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LAWYERS IN BACKSLIDING DEMOCRACY

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Lawyers in Backsliding Democracy

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This Article explores the role of lawyers in democratic backsliding—the degradation of democratic institutions and practices using law rather than violence. The Article's central aim is to set an agenda and outline an approach to studying the professional paradox at the center of backsliding: why and how lawyers attack the rule of law. It thus seeks to shift the scholarly lens from the conventional view of lawyers as defenders of democracy to investigate lawyers as authors of autocracy. Toward that end, the Article theorizes the legal profession as a site of backsliding, outlining a framework that positions lawyers in relation to distinct pathways of autocratization on the slow road of gradual democratic decline and the fast track of imminent democratic attack. On the slow road, the Article draws upon evidence of structural change in the American legal profession to suggest how the erosion of key democratic functions performed by lawyers increases backsliding risk by reducing trust in the legal system and commitment to the rule of law. On the fast track, using the 2020 Stop the Steal campaign as a case study, the Article shows how lawyers in moments of democratic crisis engage in legal mobilization to weaponize distrust, fusing legal and media tactics to legitimize false claims and justify invocation of extraordinary power. The Article concludes by calling for changes to U.S. professional regulation and education to strengthen democratic resilience, while mapping a research agenda for comparative study of antidemocratic lawyering in unsettled times.

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INTRODUCTION

One of the most extraordinary revelations from the House Select Committee Report on the January 6 Attack—buttressed by two indictments against former President Donald Trump for election interference[1]—was the role played by lawyers, sworn to uphold the rule of law, who led an assault on

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    1. Indictment at 1–4, Georgia v. Donald Trump, No. 23SC188947 (Ga. Super. Ct. Fulton Cnty. Aug. 14, 2023) [hereinafter Georgia Indictment] (charging Trump and eighteen others with RICO, conspiracy, and other violations in relation to the 2020 Georgia presidential vote); Indictment at 3–4, United States v. Donald J. Trump, No. 1:23-cr-00257-TSC (D.D.C. Aug. 1, 2023) [hereinafter Federal Election Indictment] (charging Trump with three criminal conspiracies to subvert the 2020 U.S. presidential election).

American democracy.[2] Though less overt, their conduct was perhaps even more consequential and far-reaching than the January 6 Attack itself. While the details are well known, they nonetheless mark a stunning departure in American history. Lawyers from a range of backgrounds and practice settings sought to undo the 2020 presidential election through a trio of coordinated actions: filing roughly sixty unsuccessful lawsuits in key battleground states to overturn their results,[3] propagating false (some outlandishly so) claims of election fraud to undermine the election's legitimacy,[4] and offering strategic advice on how to resist the peaceful transition of power after Trump's loss.[5]

In the period since the 2020 election attack, Trump lawyers have faced unprecedented scrutiny from the media, public advocacy groups, and the bar for their involvement.[6] In self-defense, they claim to have been serving as zealous

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2. *See* HOUSE JANUARY 6TH COMM., THE JANUARY 6 REPORT, H.R. REP. NO. 117-663, at 18–19, 30–43, 50 (2022).

3. SENATOR JOHN DANFORTH, BENJAMIN GINSBERG, THE HONORABLE THOMAS B. GRIFFITH, DAVID HOPPE, THE HONORABLE J. MICHAEL LUTTIG, THE HONORABLE MICHAEL W. MCCONNELL, THE HONORABLE THEODORE B. OLSON & SENATOR GORDON H. SMITH, LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION 3 (2022) (concluding that "[o]nly in one Pennsylvania case involving far too few votes to overturn the results did Trump and his supporters prevail").

4. HOUSE JANUARY 6TH COMM., *supra* note 2, at 18.

5. *See, e.g.*, Scott Cummings, *The Lawyer Behind Trump's Infamous Jan. 6 Memo Has a Galling New Defense*, SLATE (Oct. 20, 2021), https://slate.com/news-and-politics/2021/10/eastman-jan-6-trump-memo-defense.html [https://perma.cc/5QRL-552V] (discussing John Eastman's memo advising that Vice President Mike Pence could refuse to certify Congress's counting of Electoral College votes); Roy Strom, *Trump Lawyer Cleta Mitchell Targeted in Group's Ethics Complaint*, BLOOMBERG L. (Mar. 7, 2022), https://news.bloomberglaw.com/business-and-practice/trump-lawyer-cleta-mitchell-targeted-in-groups-ethics-complaint [https://perma.cc/D4S8-64FX] (discussing an ethics complaint against Trump lawyer Cleta Mitchell for allegedly "making false statements and assisting Trump in criminal and fraudulent behavior" in connection with Trump's call to Georgia Secretary of State Brad Raffensperger, asking him to "find" enough votes to overturn the election).

6. *See, e.g.*, Aaron Blake, *Can Trump's Lawyers Get in Trouble for Frivolous Lawsuits?*, WASH. POST (Dec. 11, 2020), https://www.washingtonpost.com/politics/2020/12/11/can-trumps-lawyers-get-trouble-frivolous-lawsuits/ [https://perma.cc/W7LV-EHX4] (discussing public scrutiny of Trump's legal team following the 2020 election); Carrie Johnson, *Trump Lawyers Who Spread False Election Claims Are Now Defending Themselves in Court*, NPR (July 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/68UY-ZU7H] (describing bar and court actions against Trump lawyers and public response by leader of the NAACP Legal Defense and Educational Fund); Ankush Khardori, *Trump's "Elite Strike Force Team" Falls on Hard Times*, POLITICO (July 26, 2023), https://www.politico.com/news/magazine/2023/07/26/trump-lawyers-65-project-00108120 [https://perma.cc/TP8X-XXFX] (describing legal and disciplinary actions against lawyers on Trump's legal team and noting the role of legal advocacy groups, like The 65 Project, in filing ethics complaints). For discussion of the broader role of ethical resistance to the Trump administration and Trump lawyers, see Leslie C. Levin, *"This Is Not Normal": The Role of Lawyer Organizations in Protecting Constitutional Norms and Values*, 69 WASH. U. J.L. & POL'Y 173, 187–227 (2022) (examining the role of bar organizations in safeguarding constitutional values and the courts during the Trump administration); Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. LEGAL ETHICS 235, 261–62 (2019) (describing various groups and lawyers involved in filing ethics complaints against Trump lawyers).

advocates in pursuit of client interests,[7] acting based on their own belief in the truth of election fraud—in the face of overwhelming evidence to the contrary.[8] In a prominent example, Rudolph Giuliani, the former personal lawyer for Trump and architect of the "Stop the Steal" campaign,[9] defended himself against New York State Bar disciplinary charges by claiming a right to assert that the election was stolen based on unverified information provided in the heat of battle.[10] The Trump election interference indictments significantly raise the stakes for the lawyers implicated and will affect bar action and public attitudes moving forward.[11] As it stands, key ethics cases against Trump lawyers remain unresolved, many of the lawyers remain unrepentant, and large segments of the population continue to believe "The Big Lie."[12] The legally complex and politically polarizing nature of the Trump lawyer cases poses an unprecedented challenge to the legitimacy of the profession as a self-governing body

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7.   Josh Kovensky, *Trump Lawyer Kenneth Chesebro Talks About His Role in the Runup to Jan. 6*, TALKING POINTS MEMO (June 16, 2022), https://talkingpointsmemo.com/feature/exclusive-trump-lawyer-kenneth-chesebro-talks-about-his-role-in-the-runup-to-jan-6 [https://perma.cc/X8GB-JH5U].

8.   DANFORTH ET AL., *supra* note 3, at 1; HOUSE JANUARY 6TH COMM., *supra* note 2, at 12–21.

9.   Stop the Steal emerged as a call by Trump supporters to stop Joe Biden from "stealing" the election from Trump, even though the actual intent of the campaign was to secure the opposite result. *See* Charles Homans, *How "Stop the Steal" Captured the American Right*, N.Y. TIMES MAG. (July 19, 2022), https://www.nytimes.com/2022/07/19/magazine/stop-the-steal.html [https://perma.cc/8Z4Q-SL3P].

10.   In the Matter of Rudolph W. Giuliani, 146 N.Y.S. 3d 266, 270 (N.Y. App. Div. June 24, 2021) (suspending Giuliani from practice). Giuliani publicly asserted that he would continue to air claims of election fraud based on his own purported "knowledge of the truth and . . . guaranteed sacred right of free speech." Azi Paybarah, *Where Giuliani Still Routinely Offers False Claims of Election Fraud*, N.Y. TIMES (Jan. 24, 2021), https://www.nytimes.com/2021/01/24/nyregion/giuliani-election-fraud.html [https://perma.cc/HKA9-JWVH].

11.   The federal indictment names six unidentified co-conspirators, all of whom are lawyers. Federal Election Indictment, *supra* note 1, at 3–4. They are widely reputed to be Giuliani, John Eastman, Sidney Powell, Jeffrey Clark, Chesebro, and Boris Epshteyn. Zach Schonfeld & Rebecca Beitsch, *What to Know About the 6 Co-Conspirators in Trump's Indictment*, HILL (Aug. 1, 2023), https://thehill.com/regulation/court-battles/4132487-what-to-know-about-the-six-co-conspirators-in-trumps-indictment/ [https://perma.cc/2DUE-SJMB]. The Georgia indictment named five lawyers (Giuliani, Eastman, Chesebro, Jenna Ellis, and Powell) as defendants. Georgia Indictment, *supra* note 1, at 1–2. Ellis, Chesebro, and Powell pled guilty in the case. Holly Bailey & Amy Gardner, *Trump Co-Defendant Jenna Ellis Pleads Guilty in Georgia Election Case*, WASH. POST (Oct. 24, 2023), https://www.washingtonpost.com/national-security/2023/10/24/jenna-ellis-plea-deal-georgia/ [https://perma.cc/FA4D-STTW].

12.   *See* Ben Kamisar, *Almost a Third of Americans Still Believe the 2020 Election Result Was Fraudulent*, NBC NEWS (June 20, 2023), https://www.nbcnews.com/meet-the-press/meetthepressblog/almost-third-americans-still-believe-2020-election-result-was-fraudule-rcna90145 [https://perma.cc/GUZ9-2RRG] (stating that 68 percent of Republicans believe Biden won the presidential election "due to voter fraud"). Trump's $475 million defamation suit against CNN for calling his scheme to overturn the election "The Big Lie"—a term originally used to describe Adolph Hitler's Holocaust propaganda—was dismissed. Andrew Zhang, *Judge Dismisses Trump's "Big Lie" Lawsuit Against CNN*, POLITICO (July 29, 2023), https://www.politico.com/news/2023/07/29/judge-dismisses-trump-defamation-lawsuit-00108871 [https://perma.cc/GZJ2-WWAN].

responsible for producing lawyers committed to the rule of law, raising calls for decisive bar action to prevent future democratic attacks.[13]

While this Article endorses bar action against Trump lawyer misconduct, its analysis of that misconduct is placed in service of a larger agenda: to better understand the legal profession's fraught relationship with American democracy in this particular moment of "peril."[14] As democracies around the globe are in retreat,[15] American democracy—the oldest continuous constitutional republic in the world—has confronted Trumpism as its most serious threat in a century.[16] Against the backdrop of that threat, this Article leverages attention that legal attacks on the 2020 election have brought to professional ethics to consider the role of lawyers in what scholars have labeled "democratic backsliding": the degradation of democratic institutions and practices using law rather than violence.[17] In the context of U.S. backsliding, the Trump lawyers' specific attacks on legality sit on the edge of the "new abnormal," different in kind from prior professional "crises,"[18] which must be understood in relation to longer-term shifts in political economy and the legal profession that have contributed to democratic decline and are urgent for the profession to now address.[19] In this sense, the Article uses the extreme case of Trump lawyering to explore broader professional dynamics and to consider what the 2020 election attacks may teach about structural vulnerabilities in the rule of law.

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13.   *See, e.g.*, Dennis Aftergut & Fern Smith, Opinion, *John Eastman Faces the Music for Trying to Swing the 2020 Election to Donald Trump*, SACRAMENTO BEE (June 22, 2023), https://www.sacbee.com/opinion/op-ed/article276595641.html [https://perma.cc/23JC-NFDQ]. *But see* Timothy A. Canova, *The California Bar Is on Trial in Its Persecution of Trump Campaign Lawyer John Eastman*, FEDERALIST (June 22, 2023), https://thefederalist.com/2023/06/22/the-california-bar-is-on-trial-in-its-persecution-of-trump-campaign-lawyer-john-eastman/ [https://perma.cc/T4U6-E3TG] (arguing that disbarment of Eastman "would be a terrible precedent").

14.   *See generally* BOB WOODWARD & ROBERT COSTA, PERIL (2021) (describing Trump's efforts to overturn the 2020 election).

15.   V-DEM INST., DEMOCRACY REPORT 2022: AUTOCRATIZATION CHANGING NATURE? 13–14 (2022), https://v-dem.net/media/publications/dr_2022.pdf [https://perma.cc/AJ6M-ZPB4].

16.   *US Added to List of "Backsliding" Democracies for First Time*, GUARDIAN (Nov. 22, 2021), https://www.theguardian.com/us-news/2021/nov/22/us-list-backsliding-democracies-civil-liberties-international [https://perma.cc/5H7A-2URB].

17.   *See* STEPHAN HAGGARD & ROBERT KAUFMAN, BACKSLIDING: DEMOCRATIC REGRESS IN THE CONTEMPORARY WORLD 2 (2021); Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 6 (2016); *see also* Fabio de Sa e Silva, *Good Bye, Liberal-Legal Democracy!*, 48 LAW & SOC. INQUIRY 292, 295 (2023) (reviewing studies of democratic backsliding). Although they do not emphasize the term backsliding, Steven Levitsky and Daniel Ziblatt brought widespread attention to the phenomenon. *See generally* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018).

18.   *See generally* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1996) (describing lawyers abandoning respect for the rule of law by adapting ethics to fit their self-interest); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994) (arguing that the bar turned law from a public calling to a crass business).

19.   This Article situates the legal profession in relation to law and political economy. *See* LPE PROJECT, https://lpeproject.org/ [https://perma.cc/A9WY-8X2T].

The Article's central contribution is to explore the *legal profession as a site of democratic backsliding* and illuminate the role that lawyers play in contributing to democracy's decline. While the concept of backsliding has gained significant attention over the past decade among political scientists—who debate its meaning,[20] the indices used to measure it,[21] and the degree to which it is happening worldwide[22]—it has only recently been introduced into legal scholarship on "autocratic legalism."[23] One of the central lessons from this literature is that recent successes by autocrats—including Vladimir Putin in Russia, Recep Erdoğon in Turkey, and Viktor Orbán in Hungary—dismantling democracy have occurred not through violent coups but rather through ostensibly legal action that undermines the foundations of liberal democracy.[24] For autocrats seeking to push democracy into a state of breakdown,[25] it is critical to have the law—or at least the appearance of legality—on their side.

Yet while the autocratic legalism literature helpfully spotlights *law* as an essential tool of backsliding, it has largely ignored the actors who wield this tool: *lawyers*.[26] This is a significant omission since lawyers, as the 2020 election

20. *See* Thomas M. Keck, *Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline*, 48 LAW & SOC. INQUIRY 314, 316 (2023). As an alternative to democratic backsliding, some scholars have proposed the idea of "rule of law backsliding" defined as "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party." Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 3, 10 (2017).

21. *See generally* Carl Henrik Knutsen, Kyle Marquardt, Brigitte Seim, Michael Coppedge, Amanda Edgell, Juraj Medzihorsky, Daniel Pemstein, Jan Teorell, John Gerring & Staffan I. Lindberg, *Conceptual and Measurement Issues in Assessing Democratic Backsliding* (Varieties of Democracy Inst., Working Paper No. 2023:140, 2023), https://v-dem.net/media/publications/wp_140.pdf [https://perma.cc/RT8J-LFQ9]; David Waldner & Ellen Lust, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, 21 ANN. REV. POL. SCI. 93, 96 (2018).

22. *See generally* Daniel Triesman, Is Democracy in Danger? A Quick Look at the Data (June 7, 2018) (unpublished manuscript), https://static1.squarespace.com/static/5a4d2512a803bb1a5d9aca35/t/5b19d7450e2e727770fa15f5/1528420167336/draft+june+7.pdf [https://perma.cc/X5G7-4BT5] (questioning the degree of worldwide democratic backsliding based on historical data).

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

24. *See* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 94–98 (2018) (explaining the mechanics of constitutional retrogression). Poland has been another widely discussed case of backsliding, although the recent election victory by the opposition party suggests a shift away from the right-wing populism of the ousted Law and Justice Party. *See generally* WOJCIECH SADURSKY, POLAND'S CONSTITUTIONAL BREAKDOWN (2019); Andrew Higgins, *Momentous Shift Looms for Poland as Governing Party Looks Set to Be Ousted*, N.Y. TIMES (Oct. 17, 2023), https://www.nytimes.com/2023/10/17/world/europe/poland-election-law-and-justice.html [https://perma.cc/Q8DE-8DBC].

25. *See, e.g.*, Matthew R. Cleary & Aykut Öztürk, *When Does Backsliding Lead to Breakdown? Uncertainty and Opposition Strategies in Democracy at Risk*, 20 PERSPS. ON POL. 205, 205–06 (2022).

26. *See, e.g.*, Fabio de Sa e Silva, *Law and Illiberalism: A Sociolegal Review and Research Road Map*, 18 ANN. REV. L. & SOC. SCI. 193, 199–202 (2022) (recommending that studies of autocratic

attacks revealed, serve as crucial gatekeepers to legal institutions targeted by autocratization and are necessary to authorize illiberal change by drafting new laws and officially sanctioning their constitutional validity. Indeed, precisely because lawyers are guardians of the legal legitimacy upon which backsliding depends, the legal profession is a critical arena of autocratic struggle that merits special attention. Accordingly, this Article's central aim is to set forth an agenda and outline an approach designed to shed new light on the professional paradox at the center of democratic backsliding: *why and how lawyers attack the rule of law*. Although this project focuses on the United States, where credible democracy observers have identified significant rule-of-law erosion over the past decade,[27] the goal is to introduce concepts that can be studied comparatively in other countries where backsliding is on the rise.[28]

Toward that end, Part I lays the foundation for the Article's approach, synthesizing lessons from the democracy literature to map the role of lawyers in relation to two distinct pathways of autocratization: the slow road of democratic decline and the fast track of democratic attack. It argues that situating lawyers along these pathways can help researchers evaluate *structural* determinants of lawyer participation in backsliding and the *strategies* used to effectuate it. Part II considers the role of lawyers on the slow road by exploring how *professional erosion* may predict and enable democratic backsliding. Specifically, it suggests how structural changes in legal practice and education may contribute to the deterioration of key democratic functions performed by lawyers, reducing faith in the legal system and commitment to the rule of law. Professional erosion draws attention to the democratic importance of lawyers' norms and practices, presenting their retrogression as "canaries in the coalmine" of American democracy.[29] Part III turns to look at lawyers on the fast track, examining legal strategy in the dangerous pivot from gradual democratic decline to imminent assault. Using the 2020 Stop the Steal campaign as a case study, it outlines how lawyers mobilize law in moments of crisis to threaten democracy by fusing legal and media tactics to weaponize false claims and justify invocation of extraordinary power. This *antidemocratic legal mobilization* seeks,

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legalism "pay greater heed to the social organization and the political impacts of the bar"); *see also* Scott Harshbarger & Laurel Stiller Rikleen, *Democracy Is Backsliding—The Rule of Law in Decline*, NAT'L L.J. ONLINE (Jan. 7, 2022), https://www.law.com/nationallawjournal/2022/01/07/democracy-is-backsliding-the-rule-of-law-in-decline/ [https://perma.cc/KTK9-BMU7] (asserting that "[t]oo many members of the legal profession have remained silent bystanders in the face of threats to the foundational principles of democracy").

