raised concerns about the professional repercussions of working in a Trump administration, I said that the stakes seemed too high to worry about my career.

To be clear, I knew that a dream job was about to be transformed into a nightmare. Trump's bigotry and disregard for the project of governing, no less the values of a democracy, were readily apparent throughout the campaign. At the time, I imagined that the bulk of the coming atrocities would arise from war or from attacks by emboldened white supremacists. In that, I was wrong. I can hardly claim surprise, however, that after four years under the Trump administration, our nation is staring down hundreds of thousands of largely preventable deaths.⁸ To this day, I have not been able to bring myself to listen to a terror-filled voice message I left myself late on election night.

General, Office of Legal Counsel . . . Preparing and making necessary revisions of proposed Executive orders and proclamations, and advising as to their form and legality prior to their transmission to the President; and performing like functions with respect to regulations and other similar matters which require the approval of the President or the Attorney General.”); *About the Office*, OFF. OF LEGAL COUNS., www.justice.gov/olc [<https://perma.cc/SAX9-SWTH>] (last visited June 15, 2021) (“All Executive orders and substantive proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President’s formal approval.”); Annika Lichtenbaum, “Form and Legality”: *The Office of Legal Counsel’s Role in the National Emergency Declaration*, LAWFAREBLOG (Feb. 15, 2019, 4:37 PM), <https://www.lawfareblog.com/form-and-legality-office-legal-counsels-role-national-emergency-declaration> [<https://perma.cc/752P-JEF8>].

8. See German Lopez, *How the US’s Covid-19 Death Toll Compares to that of Other Wealthy Countries*, VOX (Jan. 11, 2021, 8:00 AM), <https://www.vox.com/future-perfect/2021/1/11/22220827/covid-19-pandemic-coronavirus-usa-europe-canada-trump> [<https://perma.cc/GN8Q-8V29>] (stating “[i]f the US had Canada’s Covid-19 death rate, 225,000 more Americans would likely be alive today”).

But I wanted to live under a government that employed attorneys like me, rather than the attorneys who had flocked to the campaign. So I stayed.

Like others throughout the Department, in the months before and immediately following Trump's inauguration, I read Arendt, taking notes in the margins. The analogies were of course imprecise, but the warnings about thoughtless bureaucrats and inverted moral compasses seemed relevant.⁹ Arendt could write of the quality of "almost automatic yielding under pressure" that is "so symptomatic of the educated strata of certain societies," and could claim in good faith that she and her contemporaries "had no idea how serious such things were and least of all where they could lead."¹⁰ We could not.

I read the posts on *Lawfare* and *Just Security* about whether to stay or leave and discussed them with colleagues. Benjamin Wittes argued "there's an honorable place for the carrying out of destructive policy and orders in a fashion that is minimally effective, and thus minimally destructive."¹¹ Professor Oona Hathaway, in a more equivocating piece, wrote that "[w]e need good people on the inside willing to do the hard work of governing responsibly in the face of immense challenges," while urging that those who serve "must also be prepared to resist unlawful and immoral policies and, if necessary, resign."¹² She also cautioned that the appointment of Steve Bannon as a senior advisor suggested that the Trump administration might be "prepared to name people to leadership positions whose views are so vile that the only option is opposition," in which case she would have no choice but to recommend "opt[ing] out."¹³ The author I read who most vehemently opposed staying was Professor Luban, with his description of Bernhard Lösener as a man of "false consciousness."¹⁴ As I reflected on these pieces, I could not see how leaving would make anything better. I remained steadfast in my belief that I should stay.

B. 2017–2018: PROFESSOR LUBAN'S FRAMEWORK IN ACTION

Over the next two years, I checked in with myself regularly to see if it was time to leave. Taking into account the opportunity cost of staying and foregoing public

9. See generally HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963) (discussing the "thoughtlessness" of Eichmann and the way that the Nazis turned morality on its head); *id.* at 105–06 (discussing how mass murderers learned to see themselves as victims).

10. HANNAH ARENDT, *Personal Responsibility Under Dictatorship* 17, 22, in RESPONSIBILITY AND JUDGMENT (1964) (Jerome Kohn ed., 2003).

