

The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election

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INTRODUCTION

American democracy is at a crossroads.¹ According to some historians, the 2020 election and its aftermath have demonstrated that the Republican Party is “clearly an authoritarian party,” no longer committed to the ideals of democracy, free and fair elections, and the peaceful transition of power.² The United States was listed as a “backsliding democracy” for the first time in the 2021 Global State of Democracy Report.³ The report referred to President Trump’s false assertions about the 2020 election as a “historic turning point” that “undermined fundamental trust in the electoral process.”⁴ Defining the threat that American democracy faces openly and honestly can allow legal and political institutions to treat this antimajoritarian movement with the seriousness and solemnity that is required. In discussing the need to protect democracy, this Note employs a “robust view of democracy,” first introduced by two University of Chicago professors and democracy scholars, Aziz Huq and Tom Ginsburg, which focuses on

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1. See generally Preet Bharara, Christine Todd Whitman, Mike Castle, et al., *Proposals for Reform: National Task Force on Rule of Law & Democracy*, BRENNAN CTR. JUST. (Oct. 2, 2018), <https://www.brennancenter.org/our-work/policy-solutions/proposals-reform-national-task-force-rule-law-democracy> [https://perma.cc/HFY6-88U9] (explaining how the breakdown of norms, unwritten rules, and respect for the rule of law has contributed to democratic erosion and proposing solutions to revitalize American democracy).

2. See Dean Obeidallah, *Republicans would “rather end democracy” than turn away from Trump, says Harvard professor*, SALON (Oct. 13, 2021), <https://www.salon.com/2021/10/13/would-rather-end-democracy-than-turn-away-from-trump-says-harvard-professor/> [https://perma.cc/8BPH-WGNZ] (Steven Levitsky, co-author of “How Democracies Die” explaining that Republicans “would rather end democracy” than stand up to Trump and address the use of political violence. He also explains that use of terms like “fascism” to describe today’s Republican Party are “defensible” given the party’s refusal to acknowledge January 6th’s significance and promotion of political violence); see also Thomas Zimmer, *The Republican party is abandoning democracy. There can be no ‘politics as usual’*, THE GUARDIAN (Feb. 22, 2022), <https://www.theguardian.com/commentisfree/2022/feb/22/why-are-democrats-like-biden-still-defending-republican-politicians> [https://perma.cc/WU6M-U2Z8] (Zimmer, a historian and Georgetown professor who focuses on the history of democracy in the United States, describing the “Republican party’s ongoing authoritarian assault on the political system”).

3. *Global State of Democracy Report 2021*, INTERNATIONAL INSTITUTE FOR DEMOCRATIC AND ELECTORAL ASSISTANCE 7 (2021), <https://www.idea.int/gsod/global-report#chapter-2-democracy-health-check-an-overview-of-global-tre> [https://perma.cc/YBJ5-CFE3].

4. *Id.* at 15.

national, intermingling institutions rather than the mere existence of periodic elections.⁵

The rise of right-wing authoritarianism has carried with it not just the threat of democratic backsliding, but potential democratic collapse, through efforts to subvert and overturn future elections. Although the United States escaped this fate in 2020, many signs point to a repeat scenario in future elections.⁶ Republican voters have embraced Donald Trump's "Big Lie" that the 2020 election was stolen, and that Joe Biden was not legitimately elected.⁷ Right-wing media regularly parrots this false claim, relying on the myth of widespread voter fraud.⁸ Republican state legislatures have enacted a range of laws that "impose new or more stringent criminal penalties on election officials"⁹ and so-called "election subversion" laws that allow partisan officials to take over the responsibilities of nonpartisan election workers.¹⁰

While election subversion remains an immediate threat to future elections, Republican politicians have also enacted policies that cause "democrac[y] to erode slowly, in barely visible steps" which could allow an "elected autocrat [to] maintain a veneer of democracy."¹¹ Although the courts appropriately applied the law in response to the Trump campaign's 2020 election lawsuits,¹² in recent decades conservative Supreme Court Justices have consistently opposed the rights of

5. See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 87 (2018) (explaining that necessary preconditions of a "constitutional liberal democracy include 1) a democratic electoral system, most importantly periodic free-and-fair elections in which a losing side cedes power; (2) the liberal rights to speech and association that are closely linked to democracy in practice; and (3) the stability, predictability, and integrity of law and legal institutions—the rule of law—functionally necessary to allow democratic engagement without fear or coercion.").

6. Steven Levitsky & Daniel Ziblatt, *The Biggest Threat to Democracy Is the GOP Stealing the Next Election*, THE ATLANTIC (Jul. 9, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/democracy-could-die-2024/619390/> [<https://perma.cc/FY74-4UVR>] (stating that "[a]ll evidence suggests that if the 2024 election is close, the Republicans will deploy constitutional hardball to challenge or overturn the results in various battleground states").

7. See David Paleologos, *Paleologos: Voters divided by party in views on Biden legitimacy and our country's biggest challenges*, USA TODAY (Sept. 2, 2021), <https://www.usatoday.com/story/news/nation/2021/09/02/paleologos-poll-shows-partisan-split-biden-legitimacy-more-issues-suffolk-university/5694049001/> [<https://perma.cc/E78X-CU4W>] (finding that as of September, 70% of Republicans did not believe that Biden was legitimately elected, while 22% conceded he was).

8. See generally Tiffany Hsu & Katie Robertson, *After Biden Win, Right-Wing Sites Still Push False Vote-Fraud Claims*, N.Y. TIMES (Feb. 7, 2021), <https://www.nytimes.com/2020/11/11/business/media/right-wing-sites-false-vote-fraud-claims.html> [<https://perma.cc/5S8C-XSRV>] (describing the prevalence of misinformation about voter fraud on Fox News and in other publications).

9. *October 2021 Voting Laws Roundup*, BRENNAN CTR. JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/N9P9-LT3N>] [hereinafter VOTING LAWS ROUNDUP].

10. Will Wilder, Derek Tisler, & Wendy Weiser, *The Election Sabotage Scheme and How Congress Can Stop It*, BRENNAN CTR. JUST. 1-2 (Nov. 8, 2021) (explaining that there are a range of laws that constitute "election subversion" including "partisan reviews of vote tallies to justify overturning elections").

11. See DANIEL ZIBLATT & STEVEN LEVITSKY, *HOW DEMOCRACIES DIE* 3, 5 (2019).

12. See David F. Levi, John Macy, & Amelia Ashton Thorn, *2020 Election Litigation: The Courts Held*, 105 JUDICATURE 1 (2021) (detailing the lawsuits filed following the 2020 election litigation).

voters against state restrictions.¹³ Decisions gutting the Voting Rights Act,¹⁴ holding political gerrymandering nonjusticiable,¹⁵ upholding strict voter ID laws¹⁶ and voter purges that have a disparate impact on voters of color,¹⁷ and more¹⁸ have opened the floodgates for Republican politicians in state legislatures, where they hold unrepresentatively large amounts of power, to enact laws that will allow them to entrench their power for years to come.¹⁹ By October of 2021 alone, legislatures in 19 states enacted 33 laws that will make it more difficult to vote.²⁰

One potential solution is the enactment of federal voting rights and election protection legislation. However, given political conditions at the time of this writing, this remains unlikely.²¹ With the gutting of the seminal piece of voting rights legislation, inability to pass new federal voting laws, courts that have consistently refused to protect voting rights, and statehouses dominated by Republicans that have decided that winning elections is more important than democracy,²² few avenues remain to protect American democracy before it is too late.²³

One possible, but unexpected, institution that could serve as a guardrail for America's struggling democracy is the legal profession; specifically, the legal ethics regime, which includes the American Bar Association, state bar committees, state judiciaries, and other institutions that enforce legal ethics rules. This Note analyzes the actions of attorneys following the 2020 election to explain how the legal ethics regime can stand up to attorneys that abuse their positions in baseless attempts to overturn elections. State bars should apply a heightened standard of scrutiny when investigating potential ethical violations committed in

13. See John Shattuck, Aaron Huang, & Elizabeth Thoreson-Green, *The War on Voting Rights*, CARR CENTER DISC. PAPER 2019-003, 43 (2019) (explaining that campaign of attacking voting rights “has been facilitated by Supreme Court decisions invalidating protections of the Voting Rights Act, declining to review allegations of partisan gerrymandering and striking down all restrictions on independent campaign spending”).

14. See *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); see also *Brnovich v. Dem. Nat'l. Comm.*, 141 S.Ct. 2321 (2021).

15. See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

16. See *Crawford v. Marion Cnty. Bd. Of Elections*, 553 U.S. 181 (2008).

17. See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (upholding Ohio's voter purge scheme).

18. *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down limits on “independent political spending of corporations”).

19. See Shattuck, et al., *supra* note 13, at 12-14 (describing Republican state efforts to gerrymander legislative districts to maintain disproportionate power since 2010).

20. See VOTING LAWS ROUNDUP, *supra* note 9.

21. See Alana Wise & Arnie Seipel, *Democrats fail to change Senate rules to overcome GOP opposition on voting rights*, NPR (Jan. 20, 2022), <https://www.npr.org/2022/01/19/1073908955/senate-voting-rights-bills-filibuster> [<https://perma.cc/2EW6-7WHD>] (explaining that Senate Republicans have blocked floor votes on voting rights legislation and two Democratic Senators, Joe Manchin of West Virginia, and Kyrsten Sinema of Arizona, would not support changes to the filibuster needed to overcome the 60-vote required threshold).

22. See Obeidallah, *supra* note 2.

23. Hayes Brown, *GOP redistricting maps will gerrymander Democrats out of the House*, MSNBC (Nov. 2021), <https://www.msnbc.com/opinion/gop-redistricting-maps-will-gerrymander-democrats-out-house-n1284067> [<https://perma.cc/Y5PD-CFAW>] (noting the likelihood that Republicans will gerrymander congressional maps after the 2020 decennial census, severely limiting Democrats' ability to win a House majority).

furtherance of efforts to subvert democracy, because of democracy's role as the core foundation of effective self-governance.

This Note analyzes the roles that attorneys have played in facilitating democratic backsliding internationally to draw lessons for the American legal ethics regime. Utilizing these case studies as cautionary tales, this Note demonstrates with describes the need to hold attorneys accountable when they commit violations that cut to the core of American democracy.

Part I provides a brief overview of the legal ethics regime, including the role of the American Bar Association, state bars, courts, and the rules that have arisen most often in the context of the 2020 election. Part II describes the unique responsibility of attorneys to democracy, as reflected in their oath to the Constitution and the *Model Rules*. Part III explains the specific ethical violations that persisted during the Trump presidency and in the months following the 2020 election. It also summarizes the consequences that attorneys involved in efforts to subvert the 2020 election have received thus far. Part IV looks to the international context to demonstrate how attorneys have used their power to subvert democracy in Hungary and Brazil, drawing on these examples to better understand the role of lawyers in the United States. Part V explains that the legal ethics regime is well-suited to confront the violations committed by attorneys who engage in efforts to subvert democracy. It argues that potential attorney misconduct that strikes at the heart of democracy through unfounded attempts to overthrow elections and sow doubt in the democratic process should be subjected to heightened scrutiny. Ultimately, this Note concludes that, in the absence of meaningful Congressional action and unlikelihood of intervention by the Supreme Court, bar associations represent one of the last best guardrails for American democracy.

I. LEGAL ETHICS OVERVIEW: BAR ASSOCIATIONS, THE COURTS, AND THE RULES

Before analyzing the specific ethical violations associated with the 2020 election, this Note provides a brief overview of the role of legal ethics, how attorneys are disciplined, and which ethical rules were most relevant in the context of the 2020 election litigation.

A. THE AMERICAN BAR ASSOCIATION, STATE BAR ASSOCIATIONS, AND THE COURTS

To remain an attorney in good standing, American lawyers are required to comply with a range of ethical rules of professional conduct.²⁴ Justifications for

24. See generally *Comprehensive Guide to Bar Admissions Requirements*, NATIONAL CONFERENCE OF BAR EXAMINERS (2019), <https://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf> [<https://perma.cc/D9NG-FYHD>] (explaining standards to remaining in good standing in all 50 states). Other requirements include bar admission, continuing legal education, and graduation from an accredited law school. See *id.*

requiring that lawyers adhere to ethical standards include upholding the rule of law and access to justice, maintaining the “collective reputation” of the legal profession, and holding attorneys accountable by subjecting them to disciplinary procedures.²⁵ The American Bar Association (“ABA”) is a voluntary professional association that represents the interests of the legal profession.²⁶ Although it does not have binding legal authority, it establishes the *Model Rules of Professional Conduct* (“*Model Rules*”), which serve as a model on which most state bar associations base their own ethics rules.²⁷ Membership in state bar associations, unlike the ABA, is often mandatory for an attorney to practice law in each state.²⁸ However, even when membership in a state bar association is not mandatory, attorneys are bound by their state’s rules of professional conduct and must abide by these rules in order to practice.²⁹

State judiciaries hold the power to regulate attorney conduct.³⁰ But state supreme courts regularly delegate some portion of this authority to state bar associations.³¹ Therefore, when attorneys violate legal ethics rules in the jurisdiction in which they are practicing, they are subject to discipline, either directly through the courts of that jurisdiction or through the state bar association.³² Any violation of the state’s rules of professional conduct is grounds for discipline.³³ Possible sanctions include disbarment, suspension, probation, written reprimand, payment

25. *Ethics for Lawyers*, THE HORIZON INSTITUTE at 2 (last visited Mar. 18, 2022).