27.   V-DEM INST., AUTOCRATIZATION TURNS VIRAL: DEMOCRACY REPORT 2021, at 18–19, 24 (2021), https://www.v-dem.net/static/website/files/dr/dr_2021.pdf [https://perma.cc/4NMV-HEGF].

28.   *See generally* Hilary Sommerlad & Ole Hammerslev, *Studying Lawyers Comparatively in the 21st Century: Issues in Method and Methodology*, *in* 2 LAWYERS IN 21ST-CENTURY SOCIETIES: COMPARISONS AND THEORIES 1 (Richard L. Abel, Hilary Sommerlad, Ole Hammerslev & Ulrike Schultz eds., 2022) (detailing methodological challenges in contemporary comparative studies of lawyers).

29.   *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11 (2003).

paradoxically, to use the symbolic power of law to undermine faith in the very legal rules designed to stop authoritarian leaders from concentrating power. Responding to dangers along both autocratic pathways, Part IV calls for changes to professional regulation and education to strengthen resilience against real-time democratic attacks and longer-term professional decline. It also makes the case for widening the comparative study of lawyers in backsliding across political contexts to bolster democratic resistance to autocratic forces in an unsettled future.

Having outlined the Article's aims, it is important to stress at the outset what lies beyond its scope. This Article does not seek to defend American democracy, which is profoundly flawed, or indict the entire American legal profession, which is complex and heterogeneous. Rather, it identifies some ways in which important albeit imperfect American institutions, particularly elections and courts, have come under recent attack and analyzes how some lawyers have contributed to that attack—while others have resisted. Recognizing American democracy's deep problems, this Article nonetheless argues that there are better versions of democracy worth struggling to achieve and that in that struggle, lawyers have special roles to play in protecting core principles and practices. The ultimate goal is not to defend a particular substantive vision of democracy but rather to explore how legal mobilization against accepted rule-of-law foundations can destabilize the conditions necessary to sustain democracy over time.

In doing so, this Article does not seek to theorize democracy, although it does grapple with the complexity of determining when legal actions cross the line from legitimate challenges within the bounds of the adversarial process to illegitimate attacks on democratic principles and institutions. This requires conceptualizing criteria for what counts as "democracy" and when legal action transgresses its core features. Toward this end, the Article defines *antidemocratic legal mobilization as the use of legal strategies, in court and behind the scenes, to attack the legitimacy of essential "democratic" (free and fair elections), "liberal" (the right to speak, assemble, and vote), and "rule of law" (judicial and prosecutorial independence) elements of liberal democracy*. Attacks on these core elements should be considered out of bounds by political leaders and lawyers of all ideological stripes. As this Article shows, the 2020 election attacks crossed into antidemocratic territory when they used false claims of voting fraud to build a legal case for rejecting valid election results. What makes such attacks different and more dangerous than even the most hard-edged conflicts over policy—which often involve mendacious claims—are that they seek to subvert the democratic rules of the game, which hold that after a bitterly fought election, the loser accepts the results. While backsliding in the United States has been associated with right-wing populism, this Article does not suggest that the ills of democracy all stem from the radicalization of political conservatives. To the contrary, by arguing for a comparative perspective, it

shows that moves against liberal democracy may also come from the political left.

Accordingly, even as this Article spotlights recent democratic attacks in America, it is attuned to the experiences of other countries and mindful of lessons from history. These lessons teach that there is no neutral point from which to measure backsliding in democracy, which is volatile and messy, and that this is not the first time that lawyers have been implicated in assaults on liberal democratic institutions. Indeed, there are numerous historical examples of democratic decline—from Nazi Germany to Fascist Italy—in which lawyers functioned as essential enablers.[30] Nevertheless, comparative research shows that contemporary democracies confront vastly different economic, political, and technological landscapes in which the tools of autocratic legalism are being deployed with new vigor and guile, and shared through global networks. The frequency and intensity with which democracy has recently come under siege around the globe—and the novel legal strategies that are being used—warrant fresh thinking about the role of the legal profession in backsliding at this particularly fraught moment.

I.
THE LEGAL PROFESSION AS A SITE OF BACKSLIDING

Appreciating the role that lawyers play in backsliding requires shifting away from the conventional view of lawyers as defenders of democracy to ask why and how some lawyers come to serve as *authors of autocracy*. Toward that end, Part I brings together the two literatures at the center of this project—on democratic backsliding and the legal profession—to present a theoretical perspective that illuminates the roles that lawyers may play along distinctive pathways of autocratization. This perspective maps lawyers' roles in relation to structural change on the *slow road of democratic decline* (the concept of *professional erosion*) and in relation to deliberate strategy on the *fast track to democratic collapse* (the concept of *antidemocratic legal mobilization*).

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30. *See*, *e.g*., INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider trans., 1992) (analyzing the role of courts in advancing Nazism); Justice Richard D. Fybel, *Judges, Lawyers, Legal Theorists, and the Law in Nazi Germany (1933–1938)*, 70 UCLA L. REV. DISCOURSE 2, 8 (2022) (stating that "courts, judges, and legal theorists all joined in the Nazi plan and implemented it with vigor"); Brandon Gatto, *Race Law Revisited: A Brief Review of Anti-Semitism and the Role of Lawyers in Fascist Italy*, 24 DIGEST: NAT'L ITALIAN AM. BAR ASS'N L.J. 1, 10–11 (2016) (discussing complicity of the Italian legal profession in supporting Mussolini's laws purging Jewish lawyers). *But see* David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS 613, 627–54 (2021) (describing two lawyers who worked for the Nazi regime but used their inside influence to mitigate its policies).

A. Pathways of Autocratization

Understanding how backsliding carves pathways toward autocracy, and the role lawyers play, requires clarifying key terms.[31] Democracy—rule by the people, for the people—is elegantly simple but notoriously hard to define. Its core principles include treating all citizens as political equals, providing each person the right to participate in self-governance, and guaranteeing inclusive and responsive structures of collective decision-making.[32] In a *liberal* democracy, majority rule is cabined by individual rights guarded by an independent judiciary alongside other institutional checks to protect individuals against majoritarian power.[33] These checks are the bedrock of what is understood as the rule of law. Autocracy is the obverse of democracy: rule by a single absolute leader or small group without genuine electoral accountability or checks and balances.[34] Autocracy is often used interchangeably with authoritarianism, although the two ideas are distinct. Autocracy refers to the form of government (singular power), while authoritarianism refers to the style of governance (demanding obedience through repressive measures).[35] Autocrats typically rule by authoritarian means, so the concepts go hand in hand, although scholars have mapped varieties of authoritarianism that contain democratic elements.[36] Illiberalism and populism

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31. *See* Keck, *supra* note 20, at 315.

32. Marc F. Plattner, *Liberalism and Democracy: Can't Have One Without the Other*, 77 FOREIGN AFFS. 171, 172 (1998).

33. Huq & Ginsburg, *supra* note 24, at 87.

34. *See* Ashley Anderson, Jason Brownlee & Killian Clarke, Autocracy: A Substantive Approach 1–2 (Jan. 7, 2001) (unpublished manuscript), https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/abc_autocracy_v4_0.pdf [https://perma.cc/MLH4-SY8F] (defining autocracy as "politically exclusive rule"); *see also* P.D. Harms, Dustin Wood, Karen Landay, Paul B. Lester & Gretchen Vogelgesang Lester, *Autocratic Leaders and Authoritarian Followers Revisited: A Review and Agenda for the Future*, 29 LEADERSHIP Q. 105, 106 (2018) (distinguishing leadership style from characteristics of followers). Autocracies vary by leadership structure, which may be organized around a ruling party, individual dictator, or military officials. Barbara Geddes, Joseph Wright & Erica Frantz, *Autocratic Breakdown and Regime Transitions: A New Data Set*, 12 PERSPS. ON POL. 313, 314 (2014). Autocracies are typically divided into "closed" autocracies, in which there are no meaningful competitive elections, and "electoral" autocracies, in which there are elections but they are marred by irregularities. Anna Lührmann, Marcus Tannenberg & Staffan I. Lindberg, *Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes*, 6 POL. & GOVERNANCE 60, 61–63 (2018).

35. Mark J. Gasiorowski, *The Political Regimes Project*, *in* ON MEASURING DEMOCRACY: ITS CONSEQUENCES AND CONCOMITANTS 105, 110 (Alex Inkeles ed., 1991) (defining traditional authoritarian regimes as those that maintain power "through a combination of appeals to traditional legitimacy, patron-client ties, and repression, which is carried out by an apparatus bound to the ruling authority through personal loyalties").

36. *Id.*; *see also* Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 J. DEMOCRACY 51, 52 (2002) (describing authoritarian regimes with formal democratic institutions whose rules are systematically violated such that the "regime fails to meet conventional minimum standards for democracy"); Dan Slater & Sofia Fenner, *State Power and Staying Power: Infrastructural Mechanisms and Authoritarian Durability*, 65 J. INT'L AFFS. 15, 19 (2011) (describing democratic mechanisms through which authoritarian regimes assert control).

are other terms associated with backsliding.[37] Illiberalism is used to characterize systems with majority-based decision-making but lacking minority rights, civil liberties, and adequate checks and balances.[38] Populism conventionally refers to efforts to assemble democratic majorities based on appeals to nationalism, xenophobia, revolutionary ideology, or other anti-pluralistic ideologies.[39] Populism, which can take on right- or left-wing forms, is portrayed as the vehicle that delivers illiberal policy and thus contributes to backsliding.[40]

In reality, democracy and autocracy live on a spectrum, and elements of both types coexist in hybrid states.[41] Even in long-term democracies, there are ongoing, often concurrent instances of progression and regression. For example, in the United States, there are well-documented patterns of state-by-state geographic disparity with respect to fundamental protections, including voting rights and political inclusion.[42] History also provides examples of contradictory democratic action: liberal and illiberal at the same time. During the 1930s and 1940s, President Franklin Delano Roosevelt presided over the New Deal, one of the largest expansions of social democracy in American history,[43] while authorizing instances of staggering authoritarian action, notably, the internment of Japanese Americans during World War II.[44] The point is that democracy is neither static nor linear. It contains internal contradictions, and the quality of democratic institutions ebbs and flows. Understanding backsliding therefore

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37.   *See* Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFFS. 22, 23 (1997); Zsolt Körtvélyesi, *The Illiberal Challenge in the EU: Exploring the Parallel with Illiberal Minorities and the Example of Hungary*, 16 EUR. CONST. L. REV. 567, 574–78 (2020).

38.   *See* Zakaria, *supra* note 37, at 23.

39.   MARK TUSHNET & BOJAN BUGARIC, POWER TO THE PEOPLE, CONSTITUTIONALISM IN THE AGE OF POPULISM 39–44 (2021) (explaining and critiquing definitions of populism).

40.   William A. Galston, *The Populist Challenge to Liberal Democracy*, 29 J. DEMOCRACY 5, 6–7 (2018).

41.   *See*, *e.g.*, Michael McCann & Filiz Kahraman, *On the Interdependence of Liberal and Illiberal/Authoritarian Legal Forms in Racial Capitalist Regimes . . . The Case of the United States*, 17 ANN. REV. L. & SOC. SCI. 483, 484 (2021). V-Dem uses the terms "democratizers" and "autocratizers" to illustrate tendencies toward different poles. V-DEM INST., *supra* note 15, at 7.

42.   *See* Democracy Maps & Equality Maps, MOVEMENT ADVANCEMENT PROJECT, https://www.mapresearch.org/ [https://perma.cc/D3YP-H848] (click on "Democracy Maps" and "Equality Maps" under "Our Work") (measuring geographic variation in voting rights and LGBTQ+ rights); *see also* Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 AM. POL. SCI. REV. 967, 968 (2023) (showing that Republican control of state legislatures reduces democratic performance).

43.   IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 231–33 (2013); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION—AND WHY WE NEED IT MORE THAN EVER 127 (2006). Some would argue that the New Deal undermined liberalism through the expansion of government into arenas of individual liberty. *See* Huq & Ginsburg, *supra* note 24, at 98 (noting that perspectives on the New Deal vary by political ideology).

44.   *See* Peter Irons, *Politics and Principles: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693, 716–17 (1984).

begins from the critical premise that democracy is never pure,[45] as underscored by the racial subordination at the core of the American democratic experience.[46]

Nevertheless, the central idea of backsliding is that democracy can fall below previously established levels and move closer to autocracy.[47] Leading democracy indices measure backsliding as drops from prior baselines in relation to fundamental properties. For example, the V-Dem Institute measures democracy based on year-to-year expert analyses of factors that include the quality of elections (who can vote, how easy it is to vote, voting irregularities, turnout, legitimacy of results), the diversity and type of political parties, the degree to which courts are independent of political rulers, the breadth and freedom of civil society organizations, media freedom, and freedom of expression.[48] Based on these metrics, V-Dem has concluded that democracy is at its lowest ebb since the fall of the Berlin Wall, which accelerated the "third wave" of global democratization.[49] As of 2023, there were only thirty-two countries classified as liberal democracies around the world, eleven fewer than the previous decade and the lowest number since 1995.[50]

45.	There is "no single set of actual institutions, practices, or values" that embody "democracy." Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, 3 J. DEMOCRACY 76, 83 (1991).

46.	Southern backlash against Black political representation during Reconstruction and the rise of Jim Crow constituted defining moments of American democratic assault. LEVITSKY & ZIBLATT, *supra* note 17, at 90–92.

47.	Aziz Z. Huq, *The Supreme Court and the Dynamics of Democratic Backsliding*, 699 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 52 (2022).

48.	MICHAEL COPPEDGE, JOHN GERRING, CARL HENRIK KNUTSEN, STAFFAN I. LINDBERG, JAN TEORELL, DAVID ALTMAN, MICHAEL BERNHARD, AGNES CORNELL, M. STEVEN FISH, LISA GASTALDI, HAAKON GJERLØW, ADAM GLYNN, SANDRA GRAHN, ALLEN HICKEN, KATRIN KINZELBACH, KYLE L. MARQUARDT, KELLY MCMANN, VALERIYA MECHKOVA, ANJA NEUNDORF, PAMELA PAXTON, DANIEL PEMSTEIN, OSKAR RYDÉN, JOHANNES VON TZELGOV, LUCA UBERTI, YI-TING WANG, TORE WIG & DANIEL ZIBLATT, V-DEM CODEBOOK 2, 58–237 (2023), https://v-dem.net/documents/24/codebook_v13.pdf [https://perma.cc/8NYW-9PJE] (using fifteen indicators related to elections, the judiciary, civil society, the media, and other factors). For metrics used by other leading democracy trackers, see MONTY G. MARSHALL & TED ROBERT GURR, POLITY5 DATA USERS' MANUAL 15–16 (2020), https://www.systemicpeace.org/inscr/p5manualv2018.pdf [https://perma.cc/ EWF8-5J82] (coding countries based on factors related to competitive elections, constraints on the chief executive, and the quality of public participation); *Freedom in the World Research Methodology*, FREEDOM HOUSE, https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology [https://perma.cc/NK9R-BSM5] (scoring countries based on ten political rights indicators and fifteen civil liberties indicators). V-Dem groups its factors into five categories: electoral ("free and fair multiparty elections"), liberal ("individual rights"), participatory ("active participation in decision-making by the people"), deliberative (political decisions that are the product of "public deliberation based on reasoned and rational justification"), and egalitarian ("citizens equally empowered to use their political rights"). Michael Coppedge, John Gerring, Carl Henrik Knutsen, Joshua Krusell, Juraj Medzihorsky, Josefine Pernes, Svend-Erik Skaaning, Natalia Stepanova, Jan Teorell, Eitan Tzelgov, Steven L. Wilson & Staffan I. Lindberg, *The Methodology of "Varieties of Democracy" (V-Dem)*, 143 BULL. SOCIO. METHODOLOGY 107, 107 tbl.2 (2019).

49.	V-DEM INST., *supra* note 15, at 12–13.

50.	V-DEM INST., DEMOCRACY REPORT 2024: DEMOCRACY WINNING AND LOSING AT THE BALLOT 12 (2024), https://v-dem.net/documents/43/v-dem_dr2024_lowres.pdf [https://perma.cc/ 6VN8-YVUN]; V-DEM INST., *supra* note 15, at 12.

As this suggests, a critical starting point for backsliding research is defining a shared definition of democracy such that backsliding is not a function of disputes over specific policy questions but rather a result of deterioration in the quality of rules of the game—which should be cause for alarm across the ideological divide and irrespective of political consequences.[51] A minimalist conception of democracy focuses on institutions and practices rather than policies. Although the precise definition of minimalist democracy is deeply contested,[52] competitive elections are widely considered a foundational element.[53] Other "floor" requirements in Tom Ginsburg and Aziz Huq's formulation include rights to speech and association (which are necessary to enable political participation) and commitment to the rule of law effectuated through institutional checks on executive power and even-handed legal administration by courts and bureaucratic actors.[54] The degradation of these democratic elements constitutes backsliding. Such degradation is driven forward by partisan political formations and therefore is unavoidably ideological. However, such formations do not inherently skew in one political direction; rather, they may emerge from the right or left depending on political context. Although democratic backsliding in places like the United States, Hungary, and Brazil is fueled by right-wing populism, scholars studying backsliding in places like Venezuela and Ecuador highlight populist mobilization by left-wing leaders using revolutionary ideology or pan-national solidarity to attack rule-of-law restraints on their power.[55] In either case, the result is executive aggrandizement through limits on the media and political dissent, the reduction or elimination of checks and balances, and the manipulation of electoral processes.

A fundamental question motivating backsliding research is "how democracies die."[56] This question has galvanized the attention of democracy scholars,[57] as well as activists, judges, and political leaders seeking to strengthen

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51.   *See* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 9 (2018).

52.   *See id.* at 8.

53.   Elections were central to classical theorists' definitions of democracy. *See* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1972); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (1942).

54.   *See* GINSBURG & HUQ, *supra* note 51, at 9–13.

55.   *See generally* Javier Corrales, *Democratic Backsliding Through Electoral Irregularities: The Case of Venezuela*, 109 EUR. REV. OF LATIN AM. & CARIBBEAN STUD. 41 (2020); Rocio Fabbro, *López Obrador's Reforms Threaten Mexican Democracy*, FOREIGN POL'Y (Mar. 23, 2023), https://foreignpolicy.com/2023/03/23/lopez-obrador-electoral-reforms-mexico-democracy-ine/ [https://perma.cc/LP6U-ZB5H].