11. Benjamin Wittes, *How to Serve in a Trump Administration*, LAWFARE (Dec. 16, 2016, 10:18 AM), <https://www.lawfareblog.com/how-serve-trump-administration> [<https://perma.cc/88DW-L4XB>].

12. Oona Hathaway, *Work for the Trump Administration? Yes, But Be Prepared*, JUST SEC. (Nov. 14, 2016), <https://www.justsecurity.org/34409/work-trump-administration-yes-prepared/> [<https://perma.cc/FAD4-SHYD>].

13. *Id.*

14. David Luban, *The Case Against Serving*, JUST SEC. (Nov. 14, 2016), <https://www.justsecurity.org/34404/case-serving-trump/> [<https://perma.cc/WC8B-FZAM>]. I later told Professor Luban that I believed I had learned of Lösener in James Whitman's *Hitler's American Model*, which I read in 2017. I stand corrected. I read Professor Luban's *Just Security* piece before Whitman's book was published.

interest work on the outside, I asked myself whether the prognosis for our democracy would be better or worse if, instead of trying to hold the Trump administration to a standard of honesty and legality, I left and handed the reins over to a replacement who would be hired by my bosses, who were appointees of Attorney General Jefferson Beauregard Sessions III. To be clear, I knew I alone wasn't going to save our democracy. But I wanted to be part of the solution, not the problem.

Each attempt at answering this question—stay or leave—required a series of value judgments. In hindsight, I can see that in making those judgments, I hewed fairly closely to the framework that Professor Luban has set out here for deciding whether “staying at the desk can be the righteous path.”¹⁵

First, I identified that I enjoyed a great deal of what Professor Luban calls *spielraum*. The only outright firing I was aware of was Andy McCabe's, and I was a far cry from Deputy Director of the FBI.¹⁶ Some colleagues lived in fear of “becom[ing] the target of a Trump tweet,”¹⁷ but my portfolio did not include Russia-related matters, so the risk seemed negligible. I assessed that as an unknown bureaucrat, I had more *spielraum*, not less. To be clear, I entertained fears. While firing a civil servant is hard, it's not nearly as hard to make life difficult for an employee with a security clearance, even if she has done nothing wrong. Still, as a white U.S. citizen safely ensconced in a cushy job at the Department of Justice, I recognized that I was not subject to “ruthless terror.”¹⁸ I did not have a pension on the line or a family to support. I also saw that with my elite credentials and attendant connections, I would be employable even if forced out under less-than-ideal circumstances.¹⁹

I likewise believed I had “a genuine prospect of mitigating evil.”²⁰ I rejected “germ-proof moralism”²¹ on the theory that the people whose lives were affected by my work did not care whether I had clean hands. For the first year, I leaned into troubling assignments; they presented the best opportunity to take cruel and unlawful proposals that were premised on lies and tailor them to make them a little less cruel and a little more lawful. I recognized that in “diminish[ing] the immediate harmful impacts of President Trump's executive orders,” I also “made

15. Luban, *supra* note 1, at [insert page number after we receive printer proofs].

16. See, e.g., Phillip Ewing & Carrie Johnson, *Justice Department Fires Embattled FBI Deputy Director Just Short Of Retirement*, NPR (Mar. 16, 2018, 10:09 PM), <https://www.npr.org/2018/03/16/571671917/justice-department-fires-embattled-fbi-deputy-director-just-short-of-retirement> [<https://perma.cc/263U-ZMAV>].

17. See George Packer, *The President Is Winning His War On American Institutions: How Trump Is Destroying The Civil Service And Bending The Government To His Will*, THE ATLANTIC (Apr. 2020), <https://www.theatlantic.com/magazine/archive/2020/04/how-to-destroy-a-government/606793/> [<https://perma.cc/DR72-J7YU>] (describing my experience).

18. ARENDT, *supra* note 10, at 24.

19. I might not get my dream job, but my dream job was contingent on someone other than Trump being president anyway.

20. Luban, *supra* note 1, at 53; see *id.* at 50.

21. ARENDT, *supra* note 10, at 36.

them more palatable to the courts.”²² But my oath required me to oppose manifestly unlawful actions, and fighting for an office culture that cared about legality seemed like an important way to help prevent the Trump administration from becoming a criminal regime.²³ I believed that by trying to hold the line, I was helping buttress the institution against forces that were bent on transforming it into a paragon of lawlessness.