26. See ABA, *ABA Membership Application FY2022*, <https://www.americanbar.org/content/dam/aba/marketing/Membership/1membenrollform.pdf> [<https://perma.cc/B53T-3C2K>] (explaining that the ABA is “the largest voluntary association of lawyers and legal professionals”).

27. Robert M. Buchholz, Cassidy E. Chivers, Noah D. Fiedler, Alyssa A. Johnson, Katherine G. Schnake, Joanna L. Storey & Suzanne M. Walsh, *Regulation of the legal profession in the United States: overview*, WESTLAW (May 31, 2021) (explaining that “[v]irtually every state jurisdiction has substantially, if not comprehensively, adopted the American Bar Association Model Rules of Professional Conduct (ABA Model Rules) as the standards of conduct, ethics, and discipline for lawyers” and that “[r]egardless of the jurisdiction, the violation of a professional rule is grounds for discipline”); *Ethics and Professional Responsibility*, GEORGIA STATE UNIVERSITY COLLEGE OF LAW, <https://libguides.law.gsu.edu/c.php?g=253396&p=1689859> [<https://perma.cc/N48K-V53J>] (explaining that the *Model Rules of Professional Conduct* have been adopted in some form by numerous states). For simplicity, this Note will primarily refer to the *Model Rules of Professional Conduct*, not state equivalents to the *Model Rules of Professional Conduct*.

28. See generally Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. 1, 13-15 (2020) (explaining that there are mandatory state bars in 31 states and the District of Columbia and noting that the Supreme Court may strike down mandatory bar membership as compelled speech, under its Janus decision); see also Buchholz, et al., *supra* note 27.

29. See Buchholz, et al., *supra* note 27, at 3; see also Aaron Kaufman, *Is it Time to Bar Mandatory Bars?*, THE REGULATORY REVIEW (Dec. 3, 2020), <https://www.theregreview.org/2020/12/03/kaufman-time-bar-mandatory-bars/> [<https://perma.cc/HD88-FRQ6>] (describing the primary difference between mandatory and voluntary state bar membership as the requirement that attorneys be forced to pay membership dues. Attorneys still must be admitted to the state bar in order to practice).

30. LISA LERMAN, PHILIP SCHRAG, & ROBERT RUBINSON, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW*, Ch. 2: *The Legal Profession: Regulation, Discipline, and Liability* 69-70 (2020).

31. *Id.* at 71-72; see also Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics — II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 217 (2002).

32. See *Comprehensive Guide*, *supra* note 24.

33. MODEL RULES OF PROF'L CONDUCT R. 9 [hereinafter MODEL RULES].

of costs or fees, and limitation of the nature of an attorney's future practice.³⁴ Although these sanctions can come directly from a court or can be imposed by the state bar association, this Note is primarily concerned with the role of state bar associations in investigations and issuing of discipline.³⁵

The disciplinary process is similar from state to state.³⁶ Generally, the state bar association will take up a complaint, either directly from a court or one written by members of the public, usually other attorneys.³⁷ Bar associations will review the complaints and conduct a preliminary investigation, after which they will either dismiss the complaint or refer the complaint for more detailed investigation.³⁸ After the detailed investigation, the bar association will either bring charges of misconduct, dismiss the complaint, or conduct an evidentiary hearing, at which point the attorney will have the opportunity to defend himself or herself.³⁹

34. MODEL RULES R. 10.

35. MODEL RULES R. 10.

36. See generally *Guide to Lawyer Discipline*, VIRGINIA STATE BAR (2019), <https://www.vsb.org/site/regulation/lawyer-discipline> [<https://perma.cc/HR6X-CPVJ>]; Neil J. Wertlieb, *Ethics Spotlight: THE ATTORNEY DISCIPLINARY SYSTEM*, CALIFORNIA LAWYERS ASSOCIATION (2021), <https://calawyers.org/california-lawyers-association/ethics-spotlight-the-attorney-disciplinary-system/> [<https://perma.cc/UK6U-NHVU>]; *Roadmap of the Disciplinary Process*, NORTH CAROLINA STATE BAR (2022), <https://www.ncbar.gov/lawyer-discipline/roadmap-of-the-disciplinary-process/> [<https://perma.cc/RVT7-CLFF>]; *Guide to Attorney Discipline*, NEW YORK STATE BAR ASSOCIATION (2022), <https://nysba.org/public-resources/guide-to-attorney-discipline/> [<https://perma.cc/FHD6-WMGQ>].

37. See generally *Guide to Lawyer Discipline*, VIRGINIA STATE BAR (2019), <https://www.vsb.org/site/regulation/lawyer-discipline> [<https://perma.cc/HR6X-CPVJ>]; Neil J. Wertlieb, *Ethics Spotlight: THE ATTORNEY DISCIPLINARY SYSTEM*, CALIFORNIA LAWYERS ASSOCIATION (2021), <https://calawyers.org/california-lawyers-association/ethics-spotlight-the-attorney-disciplinary-system/> [<https://perma.cc/UK6U-NHVU>]; *Roadmap of the Disciplinary Process*, NORTH CAROLINA STATE BAR (2022), <https://www.ncbar.gov/lawyer-discipline/roadmap-of-the-disciplinary-process/> [<https://perma.cc/RVT7-CLFF>]; *Guide to Attorney Discipline*, NEW YORK STATE BAR ASSOCIATION (2022), <https://nysba.org/public-resources/guide-to-attorney-discipline/> [<https://perma.cc/FHD6-WMGQ>].

38. See generally *Guide to Lawyer Discipline*, VIRGINIA STATE BAR (2019), <https://www.vsb.org/site/regulation/lawyer-discipline> [<https://perma.cc/HR6X-CPVJ>]; Neil J. Wertlieb, *Ethics Spotlight: THE ATTORNEY DISCIPLINARY SYSTEM*, CALIFORNIA LAWYERS ASSOCIATION (2021), <https://calawyers.org/california-lawyers-association/ethics-spotlight-the-attorney-disciplinary-system/> [<https://perma.cc/UK6U-NHVU>]; *Roadmap of the Disciplinary Process*, NORTH CAROLINA STATE BAR (2022), <https://www.ncbar.gov/lawyer-discipline/roadmap-of-the-disciplinary-process/> [<https://perma.cc/RVT7-CLFF>]; *Guide to Attorney Discipline*, NEW YORK STATE BAR ASSOCIATION (2022), <https://nysba.org/public-resources/guide-to-attorney-discipline/> [<https://perma.cc/FHD6-WMGQ>].

39. See generally *Guide to Lawyer Discipline*, VIRGINIA STATE BAR (2019), <https://www.vsb.org/site/regulation/lawyer-discipline> [<https://perma.cc/HR6X-CPVJ>]; Neil J. Wertlieb, *Ethics Spotlight: THE ATTORNEY DISCIPLINARY SYSTEM*, CALIFORNIA LAWYERS ASSOCIATION (2021), <https://calawyers.org/california-lawyers-association/ethics-spotlight-the-attorney-disciplinary-system/> [<https://perma.cc/UK6U-NHVU>]; *Roadmap of the Disciplinary Process*, NORTH CAROLINA STATE BAR (2022), <https://www.ncbar.gov/lawyer-discipline/roadmap-of-the-disciplinary-process/> [<https://perma.cc/RVT7-CLFF>]; *Guide to Attorney Discipline*, NEW YORK STATE BAR ASSOCIATION (2022), <https://nysba.org/public-resources/guide-to-attorney-discipline/> [<https://perma.cc/FHD6-WMGQ>].

Despite some variation from state to state, bar associations typically handle the bulk of disciplinary investigations.⁴⁰

B. THE RELEVANT ETHICS RULES

As discussed, variations of the *Model Rules* are adopted by each state's bar association. Many of the rules upon which complaints following the 2020 election have been based include those concerning attorneys' untruthfulness.⁴¹ In the court setting, attorneys have a duty under Rule 3.1 to "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."⁴² Further, pursuant to Rule 4.1, attorneys cannot knowingly "make a false statement of material fact or law to a third person." Under Rule 8.4(c), it is considered misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."⁴³ In accordance with Rule 1.2(d), a lawyer cannot counsel a client to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."⁴⁴ Several other rules primarily focus on attorney conduct involving honesty and truthfulness.⁴⁵

Beyond lies associated with legal representation, the *Model Rules* contain provisions that address most cases in which attorneys assist their clients in committing illegal acts.⁴⁶ This rule has received renewed attention as the Congressional Committee investigating January 6th has hinted at the possibility of criminal charges for former President Trump and his associates⁴⁷ and as a District Judge in California has stated that attorney John Eastman assisted then-President Trump in committing a plan that he "likely knew [...] was unlawful."⁴⁸ State bars also have rules barring obstruction of justice, which could apply to efforts to interfere

40. *Resources for the Public*, ABA, https://www.americanbar.org/groups/professional_responsibility/resources/resources_for_the_public/ [<https://perma.cc/C82M-HBZR>] ("Each state has its own agency that performs that function in regard to lawyers practicing in that state.").

41. See generally *infra* Part III.

42. MODEL RULES R. 3.1.

43. MODEL RULES R. 8.4(c).

44. MODEL RULES R. 1.2(d).

45. MODEL RULES R. 7.1 (stating that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."); see, e.g., MODEL RULES R. 1.15, 3.6(a), 6.2, 7.2(c), 8.1, and 8.2(a) (holding honesty and truthfulness as specific components); see generally Dennis A. Rendleman, "Truthiness" and professional responsibility, ABA (Dec. 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/_truthiness_-and-professional-responsibility/ [<https://perma.cc/7XVG-3FEC>].

46. MODEL RULES R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."); see generally Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251 (2018).

47. C. Ryan Barber, *Liz Cheney might be onto something with criminal charges for Trump, legal experts say*, BUSINESS INSIDER (Dec. 15, 2021), <https://www.businessinsider.com/trump-criminal-prosecution-charges-liz-cheney-january-6-obstruction-congress-2021-12> [<https://perma.cc/7LHM-ECAC>].

48. *Eastman v. Thompson*, Case No. 8:22-cv-00099-DOC-DFM, 38 (C.D. CA Mar. 28, 2020).

with counting electoral votes.⁴⁹ By placing the onus of reporting to “maintain [] the integrity of the profession” on other lawyers, the Rules set up an appropriate burden of accountability, as lawyers have the tools to recognize violations within their profession, especially in high profile cases.⁵⁰

II. ATTORNEYS’ ASPIRATIONAL DUTY TO DEMOCRACY

Although the *Model Rules* do not contain an explicit duty to democracy, attorneys, domestically and internationally, have a special aspirational responsibility to support democratic institutions, including the rule of law and free elections, that form the basis of free societies.⁵¹ Every lawyer swears an oath to the “promote, uphold, and defend the Constitution,” which includes a duty to protect the civil liberties enshrined within it.⁵² As one author has argued, because an attorney is obligated to uphold the legal system, which relies on democracy for its legitimacy, “a lawyer’s fealty to democracy is obligated rather than aspirational.”⁵³ But even this obligation is personal, and is not professionally or legally enforceable. This personal obligation to democracy should remind lawyers that, when would-be authoritarians attack minority rights, voting rights, the free press, and other core tenets of the American constitutional order, they “cannot and must not sit idly by on the sidelines as witnesses to the erosion of the public’s confidence in the fundamental institutions of democracy and freedom.”⁵⁴

49. See Op. 690, TX Cent. Legal Ethics (describing Rule 3.04(a) of the Texas Disciplinary Rules of Professional Conduct). Rule 3.04(a) states:

A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

Id.

50. See MODEL RULES R. 8.3 (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”).

51. See generally Fred C. Zacharias, *The Lawyer’s Role in a Contemporary Democracy, Promoting Social Change and Political Values, True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591, 1606 (2009); Patricia Hughes, *The Role of the Legal Profession in Promoting Democracy*, SLAW (Jun. 23, 2020), <http://www.slw.ca/2020/06/23/the-role-of-the-legal-profession-in-promoting-democracy/> [<https://perma.cc/U6F7-WAUU>] (providing the perspective of a Canadian attorney arguing for strengthening the role of the legal profession to defend democracy).

52. Barry Malone, *The Burden of our Privilege*, ABA, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/mentoring/the-burden-of-our-privilege/ [<https://perma.cc/735C-F4DC>].

53. Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO J. LEGAL ETHICS 155, 161 (2006).

54. Michael Miller, *Lawyers Have a Special Obligation to Our Democracy*, LAW.COM (Aug. 27, 2018), <https://www.law.com/newyorklawjournal/2018/08/27/lawyers-have-a-special-obligation-to-our-democracy/> [<https://perma.cc/M7FN-MXSF>].