56.   LEVITSKY & ZIBLATT, *supra* note 17, at 4 (advancing goal of understanding how democracies may enter into, or avoid, "death spirals").

57.   *See, e.g.*, Waldner & Lust, *supra* note 21, at 94 (charting the increased usage of "democratic backsliding" in the literature).

democratic resilience.[58] The academic literature distinguishes between two pathways of autocratization: slow processes of "democratic erosion" and fast processes of "authoritarian collapse."[59] Slow democratic erosion happens in incremental steps that, at each individual point, may seem defensible but over time combine to degrade the "predicates of democracy."[60] Fast collapse, in turn, happens quickly in dramatic fashion, often through invocation of emergency powers by a legitimately elected leader to grasp illegitimate control.[61] The demise of democracy in the contemporary period is far more likely to occur on the slow road through gradual internal decay than on the fast track of decisive attack.[62] Yet gradual backsliding can create *conditions of possibility* for decisive attacks to occur and thus the two pathways ultimately intersect.

To succeed without violence, autocratization requires democratic legitimation—presenting illiberal actions (like packing the court or limiting fundamental rights) as vehicles to promote the majority will.[63] To achieve this, autocrats must walk a fine line. On the one hand, to overcome existing democratic institutions, they must delegitimize the old order by promoting distrust of the status quo to justify sweeping change. On the other hand, to effectuate change, they must appear to follow legal process, violating the spirit but not the form of liberal constitutionalism. Autocrats therefore cloak attacks on the rule of law in the language of law,[64] using legal "tactics" to defend changes that undermine the "liberal" dimension of liberal democracy.[65] And for this, they need lawyers.

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58. *See, e.g.*, Jack Nicas, *He Is Brazil's Defender of Democracy. Is He Actually Good for Democracy?*, N.Y. TIMES (Jan. 22, 2023), https://www.nytimes.com/2023/01/22/world/americas/brazil-alexandre-de-moraes.html [https://perma.cc/5X9R-AXS7] (reviewing efforts by Brazilian Supreme Court Justice Alexandre de Morales to counteract antidemocratic attacks by President Jair Bolsonaro).

59. GINSBURG & HUQ, *supra* note 51, at 39.

60. *Id.* at 43.

61. *Id.* at 39. Democratic collapse still occurs through military takeover. LUCA TOMINI, WHEN DEMOCRACIES COLLAPSE: ASSESSING TRANSITIONS TO NON-DEMOCRATIC REGIMES IN THE CONTEMPORARY WORLD 129–31 (2018).

62. *See* Bermeo, *supra* note 17, at 10–13. Between 2010 and 2020, autocratization in the world's biggest backsliders occurred primarily through "often slow-moving" restrictions on the media and civil society, dissemination of official disinformation, and attacks on the quality of elections. *See* V-DEM INST., *supra* note 27, at 22; *see also* GINSBURG & HUQ, *supra* note 51, at 72 (noting how "democratic regression has become the most common form of democratic backsliding").

63. *See, e.g.*, Patrick Kingsley & Aaron Boxerman, *Israel's High Court Says It Will Review Netanyahu's Judicial Overhaul*, N.Y. TIMES (July 26, 2023), https://www.nytimes.com/2023/07/26/world/middleeast/israel-supreme-court-judicial-overhaul-netanyahu.html [https://perma.cc/6VP4-PS8X] (noting that Prime Minister Benjamin Netanyahu has defended reforms some consider to undermine judicial independence as preventing the unelected court from overruling elected lawmaker decisions).

64. LEVITSKY & ZIBLATT, *supra* note 17, at 7 (stressing the importance of political leaders "rewriting the rules" of the game to "tilt the playing field" to "subvert democracy").

65. Scheppele, *supra* note 23, at 562–63, 571; *see also* Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N.U. L. REV. 351, 355–57 (2018) (listing modalities of democratic backsliding).

A key lesson from the backsliding literature—providing the foundation for this Article's study of lawyers—is that autocratization occurs as *structural* change meets deliberate *strategy*.[66] As Kim Lane Scheppele notes, for democracies to die through legal maneuvers, they must have already been sick, a point that highlights the importance of deteriorating structural conditions that support democracy.[67] Structural change, such as rising economic inequality and polarization, can facilitate backsliding by elevating new grievances, scrambling traditional political alliances, and providing new tools for building populist support.[68] Structural change by no means guarantees backsliding will occur in any particular fashion or even at all; rather, it increases risk. For risk to become reality, backsliding requires motivated leaders with capacity to mobilize legal strategies to pit democracy against the constitutional guardrails that sustain liberalism.[69] These strategies, part of the autocratic "playbook,"[70] include formal reforms that concentrate executive power, as well as subversion of informal norms that hold leaders back from exploiting democratic loopholes for extreme partisan advantage.[71]

B.   *When Professional Pillars Erode*

A *structural* perspective looks at how macro-level trends destabilizing democracy reshape lawyer norms and practices, contributing to *professional erosion* that, in turn, enables further backsliding. Professional erosion occurs when critical democratic functions performed by lawyers weaken over time. Erosion happens through structural shifts in political economy, such as the

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66.   *See* Waldner & Lust, *supra* note 21, at 97.

67.   Scheppele, *supra* note 23, at 579 (stating "liberal constitutionalism must have been ill long before the disease became fatal, if it can be toppled so quickly").

68.   LEVITSKY & ZIBLATT, *supra* note 17, at 115, 227–30 (discussing role of economic inequality in destabilizing democracy); Janna Anderson & Lee Rainie, *Many Tech Experts Say Digital Disruption Will Hurt Democracy*, PEW RSCH. CTR. (Feb. 21, 2020), https://carnegieendowment .org/2022/10/20/understanding-and-responding-to-global-democratic-backsliding-pub-88173 [https:// perma.cc/TK47-V5PQ] (describing how technology may be used to spread disinformation); Richard H. Pildes, Opinion, *Why Are So Many Democracies Floundering?*, N.Y. TIMES (Dec. 29, 2021), https://www.nytimes.com/2021/12/29/opinion/democracy-fragmentation-america-europe.html [https:// perma.cc/55F8-2V75] (noting rise of inequality as contributing to fragmentation of politics); *see also* Gero Erdmann, *Decline of Democracy: Loss of Quality, Hybridisation and Breakdown of Democracy*, *in* REGRESSION OF DEMOCRACY? 21, 26 (Gero Erdmann & Marianne Kneuer eds., 2011) (noting correlation between lower economic performance and democratic decline); Paul Pierson & Eric Schickler, *Polarization and Durability of Madisonian Checks and Balances: A Developmental Analysis*, *in* DEMOCRATIC RESILIENCE: CAN THE UNITED STATES WITHSTAND RISING POLARIZATION? 35, 46 (Robert C. Lieberman, Suzanne Mettler & Kenneth M. Roberts eds., 2022) (noting polarization and institutional malaise as factors contributing to backsliding).

69.   Scheppele, *supra* note 23, at 557.

70.   LEVITSKY & ZIBLATT, *supra* note 17, at 181; *see also* Gábor Halmai, *Legally Sophisticated Authoritarians: The Hungarian Lex CEU*, VERFASSUNGSBLOG (Mar. 31, 2017), https://verfassungs blog.de/legally-sophisticated-authoritarians-the-hungarian-lex-ceu/ [https://perma.cc/97AR-V8KQ] (describing the use of "legal tricks" by "legally sophisticated authoritarians").

71.   On the importance of informal norms, see LEVITSKY & ZIBLATT, *supra* note 17, at 102.

marketization of legal practice, and through specific acts of policy-making, such as the reduction in legal aid, which weaken the profession's democratic role over time. Understanding this erosion (the focus of Part II) requires establishing the foundation from which it occurs, which rests on three *professional pillars* essential to the rule of law: *fairness*, *independence*, and *authority*.

Fairness. In a self-regulating profession, lawyers monopolize the practice of law and must ensure their services are available to everyone irrespective of resources, identity, or power as a matter of fundamental fairness.[72] Accordingly, lawyers in democracy are expected, through legal aid and pro bono work, to guarantee meaningful access to justice. In the civil system, this requires helping individuals vindicate rights against more powerful legal actors.[73] In the criminal system, this requires providing quality defense to individuals confronting a loss of liberty at the hand of the state.[74] To balance the scales of justice, lawyers are further expected to counteract systemic resource or political disadvantages by representing underrepresented groups through public interest law and supporting legal mobilization by democratic movements.[75]

Independence. Given that lawyers control access to legal institutions and the meaning of law, they serve a critical gatekeeping role screening legitimate legal claims.[76] This role applies in court, where lawyers must assert nonfrivolous legal arguments and truthful factual claims,[77] and outside of court, where lawyers must advise clients on the legality of their prospective behavior and vouch for client actions in regulatory settings.[78] Because law is indeterminate, lawyers in both arenas are required to exercise ethical discretion to ensure client legal

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72. Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591, 1607 (2009) ("If lawyers do not protect individuals' access to a properly functioning legal system, no one will.").

73. DEBORAH L. RHODE, ACCESS TO JUSTICE 5 (2004); Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 53–54 (2019); Martin Böhmer, *Equalizers and Translators: Lawyers' Ethics in a Constitutional Democracy*, 77 FORDHAM L. REV. 1363, 1380–81 (2009).

74. Shaun Ossei-Owusu, *Civil vs. Criminal Legal Aid*, 94 S. CAL. L. REV. 1561, 1566 (2021).

75. *See generally* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND (1989) (documenting the growth and functions of public interest law organizations); Catherine Albiston, *Democracy, Civil Society, and Public Interest Law*, 2018 WIS. L. REV. 187 (2018) (empirically analyzing public interest law organizations in relation to their role in giving voice to citizen interests and encouraging civic engagement); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014) (describing the role of lawyers in supporting democratic social movements); Shaun Ossei-Owusu & Atinuke Adediran, *The Racial Reckoning of Public Interest Law*, 12 CALIF. L. REV. ONLINE 1 (2021) (discussing the need for greater diversity within public interest law to promote representation of marginalized groups).

76. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 72–74 (1988); Limor Zer-Gutman & Eli Wald, *Is the Legal Profession Too Independent?*, 105 MARQ. L. REV. 341, 343 (2021).

77. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023) (prohibiting lawyers from bringing a legal claim "unless there is a basis in law and fact for doing so that is not frivolous"); *id.* r. 3.3(a) (stating lawyers must not make "a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer").

78. *Id.* r. 2.1 (requiring lawyers to advise clients based on "independent professional judgment").

claims align with principles of systemic justice.[79] This means that even as lawyers zealously advocate client interests, they must remain ethically independent from clients to guarantee that they do not wield law contrary to its public purposes. Public lawyers, including prosecutors and government legal advisors, have special obligations in this regard, guaranteeing that when legal decisions have a policy impact, they are made in the public interest and not for partisan advantage.[80]

Authority. In an adversarial system based on the principle that the clash of opposing positions is a vehicle to assign rights and allocate blame, lawyers make legal arguments based on mutually agreed-upon facts established through evidentiary processes of discovery and testimony at trial. As zealous advocates, lawyers are permitted to make aggressive legal arguments—to "spin" the law in favor of clients—but they are not allowed to fabricate facts, ignore relevant legal authority, or attack the system's legitimacy. In this way, lawyers ensure the authority of law, which depends on the integrity of legal outcomes and mutual tolerance between legal adversaries, who must respect each other's positions (even if they disagree) and accept the legitimacy of results (especially when they lose).

While these pillars are central to functionalist accounts of lawyers as defenders of democracy[81] and find support in the ethics rules,[82] American lawyers as a whole have historically not lived up to their standards. The U.S. legal profession has an ignominious history of limiting admission to maximize

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79.	*See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 9–11 (1998) (arguing for contextual judgment to promote justice); W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 11 (2012) (proposing to manage discretion by following formal legal principles); *see also* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Code*s, 6 GEO. J. LEGAL ETHICS 241, 273–75 (1992) (noting how legal ethics codification expanded lawyers' exercise of discretion).

80.	Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 611 (1999) (noting prosecutors have traditionally been defined by their "duty to seek justice").

81.	*See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 269, 281 (Phillips Bradley trans., 1945) (1835) (defending the American legal profession as a mediating force in democracy); Terence C. Halliday & Lucien Karpik, *Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism*, *in* LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES 15, 15–64 (Terence C. Halliday & Lucien Karpik eds., 1997) (analyzing the role of the legal profession in struggles for liberal democracy); Talcott Parsons, *The Law and Social Control*, *in* THE SOCIOLOGY OF LAW: CLASSICAL AND CONTEMPORARY PERSPECTIVES 334, 337 (A. Javier Treviño ed., 2008) (noting that in democracy, lawyers are expected to discharge their "public responsibility" by "smoothing over" social conflicts arising out of client representation).

82.	*See generally* MODEL RULES OF PRO. CONDUCT pmbl. 6, r. 2.1, 3.1, 3.3, 3.8, 6.1, 6.3 (AM. BAR ASS'N 2023).

profit and prestige,[83] excluding racial and religious minorities,[84] designing rules to minimize public accountability,[85] and failing to police lawyer misconduct.[86] The legal profession, like democracy itself, is deeply flawed. Nevertheless, as with democratic backsliding, professional decline can be measured relative to "crises" that shift baselines over time. Almost thirty years ago, David Luban and Michael Millemann argued that "[t]he current Crisis is unique in several respects," suggesting "that it might be The Big One."[87] One aspect of "The Big One" was what Yale Law School Dean Anthony Kronman called the decline of "political fraternity" caused by lawyers' pursuit of profit and the polarization of politics, unraveling lawyers' commitment to the public good.[88] Since that time, there has been a further unraveling, from The Big One to The Big Lie,[89] shaped by the intensification of these longer-term trends and new challenges—the rise of populism, conspiracism, and authoritarianism—that intensify professional erosion and increase the risk of attacks on the rule of law.

C. *When Lawyers Attack the Rule of Law*

A strategic perspective on backsliding looks at the legal strategies and materials lawyers use to advance *antidemocratic legal mobilization*, understood as legal moves against the core elements of liberal democracy outlined above: competitive elections, fundamental rights to political participation, and judicial and administrative checks on power. By tracing legal methods, this perspective highlights the range of tools lawyers may draw upon to target democratic elements—from redrafting formal legal rules on elections (such as who may vote and when) to degrade the quality of democratic participation to dismantling

83. RICHARD L. ABEL, AMERICAN LAWYERS 23–25 (1989) (arguing that the professional project through the twentieth century centered on market control to promote lawyer profit and status).

84. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 127 (1976). Discrimination carries on at the highest levels of the profession. *See, e.g.*, Matt Hamilton & Harriet Ryan, *Revenge Served Ice Cold? Top L.A. Law Firm Outs Former Partners' Racist, Sexist Emails*, L.A. TIMES (June 7, 2023), https://www.latimes.com/california/story/2023-06-07/revenge-delivered-ice-cold-top-l-a-law-firm-outs-former-partners-racist-sexist-emails [https://perma.cc/M8QJ-YS3J].

85. *See* Benjamin H. Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 433 (2001) (expressing skepticism of lawyers' claim to serve the public interest).

86. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 4–6 (2000) (describing inadequate bar enforcement of ethical violations).

87. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 32 (1995); *see also* Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549, 551 (1996) (noting recurrent "laments" over the decline of professionalism).

88. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 93 (1993); *see also* Rachel F. Moran, *The Three Ages of Modern American Lawyering and the Current Crisis in the Legal Profession and Legal Education*, 58 SANTA CLARA L. REV. 453, 507–08 (2019) (analyzing epochs of professional crisis).

89. *See generally* JONATHAN LEMIRE, THE BIG LIE: ELECTION CHAOS, POLITICAL OPPORTUNISM, AND THE STATE OF AMERICAN POLITICS AFTER 2020 (2022).

informal constraints on executive authority (such as prosecutorial independence) in direct attacks on the rule of law. As this suggests, strategic analysis focuses on precisely how legal mobilization contributes to democratic backsliding, whether it occurs in the form of democratic decline on the slow road or democratic takedown on the fast track. While the temporal line between decline and collapse can be blurry, the strategies are distinctive (as depicted in Figure 1).

Figure 1. Pathways of Autocratization
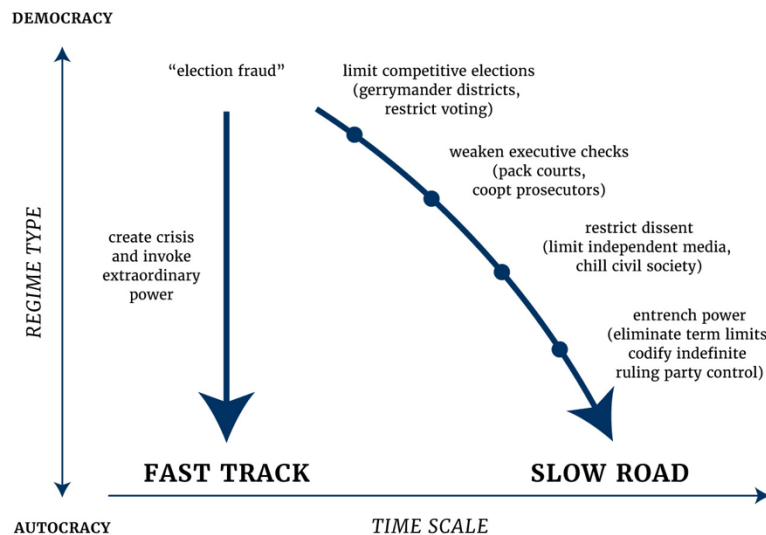
Strategies associated with decline target formal constitutional rules and informal democratic norms over longer time frames, often justified in terms of legitimate policy concerns and carried out through technically legal means. Such strategies include restricting the franchise through gerrymandered voting districts and taking control of electoral commissions, packing courts and prosecutors' offices with loyalists, suppressing free speech and political dissidents to hamper the opposition, and relaxing or eliminating term limits.[90] The strategies of collapse, in contrast, hinge on taking advantage of crisis to attack rule-of-law checks on executive power toward the goal of asserting sweeping systemic change justifying autocratic control. A prime example of this is suspending elections based on a declared state of emergency or refusing to

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90. *See* GINSBURG & HUQ, *supra* note 51, at 98–119; Scheppele, *supra* note 23, at 549–56. Slow road strategies are not inherently right or left, as seen in Democrats' calls to pack the Supreme Court in order to change its ideological direction. Charlie Savage & Katie Glueck, *Biden Punts on Expanding the Supreme Court, Calling for a Panel to Study Changes*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/us/politics/biden-supreme-court-packing.html [https://perma.cc/4YFV-P2JT] (noting liberal calls to expand the Court).

hand over power after an electoral loss based on false claims of fraud.[91] As Figure 1 highlights, on the fast track and slow road, elections are key targets of autocrats—on the left (Hugo Chávez in Venezuela) and right (Victor Orbán in Hungary)—since winning elections is typically the first step for aspiring autocrats to consolidate power.[92]

Along both pathways, backsliding rests on legal changes designed to undermine liberal democratic principles and practices,[93] and thus it should be possible to map points on the curves of democratic decline where it is necessary for lawyers to authorize illiberal change. On the slow road, this may happen for the purpose of partisan advantage,[94] though not part of a systematic plan to dismantle democratic guardrails.[95] Gerrymandering is an example. Those in power, irrespective of party, may draw voting districts to maximize seats and ensure incumbency. However, doing so contributes over the longer term to reducing fair electoral representation and increasing polarization. In another example, Steven Levitsky and Daniel Ziblatt point to the Obama administration's extensive reliance on executive action to work around legislative gridlock as a form of backsliding, authorizing the maximalist use of institutional prerogatives that circumvented norms about how law should be made.[96] Because slow erosion occurs through partisan politics, it is driven forward by political actors with specific ideological goals. Although those actors may not themselves explicitly embrace antidemocratic agendas, opportunistic backsliding may nonetheless help create an environment in which radical ideas grow—planting autocratic seeds whose harvest may be reaped by later leaders. The shift from opportunistic backsliding measures to specific legal changes designed to consolidate autocratic rule requires a leader who aspires to play the autocrat—and lawyers willing to back him up. Considering legal mobilization in relation to partisan opportunism and crisis points of political attack helps conceptualize distinctive roles for lawyers in backsliding democracy.