I maintained, at least for a time, “great confidence in [my] moral judgment.”²⁴ I believe I avoided the trap that Arendt describes, whereby, “those who choose the lesser evil forget very quickly that they chose evil.”²⁵ I was consumed with internal deliberations about how to push back more, angry with myself for every missed opportunity, and frustrated with colleagues who did not seem to see the stakes in the same terms as I did (or who felt it was wiser to act with more discretion).²⁶ I worked hard to keep front of mind that the considerable personal kindness the political appointees showed to me did not mitigate the harm our Office was doing. All of this helped me fight the chronic gaslighting, as superiors praised Trump’s intelligence and embraced some of his most bald-faced lies, criticized brave attorneys in other offices who tried to do the right thing, and offered career advice premised upon the assumption that employers would universally see staying in the Trump Administration as preferable to leaving it after a short tenure.

I tried to actively use my *spielraum*, to speak out continuously and to avoid the “effectiveness trap.”²⁷ I pushed back hard, occasionally even yelling at my political-appointee bosses (it was a sign of my *spielraum* that they engaged). I saw that, at least in that first year, they staked pride in being respected by attorneys in the office from across the political spectrum, and I wanted them to know they would have to earn my respect. I would slip into sympathetic (or at least polite) colleagues’ offices and express my frustration or disappointment of the hour. I hoped that in doing so, I was also helping them hold off the gaslighting and the normalization of what was going on around us. I was hard-pressed to believe that I was “contribut[ing] to the moral breakdown of those around [me].”²⁸ But when my Office nominated me for, and then I (along with a few colleagues) received,

22. Erica Newland, *I’m Haunted by What I Did as a Lawyer in the Trump Justice Department*, N.Y. TIMES (Dec. 20, 2020), <https://www.nytimes.com/2020/12/20/opinion/trump-justice-department-lawyer.html> [<https://perma.cc/PV2L-ELCK>].

23. See ARENDT, *supra* note 9, at 148 (discussing criminal regimes).

24. Luban, *supra* note 1, at 41.

25. ARENDT, *supra* note 10, at 36.

26. See Packer, *supra* note 17.

27. See Luban, *supra* note 1, at [insert page number after we receive printer proofs] (quoting James C. Thomson, *How Could Vietnam Happen? An Autopsy*, THE ATLANTIC (April 1968), <https://www.theatlantic.com/magazine/archive/1968/04/how-could-vietnam-happen-an-autopsy/306462/> [<https://perma.cc/6HDZ-9LFY>]); see also Packer, *supra* note 17.

28. Luban, *supra* note 1, at [insert page number after we receive printer proofs].

the Attorney General's Distinguished Service Award from the Department,²⁹ I had to reckon with how much *spielraum* I had failed to use.

C. FALL 2018: A DUTY TO LEAVE?

A little more than two years after the 2016 election, I finally left. I had used up my capital, and I increasingly judged myself in the position of “[t]he official [who] can’t do any good by staying, so continued association is unmitigated participation in evil.”³⁰ I was also beginning to worry about my judgment.³¹ I found it increasingly difficult to identify which fights were worth pursuing, and my cynicism was shading into numbness. I began to think there were more opportunities to do good from the outside than the inside. I joined Protect Democracy, an organization dedicated to preventing our democracy from declining into a more authoritarian form of government.³² Shortly after leaving, I wrote about my experience at OLC in *The Washington Post*.³³ As I explained there, I had “decided that the responsibilities entailed in my oath were incompatible with the expectations of my job.”³⁴

Still, I was haunted by my decision to leave, by the possibility that I had left *spielraum* unused. As I said my goodbyes, I thanked trusted colleagues for staying on. I advised others that if they felt they were making a difference, they should stay.

And yet.

Despite tracking Professor Luban's (then-undeveloped) framework for lesser-evilism quite closely, I have come to believe that we who stayed were complicit in ways I long failed to see.

II. SUPPLEMENTING PROFESSOR LUBAN'S FRAMEWORK

So what went wrong—and what was wrong—with the framework that I was applying and that Professor Luban has put forward? And why do I now believe that instead of staying, my colleagues and I should have resigned early on?