Authoritarianism thrives in a vacuum of truth.⁵⁵ Yet, a primary function of adjudicative processes and the law itself is “to find the truth.”⁵⁶ Many of the *Model Rules* that have been adopted by state bar associations recognize the lawyers’ duty to uphold honesty and truth.⁵⁷ In an age of fake news, propaganda, and conspiracy theories, lawyers are beholden to the fundamental reality that legal arguments must be based in fact and law. Thus, the most brazen falsehoods upon which authoritarian movements are grounded have not yet withstood scrutiny in the courts.⁵⁸ Although lies in the public square are constitutionally protected speech, the Supreme Court has upheld the right of bar committees to hold attorney speech to a higher standard.⁵⁹

The *Model Rules* state that an attorney is a “public citizen” who possesses a duty to “further the public’s [. . .] confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”⁶⁰ It is a lawyer’s “duty to uphold legal process”⁶¹ and “to serve society at large”;⁶² a duty that is “critical to the vitality of the bar.”⁶³ When lawyers engage in efforts to subvert democracy, they violate these core principles. Such efforts give a “false patina of legitimacy to meritless claims.”⁶⁴ In so doing, they contribute to the already dangerous crisis of democratic legitimacy.⁶⁵ Practicing law in the democracy and elections context carries with it a unique significance. While attorneys have a duty to zealously advocate for their clients,⁶⁶ this duty should not give lawyers the right to attack

55. See Marlies Glasius, *What authoritarianism is . . . and is not: a practice perspective*, 94 INT. AFF. 515, 528 (2018) (“The contemporary relevance of authoritarian practices in a time of ‘post-truth’ politics and alternative facts need hardly be stated.”).

56. Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases*, CORNELL FACULTY PUB. 497, 497 (1999).

57. See MODEL RULES R. 3.1, 8.4(c), 4.1.

58. See Levi, et al., *supra* note 12, at 1.

59. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074–75 (1991) (upholding speech restrictions on attorneys that were considered necessary to ensure the integrity of the judicial process, prevent the obstruction of justice, or protect clients and other parties from specific harm that would interfere with the administration of justice).

60. MODEL RULES pmb. ¶ 6.

61. MODEL RULES pmb. ¶ 6.

62. Kazimierz Grzybowski, *Woodrow Wilson on Law, State and Society*, 30 GEO. WASH. L. REV. 808, 837 (1962).

63. Rosen, *supra* note 53, at 159.

64. P.A. Joy & Kevin C. McMunigal, *The Ethics of Trump’s Lawyers?*, 36 ABA CRIM. JUST. 62, 66 (2021).

65. See Yascha Mounk & Roberto Stefan Foa, *This is How Democracy Dies*, THE ATLANTIC (Jan. 29, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/confidence-democracy-lowest-point-record/605686/> [<https://perma.cc/2X2K-NDMP>] (finding that 55% of Americans are dissatisfied with democracy, a poll taken before the events of the 2020 election).

66. MODEL RULES R. 1.3 cmt. 1 (stating that the duty of diligence includes a duty to zealously advocate for one’s client).

the institutions of law that lawyers have sworn to uphold.⁶⁷

Despite the importance of this *aspirational* duty, it should be maintained by strengthening cultural values within legal institutions, rather than enforced through sanctions, disbarment, or other means. While lawyers should aspire to strengthen and uphold democracy, the freedom that America's legal and political system are founded upon leave open opportunities for disagreement over even seemingly fundamental aspects of this democracy, including voting rights. Only when lawyers use their abilities to subvert democracy in ways that violate the *Model Rules* or state equivalents, should the legal profession get involved. But when attorneys do commit violations of the *Model Rules* in the democracy context, legal institutions, through courts and state bar committees, should serve a gatekeeping role for frivolous, deceptive, unsubstantiated, and obstructionist actions. The heightened scrutiny approach, described in Part V, can help to achieve this end.

III. ETHICAL VIOLATIONS FOLLOWING THE 2020 ELECTION

In the months following the 2020 election, lawyers allied with President Trump and working in various capacities sought to use their positions to overturn the results of the election. In their efforts, these attorneys engaged in behavior and committed acts that likely constituted violations of the *Model Rules*. In the months immediately following the election, many in the legal profession focused on the ethical violations that attorneys associated with the Trump campaign likely committed through their efforts to overturn the results of key states through litigation.⁶⁸ Less attention was given to the likely violations that were committed through public statements, and by government attorneys, those counseling the President outside of litigation, and by legislators who are also barred attorneys. Other authors have analyzed the different standards that do and should apply to attorneys in these various roles.⁶⁹ Thus, this Note does not attempt to explain how the rules should apply to lawyers serving in each of these capacities. Instead, it describes the violations that occurred in different contexts to illuminate the many

67. See Luppe B. Luppen, *You don't have a 'right' to a lawyer when you're trying to steal an election*, WASH. POST. (Nov. 24, 2020), <https://www.washingtonpost.com/outlook/2020/11/24/trump-lawyers-competent-defense/> [https://perma.cc/R64X-9ZJC].

68. John Kruzell, *Legal experts welcome sanctions of pro-Trump lawyers, say more needed*, THE HILL (Aug. 28, 2021), <https://thehill.com/regulation/court-battles/569840-legal-experts-welcome-sanctions-of-pro-trump-lawyers-say-more-needed/> [https://perma.cc/3F9H-5UXW] (focusing on sanctions of litigators); Norman Eisen & Joanna Lydgate, *The lawyers who pushed Trump's falsehoods may soon be done lawyering*, WASH. POST (Feb. 3, 2020), <https://www.washingtonpost.com/outlook/2021/02/03/powell-wood-accountability-lawyer/> [https://perma.cc/K6SY-8TTT].

69. See, e.g., Ellen Yaroshesky, *Regulation of Lawyers in Government Beyond the Client Representation Role*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 151, 161 (2019) (describing the unique problem that arises "tension between the government lawyer's public role and the private relationship basis of traditional conceptions of legal ethics"); W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L. J. 275, 294 (2017) (explaining that government lawyers "have a greater responsibility to pursue the common good than lawyers representing clients in private practice").

ways that attorneys used their power in often-coordinated attempts to undermine democracy.

By revealing the range of methods that Republican attorneys utilized to undermine the results of the 2020 election, in violation of the *Model Rules*, this Note demonstrates that these efforts were and remain core to the Republican Party. While focusing on the antics of almost-comical figures like Rudy Giuliani and Sidney Powell might imply that these antidemocratic efforts are part of a fringe political movement, zooming out to other contexts reveals that this is not the case. Recognizing the breadth of these efforts obviates the grave need for the legal ethics regime to play a larger role in these contexts, even when involvement can be viewed as “political.”⁷⁰ This analysis can help legal ethics institutions regroup and contemplate their roles in combating rising authoritarianism. Further, this section seeks to explain that, while litigation-related violations receive the most attention, attorneys can often do more harm outside of the litigation context. The profession should be cognizant of attorneys acting in ways that violate the *Model Rules* and undermine democracy, even when these actions occur outside of the courtroom setting.

This Section begins with a brief overview of ethical violations during the Trump presidency that set the stage for future abuses. It then explains the ethical offenses and consequences for lawyers in the litigation context. Next, it describes the ethical offenses and consequences for attorneys outside of the litigation context, demonstrating that these attorneys have faced fewer consequences even though their actions were highly destabilizing to American democracy.

A. THE TRUMP PRESIDENCY AS A PRESAGE OF THE 2020 ELECTION AFTERMATH

Donald Trump entered the presidency in January 2017, following a campaign of both regular and erratic lying.⁷¹ In the four years of Trump's presidency, his administration was defined by “its willingness to disseminate demonstrably false information on a consistent and repeated basis.”⁷² This lying served a specific purpose beyond the political benefit that came with each falsehood. As Hannah Arendt, a Holocaust survivor and political philosopher who dedicated her career to studying totalitarian regimes, has written:

The result of a consistent and total substitution of lies for factual truth is not that the lies will now be accepted as truth, and the truth defamed as lies, but that the sense by which we take our bearings in the real world — and the

70. See *infra* Part V.B.2.

71. See Alan Yuhas, *How does Donald Trump lie? A fact checker's final guide*, THE GUARDIAN (Nov. 7, 2016), <https://www.theguardian.com/us-news/2016/nov/07/how-does-donald-trump-lie-fact-checker> [https://perma.cc/EG2M-DDCD] (describing Trump's erratic and consistent lies during the 2016 campaign).

72. G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1088 (2020).

category of truth vs. falsehood is among the mental means to this end — is [...] destroyed.⁷³

This substitution of lies for truth causes people to believe that “everything [is] possible and nothing [is] true” and ultimately “take refuge in cynicism.”⁷⁴ Experts have warned that the “confusion and misinformation caused by [these falsehoods] undermin[e] America’s ability to govern itself.”⁷⁵ Attorneys who worked in President Trump’s administration embraced his tradition of perpetual lying.⁷⁶ And while many of these attorneys received ethics complaints, these complaints did not result in disciplinary actions.⁷⁷ In taking a hands-off approach to ethical violations committed in the political arena, especially those having to do with amplifying falsehoods, legal ethics institutions greenlit the worst abuses of professional ethics rules that followed the 2020 election.

B. LITIGATION RELATED ETHICAL VIOLATIONS IN THE 2020 ELECTION

In the aftermath of the 2020 election, attorneys threatened American democracy by weaponizing the legitimacy of the courtroom setting to advance conspiracies and fringe legal arguments through litigation. The ethical violations committed during the post-2020 election litigation arguably received more attention within the legal ethics world than did other violations. One author has explained that “[w]ith respect to lawyers’ candor and truthfulness, the current rules distinguish between trial advocacy (or the equivalent) and lawyers’ many other pursuits.”⁷⁸ The Rules establish baseline, mostly procedural requirements.⁷⁹ These procedural requirements are well suited for factual statements made in court and court filings where legal pleading standards and truthfulness requirements

73. HANNAH ARENDT, ORIGINS OF TOTALITARIANISM 382 (1951).

74. *Id.*

75. Steven Seidenberg, *Lies and Libel: Fake News is Just False, But its Cure May Not be so Simple*, 103 A. B.A. JOURNAL 48 (2017).

76. *See infra* note 77.

77. *See* Abbe Smith, *Ethics Complaint Against Kellyanne Conway* (Feb. 20, 2017) (arguing that Conway’s false statements that President Obama banned Iraqi immigrants for six months following the made up “Bowling Green massacre” committed by two Iraqi immigrants, and endorsing of Ivanka Trump’s fashion products violated a range of rules); *ACLU complaint against Jeffrey Sessions*, ACLU (2018) <https://www.aclu.org/letter/aclu-amended-ethics-complaint-against-attorney-general-jeff-sessions> [<https://perma.cc/ZH4X-MW7S>] (arguing that when then Attorney General Jeff Sessions lied under oath when questioned about whether he had ever met with Russian officials before the election he violated various duties); *Complaint against Scott Pruitt* <https://okcfox.com/news/local/ethics-complaint-filed-with-oklahoma-bar-association-against-scott-pruitt> [<https://perma.cc/6PZT-NA4D>] (complaining that Pruitt lied about his use of his personal email for work business while serving as the Oklahoma Attorney General).

78. *See* Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies they Tell*, WASH. U. J. L&P 10 (forthcoming 2022) (explaining that a higher standard applies to lies made in the courtroom setting).

79. *See* William T. Ellis & Billie J. Ellis, *Beyond the Model Rules: Aristotle, Lincoln, and the Lawyer’s Aspirational Drive to an Ethical Practice*, 26 T.M. COOLEY L. REV. 591, 593-594 (2009) (“The Model Rules are accused of helping precipitate an ethical crisis in the legal profession by removing the aspirational content of the Canons and replacing them with only bare-minimum standards of conduct.”).

beyond the ethics rules already exist.⁸⁰ Because of their public nature, offenses like relying on false statements or misstating facts in a filing are more easily recognizable in litigation than in other settings that lawyers practice.⁸¹ Supporters of democracy and legal institutions can take some solace in the fact that legal scholars and the legal ethics regime were willing to call out and sanction these violations, though not to the extent necessary to prevent future abuses.

1. ETHICAL VIOLATIONS IN THE LITIGATION CONTEXT

In the aftermath of the 2020 election, President Trump's litigation team pursued a range of legal arguments to overturn the election results in key swing states. During this litigation, three attorneys in particular, Rudy Giuliani, L. Lin Wood, and Sidney Powell, repeatedly argued that courts should overturn the results of the 2020 election, based on falsehoods about voter fraud. While these attorneys led the President's efforts, teams of lawyers assisted in these suits.⁸²

Most of these ethical violations were grounded in the lack of a factual basis for filings and statements in court. The attorneys frequently cited to unsupported conspiracy theories, including that voting machines switched votes from Trump to Biden and had been used in Venezuela to rig elections.⁸³ In one lawsuit, Rudy Giuliani argued widespread fraud but, when pressed by a judge, admitted that "[t]his is not a fraud case."⁸⁴ The attorneys also relied on affidavits from witnesses that could not withstand scrutiny and often provided inaccurate descriptions of those affidavits.⁸⁵ The list of unsupported claims about the election goes on.⁸⁶ All in all, these post-election litigation efforts resulted in more than 60

80. See, e.g., FED. R. CIV. PRO. 8 (laying out general rules of pleading); FED. R. CIV. PRO. 11 (stating that lawsuits may not be brought "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument").