First, in the context of long-term decline, lawyers serve as active *enablers* of backsliding by conceptualizing and advocating legal reforms that erode core democratic elements—without the intent of installing a specific autocratic leader in power. In the United States, for example, lawyers have been instrumental in writing voting laws that purport to police fraud but have the effect of suppressing

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91.   For an analysis of the democratic dangers of COVID-era states of emergency in Hungary, see Zoltan Szente & Fruzsina Gardos-Orosz, *Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?*, *in* PANDEMOCRACY IN EUROPE: POWER, PARLIAMENTS AND PEOPLE IN TIMES OF COVID-19, at 155, 177 (Matthias C. Kettemann & Konrad Lachmayer eds., 2022).

92.   Scheppele, *supra* note 23, at 548.

93.   Anna Lührmann & Staffan I. Lindberg, *A Third Wave of Autocratization Is Here: What Is New About It?*, 26 DEMOCRATIZATION 1095, 1099 (2019).

94.   LEVITSKY & ZIBLATT, *supra* note 17, at 11–19 (reviewing cases of Adolph Hitler, Benito Mussolini, and Hugo Chávez).

95.   *See* Keck, *supra* note 20, at 317.

96.   LEVITSKY & ZIBLATT, *supra* note 17, at 163.

voter turnout among low-income and minority voters,[97] and thus degrade the integrity of electoral processes and undermine faith in the legitimacy of outcomes. Looking more broadly at strategies on each point of the curve of slow democratic decline, lawyers are needed to *design, draft, and defend* the laws that contribute to backsliding. While some antidemocratic legal actions are easily identifiable, as when government lawyers enter court to defend laws restricting civil society organizations and oppositional political parties,[98] many occur behind the scenes and thus evade public scrutiny, as when lawyers identify constitutional loopholes permitting changes in election law favoring the ruling party, ghostwrite laws to pack the high court without running afoul of formal constitutional constraints, or author legal opinions that provide losing incumbent candidates a roadmap for how to declare a state of emergency that circumvents legal requirements for certifying election results.

Second, at moments of political crisis, when autocrats make decisive moves against democracy to consolidate power in the face of rules to the contrary, they must enlist lawyers as *conspirators* willing to perform the crucial role of legalizing authoritarian action. Here, lawyers renounce their independence to directly participate in attacking the rule of law to serve the interests of a particular autocratic leader—assisting in fomenting constitutional crisis and invoking emergency power designed to undermine legal barricades against authoritarianism.[99] Lawyer conspirators, as Part III's analysis of Stop the Steal highlights, must be willing to walk up to and cross ethical and legal lines in the service of power. The remainder of this Article explores lawyers' roles at the intersection of structure and strategy, considering how professional erosion on the long road of backsliding contributes to an environment in which antidemocratic legal mobilization on the fast track has an especially potent impact.

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97. SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION 136–37 (2019).

98. In Hungary, cases have been brought against the Orbán government in European courts challenging laws restricting higher education institutions with foreign ties, effectively banning the Soros-funded Central European University, and requiring registration of foreign-funded nongovernmental organizations serving migrants, chilling the activities of Soros-backed groups. *See* Case C-66/18, Comm'n v. Hungary, ECLI:EU:C:2020:792, ¶ 228 (Oct. 6, 2020) (ruling against the foreign higher education law on the ground that it violated the fundamental right to academic freedom); Case C-78/18, Comm'n v. Hungary, ECLI:EU:C:2020:476, ¶¶ 60–65 (June 18, 2020) (ruling against Hungary's 2017 Transparency of Organisations Supported from Abroad law on the ground that it violated the right of association).

99. In an example from the 2020 U.S. election, discussed more fully in Part III.F *infra*, when White House Counsel warned Justice Department lawyer Jeffrey Clark that his plan to help Trump stay in office would result in "riots in every major city in the United States," Clark allegedly responded: "Well, . . . that's why there's an Insurrection Act"—implying that Trump could mobilize the military to stay in power. Federal Election Indictment, *supra* note 1, at 30.

II.

HOW PROFESSIONAL EROSION WEAKENS DEMOCRACY

This Part introduces a framework for examining the erosion of professional pillars presented in Part I along the slow road of democratic decline. It links *professional erosion* to three fundamental democratic challenges: *inequality*, which undercuts the profession's commitment to fairness; *polarization*, which undermines professional independence; and *disinformation*, which subverts professional authority. Drawing upon the U.S. case, this Part theorizes professional erosion as a *product and producer* of backsliding, shaped by and contributing to long-term trends that weaken democracy by reducing trust in the legal system and commitment to the rule of law.

A. Inequality

Backsliding risk grows in the seedbed of inequality,[100] visible in the twin rise of high-end wealth and low-end precarity,[101] which degrades faith in the fairness of an economy that many come to believe is "rigged."[102] Economic inequality challenges the profession's democratic role in promoting fairness by reducing *access to* lawyers and increasing stratification *among* lawyers. This creates democratic risk by reducing public trust in the legal system and weakening lawyer commitment to professional norms supporting the rule of law.

Unequal access to lawyers subverts fairness in predictable ways: decreasing the ability of low-income people and members of marginalized groups to enter the legal system with representation while increasing the power of wealthy individuals and corporations to mobilize law to their advantage. Increasing inequality is evident in the well-documented decline of civil legal aid funding in

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100. *See* Ethan B. Kapstein & Nathan Converse, *Poverty, Inequality, and Democracy: Why Democracies Fail*, 19 J. DEMOCRACY 57, 61, 66 (2008) (showing that countries with higher levels of inequality are more likely to experience reversals of democratization). *But see* Stephan Haggard & Robert R. Kaufman, *Inequality and Regime Change: Democratic Transitions and the Stability of Democratic Rule*, 106 AM. POL. SCI. REV. 495, 495 (2012) (questioning the degree to which socioeconomic inequality has contributed to recent democratic breakdowns).

101. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 398–402, 420 (Arthur Goldhammer trans., Belknap Press 2014) (2013) (discussing the unprecedented growth of inequality in the United States since the 1970s); *see also* Thomas Piketty & Emmanuel Saez, *Top Incomes and the Great Recession: Recent Evolutions and Policy Implications*, 61 IMF ECON. REV. 456, 458–59 (2013) (describing the "U-shaped evolution of top income shares in the United States over the past century," peaking during the Great Depression and again in the 2000s). Those on the bottom of economic hierarchies are disproportionately people of color. *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155 (2013).

102. *See* LEVITSKY & ZIBLATT, *supra* note 17, at 22; Will Wilkinson, *Bernie Sanders Is Right the Economy Is Rigged. He's Dead Wrong About Why*, VOX (July 15, 2016), https://www.vox.com/policy-and-politics/2016/7/15/12200990/bernie-sanders-economy-rigged [https://perma.cc/4YCL-UZYY].

America. Despite persistent unmet legal need,[103] federal support for legal aid fell by 50 percent between 1980 and 2020, partly the result of conservative cutbacks to a program historically aligned with progressive legal activism.[104] This has resulted in a low ratio of legal aid lawyers relative to income-eligible clients,[105] exacerbated by lawyers' geographic concentration away from the nonurban poor.[106] Although private funding has partially filled in for dwindling federal dollars[107] and pro bono service has grown,[108] empirical studies suggest that private charity privileges cases reflecting donor interest, reinforcing a mismatch between legal need and resources.[109] On the criminal side, the dearth of lawyers for indigent defendants has reached crisis proportions.[110]

Although structural inequality creates barriers to access, lawyers themselves contribute to the problem in ways that can reinforce the public perception that they place their own professional well-being over the public interest. Bar organizations have led repeated attacks on legal technology

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103.   *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 13 (2009), https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [https://perma.cc/4AJV-URVD].

104.   LEGAL SERVS. CORP., 2020 BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS 6 (2020), https://lsc-live.app.box.com/s/amlce75n3jdggjw6omzjewm61eghavzt/file/872174451862 [https://perma.cc/FRD5-ZHZA]; David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 212–13, 220 (2003). Trump's 2018 budget proposed eliminating the Legal Services Corporation (LSC) altogether. Debra Cassens Weiss, *Trump Budget Eliminates Legal Services Corp. Funding*, ABA J. (Mar. 16, 2017), https://www.abajournal.com/news/article/trump_budget_eliminates_funding_for_legal_services_corp [https://perma.cc/T259-J6RN].

105.   In 2020, there were 5,529 LSC-funded lawyers in the positions of staff attorney, managing attorney, supervising attorney, and director of litigation (closing 650,462 cases). LEGAL SERVS. CORP., *supra* note 104, at 48, 72. There were 53.9 million people eligible for LSC-funded assistance. *Id.* at 3.

106.   *See* Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 19–21 (2018).

107.   LEGAL SERVS. CORP., 2022 BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS 12 fig.2.2 (2022), https://lsc-live.app.box.com/s/h2bajpr3gps4s4a1iio6fwiddhmu1nwb [https://perma.cc/CWY7-9Z87] (noting that private grants and interest on lawyers' trust funds accounted for nearly 12 percent of total funding for LSC-funded organizations in 2022 and that non-LSC grants, including attorney's fees and cy pres awards, constituted another 18 percent).

108.   Steven A. Boutcher, *Private Law Firms in the Public Interest: The Organizational and Institutional Determinants of Pro Bono Participation, 1994-2005*, 42 LAW & SOC. INQUIRY 543, 551 (2017).

109.   Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035, 1042–46 (2020); Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 UCLA L. REV. 507, 536 (2012).

110.   *See* MARA BEEMAN & CLAIRE BUETOW, NAT'L INST. JUST., *GIDEON* AT 60: A SNAPSHOT OF STATE PUBLIC DEFENSE SYSTEMS AND PATHS TO SYSTEM REFORM 20 (2023), https://www.ojp.gov/pdffiles1/nij/307325.pdf [https://perma.cc/8GLE-ZL45] (citing "conservative estimate" that "73% of county-based [public defender] offices and 79% of state-based offices exceeded" national caseload guidelines, which are themselves too high for defenders to devote adequate time to individual clients); Mary Sue Backus & Paul Marcus, *The Right to Counsel: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1566 (2018) (concluding that indigent defense remains in crisis due to underfunding sixty years after *Gideon v. Wainwright*).

platforms, like Legal Zoom, designed to provide low-cost guidance on completing and filing legal forms in areas like family law, on the ground that such platforms are engaged in the unauthorized practice of law threatening the livelihood of licensed lawyers.[111] Some legal aid leaders have resisted regulatory innovations designed to liberalize licensing nonlawyers to provide important services for low-income people facing problems that do not require full-scale legal representation. In California, a recent effort by the bar to create a "regulatory sandbox" to relax licensure rules for nonlawyers was killed by a legislative maneuver supported by legal aid leaders, who expressed concerns about quality but also appeared motivated by protecting their turf.[112]

While inequality restricts options for effective representation at the low end of the income spectrum, it also empowers those on the high end to mobilize law in their interests. There are obvious ways that this plays out, such as large corporate clients using lawyers to fend off regulatory oversight and lobby for more favorable legal rules. Less well-documented is how resources may influence enforcement of ethical regulations that injure vulnerable clients the bar is charged to protect. On the extreme end of this problem is the high-profile case of Los Angeles consumer lawyer Tom Girardi, who built one of the nation's most powerful plaintiff's firms, Girardi Keese, featured in the movie *Erin Brockovich*. Contrary to its heroic on-screen depiction, Girardi's firm operated as a Ponzi scheme by stealing funds from clients (including those in the Brockovich case) over a four-decade period, allowing Girardi to finance a lavish lifestyle, build influence in Democratic politics[113]—and fend off the California State Bar.[114] Despite over two hundred complaints against him for inappropriately handling client funds, Girardi maintained a "pristine" state bar record by plying bar investigators and officials with gifts.[115] It was only after a federal court judge referred Girardi to criminal prosecutors for stealing settlement money from families of the 2018 Lion Air crash, followed by a public records petition by the *L.A. Times*, that the extent of client complaints against Girardi—and the bar's

111.   BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION 93, 210–12 (2015). For a critique of the bar's response to the access to justice problem, see generally Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J.F. 228 (2022) (criticizing bar rules limiting who can help Americans with legal problems).

112.   Stephanie Francis Ward, *California Bill Signed into Law Restricts State Bar Sandbox Proposals*, ABA J. (Sept. 21, 2022), https://www.abajournal.com/news/article/california-bill-signed-into-law-restricts-state-bar-sandbox-proposals [https://perma.cc/NG84-TLJF].

113.   Matt Hamilton & Harriet Ryan, *"Real Housewives" Attorney Tom Girardi Used Cash and Clout to Forge Powerful Political Connections*, L.A. TIMES (Mar. 6, 2021), https://www.latimes.com/california/story/2021-03-06/tom-girardi-used-cash-clout-seek-political-favors [https://perma.cc/6KD5-WB4V].

114.   Harriett Ryan & Matt Hamilton, *Vegas Parties, Celebrities and Boozy Lunches: How Legal Titan Tom Girardi Seduced the State Bar*, L.A. TIMES (Mar. 6, 2021), https://www.latimes.com/california/story/2021-03-06/how-california-state-bar-enabled-tom-girardi [https://perma.cc/U9S3-C5R7].

115.   *Id.*

complicity in covering them up—became known, forcing the bar to replace top management and institute substantial new controls.[116]

Given such failures, it is not surprising that the public holds lawyers in low regard.[117] Declining public trust in lawyers poses democracy risks when it contributes to doubts about the integrity of legal institutions. Recent scholarship suggests that faith in the legal system decreases in relation to perceptions of lawyer unethicality,[118] a finding that is consistent with the downward trend of public confidence in courts.[119] Controversy over Justice Clarence Thomas's receipt of expensive gifts and trips from billionaire real estate developer Harlan Crow, who funds conservative organizations with issues in front of the Supreme Court, has contributed to all-time low levels of confidence in the Court, raising concerns about its democratic legitimacy.[120] Taken together, the perception that the "haves come out ahead" based on unequal access to legal resources in the adversarial system,[121] combined with concerns about judicial impartiality at the highest level, may reinforce public belief that the legal system is subject to capture by powerful actors and feed skepticism of professional independence in moments of crisis.

Increasing inequality among lawyers also contributes to backsliding risk in underappreciated ways that warrant further scrutiny. The American legal profession has long been stratified. Lawyers' economic fortunes have depended

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116. Matt Hamilton & Harriet Ryan, *Another Legacy for Tom Girardi: Tighter Regulation of California Lawyers*, L.A. TIMES (Dec. 28, 2022), https://www.latimes.com/california/story/2022-12-28/another-legacy-for-tom-girardi-tighter-regulation-of-california-lawyers [https://perma.cc/XW2F-8HFC].

117. Fully a third of Americans believe "lawyers contribute not very much or nothing at all" to society. *Public Esteem for Military Still High*, PEW RSCH. CTR. (July 11, 2013), https://www.pew research.org/religion/2013/07/11/public-esteem-for-military-still-high/ [https://perma.cc/A93T-Z7JA].

118. Matthew Kim, *For Appearance's Sake: An Empirical Study of Public Perceptions of Ethical Dilemmas in the Legal Profession*, 83 OHIO ST. L.J. 530, 566–67 (2022) (finding that public trust in the legal system declines in response to information about lawyer ethical breaches).

119. NAT'L CTR. FOR STATE CTS., STATE OF THE STATE COURTS 5, 8 (2022), https://www.ncsc.org/__data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf [https://perma.cc/E3SJ-KBXB] (finding a year-to-year drop in the percentage of voters having some or a great deal of confidence in state courts).

120. *See* Jeffrey M. Jones, *Confidence in Supreme Court Sinks to Historic Law*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/PCQ5-3FJL]; Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/P9DV-AZHT]; *see also* Danny Hakim & Jo Becker, *The Long Crusade of Clarence and Ginni Thomas*, N.Y. TIMES MAG. (Feb. 22, 2022), https://www.nytimes.com/2022/02/22/magazine/clarence-thomas-ginni-thomas.html [https://perma.cc/7VNX-KVTT]. In response to concerns about public trust, in 2023, the Supreme Court for the first time adopted its own code of conduct, which commentators hailed as a positive first step, although it does not contain an enforcement mechanism or prohibit the acceptance of gifts. Abbie VanSickle & Adam Liptak, *Supreme Court Adopts Ethics Code After Reports of Undisclosed Gifts and Travel*, N.Y. TIMES (Nov. 13, 2023), https://www.nytimes.com/2023/11/13/us/politics/supreme-court-ethics-code.html [https://perma.cc/RNW2-XAPX].

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

on whether they serve clients in the individual or corporate "hemispheres," with corporate practice generally associated with higher income, prestige, and job security.[122] Over the past half century, economic divisions have grown more extreme. In 1980, most lawyers earned close to the profession's median income with a small proportion of outliers.[123] Thirty years later, the middle range had narrowed and the percentage of high earners had grown significantly, producing a bimodal income distribution.[124] By 2013, in the private law sector, the average salary spread between lawyers in Big Law and those in small firms was $125,000.[125] Economic inequality is compounded by persistent gender and racial inequality, with women underrepresented in the top levels of law firms and lawyers of color underrepresented in the profession overall.[126] Although lawyers are no longer "walled off" in separate hemispheres, their career trajectories are deeply shaped by whether lawyers work in "elite" or "nonelite" sectors, resulting in career outcomes that "both reflect and reproduce inequalities within society writ large."[127] This inequality, alongside greater specialization,[128] contributes to

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122. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 196–97 (1982); JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 163 tbl.7.1 (2005) [hereinafter URBAN LAWYERS] (noting difference in mean income between lawyers whose clients are businesses versus people).

123. David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 93 (1983) (noting that 60 percent of lawyers earned between $25,000 and $75,000 while only 5 percent earned over $100,000 in 1980). Between 1975 and 1995, salaries of lawyers for corporate and individual clients diverged significantly. URBAN LAWYERS, *supra* note 122, at 162–63.