Is the problem, as Professor Luban, suggests, that consequentialist arguments, like the ones he and I are inclined to invoke, fail to account for a moral remainder?³⁵ There's undoubtedly wisdom there. But the framework that Professor

29. See Josh Gerstein, *Lawyers Who Vetted Trump Executive Orders Get Award*, POLITICO (Oct. 24, 2018, 7:57 PM), <https://www.politico.com/blogs/under-the-radar/2018/10/24/trump-lawyers-executive-orders-937698> [<https://perma.cc/3SQ4-JRVB>].

30. Luban, *supra* note 1, at [insert page number after we receive printer proofs].

31. See Luban, *supra* note 1, at [insert page number after we receive printer proofs].

32. See PROTECT DEMOCRACY, <https://protectdemocracy.org/> [<https://perma.cc/4YPQ-WMP6>] (last visited June 15, 2021).

33. Erica Newland, Opinion, *I Worked in the Justice Department. I Hope Its Lawyers Won't Give Trump An Alibi*, WASH. POST (Jan. 10, 2019, 6:51 PM), https://www.washingtonpost.com/opinions/i-worked-in-the-justice-department-i-hope-its-lawyers-wont-give-trump-an-alibi/2019/01/10/9b53c662-1501-11e9-b6ad-9cfd62dbb0a8_story.html [<https://perma.cc/73FA-SDX3>].

34. *Id.*

35. Luban, *supra* note 1, at [insert page number after we receive printer proofs].

Luban and I each applied also leaves a consequentialist remainder—money on the table. By adding two questions to the Luban framework, we can strengthen that framework to better guide government officials in their decision whether to stay or leave.

The first question accounts for the intuition that Professor Luban’s framework unduly rewards some of the most malevolent actors, those for whom Fritz Reck’s words echo: “[a]h, now, really gentlemen, this is a little late. You made this monster.”³⁶ The second question accounts for why, in my view, attorneys in my situation should have collectively fled.

A. DID THE GOVERNMENT OFFICIAL WHO CHOSE TO STAY LEAVE MUCH PERSONAL *SPIELRAUM* UNUSED?

Professor Luban’s framework does not sufficiently press government officials to account for their unused *spielraum*: the difference between what the officials who stayed did and what they could have done. While assessing this delta requires tough line drawing and difficult counterfactuals,³⁷ some answers are easy. For example, not only was I not fired, but I was also selected for an award for my work on executive orders. Clearly, I had unused *spielraum*. This awkward fact should complicate any assessment of the morality of my initial and iterative decisions to stay.

This unused *spielraum* is one reason (of many) why we are so unsettled by the protestations of the high-level Trump officials who worked tirelessly to strengthen the hand of the Administration and to protect it from accountability for its criminal acts.³⁸ It may also account for Professor Luban’s sense that there is something “unsatisfying, dissonant, about judging [the moral biographies of Lösener and Moltke] solely in consequentialist terms of how many expected lives they saved.”³⁹ We can look at any number of high profile Trump administration officials to understand that those who have actively, publicly, even joyously embraced and buttressed the regime will be able to use the absence of an

36. *Id.* at 42 (quoting FRIEDRICH PERCYVAL RECK-MALLECEWEN, *DIARY OF A MAN IN DESPAIR* 195–96 [*Tagebuch eines Verzweifelten*], (Paul Rubens trans., 1970) (entry of July 21, 1944)).

37. Do we adopt Hannah Arendt’s view that not even the threat of imminent death is moral justification for facilitating the crimes of a regime? Or do we lower the moral bar to excuse actions taken to maintain one’s job? Prospective jobs? Book deals? See ARENDT, *supra* note 10, at 18 (“[W]hile a temptation where one’s life is at stake may be a legal excuse for a crime, it certainly is not a moral justification.”). Lösener and Moltke both ultimately lost their lives because of their anti-regime activities, but still we might ask ourselves whether each—Lösener in particular—could have done more. Of course, it’s a question that we are not well situated to answer.