81. Christopher Coble, *Is My Legal Case Public Record?*, FINDLAW (Jan. 14, 2016), <https://www.findlaw.com/legalblogs/law-and-life/fis-my-legal-case-public-record/> [https://perma.cc/GK9Y-T7GX] (stating "almost all civil and criminal legal filings are public records, and the First Amendment protects publishing them").

82. See Alan Feuer, *Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless*, MEMO SHOWS, N.Y. TIMES (Nov. 6, 2021), <https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html> [https://perma.cc/D8LG-DXRA].

83. See Alan Feuer, *Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless*, MEMO SHOWS, N.Y. TIMES (Nov. 6, 2021), <https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html> [https://perma.cc/D8LG-DXRA].

84. Lisa Lerer, *Giuliani in Public: 'It's a Fraud.' Giuliani in Court: 'This Is Not a Fraud Case.'* N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/us/politics/trump-giuliani-voter-fraud.html> [https://perma.cc/2VYM-X69P].

85. Aaron Blake, *Trump's lawyers have lots of affidavits. That doesn't mean as much as it seems*, WASH. POST (Nov. 20, 2020), <https://www.washingtonpost.com/politics/2020/11/20/affidavit-giuliani-vote-fraud/> [https://perma.cc/AM3U-3CZC].

86. See generally Eisen & Lydgate, *supra* note 68.

losses for the Trump campaign and just one minor win that was later overturned.⁸⁷ These lawsuits were likely frivolous and in violation of rules that bar making false statements to the tribunal and third parties.⁸⁸

Although not working with the Trump campaign, Texas Attorney General Ken Paxton has also faced blowback for his involvement in a lawsuit seeking to overturn the election results of Georgia, Michigan, Pennsylvania, and Wisconsin. Paxton, as the lead counsel of record filed directly to the Supreme Court, citing “original jurisdiction.”⁸⁹ This suit was joined by over 100 House Republicans, 17 Republican state attorneys general, and President Trump. The Supreme Court ultimately dismissed the case, citing a lack of standing.⁹⁰ Multiple complaints have been brought against Paxton, arguing that his efforts to overturn the election result were knowingly false, frivolous, and had no basis in fact.⁹¹

2. CONSEQUENCES FOR ATTORNEYS INVOLVED IN LITIGATION

There has been an effort to characterize Trump’s inability to steal the election as a “triumph for the rule of law and a vindication of our judicial system as a safeguard of democracy.”⁹² This interpretation, however, fails to recognize that President Biden’s lopsided victory meant that it was “easy for judges to stay out of the way—and hard for them to get in the way.”⁹³ Although the judiciary should receive credit for not indulging in the most flagrantly unfounded claims of President Trump’s legal team, these decisions should be understood as the bare minimum, rather than a heroic act.⁹⁴ But even though the courts rejected these claims, the weaponization of the courtroom to spread false beliefs fits into a wider strategy to “cast doubt on legitimate election results” going forward.⁹⁵

87. William Cummings, Joey Garrison, & Jim Sergeant, *By the numbers: President Donald Trump’s failed efforts to overturn the election*, USA Today (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [<https://perma.cc/6MHU-JHJ3>]; see also Donald J. Trump for President, Inc. v. Boockvar, et al. 4:20-CV-02078 (M.D. Pa.) (ruling that voters could not go back and “cure” their ballots if they did not provide proper identification within three days of the election).

88. MODEL RULES R. 3.1, 3.3(a), 4.1.

89. See *Complaint Against Texas Attorney General Warren Kenneth Paxton, Jr.*, LAWYERS DEFENDING AMERICAN DEMOCRACY (Jul. 21, 2021), <https://ldad.org/wp-content/uploads/2021/07/Final-Paxton-Complaint-Signers-7-21-21.pdf> [<https://perma.cc/MF29-A6CA>] [hereinafter *Paxton Complaint*].

90. See *Texas v. Pennsylvania*, et al. 592 U.S. __ (2021) (denying state of Texas’ complaint for lack of standing under Article III of the U.S. Constitution).

91. See *Paxton Complaint*, *supra* note 89.

92. Jonathan Manes, *The System Is Not Working: The Lopsided Election Result, Not The Courts, Saved Our Democracy*, JUST SEC. (Dec. 21, 2020), <https://www.justsecurity.org/73950/the-system-is-not-working-the-lopsided-election-result-not-the-courts-saved-our-democracy/> [<https://perma.cc/7UEU-EAUM>].

93. *Id.*

94. See *id.*

95. Will Wilder, Derek Tisler & Wendy R. Weiser, *The Election Sabotage Scheme and How Congress Can Stop It*, BRENNAN CTR. JUST. (Nov. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/election-sabotage-scheme-and-how-congress-can-stop-it> [<https://perma.cc/K8BA-C5B8>].

The level of discipline attorneys involved in subversion efforts will ultimately face is still not clear, as many investigations are still ongoing as of the date of this Note. It is possible that future consequences will be severe. Yet, even the slow pace of the investigations provides cause for concern as this Note will explain. Many of the violations happened in the open for all to see, and many others have been extensively reported on.⁹⁶ The longer it takes the legal profession to tackle these instances, the more they fade from popular consciousness, and the more cover attorneys hoping to commit similar acts in the future are given.

Despite the slow pace, there have been some consequences for the most egregious actors. The attorneys involved in litigation received some relatively serious punishments at the hands of state bar associations and judicial sanctions. Rudy Giuliani's law license was temporarily suspended in New York and D.C.⁹⁷ Though the Georgia state bar's investigation into Lin Wood is still ongoing, he faces the possibility of disbarment.⁹⁸ Wood also faces an ethics complaint in Arizona, a motion for sanctions in Wisconsin, and two defamation lawsuits from voting machine companies Dominion and Smartmatic.⁹⁹ The Texas state bar's investigation into Sidney Powell is still ongoing, though the Texas Bar's disciplinary commission has asked the court to find her in violation of the state's professional code for attorneys.¹⁰⁰ She has also been referred to the Michigan disciplinary board.¹⁰¹

96. See generally Carrie Johnson, *Trump Lawyers Who Spread False Election Claims Are Now Defending Themselves In Court*, NPR (Jul. 16, 2021) <https://www.npr.org/2021/07/16/1016350616/trump-lawyers-who-spread-false-election-claims-are-now-defending-themselves-in-c> [<https://perma.cc/8R9F-V9UM>].

97. See *Matter of Giuliani*, 146 N.Y.S.3d 266 (2021) (holding that Giuliani's demonstrably false and misleading statements warranted interim suspension from the practice of law); Comm. Report, *Statement of New York City Bar Association Concerning Grievance Complaints Filed Against Rudolph Giuliani*, NYC BAR (Mar. 2, 2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/grievance-complaints-filed-against-rudolph-giuliani> [<https://perma.cc/TD2E-MZRG>] (“[A]n attorney – particularly one of notable public stature – undermines these principles when s/he participates in an all-out assault on a free and fair Presidential election based on misrepresentation and mischaracterization of the facts.”).

98. See Alison Durkee, *Pro-Trump Lawyer Lin Wood Loses Lawsuit Over Mental Health Evaluation*, FORBES (June 10, 2021), <https://www.forbes.com/sites/alisondurkee/2021/06/10/pro-trump-lawyer-lin-wood-loses-lawsuit-over-mental-health-evaluation/?sh=7d9db2405137> [<https://perma.cc/85YJ-EL5V>] (explaining that the investigation into Wood's conduct is ongoing and that Wood filed a lawsuit against the Georgia disciplinary board to block his investigation, arguing that the requirement that he take a mental health examination violated his speech rights, though that suit was dismissed).

99. Alison Durkee, *Here Are All The Places Sidney Powell, Lin Wood And Pro-Trump Attorneys Could Also Be Punished For 'Kraken' Lawsuits After Michigan Sanctions Ruling*, FORBES (Aug. 26, 2021), <https://www.forbes.com/sites/alisondurkee/2021/08/26/here-are-all-the-places-sidney-powell-lin-wood-and-pro-trump-attorneys-could-also-be-punished-for-kraken-lawsuits-after-michigan-sanctions-ruling/?sh=9c842ace1aad> [<https://perma.cc/3LLF-METL>].

100. Alison Durkee, *Sidney Powell To Face Texas State Bar Investigation—Potentially Leading To Her Disbarment*, FORBES (Aug. 26, 2021), <https://www.forbes.com/sites/alisondurkee/2021/08/26/sidney-powell-to-face-texas-state-bar-investigation-potentially-leading-to-her-disbarment/?sh=4162d3531f99> [<https://perma.cc/NT5H-BVQ9>].

101. *Id.*

Court sanctions are promising for future discipline because state bars often will not investigate a complaint against an attorney unless a judge has recommended it.¹⁰² In fact, some of the most damning decisions have come not from state bars but from judges. Sidney Powell, Lin Wood, and seven other attorneys were forced to pay sanctions and undergo continuing legal education for frivolous claims filed in Michigan.¹⁰³ Two attorneys were also forced to pay sanctions in Colorado for a proposed conspiracy theory-based lawsuit against Dominion Voting and Facebook.¹⁰⁴ Ken Paxton, who also faced charges of accepting bribes and whose own office cleared him of any wrongdoing,¹⁰⁵ has faced no consequences for his frivolous lawsuit against four states, despite serious ethics complaints.¹⁰⁶ He continues to serve as the Texas Attorney General, though an investigation is under review.

Discipline for attorneys involved in post-election litigation has been far from perfect. However, despite the slow pace and sometimes-lenient punishments, the fact that there have been consequences can serve as a deterrent for attorneys who contemplate committing similar actions going forward.

C. ETHICAL VIOLATIONS OUTSIDE OF THE LITIGATION CONTEXT

As discussed, much of the legal ethics activity following the 2020 election focused on the role of litigators in Trump's orbit. But attorneys' duties to the profession do not disappear just because they are not arguing in court or in front of a tribunal. What is the legal ethics regime to make of lawyers who violate the *Model Rules* in attempts to subvert the democratic process through avenues outside of litigation? Although each of the following contexts is unique, an overview of the many ways lawyers played a role in subverting the 2020 election outside of litigation provides context for the ethics regime to understand that it must play the role of watchdog over a broad swathe of legal contexts. The following sections provide a brief overview of a few notable instances of potential misconduct outside of the litigation setting and the consequences that these attorneys have faced thus far.

102. See Judith A. McMorrow, Jackie Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions*, 13 HOFSTRA L. REV. 1425 (2004).

103. *King v. Whitmer*, Civil Case No. 20-13134, 3 (E.D. MI 2021) (Judge Parker wrote a scathing opinion arguing, "this case was never about fraud—it was about undermining the People's faith in our democracy and debasing the judicial process to do so").

104. Melissa Heelan, *Lawyers Must Pay Costs of 'Fantastical' Voting-Fraud Suit*, BLOOMBERG LAW (Aug. 5, 2021), <https://news.bloomberglaw.com/us-law-week/lawyers-sanctioned-for-fantastical-2020-election-fraud-suit> [<https://perma.cc/3LWC-QF7Y>].

105. *Texas Attorney General Ken Paxton cleared by his own office of wrongdoing in bribery allegations*, TEX. TRIBUNE (Aug. 24, 2021), <https://www.texastribune.org/2021/08/24/texas-attorney-general-ken-paxton-bribery-report/> [<https://perma.cc/7GYK-8V4E>].

106. *Paxton Complaint*, *supra* note 89.

1. PUBLIC STATEMENTS, GOVERNMENT LAWYERS, PRIVATE REPRESENTATION, AND
LAWYERS AS LEGISLATORS

Beyond litigation, attorneys engaged in unethical conduct in various other contexts, including social media and public comments, through the Department of Justice, in direct representation of President Trump, and on the part of elected officials.

a. Public Statements and Amplification in the Press: Giuliani, Powell, Wood, and Others

Although President Trump's campaign team, including Giuliani, Powell, and Wood, received greater attention for their conduct inside of the court room, they also played a key role in amplifying the President's stolen election claims outside of the courtroom, through public statements in the media, tweets, and elsewhere.¹⁰⁷ These statements implicate the rule holding that attorneys cannot "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."¹⁰⁸

A notable ethics complaint filed against Giuliani in New York, signed by over 7000 lawyers, lays out countless instances in which Giuliani lied to the public about false election claims. The complaint argues that Giuliani violated New York's Rules of Professional Conduct, based on his "nearly daily" speeches at the Republican National Committee, in various tweets, in a speech at Four Seasons Total Landscaping, and other instances.¹⁰⁹ It also discusses Giuliani's statements at a speech on January 6th before the assault on the Capitol, including encouraging Trump supporters to engage in "trial by combat."¹¹⁰ Similar complaints concerning public statements and tweets of Wood have been filed.¹¹¹ And other lawyers, including Paxton and Eastman have received complaints regarding their public statements.¹¹²

107. Katelyn Polantz, *Judge allows defamation lawsuits against Sidney Powell, Rudy Giuliani and MyPillow CEO to go forward*, CNN (Aug. 11, 2021), <https://www.cnn.com/2021/08/11/politics/defamation-lawsuits-sidney-powell-rudy-giuliani-mike-lindell/index.html> [<https://perma.cc/FUK6-83MG>].