124. William D. Henderson, *How the "Cravath System" Created the Bi-Modal Distribution*, EMPIRICAL LEGAL STUD. (July 18, 2008), http://www.elsblog.org/the_empirical_legal_studi /2008/07/how-the-cravath.html [https://perma.cc/Y93C-6WMZ]; *see also* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 112–13 (2012) (reporting data for 2010).

125. *See* GABRIELE PLICKERT, AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 45 tbl.5.1 (2014), https://www.americanbarfoundation.org/wp-content/uploads/2022/12/after-the-jd-phase-3.pdf [https://perma.cc/S745-H49X]. In 2014, about half of surveyed lawyers reported starting salaries of $40,000 to $65,000, while 17 percent earned an average of $160,000. *Class of 2014 Bimodal Salary Curve*, NAT'L ASS'N OF L. PLACEMENT (Aug. 2015), www.nalp.org/class_of_2014_salary_curve [https://perma.cc/56M7-W4E2]. By 2018, data suggested a trimodal distribution, with the largest group of new lawyers earning between $50,000 to $60,000, while large firm lawyers were grouped into two high-income categories. Joshua Holt, *Lawyer Salaries Are Weird*, BIG L. INVESTOR (Apr. 1, 2023), https://www.biglawinvestor.com/bimodal-salary-distribution-curve/ [https://perma.cc/CGF5-JHNW].

126. ROBERT L. NELSON, RONIT DINOVITZER, BRYANT G. GARTH, JOYCE S. STERLING, DAVID B. WILKINS, MEGHAN DAWE & ETHAN MICHELSON, THE MAKING OF LAWYERS' CAREERS: INEQUALITY AND OPPORTUNITY IN THE AMERICAN LEGAL PROFESSION 45, 132 (2023); AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 33 (2020), https://www.american bar.org/content/dam/aba/publications/professional_lawyer/27-1/pln-27-1-issue.pdf [https://perma.cc/X ZA9-QGR8]; *Glass Ceiling Report: Women in Law*, LAW360 (Aug. 22, 2022), https:// www.law360.com/articles/1517878/the-2022-glass-ceiling-report-women-in-law [https://perma.cc/3JR E-DMJW].

127. NELSON ET AL., *supra* note 126, at 55–56. Stratification has been influenced by law school rankings, which correlate to job opportunities. *See* TAMANAHA, *supra* note 124, at 64, 78, 181.

128. URBAN LAWYERS, *supra* note 122, at 27.

the fragmentation of the profession,[129] causing lawyers to identify more strongly with specialized fields and practice communities than the wider bar.[130]

Intraprofessional stratification may influence how some lawyers become connected to radical movements. There is comparative evidence that lawyers on the professional margins, furthest away from the legal mainstream and state power, may be more susceptible to being recruited into radical causes.[131] Nonelite lawyers may be more likely to be sympathetic to extremist views and more open to involvement in controversial political cases as a way to enhance professional status and potentially attract clients.[132] They may be less concerned about the negative economic fallout associated with polarizing legal cases, often a deterrent for lawyers in Big Law, and may seek to use radical cases to bolster political bona fides in pursuit of other career goals like running for public office.[133] In addition, because of their lower status relative to the elite bar—and often their geographic distance from liberal urban centers—lawyers in small-scale private practice, working in politically conservative communities, may identify more strongly with ideological networks than with professional peers. Strong political identification has long been a hallmark of solo and small-firm lawyers on the left affiliated with the National Lawyers Guild.[134] The 2020 election attack analyzed in Part III suggests that political identification also may be important on the conservative side as many lawyers who took on post-election lawsuits in battleground states were recruited from small nonurban firms with strong ties to the conservative legal movement.

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129. Ann Southworth, *Our Fragmented Profession*, 30 GEO. J. LEGAL ETHICS 431, 433 (2017).

130. *See* Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 561 (2005).

131. Maria da Gloria Bonelli, The Professional Ecology of Lawyers, Legal Ethics, and Democratic Backsliding in Brazil 2 (Nov. 2023) (unpublished manuscript) (draft on file with author).

132. Psychology research suggests that status anxiety can affect job satisfaction and motivate people to seek status through job choices. *See* Anna Keshabvan & Martin V. Day, *Concerned Whether You'll Make It in Life? Status Anxiety Uniquely Explains Job Satisfaction*, 11 FRONTIERS PSYCH., no. 1523, 2020, at 1, 1. For an extreme example of the quest for status, see Emily Jane Fox, *"I Want to Be Really F--king Clear": The Epic, Inconceivable, Totally Predictable Fall of Michael Avenatti*, VANITY FAIR (Feb. 14, 2020), https://www.vanityfair.com/news/2020/02/epic-inconceivable-totally-predictable-fall-of-michael-avenatti [https://perma.cc/DC3E-EANQ].

133. This seems to have been the case with Alex Kolodin, the Arizona attorney who was local counsel in the Kraken lawsuit filed with Sidney Powell, along with two earlier suits (both called *Aguilera v. Fontes*) alleging voting machine problems. In 2022, Kolodin successfully ran for the Arizona state house with a website featuring an endorsement from Trump calling him "a hell of an attorney [and] a patriot!" ALEX KOLODIN FOR STATE HOUSE, https://www.alexforaz.com [https://perma.cc/NA86-RWXX]. In 2023, he was placed on probation by the State Bar of Arizona. Matthew Deperno of Portage, Michigan, who filed *Bailey v. Antrim*, No. 2020-9238 CZ (Mich. Cir. Ct. filed Nov. 23, 2020), was also endorsed by Trump in his failed race for Michigan attorney general in 2022. He was later indicted for illegally accessing Michigan voting machines in the 2020 election. *Former Michigan GOP Attorney General Nominee Is Charged in Voting Machine Breach*, NPR (Aug. 1, 2023), https://www.npr.org/2023/08/01/1142599350/deperno-michigan-voting-machine-breach-charges [https://perma.cc/LKT3-4WE2].

134. Scott L. Cummings, *Movement Lawyering*, 2017 ILL. L. REV. 1645, 1665 (2017).

B. Polarization

Political polarization shapes the professional environment of lawyers in ways that also raise democracy concerns, pulling lawyers in positions of public trust further to the extremes and thereby compromising their role as independent checks on executive power. Polarization does not guarantee lawyer radicalization will happen but increases risk by contributing to the rise of more extreme us-versus-them thinking in social movements, which shapes the legal networks vetting lawyers for governmental gatekeeping roles, the loyalty demanded of lawyers by leaders once in these roles, and the public reaction to lawyer conduct.

Democracy scholars trace polarization to intertwined policies pursued for partisan advantage—campaign finance deregulation, gerrymandering, and voter suppression—alongside new media techniques for influencing public opinion that invite winner-take-all approaches to politics.[135] These strategies can contribute to "toxic polarization": ideologically rigid groups with mutually exclusive worldviews whose members vote for politicians promising to deliver instrumental outcomes that benefit in-groups irrespective of social costs.[136] Because in-group members deny the legitimacy of opponents—who are viewed as existential threats to the national interest—the perceived cost of losing power increases, justifying more extreme measures to maintain political control. Such measures are often couched in terms of protecting higher-order democratic values even as they weaken democratic checks and balances. Polarization is a key factor contributing to radicalization, in which political actors reject the legitimacy of counterarguments, vilify opponents, and use extreme language and hardball tactics to win at any cost.[137] Radicalization occurs on both sides of the ideological divide. Extremism on the political right ascribes the unfairness of existing arrangements to larger forces—secularism, immigration, socialism— which populist leaders mobilize to build movements based on social grievances that can obscure the economic consequences of neoliberal policy and, on the fringe, reach for Deep State conspiracy theories to discredit opponents.[138] On the left, extremism manifests as radical calls to abolish institutions like police

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135.   Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, *in* SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 19, 27–35 (Nathaniel Persily ed., 2015); Robert C. Liberman, Suzanne Mettler & Kenneth M. Roberts, *How Democracies Endure: The Challenges of Polarization and Sources of Resilience*, *in* DEMOCRATIC RESILIENCE 3, 20–22 (Robert C. Lieberman, Suzanne Mettler & Kenneth M. Roberts eds., 2021).

136.   *See* PETER T. COLEMAN, THE WAY OUT: HOW TO OVERCOME TOXIC POLARIZATION 5–6 (2021); V-DEM INST., *supra* note 15, at 7, 12, 16; *see also* EZRA KLEIN, WHY WE'RE POLARIZED at ix, ix–xxiii (2020); Simon A. Levin, Helen V. Milner & Charles Perrings, *The Dynamics of Political Polarization*, 118 PNAS, no. 50, 2021, at 1, 2–3.

137.   *See* Mark V. Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 529 (2004).

138.   *See* Melissa Healy, *Why Do Conspiracy Theories About Pedophilia Hold Such Sway with Some Conservatives?*, L.A. TIMES (Oct. 16, 2020), https://www.latimes.com/science/story/2020-10-16/why-do-conspiracy-theories-about-pedophilia-hold-such-sway-with-some-conservatives [https://perma.cc/RBZ4-JZ3X].

departments and immigration agencies linked to racist policy alongside weaponization of "cancel culture" to restrict legitimate but unpopular speech in educational institutions and the broader public domain.[139]

As polarization fractures public opinion,[140] it pulls opposing social movements and political parties further apart, which places pressure on affiliated lawyers to display greater loyalty through more extreme position-taking. This pressure on professional independence is particularly acute for lawyers whose work is most closely associated with the "public interest": lawyers representing social movements outside the state and lawyers on the inside of government representing political leaders. Although the roles of movement and government lawyers are distinct—movement lawyers advance political goals while government lawyers serve the public good—there is evidence from the United States that they are becoming more intertwined in ways that may contribute to the politicization of government service.[141] Specifically, as social movements on the left and right gain greater influence in political governance, they accumulate power to promote recruitment of government lawyers from the ranks of movement lawyers, which may over time blur professional identities and legal tactics, contributing to more sharply partisan legal conflict.[142]

The U.S. public interest law movement began in the 1960s as a project to advance progressive visions of democratic inclusion, building on the pioneering model of the NAACP's impact litigation campaign to desegregate public schools in *Brown v. Board of Education*.[143] Liberal public interest lawyers contributed to the Rights Revolution during the Warren Court era, expanding civil rights and due process protections for minority groups and low-income people.[144] But they were also criticized for overreaching, using law to resolve contested policy issues and pursuing their own conception of the public interest rather than serving clients.[145] In response, conservative leaders pledged to meet liberal legal groups like the NAACP and ACLU on their own ground by creating an oppositional

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139.   *See, e.g.*, Note, *Pessimistic Police Abolition*, 136 HARV. L. REV. 1156, 1157 (2023).

140.   *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/5KC4-WZ26]; *see also* Ari Blaff, *Partisan Gap Widens on Hot-Button Issues: Gallup Report*, NAT'L REV. (Aug. 7, 2023), https://nationalreview.com/news/partisan-gap-widens-on-hot-button-issues-gallup-report/ [https://perma.cc/3TZT-W93Q] (finding that there is an over 50 percentage point difference of opinion between the average Democratic and Republican voter).

141.   *See generally* Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149 (2024) (analyzing the success of Religious Right social movement mobilization against *Roe v. Wade* in creating "movement jurists").

142.   Partisanship on behalf of clients is a key element of zealous advocacy that frequently produces conflict with lawyers' ethical duties to the public. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 31–32 (1998).

143.   Cummings, *supra* note 134, at 1669–75.

144.   *Id.* at 1674–75.

145.   *Id.* at 1665.

infrastructure to mobilize law on behalf of conservative causes.[146] A decade later, rather than "public interest law" being understood in relation to liberal causes like racial and environmental justice,[147] it became fundamentally contested at the center of left-right political struggle—a form of "politics by other means."[148] This contestation reshaped the organizational terrain of public interest lawyering, giving rise to a multifaceted conservative legal movement, while changing the landscape of law schools, where the Federalist Society was launched to develop conservative legal talent and build networks to strengthen ties among diverse conservative factions.[149]

Within lawyering networks growing out of these legal movements, increasing polarization would be expected to push the views of financial benefactors and political allies toward greater extremes, creating incentives for lawyers to take more radical advocacy positions to maintain funding and policy influence. Polarization would be further expected to challenge professional independence in the public lawyering context by influencing who is chosen to serve in key government legal positions. As more extreme views gain greater support within governing parties, the background experiences and network connections necessary to credentialize lawyers for such positions would have to pass muster with new leaders—placing a greater premium on demonstrated lawyer commitment to political causes and legal positions as proxies for partisan loyalty. On the American political right, these causes have included movements to deregulate election spending, expand gun rights, restrict abortion and LGBTQ+ rights, and limit immigration.[150] By providing support to advance these efforts, the organizational structure for conservative legal activism may serve as an important proving ground for lawyers to work on behalf of elected leaders. Notable conservative movement lawyers were tapped to play prominent legal roles for Trump. For example, Jay Sekulow, former chief counsel of the politically conservative, Christian-based American Center for Law & Justice,

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146.   ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 14–18 (2008).

147.   JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 72 (1978); STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 100–01 (2004).

148.   RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994, at 7–10 (1995).

149.   STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OVER LAW 135–80 (2008); *see also* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 10–22 (2015).

150.   *See generally* ANN SOUTHWORTH, BIG MONEY UNLEASHED: THE CAMPAIGN TO DEREGULATE ELECTION SPENDING (2024) (examining the lawyers and litigation strategy used in the successful challenge to campaign finance laws); MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT (2020) (charting the legal strategy that shifted the terms of the abortion debate); Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008) (detailing decades of social movement conflict and mobilization leading to the transformation of the Second Amendment in *District of Columbia v. Heller*).

was selected to be lead counsel in Trump's first impeachment trial.[151] In devising legal strategy to prevent certification of the 2020 presidential election, Trump turned to John Eastman, who was former chair of the National Organization for Marriage and board member of the Public Interest Legal Foundation, known for bringing lawsuits to purge immigrants from local voting rolls.[152]

These lawyers were influential members of the conservative legal movement,[153] which provided a pipeline into high-level Trump administration positions through a vetting process run by Trump legal advisor and Federalist Society Executive Vice President Leonard Leo.[154] This pipeline has cultivated mainstream legal conservativism, committed to principles of originalism and independence, and during the Trump era (as Part III details), many lawyers who entered high-level government positions fit this model. However, as mainstream conservative government lawyers refused to back Trump's efforts around the 2020 election, he turned to outside lawyers, like Eastman, willing to endorse extreme claims and sacrifice gatekeeping roles. This has produced deep splits in the conservative legal movement over the role of the Federalist Society, which is caught in the middle of intense conflict between radical and mainstream lawyers over the future of legal conservativism.[155]

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151.   *See* Elizabeth Williamson, *In Jay Sekulow, Trump Taps Longtime Loyalist for Impeachment Defense*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/2020/01/17/us/politics/jay-sekulow-trump-impeachment.html [https://perma.cc/E8F2-TMWD].

152.   JOHN C. EASTMAN, CURRICULUM VITAE (2020), https://www.congress.gov/116/meeting/house/110084/witnesses/HHRG-116-JU10-Bio-EastmanJ-20191017.pdf [https://perma.cc/FB39-LUTY]; *John C. Eastman*, CLAREMONT INST., https://www.claremont.org/scholar-bio/john-c-eastman/ [https://perma.cc/TC5Y-35AV] ("Dr. Eastman has served as the chairman of the Federalist Society's Federalism and Separation of Powers Practice Group."); Deepa Shivaram, *Who Is John Eastman, the Trump Lawyer at the Center of the Jan. 6 Investigation?*, NPR (June 17, 2022), https://www.npr.org/2022/06/17/1105600072/who-is-john-eastman-the-trump-lawyer-at-the-center-of-the-jan-6-investigation [https://perma.cc/S7T2-VP7N]; *Civil Rights Groups Launch National Effort to Combat Alarming Voter Purge Attempt*, BRENNAN CTR. FOR JUST. (Nov. 22, 2017), https://www.brennancenter.org/our-work/analysis-opinion/civil-rights-groups-launch-national-effort-combat-alarming-voter-purge [https://perma.cc/EJW3-VZ4W].

153.   *See* Deborah Pearlstein, Opinion, *Why Are So Many of Trump's Alleged Co-Conspirators Lawyers?*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/opinion/trump-indictment-lawyers.html [https://perma.cc/VX44-QM97].

154.   *See Leonard A. Leo*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/leonard-leo [https://perma.cc/7HKG-74ZQ].

155.   On one side, the Federalist Society has come under attack from Trump-aligned lawyers who complain about mainstream conservative reluctance to support Trump's radical agenda and who seek to circumvent the Federalist Society's vetting process in selecting lawyers for a potential Trump second term. Jonathan Swan, Charlie Savage & Maggie Haberman, *If Trump Wins, His Allies Want Lawyers Who Will Bless a More Radical Agenda*, N.Y. TIMES (Nov. 1, 2023), https://www.nytimes.com/2023/11/01/us/politics/trump-2025-lawyers.html [https://perma.cc/SXN9-66XB]. On the other side, mainstream conservatives dissatisfied with the Federalist Society's failure to "speak out" against Trump's "legal excesses" are launching a rival organization, the Society for the Rule of Law Initiative, "to bring sanity back to conservative lawyering and jurisprudence." George Conway, J. Michael Luttig & Barbara Comstock, Opinion, *The Trump Threat Is Growing. Lawyers Must Rise to Meet This Moment*, N.Y. TIMES (Nov. 21, 2023), https://www.nytimes.com/2023/11/21/opinion/trump-lawyers-constitution-democracy.html [https://perma.cc/ST7A-NQ86].

The interplay between politics and practice has also blurred boundaries between the conservative legal movement and private law firms in ways that raise novel independence concerns. While pro bono has often advanced policy commitments of Big Law lawyers on the left, and firms with conservative leadership like Kirkland & Ellis have historically produced legal talent for Republican administrations, there is evidence of closer integration of private practice with government and movement lawyering (particularly as corporate clients navigate increasingly partisan political environments). A vivid example of this is the rise of the Jones Day law firm as outside counsel to, and feeder for, Republican Party leadership.[156] After becoming managing partner in 2003, Steven Brogan recruited Federalist Society lawyers to head an elite "issues-and-appeals" practice unit charged with advancing conservative causes, including stopping early voting in battleground states and abolishing the Consumer Financial Protection Bureau.[157] The firm recruited high-profile conservative lawyers from other firms, including Don McGahn, who arrived in 2014 with substantial experience in Washington, D.C., and a book of clients that included the National Rifle Association and the Koch brothers.[158] McGahn spearheaded the firm's decision to represent what was then seen as the long-shot presidential campaign of Donald Trump in 2016, negotiating a deal with skeptical Federalist Society power brokers to vet Trump's judicial appointments.[159] After Trump's election, Jones Day lawyers were brought into the White House Counsel's office and given high-level appointments in the Department of Justice (DOJ) (partner Noel Francisco became Solicitor General) and other agencies, resulting in "an extraordinary transfer of talent from a single law firm to a new administration."[160] Critics questioned the independence of these government lawyers not only because of close ties to the conservative legal movement but also because of ongoing litigation by Jones Day colleagues on issues pending in front of government agencies and the Supreme Court.[161]

Precisely because the DOJ occupies a critical democratic position—representing the executive branch while acting as a bulwark against executive overreach—it has long been at the epicenter of legal conflict over executive power.[162] Although the DOJ is a political institution, whose top lawyers are

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156.   *See* DAVID ENRICH, SERVANTS OF THE DAMNED: GIANT LAW FIRMS, DONALD TRUMP, AND THE CORRUPTION OF JUSTICE 4 (2022).