38. Think, for example, about John Bolton who served as the National Security Advisor from April 2018 to September 2019. Bolton maintains that he protected the nation from Trump. See Peter Nicholas, *Was It Worth It?*, *THE ATLANTIC* (Dec. 18, 2020), <https://www.theatlantic.com/politics/archive/2020/12/trumps-ex-staffers-have-no-regretseven-ones-he-fired/617418/> [<https://perma.cc/LEM9-4Q9C>]. He also declined to testify in the impeachment hearing for Trump’s first impeachment, despite being a witness to events at issue. See Andrew Desiderio, *Impeachment Investigators Pressing Forward Without John Bolton*, *POLITICO* (Nov. 7, 2019), <https://www.politico.com/news/2019/11/07/john-bolton-impeachment-067318> [<https://perma.cc/ZZR8-L4HM>].

39. Luban, *supra* note 1, at [insert page number after we receive printer proofs].

aspirational comparator—the absence of any notion of what *could have been* had they used their *spielraum*—to cast themselves as heroes who saved lives.⁴⁰ By incorporating an analysis of unused *spielraum* into Professor Luban's framework, we better align his framework with our consequentialist aims and our moral intuitions.

B. DID THE GOVERNMENT OFFICIAL'S DECISION TO STAY MAKE *SPIELRAUM* FOR THE REGIME?

Second, Professor Luban's framework does not account for how a government official's decision interacts with the regime's grip on power.

Professor Luban's framework could be strengthened by asking how much *spielraum* the regime has with *the polity* (or the relevant political elites), and the effect of the decision to stay on that *spielraum*.⁴¹ When a regime is low on *spielraum*, it has a harder time maintaining power, and it is more likely that in choosing the "lesser evil," the attorney will unintentionally buttress the regime. When a regime enjoys more *spielraum*, staying may be the better decision.

Consider the Trump administration's example. It can be difficult, in 2021, to recall a time when Trump had little *spielraum* with Republican officeholders. After all, even though Trump repeatedly lied to the American people about a deadly pandemic,⁴² likely killing hundreds of thousands of people by mishandling the government response to it,⁴³ and incited and celebrated a deadly, white supremacist attack on the Capitol and on the peaceful transition of power,⁴⁴ resulting in "one of the worst days of injuries for law enforcement in the United States since the Sept. 11, 2001, terrorist attacks,"⁴⁵ 197 Representatives⁴⁶ and

40. See Nicholas, *supra* note 38.

41. Professor Luban engages to some extent with this question when he takes up Arendt's argument that, in his paraphrase, "the appearance of obedience" "mutually normalize[s] the abnormal." Luban, *supra* note 1, at [insert page number after we receive printer proofs]. He acknowledges that in Nazi Germany, "Germans reinforced in each other the sense that nothing too outrageous was taking place" and adds the risk of "complicity by consorting" to his framework. Luban, *supra* note 1, at [insert page number after we receive printer proofs]. But here, I mean to focus on the substance of the work that regime attorneys engage in as distinct from the laundering of their public reputations.

42. Christian Piaz, *All the President's Lies About the Coronavirus*, THE ATLANTIC (Nov. 2, 2020), <https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/> [https://perma.cc/5PH3-45KS].

43. See Lopez, *supra* note 8.

44. See *All the Evidence Presented in Trump's Impeachment Trial*, WASH. POST (Feb. 13, 2021), <https://www.washingtonpost.com/politics/interactive/2021/evidence-trump-second-impeachment/> [https://perma.cc/QR6A-Q3ST] (compendium of evidence).

45. Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html> [https://perma.cc/PQW5-RQLX].

46. Benjamin Swasey & Audrey Carlsen, *The House Has Impeached Trump Again. Here's How House Members Voted*, NPR (Jan. 13, 2021), <https://www.npr.org/sections/trump-impeachment-effort-live-updates/2021/01/13/956412385/the-house-has-impeached-trump-again-heres-how-house-members-voted> [https://perma.cc/59F6-S9UA].