108. MODEL RULES R. 8.4(c). *But see* Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies they Tell*, WASH. U. J. L&P (forthcoming 2022) (arguing that lawyer lies in the public square should be protected political speech).

109. *See generally* Professional Responsibility Investigation of Rudolph W. Giuliani, Registration No. 1080498, LAWYERS DEFENDING AMERICAN DEMOCRACY (Jan. 20, 2021) (stating that many of the complaints are grounded in Giuliani's violation of N.Y. Bar Rule 8.4(c), the "general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); *see, e.g., N.Y. Rules of Prof. Conduct* (2020).

110. *Id.*

111. *See* State Bar Disciplinary Complaint Against L. Lin Wood (Feb. 2021) (stating in the confidential document that Mr. Wood "may have engaged in conduct in violation of Georgia Rules of Professional Conduct").

112. *Request for Investigation of John C. Eastman*, California State Bar No. 193726 (Oct. 4, 2021) <https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf> [<https://perma.cc/RN3X-WU5Y>] [hereinafter Easton Complaint]; *Paxton Complaint*, *supra* note 89.

b. Government Lawyers: Jeffrey Clark and Impropriety at the Department of Justice

When it became apparent that he could not overturn the election results through litigation, President Trump looked to alternative avenues. The most obvious was the Department of Justice, which, under Attorney General Bill Barr, had been unflinchingly loyal to the President.¹¹³ However, Attorney General Barr (somewhat unexpectedly) publicly stated that there was no voter fraud in the 2020 election and resigned in mid-December.¹¹⁴ After his resignation, President Trump again sought the assistance of the Justice Department. In a call to acting Attorney General Jeff Rosen and deputy Attorney General Richard Donoghue, he told them to “just say the election was corrupt and leave the rest to me.”¹¹⁵ When they refused and told the President that the information on which he was relying was false, President Trump floated replacing Rosen with Jeffrey Clark, then head of the Department’s Civil Division.¹¹⁶

In an unusual move, Clark met with President Trump, and the two came up with a plan to fire Jeff Rosen and appoint Clark as the head of the Justice Department.¹¹⁷ This would have allowed Clark to open an investigation into the validity of the election.¹¹⁸ Clark threatened Rosen that if he did not open an investigation into the election, Trump would fire him. Clark also circulated a letter within DOJ, urging signoff from Rosen and Donoghue that would have told the Georgia governor and other top state officials to convene their Republican-dominated legislature in a special session to investigate claims of voter fraud.¹¹⁹ An extensive report from the Senate Judiciary Committee provides key details about

113. See Caroline Fredrickson, *Bill Barr: No Lap Dog, Just Defending His Idea of the Top Dog*, JUST SECURITY (Jul. 6, 2020), <https://www.justsecurity.org/71230/bill-barr-no-lap-dog-just-defending-his-idea-of-the-top-dog/> [https://perma.cc/HF2D-TC9B].

114. Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*, AP (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d> [https://perma.cc/TXY4-YTNN].

115. Jeremy Herb, *Trump to DOJ last December: ‘Just say that the election was corrupt + leave the rest to me’*, CNN (Jul. 31, 2021), <https://www.cnn.com/2021/07/30/politics/trump-election-justice/index.html> [https://perma.cc/P8PY-7QFR].

116. *Id.*

117. *Id.*

118. Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html> [https://perma.cc/5HL8-HZEC].

119. Katherine Faulders, *DOJ officials rejected colleague’s request to intervene in Georgia’s election certification: Emails*, ABC (Aug. 3, 2021), <https://abcnews.go.com/US/doj-officials-rejected-colleagues-request-intervene-georgias-election/story?id=79243198> [https://perma.cc/PF5L-ZS6Y] (citing to the draft letter which stated, “The Department of Justice is investigating various irregularities in the 2020 election for President of the United States. The Department will update you as we are able on investigatory progress, but at this time we have identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia. [. . .] While the Department of Justice believe[s] the Governor of Georgia should immediately call a special session to consider this important and urgent matter, if he declines to do so, we share with you our view that the Georgia General Assembly has implied authority under the Constitution of the United States to call itself into special session for [t]he limited purpose of considering issues pertaining to the appointment of Presidential Electors”).

Clark's role in pushing the Big Lie from within the Department and, among other things, accuses him of violating D.C. Bar Rule 8.4 and Rule 1.2, which prohibit attorneys from assisting or counseling clients in criminal or fraudulent conduct.¹²⁰ Clark is now facing ethics investigations in D.C. that could lead to disbarment and a watchdog inquiry that could result in criminal referral.¹²¹ The ethical duties of government attorneys are complex and have been the subject of renewed interest in recent years.¹²² This, however, a coordinated effort seeking to undermine a free and fair election, is not one of those complex scenarios.

c. The President's Attorneys: John Eastman Memorandum

Another attorney associated with President Trump, John Eastman, likely violated the *Model Rules* in the aftermath of the 2020 election. He wrote a controversial two-page memorandum, providing Vice President Pence with a six-point plan to overturn the 2020 presidential election results.¹²³ This memo essentially argued that the Vice President had unilateral authority to determine the outcome of the election. The legal theory upon which Eastman relied was legally "nonsensical" as well as "morally dangerous."¹²⁴ Ultimately, Vice President Pence refused to go along with the plot, but the legitimacy that Eastman, a reputable and accomplished lawyer, gave to it inspired Trump's dangerous threats against the Vice President, which could have resulted in real violence against Pence on January 6th.¹²⁵ Eastman had also previously filed a pleading in the *Texas v. Pennsylvania* Supreme Court case, a case that has received other complaints for being frivolous.¹²⁶ Eastman also spoke at the rally preceding the January 6th

120. Maj. Staff Rep., *Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election*, SEN. JUDIC. COMM. 4648 (2021).

121. See Ethics Complaint against Jeffrey Clark (Oct. 5, 2021), <https://ldad.org/wp-content/uploads/2021/10/DC-Ethics-Complaint-Against-Jeffrey-Clark.pdf> [<https://perma.cc/5MTS-U5FL>]; see also Nick Wadhams, *DOJ Watchdog Probes If Staff Tried to Alter Election Outcome*, BLOOMBERG LAW (Jan. 25, 2021), <https://www.bloomberglaw.com/politics/doj-watchdog-to-probe-if-staff-tried-to-alter-election-outcome> [<https://perma.cc/H72C-RNDG>] (noting that the inspector general can make referrals to criminal authorities).

122. See generally David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS 613 (2021) (describing the role of a government attorney in an authoritarian regime); Ellen Yaroshefsky, *Regulation of Lawyers in Government Beyond the Representation Role*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 151, 153 (2019) (discussing the obligations of government lawyers).

123. See John Eastman Memorandum: "January 6 scenario" (2020), <https://www.documentcloud.org/documents/21066248-eastman-memo> [<https://perma.cc/DF7P-AQ3U>].

124. Matthew Seligman, *John Eastman Is Right: His Election Memo Was "Crazy"*, SLATE (Oct. 22, 2021), <https://slate.com/news-and-politics/2021/10/john-eastman-crazy-election-memo-trump.html> [<https://perma.cc/2DRG-JU7W>].

125. Ashley Parker, Carol D. Leonnig, Paul Kane & Emma Brown, *How the rioters who stormed the Capitol came dangerously close to Pence*, WASH. POST (Jan. 15, 2021), https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html [<https://perma.cc/WAF2-S84L>].

126. Motion to Intervene on behalf of Donald Trump, *Texas v. Pennsylvania* (2020), https://www.supremecourt.gov/DocketPDF/22/220155/163234/20201209155327055_No.%20220155%20Original%20Motion%20to%20Intervene.pdf [<https://perma.cc/8L6U-2E5D>].

insurrection and spread baseless conspiracy theories. Afterwards, a group of attorneys associated with the States United Democracy Center filed a request for investigation with the California state bar alleging violations of the California Rules of Professional Conduct 3.1, 3.3, 4.1, 8.4(c), among others.¹²⁷

d. Elected Officials: Josh Hawley and Ted Cruz

Finally, a category of attorney that often does not fall neatly within the parameters of the ethics rules is the attorney-as-legislator.¹²⁸ Although these individuals' duties are complicated, they are at least worth mentioning here because of the important role that attorney legislators have played in attempts to subvert the 2020 election and cover up these attempts.¹²⁹ Many members of Congress who are also attorneys were complicit or active participants in President Trump's attempts to overturn the election. Even after the deadly insurrection, 138 members of the House, including 25 lawyers, and twelve senators, including three lawyers, voted to overturn the election.¹³⁰ But two senators in particular, Josh Hawley and Ted Cruz, were instrumental.

A petition that received thousands of signatures argued that Hawley and Cruz, who amplified lies about the election and were the key Senate proponents of refusing to certify the election, fomented the deadly insurrection and should be disbarred.¹³¹ In addition to alleging violations of Rule 8.4(c), the complaint also argues that they violated rules in D.C., barring conduct that "seriously interferes with the administration of justice"; Missouri, barring conduct that "is prejudicial to the administration of justice"; and Texas, prohibiting conduct that comprises "obstruction of justice."¹³² Although the Speech and Debate Clause protects legislators for statements made while on the floor for the House of Representatives or Congress, this carveout does not extend to the many statements the two senators

127. Eastman Complaint, *supra* note 112.

128. *Ethics Opinion 231: Lawyer as Legislator*, D.C. BAR (2022), <https://dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-231#note1> [<https://perma.cc/E3DX-LTRN>] ("The subject of legal or ethical constraints on the conduct of a practicing lawyer who is also an elected member of a legislative body is addressed specifically and primarily by legislation and regulations. No Rule directly applies to or limits a lawyer's conduct, simultaneously, as a member of a law firm and a member of an elected legislative body. Given the frequency with which lawyers are also legislators, one would expect any additional ethical constraints on such a lawyer's activities or duties to be set forth expressly in the Rules. Accordingly, we believe that the sometimes-vague provisions of general rules should not too readily be construed to impose such constraints unless clearly required by their language or purpose.")

129. *See generally* Henry Farrell & Elizabeth N. Saunders, *A cynical ploy like Hawley and Cruz's looks harmless. Until it isn't.*, BROOKINGS (Jan. 11, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/01/11/a-cynical-ploy-like-hawley-and-cruzs-looks-harmless-until-it-isnt/> [<https://perma.cc/SGD2-6D64>].

130. *See* Rick Linsk & Disha Raychaudhuri, *Lawyers, law students call for disbarment of Sens. Hawley, Cruz*, REUTERS (Jan. 12, 2021), <https://www.reuters.com/article/us-disbar-pet/lawyers-law-students-call-for-disbarment-of-sens-hawley-cruz-idUSKBN29H2A7> [<https://perma.cc/768B-PRE7>].

131. *Id.*

132. *Id.*

made on social media and elsewhere.¹³³ In the words of one ethics attorney, “[a]t some point, we have to say that if you’re making statements that undermine the legitimacy of our government, then you’re making statements that undermine the administration of justice.”¹³⁴ Seven Senate Democrats also filed an ethics complaint against Cruz and Hawley, citing their objection to the electors after the violent attack.¹³⁵

2. LIMITED CONSEQUENCES: ATTORNEYS OUTSIDE OF THE LITIGATION CONTEXT

Most of the attorneys involved in the attempts to overturn the 2020 election have faced few, if any, consequences, professionally or reputationally. Investigations into Giuliani and others have focused on their litigation efforts, rather than public statements. The State Bar of California announced an investigation of John Eastman in March 2022, over a year after his involvement in the 2020 election.¹³⁶ The District of Columbia Disciplinary Counsel is similarly investigating Jeff Clark for misconduct, according to reports.¹³⁷ Neither of these investigations have resulted in consequences thus far. Instead, these attorneys have been able to maintain legitimacy and land cushy jobs in the Republican legal establishment.¹³⁸ This points to the extent to which antidemocratic values have been normalized, or at least do not warrant ostracism, in conservative circles. Ted Cruz and Josh Hawley similarly have not faced consequences and remain prominent Republicans in the Senate. Because these attorneys’ peers will not hold them to account, “the job falls on those officials responsible for protecting the practice of law from corruption.”¹³⁹

Legal ethics institutions can and should step in when attorneys commit ethical violations that strike at the heart of American democracy, regardless of the context in which these violations occur. Because the rules of evidence, civil

133. U.S. Const. art. I § 6; Todd Garvey, *Understanding the Speech and Debate Clause*, CRS (Dec. 1, 2017) (explaining that the Speech and Debate Clause has been interpreted to include “legislative acts” undertaken in the course of legislators’ official responsibilities).

134. Linsk & Raychaudhuri, *supra* note 130, quoting Michael Downey, a legal ethics lawyer.

135. Marianne Levine, *Senate Democrats file ethics complaint against Hawley, Cruz over election challenge*, POLITICO (Jan. 21, 2021), <https://www.politico.com/news/2021/01/21/senate-democrats-file-ethics-complaint-against-hawley-cruz-over-election-challenge-461190> [<https://perma.cc/SLL7-FSJY>].