157.   David Enrich, *How a Corporate Law Firm Led a Political Revolution*, N.Y. TIMES MAG. (Aug. 25, 2022), https://www.nytimes.com/2022/08/25/magazine/jones-day-trump.html [https://perma.cc/2PYD-LTET].

158.   *Id.*

159.   *Id.*

160.   *Id.*

161.   As the firm litigated against Obamacare, Jones Day lawyers inside the Justice Department secured a rule exempting religious organizations from its insurance requirements. *Id.*

162.   Trump famously clashed with his first AG, Jeff Sessions, after Sessions recused himself from the Russian election interference case and appointed Special Counsel Robert Mueller. Peter Baker,

political appointees, it has also prided itself on independence. Comparing challenges to DOJ independence during the Trump presidency with two other seminal government lawyer controversies of the modern era—Watergate and the torture memos—sheds light on how polarization may affect public lawyering over time.

Watergate involved criminal conduct orchestrated by President Richard Nixon's White House, which plotted an effort to break into the Democratic National Committee headquarters to steal campaign plans of Nixon's rival in advance of the 1972 presidential election.[163] The scandal implicated nearly thirty lawyers—including Attorney General (AG) John Mitchell, who was notified of the plan; White House Counsel John Dean, who authorized it; and G. Gordon Liddy, who masterminded it. At the core of the scandal was unethical and criminal conduct in the service of election interference: spying on opponents for partisan advantage. It was an election attack but, unlike the Trump 2020 effort, it did not claim to follow the rule of law and the consequences, though grave, were not democratically destabilizing. After the scandal broke, there was bipartisan condemnation of the lawyers' actions, serious ethical and criminal sanctions,[164] and organizational change at the DOJ.[165] Watergate also produced significant professional reform, leading the American Bar Association (ABA) in 1973 to mandate that law schools "provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession"—making legal ethics the only substantive course required for accreditation. Watergate also sparked a movement to revise the ethical rules, resulting a decade later in the ABA's adoption of the 1983 Model Rules of

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Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html [https://perma.cc/F7PR-883N]. There is evidence that state AGs have also become politicized, pursuing liberal causes in some states and conservative ones in others. *See* Marissa A. Smith, *Politicization of State Attorneys General: How Partisanship Is Changing the Role for the Worse*, 108 CORNELL L. REV. 517, 518 (2023).

163.   GARRETT M. GRAFF, WATERGATE: A NEW HISTORY, at xv–xxvi (2022).

164.   *See* Alice Popovici, *Watergate: Who Did What and Where Are They Now?*, HISTORY (June 15, 2012), https://www.history.com/news/watergate-where-are-they-now [https://perma.cc/F5KV-NFSH]; Nicole Hemmer, Opinion, *This Is So Much Worse than Watergate*, CNN (June 29, 2022), https://www.cnn.com/2022/06/29/opinions/jan-6-cassidy-hutchinson-worse-than-watergate-hemmer/index.html [https://perma.cc/M8BR-EJ4X] ("[Watergate] continues to set our expectations for presidential wrongdoing [including]—if the wrongdoing is serious enough—bipartisan condemnation.").

165.   Following Watergate, AG Edward Levi issued an order to establish the Office of Professional Responsibility at the DOJ. *About OPR*, OFF. OF PROF. RESP. (Feb. 8, 2023), https://www.justice.gov/opr/about-opr [https://perma.cc/SAY7-DSHR]. The ABA promoted the response to Watergate as "a source of pride for the profession." Lesley Oelsner, *Lawyers at A.B.A. Parley Indicate Watergate Embarrassment Is Over*, N.Y. TIMES (Aug. 15, 1975), https://www.nytimes.com/1975/08/15/archives/lawyers-at-aba-parley-indicate-watergate-embarrassment-is-over.html [https://perma.cc/CJY7-KBA4].

Professional Responsibility, which made clear that lawyers are public citizens with special obligations to the justice system.[166]

The second high-profile instance of government lawyer politicization, during the presidency of George W. Bush, involved the production of the 2002 "torture memos" written by lawyers in the Office of Legal Counsel (OLC), the elite DOJ unit charged with advising the executive branch.[167] In that case, the White House and CIA asked the OLC to provide advice on whether proposed interrogation techniques to be used on purported al Qaeda terrorists constituted torture under relevant domestic and international law. On August 1, 2002, the OLC issued two memoranda: the first sent to CIA Acting General Counsel John Rizzo entitled "Interrogation of al Qaeda Operative" and the other sent to White House Counsel Alberto Gonzales entitled "Standards of Conduct for Interrogation."[168] Although both were signed by OLC head Jay Bybee, they were largely written by Deputy Assistant AG John Yoo, a former Justice Thomas clerk and tenured faculty member at Berkeley Law.[169] In the Rizzo memo, the OLC concluded that ten interrogation techniques, which included "insects placed in a confinement box" and "the waterboard," did not constitute torture under the U.S. federal torture statute.[170] The legal analysis supporting this conclusion was

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166. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 1983) (affirming that a lawyer is "a public citizen having special responsibility for the quality of justice" who should "seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession"); Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 4 AM. BAR FOUND. RSCH. J. 247, 248 (1979); Russell G. Pearce, *Teaching Legal Ethics Seriously: Legal Ethics as the Most Important Subject in School*, 29 LOY. U. CHI. L.J. 719, 722–23 (1998). The requirement for training in professional responsibility was codified as the only substantive curricular requirement aside from "instruction in those subjects generally regarded as the core of the law school curriculum" and "professional skills." AM. BAR ASS'N, STANDARDS AND PROCEDURES FOR APPROVAL OF LAW SCHOOLS § 303 (1973); *see also* Peter Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 566 n.90 (2018).

167. David Luban, *The Defense of Torture*, 54 N.Y. REV. BOOKS 37 (2007) [hereinafter Luban, *The Defense of Torture*] (reviewing JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006)); *see also* DAVID LUBAN, TORTURE, POWER, AND LAW 197–243 (2014) (analyzing the legality of the torture memos); Claire Finkelstein, *When Government Lawyers Break the Law: The Case for Prosecution*, 158 U. PENN. L. REV. PENNUMBRA 196, 200–03 (2010) (making the case that OLC lawyers involved in the torture memos committed criminal offenses). From 2002 to 2005, there were several memoranda issued by the OLC on torture. For a compendium, see generally THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (David Cole ed., 2009).

168. Memorandum from Jay S. Bybee, Assistant Att'y Gen., to John Rizzo, Acting Gen. Couns. of the Cent. Intel. Agency (Aug. 1, 2002) [hereinafter Rizzo Memorandum]; Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Couns. to the President (Aug. 1, 2002) [hereinafter Gonzales Memorandum]. The memos were withdrawn by the OLC in 2009. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (Apr. 15, 2009).

169. Yoo was one of two attorneys assigned to the Rizzo memo and was chief author of the Gonzales memo. U.S. DEP'T OF JUST., OFFICE OF PROF. RESP., REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 39, 43, 251 (2009).

170. Rizzo Memorandum, *supra* note 168, at 10–11.

drawn from the Gonzales memo's analysis of the federal torture statute,[171] which defined torture as an act "specifically intended to inflict severe physical or mental pain or suffering."[172] Because the torture statute did not explicitly define "severe pain," the memo drew upon a different statute defining an emergency medical condition qualifying for free medical care to conclude that torture required the specific intent to inflict severe pain rising to "the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."[173] While the Gonzales memo reviewed U.S. cases interpreting the Torture Victims Protection Act, concluding that "they are in keeping with the general notion that the term 'torture' is reserved for acts of the most extreme nature,"[174] it omitted analysis of contrary cases suggesting that waterboarding was torture.[175] In concluding that the interrogation procedures proposed by Rizzo were legal, that memo emphasized that "this is our best reading of the law."[176]

In the uproar that followed the memos' disclosure,[177] some former OLC lawyers defended the opinions as "standard lawyerly fare," providing the White House with the strongest legal justification of its desired policy in a national security context in which executive authority was at its zenith.[178] In its 2009 report on the torture memos, the DOJ's Office of Professional Responsibility (OPR)—created after Watergate to enforce ethical standards—concluded that Yoo had "committed intentional professional misconduct when he violated his duty to exercise independent legal judgment" by knowingly providing "incomplete and one-sided advice."[179] Specifically, OPR found evidence that Yoo and others were "aware of the result desired" by the CIA "and drafted

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171.   Gonzales Memorandum, *supra* note 168, at 2–13.

172.   18 U.S.C. § 2340.

173.   Gonzales Memorandum, *supra* note 168, at 5–6. With respect to the "prolonged mental harm" part of the torture definition, the memo reasoned that physical pain could also constitute torture when intended to inflict mental pain and that a "good faith belief" that conduct would "not result in prolonged mental harm" was a defense. *Id.* at 6–9. The memo went on to interpret the Convention Against Torture as confirming its "conclusion that Section 2340A [of the U.S. torture statute] was intended to proscribe only the most egregious conduct" and stated that international law precedent supported limiting torture to situations "where extreme circumstances exist," while justifying torture based on a "necessity" defense. *Id.* at 22, 31, 40.

174.   *Id.* at 27.

175.   *See* United States v. Lee, 744 F.2d 1124, 1125 (5th Cir. 1984) (referencing the conviction of law enforcement officers for civil rights violations stemming from the use of "water torture"); *see also In re* Est. of Marcos, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (stating that the "water cure" was a "form[] of torture").

176.   Rizzo Memorandum, *supra* note 168, at 18.

177.   In June 2004, the *Washington Post* broke the story about the Rizzo memo. Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST (June 8, 2004), https://www.washingtonpost.com/archive/politics/2004/06/08/memo-offered-justification-for-use-of-torture/17910584-e7c3-4c8c-b2d1-c986959ebc6a/ [https://perma.cc/D2S2-C2N4].

178.   Eric Posner & Adrian Vermeule, Opinion, *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J. (July 6, 2004), https://www.wsj.com/articles/SB108906730725255526 [https://perma.cc/B2G3-WA3A].

179.   U.S. DEPT. OF JUST., *supra* note 169, at 252, 260.

memoranda to support that result, at the expense of their duty of thoroughness, objectivity, and candor," and also disregarded the fact that the Rizzo memo sought to "provide immunity to CIA officers engaged in acts that might be construed as torture."[180] The OPR further concluded that Yoo exaggerated the importance of cases supporting his argument and relegated cases "in which far less serious conduct was found to constitute torture" to the appendix where "their significance was not fully discussed."[181]

Although the Bush administration launched the investigation, the DOJ's final report was released during the Obama administration, which overruled the OPR opinion, finding that Yoo exercised "poor judgment" but declining to refer him for bar discipline.[182] Critics condemned the memos as giving the CIA legal cover to violate the law in service of an illegal covert action targeting Arab and Muslim men,[183] while deliberately widening the scope of executive power as part of a larger effort to reduce legislative and judicial constraint.[184] Because the memos purported to operate within the traditional frame of legal analysis to justify illegal client conduct, they were more damaging to DOJ independence than Watergate, in which no one claimed that the actions of lawyers were legal. Insofar as the memos skewed legal advice for political purposes, infringing individual freedoms in the name of national security, they were inconsistent with the DOJ's role as an independent gatekeeper committed to checking executive overreach—a step down the slow road of professional erosion. However, the memos involved lawyers straining law to advance policy—not to enable a specific president to illegitimately keep power—and thus did not implicate DOJ in a direct autocratic attack.

In this regard, the Trump DOJ moved into more dangerous territory, pushed by a president whose mandate derived from radical elements of the conservative movement and who bridled against legal checks on executive power.[185] AG William Barr's conduct around the release of Special Counsel Robert Mueller's 2019 report—which concluded that Russia interfered with the 2016 election,

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180.   *Id.* at 227, 252.

181.   *Id.* at 229.

182.   Memorandum of Decision from David Margolis, Associate Deputy Att'y Gen., Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 67 (Jan. 5, 2010).

183.   DEBORAH L. RHODE, DAVID LUBAN, SCOTT L. CUMMINGS & NORA FREEMAN ENGSTROM, LEGAL ETHICS 673 (8th ed. 2020).

184.   *See* Luban, *The Defense of Torture*, *supra* note 167, at 43–44.

185.   Michael Balsamo, *Trump Blurs Lines Between Personal Lawyer, Attorney General*, AP NEWS (Sept. 29, 2019), https://apnews.com/article/donald-trump-ap-top-news-joe-biden-politics-impeachments-7d134da3dadd497e9af37c60278d68dc [https://perma.cc/998Y-Z97U]. For an analysis of DOJ lawyer conduct during the Trump presidency compromising departmental independence, see generally CTR. FOR ETHICS & THE RULE OF L. & CITIZENS FOR RESP. & ETHICS IN WASH., REPORT ON THE DEPARTMENT OF JUSTICE AND THE RULE OF LAW UNDER THE TENURE OF ATTORNEY GENERAL WILLIAM BARR (2020).

there were numerous links to the Trump campaign, and there was evidence of obstruction[186]—was an early illustration of the challenges to prosecutorial independence posed by Trump. On April 18, 2019, Barr called a press conference, in which he stated that the Mueller report "did not establish that members of the Trump [c]ampaign conspired or coordinated with the Russian government" and that he had "concluded that the evidence . . . is not sufficient to establish that . . . President [Trump] committed an obstruction-of-justice offense."[187] This statement contradicted the report's assertion that "if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state" and that it was not recommending prosecution due to DOJ policy against indicting a sitting president—not based on an assessment of the merits.[188] The media picked up Barr's spin on the Mueller report, reinforcing already highly divided public opinion on whether Trump broke the law.

In 2020, a Bush-appointed federal judge, Reggie Walton, overseeing a Freedom of Information Act lawsuit to access the full Mueller report, took the extraordinary step of publicly rebuking Barr for misleading the public and the court about its contents, claiming that "inconsistencies" between the actual report and Barr's public description of it reflected a "lack of candor."[189] Judge Walton pointed out that Mueller himself objected to Barr's characterization of his report in a letter to Congress, stating that Barr "did not fully capture the context, nature, and substance of th[e] [Special Counsel's] Office's work and conclusions."[190] Judge Walton questioned "whether AG Barr made a calculated attempt to influence public discourse about the Mueller report in favor of President Trump despite certain findings in the redacted version . . . to the contrary."[191] Following Barr's remarks about the Mueller report, the New York City Bar Association issued a statement calling for Barr to recuse himself from the investigation into whether Trump improperly pressured Ukrainian President Volodymyr

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186.   SPECIAL COUNSEL ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 2, 9 (2019). Barr had earlier served as AG to President George H.W. Bush.

187.   Elec. Privacy Info. Ctr. v. U.S. Dep't of Just., 442 F. Supp. 3d 37, 42, 42–43 (D.D.C. 2020).

188.   MUELLER, *supra* note 186, at 1–2; *see also* Charlie Savage, *Judge Calls Barr's Handling of Mueller Report 'Distorted' and 'Misleading,'* N.Y. TIMES (Mar. 5, 2020), https://www.nytimes.com/2020/03/05/us/politics/mueller-report-barr-judge-walton.html [https://perma.cc/82CW-G7MM].

189.   Savage, *supra* note 188. Barr's statements appeared to conflict with the 1995 admonition by Chief Justice Warren Burger: "No prosecutor—including the Attorney General of the United States . . . —should ever, except in the most unusual circumstances, make out-of-court statements about a pending investigation or a pending case." Chief Justice Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 952 (1995).

190.   *See* Amanda Robert, *Federal Judge Questions Barr's Credibility and Orders Review of Mueller Report Redactions*, ABA J. (Mar. 6, 2020), https://www.abajournal.com/news/article/federal-judge-questions-barrs-credibility-and-orders-review-of-full-mueller-report [https://perma.cc/F9A2-HYYA].

191.   *Id.*

Zelenskyy to investigate Hunter Biden.[192] The opinion stressed concerns that Barr appeared to discredit an investigation into what was, at that point, the most serious allegation of election interference by an American president—effectively acting as the president's personal lawyer defending against potential criminal prosecution rather than independently enforcing U.S. law.[193]

That problem would reach new extremes during Trump's attack on the 2020 presidential election, detailed in Part III, in which he recruited high-level DOJ lawyers to officially endorse unfounded allegations of voting fraud in an effort to toss out certified electors from key battleground states on January 6.[194] This effort to coopt the DOJ combined central elements of the earlier controversies in an effort to subvert departmental independence in service of an autocratic agenda: packaging an illegal attack on the presidential election (like Watergate) but now dressed up in the official language of law (like the torture memos). As Part III reveals, this effort failed precisely because other lawyers in the DOJ and White House performed their independent roles—reinforcing the point that polarization increases risk but does not guarantee outcomes.

As this review suggests, public lawyers eschewing professional independence is by no means a new phenomenon. However, in the pre-Trump controversies, while lawyers engaged in indefensible conduct, they did not use legal means to subvert core democratic institutions. In Watergate, lawyers broke the law believing they could get away with their actions. This was a grievous assault on election integrity—but one that never purported to operate within the bounds of legality. In the torture memo case, by contrast, the lawyers violated the spirit of the law while claiming to follow its letter; however, their actions were not designed to entrench the president's political power. The crucial historical difference in the Trump context was that the most extreme legal conduct went beyond violating the rules of the game (illegal spying or torture) to asserting that the president was above the rules altogether.

C. Disinformation

In backsliding democracies, the spread of disinformation is a critical tool used to inflame public opinion against opponents and promote public distrust of government. Disinformation is part of what Nancy Rosenblum and Russell

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192. Press Release, N.Y.C. Bar, Attorney General Barr Should Recuse Himself from Department of Justice Review of Ukraine Matter (Oct. 23, 2019), https://www.nycbar.org/media-listing/media/detail/attorney-general-barr-should-recuse-himself-from-department-of-justice-review-of-ukraine-matter [https://perma.cc/F2YD-CYSJ].

193. *Id.*; *see also* Tom McCarthy, *William Barr: How the Attorney General Became Trump's Enabler-in-Chief*, GUARDIAN (Feb. 15, 2020), https://www.theguardian.com/us-news/2020/feb/15/william-barr-attorney-general-donald-trump-enabler [https://perma.cc/XD7X-UMW7].

194. *See infra* Part III.F; 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/PG6Z-8LKH].