43 Senators⁴⁷ still voted with Trump in the second impeachment trial, and 139 Representatives and 8 Senators objected to the certification of Biden's electoral victory.⁴⁸

But when Trump came into office in 2017, he did not have such an iron grip on the Republican party. The new president was inaugurated under a Russia-sized cloud. John McCain was still alive and Lindsey Graham was considered "one of [the] staunchest Trump critics in the Senate."⁴⁹ It seemed as if every evening, the *New York Times* or *Washington Post* dropped new, destabilizing reports. Notwithstanding that Republicans controlled the House and the Senate, Trump's "mere" firing of the FBI director prompted the hiring of a special counsel. Deputy Attorney General Rod Rosenstein, who would later become a key Administration defender,⁵⁰ suggested "secretly record[ing] President Trump in the White House to expose the chaos consuming the administration" and "discussed recruiting cabinet members to invoke the 25th Amendment to remove Mr. Trump from office for being unfit."⁵¹ Impeachment was in the air.⁵² Meanwhile, the Supreme Court was a conservative-leaning but not conservative-dominated 4-4, with Justice Kennedy as the swing vote. Trump-appointed judges did not yet control the lower courts, and the American people had not yet assimilated to the new style of governance. Within OLC, I noticed that political leadership had its own fears about Trump's erratic behavior, fears that seemed to recede over time. There was, initially, a sense that the President had better not push Congress too far.

What I failed to appreciate at the time was that against this landscape, the mere competence of attorneys (at OLC) who vetted proposed presidential actions and of attorneys (elsewhere at DOJ) who otherwise helped develop those actions and defend them in court, created a critical mirage of stability and respectability.⁵³

47. Brakkton Booker, *Trump Impeachment Trial Verdict: How Senators Voted*, NPR (Feb. 13, 2021), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967539051/trump-impeachment-trial-verdict-how-senators-voted> [https://perma.cc/88PD-DG6B].

48. Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html> [https://perma.cc/7ZQ6-9P4Z].

49. Manu Raju & Tom LoBianco, *Graham Blasts Trump After Latest Voter Fraud Claim*, CNN (Jan. 24, 2017), <https://www.cnn.com/2017/01/24/politics/lindsey-graham-trump-illegal-votes/index.html> [https://perma.cc/QH7Z-E5BY].

50. See David Leonhardt, *How Rosenstein Fell Short*, N.Y. TIMES (May 1, 2019), <https://www.nytimes.com/2019/05/01/opinion/rod-rosenstein-resignation-trump.html> [https://perma.cc/93FK-8P6U].

51. Adam Goldman & Michael S. Schmidt, *Rod Rosenstein Suggested Secretly Recording Trump and Discussed 25th Amendment*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/us/politics/rod-rosenstein-wear-wire-25th-amendment.html> [https://perma.cc/GL8G-YE4D] (describing conversations that took place in the spring of 2017).

52. Matthew Yglesias, *By Firing James Comey, Trump Has Put Impeachment on the Table*, VOX (May 10, 2017), <https://www.vox.com/policy-and-politics/2017/5/10/15611522/comey-trump-obstruction-justice-impeachment> [https://perma.cc/N2NR-VF57].

53. In fact, I believed that by preserving institutional respectability I was helping preserve our institutions, barricading them against coming attacks. See Packer, *supra* note 17.

Professor Luban observes that “[s]pielraum is made, not just found.”⁵⁴ Even as I was narrowing executive actions to make them less toxic and fighting for the principle that only lawful actions should be allowed out the door, I was (unintentionally) making *spielraum* for the regime. Rather than buttressing the institution against lawlessness, I was strengthening its capacity to engage lawlessly.

This only became clear to me after the 2020 election, when the Trump campaign found itself without skilled government lawyers or top-flight private representation. After years of benefitting from top-notch lawyers who could paper over his lies, stitching garments for an otherwise naked emperor, Trump and his lackeys were suddenly laid bare. Even Republican judges were forced to admit that the emperor had no clothes.⁵⁵

Without skilled attorneys to make him *spielraum*, the anti-democratic Trump agenda was halted. After four years of defending the decision to stay, I now saw that:

In giving voice to those trying to destroy the rule of law and dignifying their efforts with our talents and even our basic competence, we enabled [the] destruction [of our democracy]. . . . We collectively perpetuated an anti-democratic leader by conforming to his assault on reality. We may have been victims of the system, but we were also its instruments.⁵⁶

What if enough of us⁵⁷ had refused from the beginning to close that competency gap? If we had resigned when Trump's *spielraum* was at its lowest ebb?