136. *State Bar Announces John Eastman Ethics Investigation*, THE STATE BAR OF CALIFORNIA (Mar. 1, 2022), <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation> [<https://perma.cc/BTM3-93GR>].

137. Sarah N. Lynch, *EXCLUSIVE Two Former U.S. Officials Help Ethics Probe of Trump ally, Clark, source says*, REUTERS (Mar. 29, 2022), <https://www.reuters.com/world/us/exclusive-two-former-us-officials-help-ethics-probe-trump-ally-clark-source-says-2022-03-29/> [<https://perma.cc/S3X3-XY4U>].

138. Mark Joseph Stern, *The Legal Architects of Trump’s Failed Coup May Finally Face Real Consequences*, SLATE (Oct. 5, 2021), <https://slate.com/news-and-politics/2021/10/john-eastman-jeffrey-clark-coup-consequences.html> [<https://perma.cc/N5FJ-LQMC>] (explaining that Eastman remains a senior fellow at the Claremont Institute, where he files briefs to the Supreme Court and Clark landed a position as the chief of litigation and director of strategy at the New Civil Liberties Foundation).

139. *Id.*

procedure, and other standards that serve as a guardrail in the courtroom do not exist outside of court, attorneys operating outside of litigation have opportunities to do even more long-term harm by proposing legal arguments that would not survive in court, by spreading falsehoods that warp public opinion about the legitimacy of elections, and by engaging or assisting clients to engage in criminal acts. As this Note will explain in Part V, the breadth and potential harm of these efforts justify courts and bar committees applying a heightened level of scrutiny when investigating ethics violations committed in furtherance of efforts to undermine democracy.

IV. COMPARATIVE ANALYSIS: LESSONS FROM ABROAD

The idea that attorneys owe a special duty to democracy, inherent in their oath to uphold the rule of law, is not uniquely American. The ABA's International Rule of Law project works to promote democracy abroad through funding and oversight of elections, promotion of independent judiciaries, and promotion of strong constitutions.¹⁴⁰ The Organization for Security and Cooperation in Europe ("OSCE") has stated that "democracy is an inherent element of the rule of law."¹⁴¹ And the United Nations General Assembly has affirmed that "the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations."¹⁴² Arguments for the essential role of lawyers in democracy have been made across the globe, from Nigeria, to Myanmar, to Taiwan, and elsewhere.¹⁴³

Understanding this internationally recognized duty, a few case studies in which attorneys have advanced authoritarianism while avoiding consequences from their country's legal ethics apparatus stand out. Yet, democratic breakdown today happens slowly, through "legal" means that allow authoritarians to consolidate power through courts, expansion of executive authority, and redrawing districts

140. *International Rule of Law – Funding for Agencies that Promote the Rule of Law*, ABA (May 2018), https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/ [<https://perma.cc/8UGG-ZDLC>].

141. This position was adopted in the *Report on the Rule of Law*, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) 7 (2011), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e) [<https://perma.cc/546G-LSRG>].

142. United Nations General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, 2 (A/67/L.1) (Sept. 2012).

143. See Okechukwu Oko, *The Lawyer's Role in a Contemporary Democracy. Promoting the Rule of Law, Lawyers in Fragile Democracies and the Challenges of Democratic Consolidation: The Nigerian Experience*, 77 *FORDHAM L. REV.* 1295, 1295 (2009) ("African lawyers, like their counterparts all over the world, have an enlightened self-interest in consolidating democracy because lawyers function optimally in a constitutional democracy."); Jonathan Liljeblad, *Democracy, Rule-of-Law and Legal Ethics Education in Context: directing Lawyers to Support Democratization in Myanmar*, 47 *GA. J. INT'L & COMP. L.* 451, 467 (2019) (arguing for "legal ethics that direct lawyers to accept and fulfil professional responsibilities to promote democracy and rule-of-law"); see generally Jane Kaufman Winn & Tang-chi Yeh, *Advocating Democracy: The Role of Lawyers in Taiwan's Political Transformation*, 20 *L. & SOC. INQUIRY* 561 (1995) (describing the role of lawyers in promoting Taiwan's turn towards democracy).

to entrench political power.¹⁴⁴ Democracies far less frequently die by military coup or overthrow of the existing government.¹⁴⁵ And while one can argue that the slow democratic backsliding through “legal” means is happening in the United States through gerrymandering, voter restrictions, and other disenfranchising measures, the post-2020 attempts to overturn the election seem to fall somewhere in between this slow democratic degradation and the more traditionally understood “coup” wherein parties use various means, usually but not exclusively violence, to seize power.¹⁴⁶ This reality, coupled with the unique features of American politics, law, and legal regulation mean that any comparison to events abroad will be imperfect. Still, there are valuable lessons to be drawn from the experience of lawyers abroad, including failed efforts to police them.

Much of the literature on attorneys and authoritarianism places the two in “fundamentally opposed camps,” with attorneys nobly fighting back against antidemocratic forces, alongside other members of civil society like the free press and NGOs.¹⁴⁷ This framing is somewhat justified, given the role attorneys often do face in promoting rule of law and democracy and the brutal repression that attorneys frequently face under the rule of authoritarian regimes.¹⁴⁸ But these analyses ignore the instrumental and often indispensable role that attorneys play in advancing illiberalism and authoritarianism. Although the following examples focus on long-term efforts to subvert democracy, either through illiberal electoral or power-centralization mechanisms, rather than efforts to overturn the results of specific elections, they reveal lessons about what can happen when attorneys use their influence to pursue antidemocratic aims without accountability, and how this can push countries to a point of no return.

A. THE CENTRAL EUROPEAN LEGAL ETHICS DILEMMA: HUNGARY

The high expectations of post-Soviet Central European states’ transition from communist totalitarianism to Western-style democracy have been tempered by

144. Zibblatt & Levitsky, *supra* note 11, at 3.

145. *Id.*

146. David A. Graham, *The Paperwork Coup*, THE ATLANTIC (Dec. 15, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/trumps-coup-before-january-6/620998/> [<https://perma.cc/7M4M-LYV2>] (arguing that the Trump team attempted two coups with a coherent strategy, one involving the violent insurrection of January 6th and one taking place over a matter of weeks and noting only a few things needed to go differently to allow Trump to stay in power or at least cause widespread conflict).

147. Fabio De Sa E Silva, *From Car Wash to Bolsonaro: Law and Lawyers in Brazil's Illiberal Turn (2014-2018)*, 47 J.L.S. S90, S91 (2020) (explaining further that ideals of attorneys as opponents of illiberalism “are consistent with a time-honoured idealization of law as a tool of political accountability and of lawyers as champions of political liberalism”).

148. See, e.g., Anastasiia Zlobina, *Belarusian Authorities Retaliate Against Lawyers Defending Human Rights*, HUMAN RIGHTS WATCH (Oct. 26, 2021), <https://www.hrw.org/news/2021/10/26/belarusian-authorities-retaliate-against-lawyers-defending-human-rights> [<https://perma.cc/H2AE-ENTA>] (detailing attacks on lawyers in Belarus); Halya Coynash, *Russia launches dangerous attack on lawyers defending victims of persecution in occupied Crimea*, Kharkiv Human Rights Protection Group (Nov. 1, 2019), <https://khpg.org/en/1547155054> [<https://perma.cc/43DF-RA2Y>].

the realities of slow reform, as well as a nostalgia for the order and constrained worldview of the Soviet era. Particularly in the field of legal education, scholars have argued that “the greatest challenge is creating a new legal culture, starting with a new legal consciousness among lawyers.”¹⁴⁹ Although some of the post-Soviet states, including Lithuania, Czech Republic, and Romania, have taken significant legislative steps to reform their legal systems, in others, including Hungary, Ukraine, and Belarus, “remnants of the totalitarian past haunt law faculties and legal education.”¹⁵⁰ The continued “neglect of ethics in post-Soviet legal education” has contributed to a legal culture of individualism and a lack of introspection about the attorneys’ duty to his or her country.¹⁵¹ The “near-total absence of legal ethics courses in post-Soviet countries” allows attorneys to view their ethical duties as being “of secondary importance” and opens the door for them to utilize their degrees to achieve antidemocratic ends.¹⁵² Research has found that the slow transition from the Soviet era to rule of law has contributed to high levels of corruption in these countries.¹⁵³

Although many post-Soviet states present illuminating case studies on the ways in which weak legal ethics regimes can contribute to illiberalism, Hungary, the “archetypal case” of an autocratic legalist society presents a strong comparator to the United States.¹⁵⁴ In Hungary, literature has found that “educating ethics is missing broadly [. . .], and even if ‘legal ethics’ is taught, it covers merely ethical codices of the Bar.”¹⁵⁵ Although the country has taken steps to increase its legal ethics education in recent years, these efforts have been too little and too late. Under Viktor Orbán, lawyers facilitated the country’s “constitutional backsliding from a full-fledged liberal democratic system to an illiberal one with strong authoritarian elements.”¹⁵⁶

Attorneys associated with Orbán’s government rewrote thousands of pages of the 1989-1990 constitution, drew up new election laws that all but guaranteed the Fidesz party’s dominance in future elections, and worked with the government to attack the independence of the judiciary, media, elections commissions, and tax authority, and packing of the constitutional courts.¹⁵⁷ Although literature generally focuses on the authoritarian leader himself, Orbán could not have possibly

149. Christopher R. Kelly & Julija Kiršienė, *The Role of Ethics in Legal Education of Post-Soviet Countries*, 8:1 BALTIC J. L. & POL. 139, 147 (2015).

150. William D. Meyer, *Remnants of Eastern Europe’s Totalitarian Past: The Example of Legal Education in Bulgaria*, 43 J. LEGAL EDUC. 227, 227 (1993).

151. Kelly & Kiršienė, *supra* note 141, at 149.

152. *Id.* at 148–49.

153. *Id.* at 157–59.

154. See Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549 (2018).

155. Andras Jakab, *Dilemmas of Legal Education: A Comparative Overview*, 57 J. L. ED. 14 253, 257 (2007).

156. Gabor Hamai, *Second-Grade Constitutionalism: The Cases of Hungary and Poland*, Eleven International Publishing, CSF - SSSUP Working Paper Series 4 (2017).

157. See Scheppelle, *supra* note 154, at 549–50.

carried out an “autocratic revolution with exquisite legal precision” without the aid of lawyer foot soldiers, drafting the laws, framing authoritarian policies through legalistic arguments, and stepping up to serve as loyalists in the country’s constitutional courts.¹⁵⁸ Without a strong legal ethics regime, attorneys capitalized on political opportunism and individualistic notions of success to promote a would be authoritarian government. In so doing, they used their legal degrees to advance the “dismantling of institutional rule of law guarantees and the weakening of checks and balances.”¹⁵⁹

B. CULTURAL REMNANTS OF MILITARY DICTATORSHIP: BRAZIL

Brazil presents another compelling example of attorneys using their authority to pursue illiberal and antidemocratic ends. Whereas Hungary’s history of communist totalitarianism created an apathy for ethics and rule of law principles, Brazil’s history of military rule established a legal ethics regime “structured almost entirely around formal technical dogmatic content.”¹⁶⁰ Although Brazil has reformed its legal and legal ethics regimes, the culture of the era of military dictatorship is still present in the legal professions’ focus on ferreting out crime and punitive culture.¹⁶¹

From the period of 2014 to 2021, Brazil embarked on a program known as “Operation Car Wash,” which focused on anti-corruption measures in Brazil.¹⁶² While the prosecutors involved in Car Wash were lauded domestically and abroad, “as champions of transparency, accountability, and ‘the rule of law,’” some have argued that this program promoted illiberalism and set the stage for the election of Jair Bolsonaro, the right-wing populist and antidemocratic leader, in 2018.¹⁶³ By framing corruption as an existential threat to the country, the Car Wash prosecutors were able to consolidate their power and suppress defendants’ rights through increased pretrial detention and limiting the scope of pretrial detention petitions.¹⁶⁴ They invoked nationalistic rhetoric, lauding corruption as a “cancer” and “disease” that was harming the needs of the common people of Brazil. Although the program was recently disbanded, many of the Car Wash attorneys found prominent positions in the Bolsonaro government, where they have pushed draconian, tough on crime laws, including one that would exonerate

158. *Id.* at 550.

159. See ANDRAS L. PAP, *DEMOCRATIC DECLINE IN HUNGARY: LAW AND SOCIETY IN AN ILLIBERAL DEMOCRACY* (2018).

160. Kim Economides & Joaquim Leonel de Rezende Alvim, *Bar exams, legal ethics and the fight against corruption: lessons from Brazil*, *LEGAL ETHICS* 35 (2020).

161. Leandro Ayres França, *Violence and Punishment in Brazil*, *CENTRE FOR CRIME AND JUSTICE STUDIES* (Mar. 6, 2017), <https://www.crimeandjustice.org.uk/resources/violence-and-punishment-brazil> [<https://perma.cc/ZC5E-FWHM>] (discussing Brazil’s historically punitive culture which encourages harsh criminal policies).