Muirhead call the "new conspiracism"—the spread of false facts by carefully embedding enough real facts to make them "true enough"—promoted by political actors to build support among disaffected voters who desire an outsider willing to fight the status quo.[195] Technology expands the conspiracy repertoire by allowing proponents to use decentralized media platforms to delegitimize inconvenient facts and spread "fake news."[196] Technological tools can be used to directly target disinformation to receptive audiences, undermine civil discourse by shrinking common ground, and reduce social trust.[197] In extreme cases, authoritarian leaders spread lies to smear opponents, accusing them of "corruption" or "sedition" as bases for political prosecutions that squelch dissent. One of Trump's favorite slogans in his 2016 race against Hillary Clinton—"Lock her up!"—mobilized disinformation (that Clinton hid classified information on a private email server while secretary of state) to legitimize the idea of criminal culpability.[198] Disinformation challenges the rule of law by supplying false grounds to concoct legal violations against political opponents, as in the Clinton example, or creating false grounds to help political leaders (and their allies) to *avoid* liability, as in the case of Trump.[199]

New conspiracism is part of the broader trend of "truth decay," associated with increasing disagreement about facts, blurring the line between opinion and fact, and declining trust in formerly respected sources of fact.[200] Truth decay has reshaped American politics by enabling leaders to more easily advance facially plausible but unsubstantiated claims, like pervasive voting fraud, to garner support for regressive policies, like voter suppression. It has also lowered the political costs of lying. While the Trump era brought a sharp decline in the

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195.   NANCY L. ROSENBLUM & RUSSELL MUIRHEAD, A LOT OF PEOPLE ARE SAYING: THE NEW CONSPIRACISM AND THE ASSAULT ON DEMOCRACY 43 (2019).

196.   *See* Paul Barrett, Justin Hendrix & Grant Sims, *How Tech Platforms Fuel U.S. Political Polarization and What Government Can Do About It*, BROOKINGS INST. (Sept. 27, 2021), https://www.brookings.edu/articles/how-tech-platforms-fuel-u-s-political-polarization-and-what-gover nment-can-do-about-it/ [https://perma.cc/B2DW-BQBV].

197.   *See* Geoff Bennett, Andrew Corkery & Juliet Fuisz, *How New Technologies Could Accelerate the Spread of Conspiracy Theories*, PBS NEWS HOUR (July 23, 2022), https://www.pbs.org/newshour/show/how-new-technologies-could-accelerate-the-spread-of-conspirac y-theories [https://perma.cc/9H64-Y87K]. On the importance of trust to democracy, see generally Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANN. REV. POL. SCI. 475 (2000).

198.   Peter Baker, *"Lock Her Up" Becomes More than a Slogan*, N.Y. TIMES (Nov. 14, 2017), https://www.nytimes.com/2017/11/14/us/politics/trump-pressure-clinton-investigation.html [https://per ma.cc/2WVU-4896].

199.   While right-wing populists like Trump are known for dismissing legitimate reporting as "fake news," disinformation also circulates on the political left, with cases of false reports of government crackdowns on protestors targeted to liberal audiences on social media. *The Rise of Left-Wing, Anti-Trump Fake News*, BBC NEWS (Apr. 15, 2017), https://www.bbc.com/news/blogs-trending-39592010 [https://perma.cc/TK3K-Y6B6].

200.   JENNIFER KAVANAGH & MICHAEL D. RICH, RAND CORP., TRUTH DECAY: AN INITIAL EXAMINATION OF THE DIMINISHING ROLE OF FACTS AND ANALYSIS IN AMERICAN PUBLIC LIFE, at x–xi (2018), https://www.rand.org/pubs/research_reports/RR2314.html [https://perma.cc/8WT6-8TJ7].

percentage of Americans who believe presidents tell the truth[201]—a result of the sheer volume of Trump's mendacity[202]—Trump's own dishonesty did not significantly affect his popularity among Republicans.[203] This decoupling of dishonesty from its consequences inspires further dishonesty in a vicious cycle. As a point of contrast, when President Bill Clinton, a lawyer, publicly denied his affair with intern Monica Lewinsky by saying "[i]t depends on what the meaning of the word 'is' is," his technical parsing was condemned as quintessential lawyer-speak and followed by a highly publicized mea culpa.[204]

As the Clinton example underscores, legal culture contributes to truth decay. American lawyers have always had an uneasy relationship to truth, which is too often a casualty of lawyers' skill in mobilizing facts toward a version of reality that advances client interests.[205] This skill is taught in law school as a foundational component of what it means to "think like a lawyer."[206] Law schools have promoted moral neutrality as a cornerstone professional value—training students to make the most aggressive arguments for clients irrespective of their social value. Empirical research suggests that law students' commitment to higher-order public values diminishes as a result of legal training that encourages them to stretch facts to their limits in order to prepare for careers serving high-paying clients that demand total loyalty.[207] Although this professional ethos does not embrace disinformation, it does ask students to look at facts in a skeptical light—a perspective that may become increasingly dangerous in a context of disintegrating factual consensus. The democratic danger is that in a culture of truth decay, it becomes easier for lawyers trained to slant facts to reach for information of dubious credibility to advance client

201.   *See Partisans Agree Political Leaders Should Be Honest and Ethical, Disagree Whether Trump Fits the Bill*, PEW RSCH. CTR., (Jan. 30, 2019), https://www.pewresearch.org/short-reads/2019/01/30/partisans-agree-political-leaders-should-be-honest-and-ethical-disagree-whether-trump-fits-the-bill/ [https://perma.cc/FZZ5-PXLH] (finding that 91 percent of the American public believe that it is essential for those in high political offices to be honest and ethical).

202.   The *Washington Post* reported that Trump made more than thirty thousand false or misleading claims while in office. Glenn Kessler, Salvador Rizzo & Meg Kelly, *Trump's False or Misleading Claims Total 30,573 over 4 Years*, WASH. POST (Jan. 24, 2021), https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/ [https://perma.cc/7XCP-M5VS].

203.   Despite making consistency false statements throughout his presidency, Trump's overall approval ratings remained relatively constant with Republican support sustained at high levels. *See Presidential Approval Ratings—Donald Trump*, GALLUP NEWS (2019), https://news.gallup.com/poll/203198/presidential-approval-ratings-donald-trump.aspx [https://perma.cc/Y4P2-CKND].

204.   Timothy Noah, *Bill Clinton and the Meaning of "Is*,*"* SLATE (Sept. 13, 1998), https://slate.com/news-and-politics/1998/09/bill-clinton-and-the-meaning-of-is.html [https://perma.cc/B99T-F8ZF].

205.   MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2023) (giving control over the "objectives of representation" to the client).
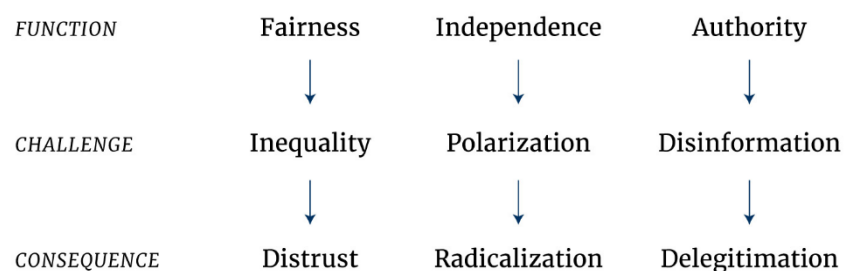
206.   ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 3 (2007).

207.   *See* John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of "Public Interest Drift" in Law School*, 51 U.C. DAVIS L. REV. 1973, 1979–81 (2018).

interests, justifying their actions in the professional language of zealous advocacy. As an illustration, Eastman has criticized the Georgia election interference case against him and other Trump lawyers for seeking to criminalize "zealous advocacy on behalf of their clients."[208]

While contesting the legal interpretation of facts is a core element of effective advocacy—and routine legal cases regularly turn on profound disagreement over which version of the facts should prevail—reliance on false facts, especially in political cases, poses significant threats to the rule of law. Disinformation may be used to delegitimize opponents' positions, which subverts mutual tolerance required for compromise and may cause parties on the losing side of a case to reject its legitimacy. Disinformation directly undermines legal authority when it is used by lawyers to defend against client culpability— and their own misconduct. Even before disinformation was deployed in the Stop the Steal campaign, Trump lawyers famously promoted public distrust of facts. In a series of Orwellian moments designed to protect Trump from legal scrutiny in relation to Russian election interference, Giuliani defended the president by asserting that "truth isn't truth" and suggesting that facts were in "eye of the beholder," while Trump's top advisor, lawyer Kellyanne Conway, publicly endorsed the use of "alternative facts."[209] These arguments laid the groundwork for Trump's central defense to election interference charges—that he reasonably believed in conspiracy claims of voter fraud thus negating criminal intent. As Part IV explores, this same defense has been deployed by Eastman and other Trump lawyers, challenging the bar's authority to discipline them for false statements on the grounds that voter fraud conspiracies swirling at the time rendered them "true enough."

Figure 2. Causes and Consequences of Professional Erosion

FUNCTION	Fairness	Independence	Authority
	↓	↓	↓
CHALLENGE	Inequality	Polarization	Disinformation
	↓	↓	↓
CONSEQUENCE	Distrust	Radicalization	Delegitimation

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208.   Eric Tucker, *Lawyers Indicted with Trump Say They Were Doing Their Jobs. But That May Be a Tough Argument to Make*, AP NEWS (Aug. 29, 2023), https://apnews.com/article/trump-georgia-indictment-election-giuliani-95f5451f6b038c98db7bb14b1e0cd4e2 [https://perma.cc/4AFN-79WE].

209.   Rebecca Morin & David Cohen, *Giuliani: 'Truth Isn't Truth*,' POLITICO (Aug. 19, 2018), https://www.politico.com/story/2018/08/19/giuliani-truth-todd-trump-788161 [https://perma.cc/Q74E-YAS6].

This Part has outlined vectors of professional erosion and suggested how each is shaped by, and contributes to, democratic backsliding. Figure 2 provides an overview. It highlights how trends associated with democratic backsliding—inequality, polarization, and disinformation—can challenge the legal profession's central democratic functions in ways that produce consequences contributing to further backsliding. Specifically, this Part has outlined how economic inequality can undermine legal fairness and promote public distrust in the integrity of the legal system, how polarization can threaten professional independence by increasing the risk of lawyer radicalization, and how disinformation can delegitimize the authority of law by divorcing it from agreed-upon facts.

While this Part has focused on long-term structural change by spotlighting legal institutions where erosion occurs—legal aid and public interest law, DOJ, and law school—it also helps to identify potential targets of autocratic strategy. To insulate autocratic leaders from legal oversight, it would make sense for them to weaken the support structure of rights mobilization in the public and nongovernmental legal sectors, install loyalists in key public lawyering positions to break down legal checks and balances, and reshape legal education as a site for incubating extreme legal views. Aspects of this type of institutional targeting have been part of the autocratic playbook in other countries.[210] Allies of Trump planning for a potential next term are reported to be following this lead by recruiting lawyers committed to a more radical "America First" agenda to occupy key appointed roles[211]—underscoring that ethical resistance at one point on the slow road of erosion may provide a roadmap for how to circumvent it the next time around.

The analysis presented in this Part therefore ultimately connects structural forces of democratic decline to autocratic legal strategy by suggesting how slow professional erosion can create conditions of possibility in which fast-track legal attacks occur. Backsliding is more likely to turn from risk to reality when there are more members of the public willing to believe that the legal system is grossly unfair and subject to capture by elites, more public lawyers willing to view their professional role in partisan terms, and more tools to circulate conspiracy theories and pollute public discourse. It is in this dangerous environment that

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210. For Orbán's targeting of higher education and NGOs in Hungary, see Benjamin Novak, *Pushed from Hungary, University Created by Soros Shifts to Vienna*, N.Y. TIMES (Nov. 15, 2019), https://www.nytimes.com/2019/11/15/world/europe/university-soros-vienna-orban.html [https://perma.cc/L3AS-82FM]; Patrick Kingsley, *Hungary Criminalizes Aiding Illegal Immigrants*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/world/europe/hungary-stop-soros-law.html [https://perma.cc/DR8G-P2YD].

211. Swan, Savage & Haberman, *supra* note 155 (noting that Jeffrey Clark, the former DOJ lawyer indicted in Georgia for his role in the 2020 election attack, who is now a top contender for a high-level position in a new Trump administration, wrote a constitutional analysis titled "The U.S. Justice Department Is Not Independent").

political leaders, and the lawyers who serve them, may mobilize lack of faith in the legal system to target elections as the gateway to autocratic power.

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III.

HOW LAW IS MOBILIZED AGAINST THE RULE OF LAW

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Audacious attacks on the rule of law can put democracy on the fast track to collapse. This happens when autocrats exploit—or invent—moments of crisis to justify seizing extraordinary power that eviscerates constitutional limits and civil society oversight. Like slow erosion, this pathway to autocracy relies on law: appearing to follow rules to invoke a state of emergency. In these moments of crisis, lawyers are essential for autocratic success, recruited to legitimize extraordinary legal measures by developing theories and strategies to mobilize law against the rule of law. Part III asks what can be learned from such mobilization to deepen understanding of autocratic legal methods and goals. It does so through analysis of the Stop the Steal campaign, which challenged the results of the 2020 presidential election on behalf of Trump, who lost six critical battleground states—Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin—costing him victory in the decisive Electoral College system.[212]

The aim of this Part is both descriptive and conceptual. By documenting legal strategy, it seeks to shed light on how law, designed to have a stabilizing effect on democracy, is mobilized in the service of destabilization. Conceptually, the case study is used to illuminate a form of *antidemocratic legal mobilization*: legal strategies and arguments deployed to attack the legitimacy of central institutions and practices of liberal democracy.[213] It does so by tracing how a team of lawyers, whose composition changed over time, contributed to a synchronized legal and media campaign, beginning before the election but increasing in intensity after, to cast doubt on the outcome of the election. The case study conceptualizes this mobilization in terms of six steps creating a *cycle of distrust*:[214] (1) theorizing legitimate legal space for election fraud claims and filing pre-election suits to foster doubt in election integrity, (2) mobilizing the conservative bar and recruiting legal influencers to amplify fraud claims in the

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212.   The contested states that Trump lost (by percentage difference in voting results and by total number of votes) were Arizona (0.3 percent, 10,457 votes), Georgia (0.23 percent, 11,779 votes), Michigan (2.8 percent, 154,188 votes), Nevada (2.4 percent, 33,596 votes), Pennsylvania (1.2 percent, 81,660 votes), and Wisconsin (0.63 percent, 20,682 votes). Overall, Trump lost to Biden by roughly seven million votes and lost the Electoral College by seventy-four votes. *Presidential Election Results: Biden Wins*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html [https://perma.cc/JT5N-M8KW].

213.   The case study was assembled through compilation and synthesis of public records, election law case filings, ethics complaints and disciplinary rulings, legal documents disclosed by the press, records from the House January 6th Committee, the federal and Georgia election interference indictments, and press reports. Where facts remain in legal dispute, I sought corroboration from multiple sources and indicated where assertions are allegations.

214.   The federal indictment accused Trump and co-conspirators of knowingly using false claims to "create an intense national atmosphere of mistrust." Federal Election Indictment, *supra* note 1, at 2.

lead-up to the election, (3) flooding courts with cases that mixed legitimate and false claims (some relying on conspiracy theories) to buy time and confuse the public, (4) disseminating false fraud claims through social media to inflame opinion, (5) designing a legal roadmap based on false claims to thwart Electoral College certification, and (6) attempting to coopt government lawyers to spark a crisis justifying extraordinary measures.[215]

While legal mobilization around the election was initiated by lawyers seeking to protect Trump's legal rights and win on the merits, as it evolved in the chaotic post-election atmosphere, some lawyers closest to Trump participated in a plan that relied on disinformation to mislead the public into believing that the system was broken and could only be fixed by keeping Trump in office—provoking a constitutional crisis to prevent the peaceful transition of power. In documenting this shift, the case study suggests links between the structural preconditions of backsliding outlined in Part II and direct democratic attacks. Specifically, while the switch from slow decline to fast attack requires an aspiring autocrat willing to seize the moment, it also builds upon professional erosion: weaponizing truth decay to deepen distrust of the legal system among a polarized electorate, enlisting lawyers from the radical wing of the conservative legal movement willing to legitimize and amplify false election claims, recruiting small-firm lawyers from the professional margins to bring cases based on those claims, and mobilizing government lawyers willing to sacrifice their independent role to support an attack on the rule of law.

A.   *Theorize Legal Space for Fraud Claims*

The first stage of Stop the Steal can be traced to *before* the election when lawyers laid the groundwork for election fraud claims in battleground states by identifying and theorizing legitimate legal grounds for challenges and amplifying those grounds through media to sow public doubt about election integrity. This stage did not dictate the ultimate result—Trump's effort to cling to power after exhausting all legitimate election challenges—but influenced its path. The 2020 election challenge built on a long-term Republican project, launched after the contested 2000 Bush-Gore election, to legitimize the notion of widespread voter fraud to justify a range of state voting laws that suppressed

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215.   These stages are derived inductively from the case, designed to illuminate the campaign's strategy around the 2020 election, not to claim a generalizable mobilization theory.

Democratic voter turnout.[216] These efforts included a Bush DOJ initiative to prosecute voter fraud, which failed to find any serious problems.[217]

Pre-election legal challenges in 2020 tapped into this pre-existing voting fraud narrative—advanced by conservative movement lawyers well-versed in election law strategy. While many of these lawyers sought in good faith to protect Trump's legal rights, the challenges they mounted laid a foundation for later litigation that cultivated conspiracy claims of election fraud from kernels of truthful concerns about election security. The facially legitimate concerns centered on mail-in voting, which Republicans consistently linked to fraud without evidence.[218] In the year leading up to the 2020 presidential election, particularly after COVID widened opportunities for mail-in voting, lawyers aligned with the Trump campaign and Republican Party raised legal questions about mail-in voting in key battleground states, in some cases filing lawsuits challenging state and local practices.[219] These cases involved issues that would be critical to post-election litigation: voter roll accuracy, fraudulent ballots, and accessibility of Republican poll watchers.

Behind this effort was a group of prominent conservative lawyers who coordinated pre-election legal challenges to voting systems in battleground states and assembled a national lawyer network to be mobilized afterwards in the event Trump lost. The point person was Leonard Leo, legal advisor to Trump.[220] Leo left his position as executive vice president of the Federalist Society in early 2020 (staying on as board co-chair) to coordinate election legal strategy. Leo helped to establish The 85 Fund, a nonprofit group that hosted the newly formed Honest

216.   RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 41–73 (2012) (discussing the "fraudulent fraud squad"); *see also* Jim Rutenberg, *The Attack on Voting*, N.Y. TIMES MAG. (Sept. 30, 2020), https://www.nytimes.com/ 2020/09/30/magazine/trump-voter-fraud.html [https://perma.cc/89A7-NJZS]. For an analysis of how fraud claims are used to advance voter suppression measures, see JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 2–10 (2018), https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote [https://perma.cc/B8JS-R3AQ].

217.   HASEN, *supra* note 216, at 52–53.

218.   Anita Kumar, *Trump Aides Exploring Executive Actions to Curb Voting by Mail*, POLITICO (Aug. 8, 2020), https://www.politico.com/news/2020/08/08/trump-wants-to-cut-mail-in-voting-the-republican-machine-is-helping-him-392428 [https://perma.cc/XCD7-K8TP]. Trump's own Commission on Voter Fraud, established after the 2016 election, produced no credible evidence. David A. Graham, *The Last Time Trump Alleged Massive Fraud*, ATLANTIC (Nov. 12, 2020), https://www.theatlantic.com/ideas/archive/2020/11/kris-kobach-and-search-mythical-voter-fraud/6170 69/ [https://perma.cc/543V-XGQW].