III. CLOSING THOUGHTS: HELPING THOSE ON THE INSIDE CHOOSE THE MORAL PATH

Practically speaking, generating such a collective emptying is no small thing.⁵⁸ Just as it is pragmatically difficult to both “choose the lesser evil” and remember that you still “chose evil,”⁵⁹ it is pragmatically difficult for a civil servant lawyer

54. Luban, *supra* note 1, at [insert page number after we receive printer proofs].

55. See Rosalind S. Helderman & Elise Viebeck, *The Last Wall: How dozens of judges across the political spectrum rejected Trump's efforts to overturn the election*, WASH. POST (Dec. 12, 2020), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html [<https://perma.cc/YA6X-PB9A>]; Newland, *supra* note 22.

56. *Id.* (citing VÁCLAV HAVEL, *THE POWER OF THE POWERLESS* 19 (2009 ed.)).

57. Who is the relevant “us” here? It does not include every lawyer at DOJ. Neither the members of the Mueller team, the attorneys pursuing investigations of the Administration for the Office of the Inspector General, nor the prosecutors pursuing run-of-the-mill Medicare fraud seemed to be generating *spielraum* for the regime. In offices where the lines are blurrier, however, where civil servant lawyers are trying to walk a path of “lesser evil” but filling a competency gap and thereby creating *spielraum* for the regime, I’ve come to believe that the best outcome would have involved a *collective* emptying of the ranks.

58. Arendt seems to treat it as the easy, if often overlooked, option, writing, “we have only for a moment to imagine what would happen to any of these forms of government if enough people would act ‘irresponsibly’ and refuse support, even without active resistance and rebellion, to see how effective a weapon this could be.” ARENDT, *supra* note 10, at 47.

59. *Id.* at 36.

to give up a treasured government job. Many of the attorneys faced with the decision to stay or leave had been at, or planned to stay at, DOJ for decades. Leaving not only meant abandoning a job, it meant abandoning a career.⁶⁰

One lesson from the Trump years is that the nation would have been better served by a set of counter-incentives, generated *on the outside*, which could have made it easier for civil servant attorneys to understand the weight of their role, better empowered them to push back so long as they stayed, and enabled them to leave. In other words, just as “resistance”⁶¹ must be actively voiced from the inside, it must be actively welcomed by the outside.

Given the high likelihood that we will face another authoritarian-minded president, it’s worth briefly sketching what such counter-incentives could look like.

Law firms and other legal employers could announce that they will ask hard interview questions about an attorney’s portfolio, conduct, and decision-making in the authoritarian-leaning regime. Government lawyers are highly risk averse,⁶² and the mere specter of such questions would be powerful. To encourage those who stay to push back from within, legal employers could also clarify that they won’t automatically ding applicants for imperfect performance evaluations or challenges getting references from inside the government. More than the fear of being fired, many civil servants felt a fear that if they pushed back too much, they would never get the references they would need in order to leave. Private employers might also establish an expectation that employees who served in the regime will voluntarily participate in subsequent truth commissions or oversight. Clients—who have helped push law firms on racial equity⁶³—could pressure firms not to hire attorneys who have engaged in active attacks on democracy or who have effectuated unjustifiable policies, such as family separation.⁶⁴

Law schools, especially the well-funded elite sort that produce so many government attorneys, could offer salary bridges for those who leave in the first year of the regime, or extra help with loan repayment. Of course, law schools play a role in molding professional ethics long before their students enter the workforce. In the classroom, professional responsibility courses should help students identify their own red lines. And law school faculty should weave professional responsibility into other elements of the curriculum. For example, constitutional law

60. Moreover, many attorneys genuinely view the Department of Justice as the only place where they can make enough money to support their family, preserve enough time to spend with them, and maintain an upward career trajectory, one imbued with the respectability of public service.

61. See Luban, *supra* note 1, at 41 (“It seems at least plausible that a collateral benefit of active resistance is keeping one’s moral judgment firm.”).

62. See Packer, *supra* note 17.

63. See e.g., Ruiqi Chen, *Coke GC Tired of ‘Good Intentions,’ Wants Firm Diversity Now*, BLOOMBERG LAW (Jan. 28, 2021), <https://news.bloomberglaw.com/business-and-practice/coke-gc-tired-of-good-intentions-wants-law-firm-diversity-now> [<https://perma.cc/MY99-BBVA>].