162. See Silva *supra* note 147, at S93–94.

163. *Id.* at S93; França, *supra* note 161.

164. See Silva, *supra* note 147, at S93.

policemen from homicide charges if they were acting under “fear, surprise, or violent emotion.”¹⁶⁵

Bolsonaro’s attorneys have employed “legal” efforts to use “constitutional and legislative tools against liberal democracy.”¹⁶⁶ His Minister of Justice has taken advantage of national security laws to target journalists, political opponents, and other attorneys in the country, including through a law that bars defamation or slander against the president. Attorneys associated with Bolsonaro and his congressional allies have drafted a sweeping revision to the nation’s election laws that “would legalize or reduce punishment for multiple forms of corruption and voter intimidation; weaken measures designed to promote racial and gender diversity in politics; and dismantle regulatory structures.”¹⁶⁷ In helping to enact legislation that will entrench the power of an authoritarian figure, these attorneys use their power to promote antidemocratic illiberalism.

As in Central Europe, the institutions of legal discipline have not been up to the task. The attorneys who have used their authority to harm push illiberalism have “downplayed, and were even willing to disregard, rules and accountability mechanisms when these represented an obstacle to the pursuit of that ‘greater good.’”¹⁶⁸ Despite efforts to strengthen legal ethics, studies have shown that rules governing ethical conduct are unenforced.¹⁶⁹

C. TAKEAWAYS FROM THE INTERNATIONAL CONTEXT

These examples demonstrate that attorneys are products of the institutions and political environments in which they practice and are not inherently predisposed to supporting liberalism or democratic values. When legal institutions promote cultures of opportunism and amorality, attorneys will act in ways that allow them to consolidate power and advance antidemocratic policies. Hungary and Brazil present striking analogs and potential forewarnings for the American context. Not long ago, both were considered stable democracies, with high hopes for the future.¹⁷⁰ Yet, in recent

165. *Id.* at S110.

166. See Ulisses Levy Silvério dos Reis & Emilio Peluso Neder Meyer, *Undemocratic Legislation to Undermine Freedom of Speech in Brazil*, BLOG OF INT. J. CON. LAW (Feb. 3, 2021), <http://www.icconnectblog.com/2021/02/undemocratic-legislation-to-undermine-freedom-of-speech-in-brazil/> [<https://perma.cc/UM8A-JL9J>].

167. Andrew Fishman, *Bolsonaro Allies in Brazilian Congress Push Sweeping Electoral Changes to Keep Hold on Power*, THE INTERCEPT (Aug. 11, 2021), <https://theintercept.com/2021/08/11/bolsonaro-brazil-congress-elections-2022/> [<https://perma.cc/3NJP-TGMY>].

168. See Silva, *supra* note 147, at 93.

169. Roberto Fragale Filho, *Regulating Lawyers through Disciplinary Systems: The Brazilian Case*, Paper presented at a workshop at Oñati International Institute of Sociology of Law (2018).

170. Zach Beauchamp, *It happened there: how democracy died in Hungary*, VOX (Sep. 13, 2018), <https://www.vox.com/policy-and-politics/2018/9/13/17823488/hungary-democracy-authoritarianism-trump> [<https://perma.cc/82C5-NHKA>] (“For roughly the first two decades of Hungary’s post-communist history, from 1990 to 2010, Hungary was a young but stable democracy.”); Oliver Stuenkel, *Democracy is Dying in Brazil*, FOREIGN AFFAIRS (Nov. 1, 2021), <https://www.foreignaffairs.com/articles/brazil/2021-11-01/democracy-dying-brazil> [<https://perma.cc/C8YM-V5RV>].

years both have taken illiberal turns and were listed as backsliding democracies in 2021, alongside the United States.¹⁷¹ Hungary and Brazil are further along the process of democratic backsliding and reveal how illiberal actors in these countries “disempower or capture institutions” to the point that those institutions are no longer able to advance democracy or the rule of law.¹⁷² These countries demonstrate that once professional incentive structures encourage attorneys to conduct themselves in self-interested, punitive, or other antidemocratic manners, it is very difficult shift those incentives back to supporting democracy. Although American legal institutions appear to be strong, allowing the breakdown of rules and norms within the profession could facilitate a backsliding from which returning to stability and democracy will be all but impossible.

These examples are not provided in an attempt to suggest that countries' weak legal ethics regimes are the direct cause of their antidemocratic turns. Rising nationalism, globalization, anti-elite sentiment, inequality, spread of disinformation on new technologies, and many other factors have contributed to this phenomenon.¹⁷³ Yet, recognizing how legal cultures abroad have failed to advance democratic values can provide context for those working to promote democracy in the United States.

V. RECOMMENDATIONS

American attorneys' attempts to overturn the 2020 election are cause for serious concern within the legal profession. The sometimes complicit and sometime active role that attorneys have played in democratic subversion abroad should serve as a cautionary tale for American legal ethics. These examples underscore the need for greater regulation and a culture that advances democratic values within the profession. Because traditional avenues that could be used to defend democracy, from federal legislation to the Supreme Court to state governments, have proven unwilling or unable to do so, the legal ethics regime stands as an unlikely, but highly capable, guardrail between American democracy and rising illiberalism.

This Part explains the role of legal ethics following the abuses associated with the 2020 election, arguing that the foundations of the current rules are strong, but that they are too weakly enforced. Subjecting violations that cut to the core of democratic self-governance to heightened scrutiny would benefit the legal profession, democracy, and the rule of law.

171. *Global State of Democracy Report 2021*, *supra* note 3.

172. Alexander Hudson, *Democratic backsliding: Different causes, divergent trajectories*, Institute for Democracy and Electoral Assistance (Dec. 16, 2021), <https://www.idea.int/blog/democratic-backsliding-different-causes-divergent-trajectories> [<https://perma.cc/LG7X-NBFP>].

173. Melissa Morgan, *Understanding the Global Rise of Authoritarianism*, STAN. FREEMAN SPOGLI INST. FOR INT. STUDIES (2021).

A. THE STRONG FOUNDATION OF THE CURRENT ETHICS RULES

The legal ethics rules, as promulgated by the ABA and adopted in various forms by the states, are well-suited to address the ethical violations that arose in the aftermath of the 2020 election. Whereas the legal professions in Hungary and other parts of Central Europe have struggled to incorporate strong legal ethics into a tradition rooted in communist totalitarianism, and the legal profession in Brazil has sustained values of its history as a military dictatorship, the American legal profession has a more entrenched history of liberalism and promotion of individual rights.¹⁷⁴ Without glorifying American legal history, and recognizing that American lawyers have often failed to live up to the profession's values, America's self-proclaimed role "as a model democracy that could serve as an example to countries that wished to emulate its success" has produced a commitment within the legal profession to these values.¹⁷⁵ The 1908 Canons of Professional Conduct were intentionally "aspirational in character," "expounding higher principles of professional ethics."¹⁷⁶ One author argues that the legal profession in the first half of the 20th century produced a commitment to democracy in the "social realm to ensure justice and progress."¹⁷⁷

The *Model Rules* in their current form, and as adopted by the states, carry with them the legacy of legal ethics as a guardian of democracy. They are forceful and clear about attorneys' duties of honesty both inside and outside of the courtroom.¹⁷⁸ The rules on meritorious claims, truthfulness in statements to others, and barring "conduct involving dishonesty, fraud, deceit or misrepresentation" could play a role in addressing instances in which attorneys have spread disinformation about widespread voter fraud, foreign election interference, and other

174. See *Rule of Law in American Life: A Long and Intentional Tradition*, ABA (2019), https://www.americanbar.org/groups/public_education/resources/rule-of-law/rule-of-law-in-american-life-a-long-and-intentional-tradition/ [<https://perma.cc/B3R6-QRS8>] (providing historical context to America's cultural commitment to legal institutions).

175. Mounk & Foa, *supra* note 65; see also Christopher Reenock, Jeffrey K. Staton & Marius Radean, *Legal Institutions and Democratic Survival*, 75 J. Pol. 491 (2013) (describing America's commitment to strong legal institutions as a means of strengthening democracy, at home and abroad).

176. See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY 1 (1980) (explaining that "continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government," that "lawyers play a vital role" in preserving society, and that the 1908 Canons of Professional Ethics were foundationally aspirational); Geoffrey C. Hazard Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEVELAND ST. L. REV. 571, 572 (1981).

177. See Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 656 (2016). This is not to say that American lawyers should aspire to some past "heyday." It is simply to say that there is a long history of the American legal profession feeling a commitment to society at large, and democratic values in particular.

178. See MODEL RULES R. 3.3, 4.1, 8.4(c). *But see* Raymond J. McKoski, *The Truth be Told: The Need for a Model Rule Defining a Lawyer's Duty of Candor to a Client*, 99 IOWA L. REV. BULL. 73 (2014) (arguing that the rules should be clearer about the impact of lawyers' lies to clients).

conspiracy theories.¹⁷⁹ Further, existing provisions allow courts and bar committees to discipline attorneys who counsel their clients to engage in illegal conduct and when they obstruct justice.¹⁸⁰ While one could argue that the ethics rules should be amended to clarify and strengthen the role of lawyers in democracy, such amendments are not necessary, given the strength of the existing rules. Further, new rules requiring lawyers to commit to supporting democracy could raise First Amendment concerns and lead to difficult line-drawing problems.¹⁸¹ As such, the legal profession is in a strong position to address the key concerns related to election subversion; disinformation, attempts to interfere with process, and counseling clients to engage in illegal acts.

B. BAR COMMITTEES' ENFORCEMENT OF THE MODEL RULES

The *Model Rules* and their state equivalents could capture the worst abuses committed by attorneys. However, although the existing rules *could* resolve the most egregious violations, they have failed to do so in recent history because bar committees either choose not to investigate such abuses or choose not to sanction or otherwise reprimand attorneys for committing such abuses.¹⁸² Although bar associations are reluctant to bring cases that are perceived as politically motivated, cases involving attacks on democracy should be scrutinized more stringently, not less.

1. HEIGHTENED STANDARD OF SCRUTINY IN ELECTIONS CONTEXT

Although bar associations should take all ethical violations seriously, the unique aspirational duty of attorneys to democracy warrants a higher standard than exists in other cases. Though some have argued that the “threats to American democracy posed by Trumpist election denialism cannot be addressed adequately by bar discipline,” the fact that bar discipline is not sufficient to address these threats does not mean it is not necessary.¹⁸³ As the Supreme Court has recognized, voting rights are “the essence of a democratic society” and efforts

179. See generally Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J. 114 (2021) (arguing for harsher sanctions when lawyer lies threaten democracy).

180. MODEL RULES R. 1.2(d).

181. See Jefferson, *supra* note 179; see also Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies they Tell*, WASH. U. J. L&P (forthcoming 2022).

182. See Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 648-649 (explaining that “[s]tudy after study has shown that the current rules of professional conduct are not enforced. Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another”).

183. Paul Rosenzweig, *Legal Ethics, Bar Discipline, and John Eastman*, LAWFARE (Oct. 20, 2021), <https://www.lawfareblog.com/legal-ethics-bar-discipline-and-john-eastman> [<https://perma.cc/SEW3-RPV2>] (arguing that lawyer discipline is, at best, an ancillary remedy and at worst, a distraction from needed legislative reforms and criminal prosecutions).

to restrict that right “strike at the heart of representative government.”¹⁸⁴ Bar committees, as adjudicative bodies that are created by the courts, should embrace the Supreme Court’s jurisprudence on these issues and engage in a parallel analysis. Just as courts have subjected restrictions on voting to strict scrutiny because voting is “preservative of other basic civil and political rights,”¹⁸⁵ bar committees should analyze potential ethical violations that seek to undermine democracy under a standard of heightened scrutiny because, as previously discussed, free and fair elections are essential to preserving the rule of law in a democracy.

As a Colorado Judge explained in one ethics opinion, given the significance of the issues and the false statements’ potential to result in political violence, “the attorneys had a ‘heightened’ duty to make sure their claims were valid.”¹⁸⁶ Given this “heightened duty,” bars should be less deferential to attorneys’ potential violations in the elections context, even if those violations are viewed as political.¹⁸⁷

2. BAR ASSOCIATIONS’ FEAR OF COMING ACROSS AS “POLITICAL” LACKS MERIT

State bar associations have long made clear that they are reluctant to get involved when a case is “political” and are “highly resistant to charging any lawyer pressing a political agenda for a willing client, inside or outside of court.”¹⁸⁸ Bar counsels are somewhat understandably more likely to focus on instances in which clients were harmed by lawyer malfeasance.¹⁸⁹ Because membership in state bar associations is often compulsory, meaning attorneys are required to pay dues, they do not want to appear to be taking sides in political debates. Compulsory state bars have been upheld as constitutional despite arguments that they violate prohibitions on compelled speech.¹⁹⁰ But the Court’s recent decision in *Janus v. AFSCME*, holding that compelling union dues for those who are not

184. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

185. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

186. Opinion of Judge Neureiter, Order Granting Defendant’s Motion for Sanctions Case 1:20-cv-03747-NRN, 3637, 5657 (2021) (also referencing D.C. judges’ opinions deciding to keep defendants in jail because the repeated lies mean the threat is still present and could lead to future violence) (citing *United States v. Meredith*, Crim. No. 21-0159 (SBJ), Dkt. #41 at 24 (D.D.C. May 26, 2021)).