64. Non-profit organizations have tried to create such pressure. See, e.g., *Trump Accountability Team*, PEOPLE’S PARITY PROJECT’S TRUMP ACCOUNTABILITY TEAM, <https://www.peoplesparity.org/trumpaccountability> [<https://perma.cc/ANY7-M6RK>] (last visited Apr. 9, 2021).

professors should not gloss over the advocates who argued the wrong sides of *Dredd Scott* and *Brown v. Board*, the attorneys who crafted and enabled Jim Crow,⁶⁵ or the lawyers from the federal government who lied to the Supreme Court in order to win its endorsement of the internment of American citizens of Japanese descent.⁶⁶ More generally, law schools should push and empower their students to exceed the standards set by “rules of professional misconduct [that] are aimed at weeding out sociopaths and people driven to theft and egregious incompetence . . . [but that] do not guarantee that lawyers will do right by their clients, or, in this case, by the Constitution and laws of the United States of America.”⁶⁷

Funders and public interest organizations can work together to increase whistleblower aid,⁶⁸ openly offering free consultations to at least help government employees know their rights. Consultations can help those who have already left discern what they can lawfully share publicly. Commitments from opposing party presidential candidates to use the Office of Personnel Management’s significant reinstatement authority⁶⁹ to rehire civil servants who have left the federal government can signal that employees who leave aren’t foreclosing entire careers. Opposing party Senators can pledge to ask hard questions of attorneys in future confirmation hearings, as McCain did of attorneys who approved torture.⁷⁰

65. See, e.g., JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2017).

66. See, e.g., *Confession of Error, The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T OF JUST. ARCHIVES (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [<https://perma.cc/WVZ3-KTVR>] (last visited June 15, 2021).

“By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, the Solicitor General had learned of a key intelligence report that undermined the rationale behind the internment. . . . But the Solicitor General did not inform the Court of the report, despite warnings from Department of Justice attorneys that failing to alert the Court ‘might approximate the suppression of evidence.’ Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones. Nor did he inform the Court that a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC.

67. Jack Balkin, *Justice Department Will Not Punish Yoo and Bybee Because Most Lawyers Are Scum Anyway*, BALKINIZATION (Feb. 19, 2010), <https://balkin.blogspot.com/2010/02/justice-department-will-not-punish-yoo.html> [<https://perma.cc/S36F-UD5D>].

68. See, e.g., GOV’T ACCOUNTABILITY PROJECT’S DEMOCRACY PROTECTION INITIATIVE, <https://www.democracy.whistleblower.org/> [<https://perma.cc/4ER9-6RJ7>] (last visited June 15, 2021).

69. See *Policy, Data, Oversight*, OFF. OF PERSONNEL MGMT. <https://www.opm.gov/policy-data-oversight/hiring-information/reinstatement/> [<https://perma.cc/RY8F-LJL9>] (last visited Apr. 9, 2021).

70. Seung Min Kim, *McCain opposes Trump nominee over torture memos*, POLITICO (Nov. 8, 2017), <https://www.politico.com/story/2017/11/08/john-mccain-trump-nominee-steven-engel-torture-244706> [<https://perma.cc/8DMX-QHQR>] (“Sen. John McCain (R-Ariz.), who has already warned President Donald Trump against bringing back torture, is vowing to reject any administration nominee who has backed so-called enhanced interrogation techniques.”).

Talking heads can proactively and repeatedly reject the otherwise legitimizing effect that power inevitably has.

In other words, those outside government, like those in it, have obligations to avoid complicity and lesser evils. In a non-totalitarian society, where one can participate in civic life without supporting the regime, “inner emigration”⁷¹ becomes its own form of support. When civil servants look outside the walls of government and see, or are allowed to assume, a status quo in which disobeying remains the wrong thing to do,⁷² their judgment is weakened, undermined. As Arendt observes, “[n]o man, however strong, can ever accomplish anything, good or bad, without the help of others.”⁷³

71. See Luban, *supra* note 1, at [insert page number after we receive printer proofs].

72. See *id.* at [insert page number after we receive printer proofs] (“As Arendt was wont to say: in politics, appearance is reality. Obedience is support because it shakes the confidence in their own judgment of those contemplating disobedience. When people around them look like supporters, it undermines their confidence that disobeying is the right thing to do.”).

73. ARENDT, *supra* note 10, at 47. She made this point in a different context, arguing that this is why obedience is equivalent to support.