187. Quinta Jurecic, *There Aren’t Serious-Enough Consequences for Those Trying to Break American Democracy*, THE ATLANTIC (Nov. 30, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/there-arent-enough-consequences-trying-break-american-democracy/617214/> [https://perma.cc/VL8K-TQDR].

188. *Id.* (quoting a number of legal ethics professors who argue that state bars and judges are unlikely to be the drivers of discipline, given the fear of coming across as political); Bruce Green, *Ethics Complaints Against Trump Attys Are Likely A Dead End*, LAW360 (Nov. 2020), <https://news.law.fordham.edu/blog/2020/11/30/ethics-complaints-against-trump-attys-are-likely-a-dead-end/> [https://perma.cc/M9R9-C55M]. *But see* James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L. Q. 725, 730 (2005) (arguing that bar machinery has historically been utilized for political ends, including during the Red Scare, Civil Rights Movement, and the War on Terror, and that bars should be reluctant to engage in political investigations, but recognizing that these bar complaints have political motivations and lack merit). The investigations that this paper argues for likely would not fall within Moliterno’s framework of “political” for the reasons previously explained.

189. *Id.*

190. *Keller v. California State Bar Association*, 496 U.S. 1 (1990).

members is unconstitutional, and the Supreme Court's general rightward shift has likely put these bar associations on edge.¹⁹¹ Veering too far into the political waters could put state bar associations at risk of similar challenges.¹⁹²

Despite state bar associations' understandable worry about appearing political, "[i]t is not [. . .] "political" to stand up for democratic values and institutions."¹⁹³ When attorneys, associated with one political party, have committed themselves to authoritarian values, the legal profession, whose job it is to uphold the rule of law, cannot shy away out of fear of appearing to be political. To the contrary, standing up for the Constitution, rule of law, and democratic values is the least political thing that bar associations can do. As Democratic Congressman Bill Pascrell has explained:

In their frivolous lawsuits geared toward stealing the election, Trump's lawyers are bringing ill-repute to the entire legal community and abusing the legal system to assault democracy. Every lawyer promulgating or promoting Trump's suits should face the strongest possible punishment and be stripped of their license to practice law. If targeting American democracy does not merit such sanction, nothing does.¹⁹⁴

While courts and legal ethics bodies wish to stay above the political fray, failing to penalize attorneys that attempt to subvert democracy because such efforts are seen as "political" "would prevent ethics rules from operating in a context in which they are particularly important – the protection of our constitutional democracy."¹⁹⁵

3. APPLICATION OF THE HEIGHTENED STANDARD

Bar committees should apply a heightened standard of scrutiny to cases potentially involving ethical violations in the context of subverting elections. Drawing on courts' analyses of fundamental rights, such an approach would recognize the

191. 585 S. Ct. 2448 (2018) (requiring agency fees from nonconsenting public sector employees violated First Amendment rights).

192. See Deborah J. La Fetra & Elizabeth Slattery, *The First Amendment protects attorneys from compelled speech*, THE HILL (Jun. 15, 2020) (attorneys associated with the Pacific Legal Foundation have argued that compelled membership in bar committees is unconstitutional).

193. Lauren Stiller Rikleen, *Now is the Time For Bar Associations to Come to the Aid of their Country*, LAW.COM (Nov. 16, 2020), <https://www.law.com/nationallawjournal/2020/11/16/now-is-the-time-for-bar-associations-to-come-to-the-aid-of-their-country/> [<https://perma.cc/TF3P-XSBB>].

194. Kim Bellware, *Letter from 1,500 attorneys says Trump campaign lawyers don't have 'license to lie'*, WASH. POST (Dec. 8, 2020), <https://www.washingtonpost.com/politics/2020/12/08/trump-lawyer-letter/> [<https://perma.cc/MM9C-S25D>].

195. *Id.*; see also Scott Cummings, Nora Freeman Engstrom, David Luban & Deborah L. Rhode, *It's Time to Consider Sanctions for Trump's Legal Team*, SLATE (Nov. 23, 2020), <https://slate.com/news-and-politics/2020/11/trump-legal-team-rudy-giuliani-state-bar-sanctions.html> [<https://perma.cc/A3TA-Z5SG>] (arguing that "Trump's lawyers' conduct should not be viewed in a vacuum. The conduct must be judged in the context of the Trump campaign's broader effort to perpetrate an unprecedented fraud upon the American public by claiming election theft, without a shred of credible evidence").

ways in which attacks on democracy function as attacks on bar committees, which serve as representatives of the rule of law. There are several ways in which the heightened scrutiny approach would play out in practice.

First, rather than waiting for referrals, or feeling hesitant to get involved until a judicial opinion is written, state bars should act when it becomes apparent that ethical violations have possibly occurred.¹⁹⁶ Election-related legal disputes are often highly publicized, meaning bar associations are likely aware of potential misconduct, simply by following what is happening in the news. This is especially true in the litigation context, where filings are public, and transcripts or recordings of hearings are available. Outside of litigation, it sometimes takes months for behind-the-scenes events to come to light. But once credible evidence appears that potential violations have occurred, including through news reporting, books, and public statements, state bars should open their own investigations, rather than wait for referrals.

Second, and relatedly, there is little functional difference between attempting to subvert an election through litigation as compared to through pressure at the Department of Justice, refusal to certify votes, public campaigns to sow doubt in elections, or other subversion-related measures in terms of anticipated real-world outcomes.¹⁹⁷ State bars should be willing to investigate all attorneys with the same tenacity, regardless of where and when violations occur.

Third, although attorneys are generally responsible only for their own actions,¹⁹⁸ bar associations do not need to investigate each instance in a vacuum.¹⁹⁹ Context matters in these cases, because although each lawsuit may not ultimately change the election results, the sheer number of suits and other efforts have a real impact in terms of granting legitimacy to these claims and decreasing public faith in elections.²⁰⁰ The lawsuits filed across the country and sowing of conspiracies are part of a coordinated effort, not mere isolated instances. Thus, the presumption should be on the attorney to explain why their ethical violations do not warrant punishment, rather than vice versa. The “heightened duty” requires heightened scrutiny. State bars could consider whether attorneys’ representations are based in facts and law, whether they are in furtherance of the cause of justice, whether any aspect of their representation involves helping a client

196. See *Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement*, ABA (2018) (finding bars are more likely to take complaint referrals when they come from the courts); see, e.g., MN MODEL RULES R. 8(a) (stating that the Bar Director can initiate an investigation without a complaint).

197. See, e.g., Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, *77 Days: Trump’s Campaign to Subvert the Election*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html> [<https://perma.cc/CUC7-B8DJ>] (providing a timeline of the legal and extralegal campaigns between Election Day and January 6th and explaining that the end goal of all these efforts was to deny the will of the American people).

198. *But see* MODEL RULES R. 5.1 (governing the role of supervisors and supervisees).

199. See Cummings, et al., *supra* note 195.

200. See Joy & McMunigal, *supra* note 64, at 66.

achieve illegal goals, and somewhat more amorphously, whether the representation seeks to subvert democracy and the rule of law, upon which the legal profession relies.

Fourth, bars should take swift action in these lawsuits. The 2020 experience reveals how a long, drawn-out process can fail to achieve its purposes.²⁰¹ Even if attorneys ultimately face consequences, they may have time to publicly launder their reputations. The public's attention on these issues is short, so the public might assume that no action was taken, allowing the legitimacy that lawyers lend to unfounded claims to seep into public perceptions about the validity of an election. And because bar associations cannot talk about their investigations, the accused is given broad latitude to shape the public narrative around their own culpability.²⁰²

Fifth, when ethical violations are discovered, under the heightened scrutiny approach, consequences should be severe. Whereas bars will often dismiss cases against first time offenders or impose relatively minor sanctions, the fact that violations committed in furtherance of an anti-democratic agenda weakens the rule of law and the American system of self-governance, warrants severe penalties. Disbarment, either temporary or permanent, is appropriate and commensurate. When evidence of ethical violations is clear, temporary disbarment pending investigation, as was done in for Rudy Giuliani in New York and D.C. is wise.

C. THE HEIGHTENED STANDARD'S FUNCTIONAL BENEFITS

Subjecting attorneys who may have violated the ethical rules in the elections context to the heightened standard has several benefits. These include stopping those involved from doing more harm, deterring future lawyers from risking their reputations on these cases, and establishing a commitment to democracy in the legal profession, making clear that belief in voting in a representational democracy is not a mere political disagreement.

Punishing attorneys who engage in elections-related ethical violations can prevent them from committing more harm in the short-term. In the weeks following the 2020 election, a few repeat actors, including Giuliani, Wood, and Powell contributed to the daily onslaught of misinformation, through legal proceedings, press briefings, social media, and more. Their actions likely fueled the apocalyptic frenzy that contributed to the violence of January 6th and the continued widespread belief that the 2020 election was stolen.²⁰³ Had they been reprimanded, or at least temporarily suspended pending review, in the moment, some of that harm could have been prevented. Similarly, disbarment or other strict penalties could

201. See Jurecic, *supra* note 187 (noting that there still have been limited consequences for these attorneys).

202. *Did the Supreme Court Lawsuit to Overturn the 2020 Election Violate Lawyer Ethics?*, LAWYERS DEFENDING AMERICAN DEMOCRACY (Dec. 9, 2021), <https://ldad.org/panel-discussion-did-the-supreme-court-lawsuit-to-overturn-the-2020-election-violate-lawyer-ethics> [<https://perma.cc/CWY8-Y9HM>].

203. See Paleologos, *supra* note 7.

prevent these attorneys from playing a role in future efforts to undermine the legitimacy of elections. Finally, strict penalties are an appropriate and commensurate retributive response under the heightened scrutiny approach, given the damage, both measurable and immeasurable, caused by the offense.

Next, and significantly, the heightened scrutiny approach is important because it sets a precedent that attorneys involved in efforts to undermine democracy will face significant consequences. As one author has argued, “sanctioning even some of the Trump lawyers would send a message likely to generally deter other lawyers, especially younger ones, from emulating their behavior.”²⁰⁴ This deterrence could take on a few forms. Certainly, the threat of disbarment would likely serve as a significant deterrent. Attorneys invest significant economic resources and time into receiving their legal education. Loss of or the threat of losing one’s law license also would force young attorneys to face the prospect of forgoing future income and career opportunities. But, even if an attorney is not concerned with potential financial consequences, the reputational costs associated with investigation and disbarment would also serve as a significant deterrent.²⁰⁵

Finally, treating ethical violations that cut at the heart of American democracy with the greater seriousness can set the legal profession on a path towards cultural reorientation, reinvigorating the moral imperatives of the profession in a way that aligns with the purposes of the rule of law. The fact of attorney self-regulation has been referred to as one of the “crown jewels” of the legal profession.²⁰⁶ In the aftermath of the 2020 election, it is attorneys who must stand up for the Constitution, democracy, and the rule of law, including when it requires standing up to their colleagues and peers. As Sherilynn Ifill, former president of the NAACP Legal Defense and Education Fund has argued, “the legal profession must urgently take collective stock of why so many prominent legal institutions and leaders were embroiled in supporting one of the most corrupt and destructive presidencies in our history.”²⁰⁷ The Central European and Brazilian case studies can serve as a reminder of the importance of maintaining strong, values-based legal institutions. This dark chapter can serve as a turning point for attorneys committed to democratic values in the United States.

204. See Joy & McMunigal, *supra* note 64, at 4 (arguing for serious sanctions and even disbarment on lawyers who engaged in “outrageous and notorious” conduct).

205. See Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 176-183 (explaining that lawyers’ reputations play a significant role in their work and therefore lawyers will be careful about taking cases that might harm that reputation).

206. Rosenzweig, *supra* note 183.

207. Sherilynn Ifill, *Lawyers Enabled Trump’s Worst Abuses, The legal profession must reckon with its complicity in Trump’s attack on democracy*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/opinion/politics/trump-lawyers.html> [<https://perma.cc/87GS-23PU>].

CONCLUSION

The 2020 election and the months that followed posed an existential threat to American democracy. As more information about the post-election efforts has been revealed, it has become clear that lawyers associated with the former President committed brazen violations of their oaths of office and the Constitution. Bearing in mind the ways in which attorneys have facilitated authoritarian turns abroad, this conduct should motivate state bar associations to reimagine their responsibility to American democracy. While recognizing that improvements to the legal ethics regime alone will not be a panacea for America's ailing democracy, the heightened scrutiny standard proposed in this Note can increase the costs of engaging in antidemocratic conduct. Because democratic breakdown today often occurs through apparently "legal" changes to election laws and constitutions, meaning attorneys are not just complicit but necessary, this approach would force attorneys to think twice about their participation in antidemocratic and pro-authoritarian conduct. Through a new, more stringent approach to violations of legal ethics that implicate fundamental aspects of democracy, state bar associations can revitalize the legal profession's commitment to the Constitution and the rule of law.