219.   An analysis by *USA Today* found that, through October 2020, a total of 230 election lawsuits had been filed by liberal and conservative groups on a range of issues. Alan Gomez & Kevin McCoy, *Federal Election Lawsuits Have Already Set a Recent Record. A Look at 2020 in the Courts*, USA TODAY (Oct. 30, 2020), https://eu.usatoday.com/story/news/nation/2020/10/30/courts-reject-voting-rights-extensions-in-covid-shadowed-elections/5998149002/ [https://perma.cc/E49D-FKDN].

220.   *See* Lisa Riordan Seville, *These Lawyers Remade the Supreme Court. Now They're Fighting to Limit Voting*, NBC NEWS (Nov. 1, 2020), https://www.nbcnews.com/politics/2020-election/ these-attorneys-remade-supreme-court-now-they-re-fighting-limit-n1245469 [https://perma.cc/R54M-MWNN].

Elections Project (HEP), which used litigation, policy advocacy, and media to promote "election integrity."[221] HEP, led by former Heritage Foundation voter fraud staffer Jason Snead, worked through affiliated lawyers to identify and enforce election requirements in swing states. Two lawyers leading those challenges were William Consovoy, a former Justice Thomas clerk and head of a D.C. boutique firm representing the Republican National Committee (RNC) and the Trump campaign, and Jason Torchinsky, partner at a small Virginia firm who was well known for his book of prominent conservative clients.[222] As an example of their strategy, in February 2020, Consovoy and Torchinsky threatened to sue Michigan over the accuracy of its voter rolls in Democratic-leaning Michigan counties, contesting the "abnormally high" number of voters on the rolls.[223]

In the months before the election, lawyers working with HEP, the RNC (which set aside $20 million for election litigation),[224] and the Trump campaign ramped up legal challenges, while the campaign targeted advertising in battleground states.[225] Consovoy and Torchinsky were joined by election law experts, including Ronald Hicks, Jr., co-chair of the election law group at Porter Wright Morris & Arthur LLP (an Ohio firm with an office in Pittsburgh, Pennsylvania, where Hicks was based). Trump campaign senior legal counsel Justin Clark headed the legal team. Clark went on leave as a partner at Milwaukee-based Michael Best & Friedrich to start the Elections LLC law firm to represent the Trump campaign; he was joined by fellow partner (and former White House Counsel lawyer) Stefan Passantino[226] and Matthew Morgan from Barnes & Thornburg in Indianapolis, Indiana.[227]

221.   *See id.* (noting that The 85 Fund also supported the Republican Attorneys General Association); *see also About Us*, HONEST ELECTIONS PROJECT, https://www.honestelections.org/about/ [https://perma.cc/6JZR-Q47V].

222.   *See* Seville, *supra* note 220. Consovoy was counsel in *Shelby County v. Holder*, which rolled back the Voting Rights Act, and represented plaintiffs suing to eliminate affirmative action at Harvard until he was forced to withdraw for health reasons. *See* Danny Hakim & Stephanie Saul, *The Rising Trump Lawyer Battling to Reshape the Electorate*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/06/15/us/elections/voting-william-consovoy-trump.html [https://perma.cc/7VNX-KVTT]; Rahem D. Hamid, *SFFA Attorney Withdraws from Supreme Court Oral Arguments to Receive Cancer Treatment*, CRIMSON (Oct. 20, 2022), https://www.thecrimson.com/article/2022/10/20/william-consovoy-cancer/ [https://perma.cc/HAC3-Y2V2].

223.   *See* Seville, *supra* note 220. The Michigan Secretary of State defended against the charges, which did not produce any significant changes. *Id.*

224.   *See* Anita Kumar, *Trump Readies Thousands of Attorneys for Election Fight*, POLITICO (Sept. 27, 2020), https://www.politico.com/news/2020/09/27/trump-legal-network-election-day-fight-422035 [https://perma.cc/N46T-2M2Q].

225.   *See* Seville, *supra* note 220.

226.   Passantino and Clark had extensive experience in Republican politics and Clark also served in the Trump White House. *Id.*

227.   *See* Brandon Lowrey, *Meet the Legal Muscle Battling for Team Trump*, LAW360 (Nov. 2, 2020), https://www.law360.com/articles/1324575/meet-the-legal-muscle-battling-for-team-trump [https://perma.cc/C6ER-72DF].

As the pandemic caused shutdowns in spring 2020, states widened access to mail-in voting, prompting challenges from this team of lawyers.[228] Pennsylvania, which Trump narrowly won in 2016 and was considered key to his chances in 2020,[229] emerged as a flashpoint. In June, Hicks and colleagues teamed up with Morgan and Clark to file a federal suit challenging guidance issued by the Pennsylvania secretary of state to clarify COVID mail-in procedures under the state's recently enacted voting law.[230] The suit challenged provisions of the guidance facilitating no-excuse mail-in voting, permitting drop boxes, and restricting poll watchers, arguing that those provisions permitted variation by precinct that diluted Republican votes.[231] The federal district court abstained to permit the state supreme court to decide the issues,[232] which it did in September, keeping in place the guidance and extending the time for receiving mail-in ballots until after the election owing to postal service delays.[233] In response, Torchinsky filed petitions for an emergency stay and expedited review to the U.S. Supreme Court,[234] which were denied.[235]

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228.   The Republican focus on mail-in voting was based, in part, on the fact that it was "well-known that Democrats were much more likely to vote via mail-in ballots than in person in 2020." HOUSE JANUARY 6TH COMM., *supra* note 2, at 197.

229.   Gomez & McCoy, *supra* note 219.

230.   The state law passed in 2019 was known as Act 77, which permitted mail-in ballots by request and liberalized other procedures. Act of Oct. 31, 2019, Pub. L. No. 552-77, 2019 Pa. Laws; *see also* McLinko v. Dep't of State, 279 A.3d 539, 595 (Pa. 2022) (upholding the constitutionality of Act 77 permitting elective mail-in voting).

231.   *See* First Amended Complaint at 3, 39–54, Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. July 27, 2020) (No. 2:20-CV-00966) (alleging that mail-in voting is the "single greatest threat to free and fair elections"). The original complaint was filed June 29, 2020.

232.   *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 346 (Oct. 10, 2020).

233.   Pa. Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. Sept. 17, 2020) (No. 133 MM 2020). A subsequent case ruled that canvassing boards were not permitted to reject mail-in ballots based on signature analysis. *In re* Nov. 3, 2020 General Election, 240 A.3d 591, 611 (Pa. Oct. 23, 2020) (No. 149 MM 2020).

234.   Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari at 8, Scarnati v. Boockvar, 141 S. Ct. 644 (Sept. 28, 2020) (No. 20A53), 2020 WL 5898732, at *8.

235.   *See Scarnati*, 141 S. Ct. at 644 (Oct. 19, 2020) (noting that Justices Alito, Thomas, Gorsuch, and Kavanaugh would have granted the stay); Republican Party Pa. v. Boockvar, 141 S. Ct. 1, 1 (Oct. 28, 2020) (No. 20-542) (denying motion to expedite review, with Justice Alito writing that although the Supreme Court of Pennsylvania had "squarely alter(ed)" state law, there was "simply not enough time" to decide the issue before the election). Justice Coney Barrett did not participate in either decision having not yet been sworn in. A subsequent case brought by Bradley King of King Legal Group in Greensburg, Pennsylvania, and David Thompson of Cooper & Kirk (pro hac vice) challenged the Pennsylvania Supreme Court's decision to extend the deadline for receiving mail-in ballots. Complaint at 4, Bognet v. Boockvar, No. 3:20-cv-215 (W.D. Pa. Oct. 22, 2020). The district court dismissed the suit for lack of standing. Bognet v. Boockvar, No. 3:20-cv-215, 2020 WL 6323121 (W.D. Pa. Oct. 28, 2020); *see also* Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections, 241 A.3d 120, 2020 WL 6260041, at *6 (Pa. Commw. Ct. Oct. 23, 2020) (No. 983 C.D. 2020) (unpublished table decision) (affirming that satellite election offices at which voters request, fill out, and drop off mail-in ballots are not "polling places" under state election law).

This type of skirmish played out in other pre-election suits in battleground states.[236] In August, Consovoy was part of a team suing to stop Nevada's plan to send ballots to all registered voters,[237] while Ian Northon from Rhoades McKee (a Grand Rapids-based firm specializing in business, family, and personal injury law) and Edward Greim from the Thomas More Society (a Catholic public interest law organization known for opposing abortion) unsuccessfully sued to prevent Michigan from allowing voters to request ballots online.[238] During this time, Trump reportedly considered an executive order banning mail-in voting entirely but ditched the plan when government lawyers determined it exceeded his authority.[239] Opting to continue the state-by-state approach, in October, Nevada lawyers representing the Trump campaign filed suits to prohibit mail-in ballot counting without Republican monitoring[240] and to gain access to the identities of local election board members to ensure nonpartisan review.[241] A key argument in many of these suits was the independent state legislature (ISL) theory, which asserted that the Federal Constitution conferred power solely upon state legislatures to set voting rules, denying any role for local election boards, secretaries of state, or state courts.[242] A leading proponent of ISL, HEP filed an amicus brief on that ground in the Pennsylvania suit challenging the state

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236. Consovoy filed suit to stop Wisconsin from permitting mail-in votes to be received after the election. *See* Seville, *supra* note 220.

237. Donald J. Trump for President, Inc. v. Cegavske, 488 F. Supp. 3d 993, 1004 (D. Nev. Sept. 18, 2020) (No. 2:20-CV-01445 JCM (VCF)) (dismissing case for lack of standing). Nevada attorneys Donald Campbell and J. Colby Williams from Las Vegas-based Campbell & Williams were local counsel on Trump's original complaint, along with colleagues from Consovoy's law firm. Complaint for Declaratory and Injunctive Relief at 1, *Cegavske*, 488 F. Supp. 3d 993 (D. Nev. Aug. 4, 2020) (No. 2:20-cv-01445-JCM-VCF), 2020 WL 4530415.

238. Election Integrity Fund v. Benson, No. 20-000169-MM, 2020 WL 7033535 (Mich. Ct. Cl. Oct. 26, 2020). The complaint was filed on August 4, 2020.

239. *See* Kumar, *supra* note 218.

240. *See* Application for TRO at 1–2, Kraus v. Cegavske, No. 20 OC 00142 1B (Nev. 1st Jud. Dist. Ct. Oct. 23, 2020), 2020 WL 8289111. The Nevada lawyers in this case were Brian Hardy and Susan Gillespie of Marquis Aurbach Coffing in Las Vegas and David O'Mara of The O'Mara Law Firm in Reno. They also filed an Election Day emergency petition to stay processing of mail-in ballots pending appeal. Emergency Motion Under NRAP 27(e) for Stay and to Expedite Appeal, Kraus v. Cegavske, 475 P.3d 62 (Nev. Nov. 3, 2020) (No. 82018), 2020 WL 6481976. The parties settled the case a week later. *Kraus*, 475 P.3d 62 (Nev. Nov. 10, 2020) (unpublished table decision).

241. *See* Application for Order Compelling Disclosure of Public Records, Nev. Republican Cent. Comm. v. Clark Cnty., No. A-20-823821-W (Nev. 8th Jud. Dist. Ct. Oct. 27, 2020). Las Vegas lawyers David Lee and Charlene Renwick from Lee, Landrum & Carlson sued on behalf of Trump, the RNC, and Nevada Republicans.

242. Hansi Lo Wang, *This Conservative Group Helped Push a Disputed Election Theory*, NPR (Aug. 12, 2022), https://www.npr.org/2022/08/12/1111606448/supreme-court-independent-state-legislature-theory-honest-elections-project [https://perma.cc/Q65H-HAF5]. *See generally* Ari Berman, *How Right-Wing Groups Set the Stage for the Supreme Court to Rig Future Elections*, MOTHER JONES (Dec. 5, 2022), https://www.motherjones.com/politics/2022/12/supreme-court-moore-v-harper-federalist-society-leonard-leo/ [https://perma.cc/6VVB-LM5G] (describing the Federalist Society's role in promoting ISL to challenge election integrity). For the textual basis for ISL, see U.S. CONST. art. I, § 4, cl. 1 (containing the Elections Clause); *id.* art. II, § 1, cl. 2 (containing the Electors Clause).

supreme court's decision to grant a time extension for mail-in ballots.[243] ISL theory was the basis of other pre-election cases.[244] Although ISL asserted an aggressive interpretation of the Constitution, it was one that had not yet been resolved by the Supreme Court,[245] where Trump predicted the election would "end up."[246]

While most pre-election cases failed to win the relief sought,[247] they succeeded in honing arguments against election security that paved the way for later legal challenges[248] while helping Trump frame a public narrative of distrust. In the spring of 2020, the Trump team initiated a media campaign attacking mail-in voting on the same grounds raised in the pre-election lawsuits. In April, Trump tweeted: "Mail ballots are a very dangerous thing for this country, because they're cheaters. They go and collect them. They're fraudulent in many cases."[249] As the election approached, these attacks escalated. In August, Trump posted that there was "no way you can go through a mail-in vote without massive cheating" and said the only way he could lose was if there was "a rigged election."[250] The next month, Trump refused to agree that he would respect the results of the election if he lost, stating that "the ballots are a disaster" and questioning whether the election could be "honest" given "this whole situation of unsolicited ballots."[251] Trump's bottom-line strategy was straightforward:

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243.   *See* Wang, *supra* note 242.

244.   *See, e.g.*, Emergency Election Petition at 6, Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections, No. 200902035 (Pa. Phila. Cnty. C.P. Oct. 3, 2020), 2020 WL 6260837 (arguing that the secretary of state "has no power or authority to intrude upon the province of the General Assembly"); Verified Amended Complaint for Declaratory and Injunctive Relief at 17, Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. July 27, 2020) (No. 2:20-cv-00966-NR) (raising ISL theory).

245.   The Supreme Court later rejected ISL theory in Moore v. Harper, 600 U.S. 1 (2023).

246.   Kathryn Watson, *Trump Predicts Supreme Court Needs a Ninth Justice to Decide November Election*, CBS NEWS (Sept. 23, 2020), https://www.cbsnews.com/news/trump-predicts-supreme-court-needs-a-ninth-justice-to-decide-november-election/ [https://perma.cc/DVQ6-D5JZ].

247.   One exception was in Arizona, where local lawyers won a case blocking Maricopa County from instructing voters on how to correct mail-in ballot errors. Amended Order at 1, Ariz. Pub. Integrity Alliance v. Fontes, 2020 WL 13912796, at *1 (Ariz. Nov. 10, 2020) (No. CV-20-0253-AP/EL); *see also* Kumar, *supra* note 224 (noting that pre-election lawsuits won some cases about where drop boxes could be placed and whether absentee ballots could be bundled).

248.   Tierney Sneed & Fredreka Schouten, *Avalanche of Early Lawsuits Could Pave Way for Disputes over Tuesday's Election Results*, CNN (Nov. 7, 2022), https://www.cnn.com/2022/11/07/politics/election-lawsuits-midterms-challenges/index.html [https://perma.cc/XC33-489B] ("But even the cases that have failed to produce the orders that the challengers were seeking could be a source of post-election litigation.").

249.   HOUSE JANUARY 6TH COMM., *supra* note 2, at 201. For a thorough accounting of Trump's public and social media statements on the election, see *id.* at 199–203.

250.   Nick Niedzwiadek, *The 9 Most Notable Comments Trump Has Made About Accepting the Election Results*, POLITICO (Sept. 24, 2020), https://www.politico.com/news/2020/09/24/trump-casts-doubt-2020-election-integrity-421280 [https://perma.cc/RV3T-73W3]; *see also* Morgan Chalfant, *Trump: 'The Only Way We're Going to Lose This Election Is if the Election Is Rigged,'* HILL (Aug. 17, 2020), https://thehill.com/homenews/administration/512424-trump-the-only-way-we-are-going-to-lose-this-election-is-if-the/ [https://perma.cc/FB7G-PJAQ].

251.   Niedzwiadek, *supra* note 250.

repeat the election fraud message enough times that people would come to believe it.

B. *Mobilize Lawyer Networks and Recruit Legal Influencers*

Media efforts fed into the second stage of the pre-election strategy: to mobilize a larger coalition of the conservative bar, under the banner of "Lawyers for Trump," prepared to challenge the results of the election, while recruiting high-profile legal influencers willing to make the public case against election integrity. Lawyers for Trump was officially launched in July 2020 by Leo and Clark, who stated the group was "committed to rallying support to help make another four years of President Trump's leadership a reality."[252] Lawyers for Trump was led by four co-chairs—Texas AG Ken Paxton, former White House Counsel lawyer Passantino, Arkansas AG Leslie Rutledge, and Harmeet Dhillon of the San Francisco-based Dhillon Law Group—joined by eight other state attorneys general, alongside key members Consovoy, Giuliani, and Leo.[253] As the election approached, a critical function of the group, coordinated with the Trump campaign and RNC, was recruiting a cadre of lawyers licensed in battleground states willing to file post-election legal challenges.[254] This effort was led by lawyers from three anchor firms: Consovoy McCarthy, Jones Day (to which Trump's first White House Counsel, Don McGahn, had returned), and King & Spaulding (the former firm of FBI Director Christopher Wray).[255] Lawyers for Trump researched election law in battleground states, building on claims made in the pre-election lawsuits, and drafted ready-made legal forms to be filed.[256] Stopping fraud was the group's animating principle, as illustrated by the Lawyers for Trump recruitment poster (Figure 3) showing Trump depicted as Uncle Sam stating, "I want you to join Lawyers for Trump. Help prevent voter fraud on election day."[257]

252.	Press Release, Trump Campaign Launches 'Lawyers for Trump,' Mobilizing Support for Four More Years of President Trump's Strong Leadership (July 23, 2020), https://www.presidency.ucsb.edu/documents/trump-campaign-press-release-trump-campaign-launches-lawyers-for-trump-mobilizing-support [https://perma.cc/L5FY-AYZ2].

253.	*Id.*; *see also* Brenda Sapino Jeffreys, '*Lawyers for Trump' Organized to Drum Up Support, Ensure 'Election Integrity*,' TEX. LAW. (July 23, 2020), https://www.law.com/texaslawyer/2020/07/23/lawyers-for-trump-organized-to-drum-up-support-ensure-election-integrity/ [https://perma.cc/Q377-XGBX] (outlining organization's membership and goals). Matthew Morgan, Trump campaign general counsel, stated that "[t]he Lawyers for Trump coalition, which grows daily, will rally support for President Trump as they lend their time and legal expertise to protect the integrity of November's election." Kumar, *supra* note 224.

254.	Kumar, *supra* note 224.

255.	*Id.*

256.	*Id.*

257.	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 (June 14, 2022), https://www.nytimes.com/2021/01/31/us/trump-election-lie.html [https://perma.cc/6QSW-ABT4].

Figure 3. Lawyers for Trump Recruitment Poster

This anti-fraud strategy was amplified by legal influencers: lawyers with credibility among conservatives willing to enter the public sphere to disseminate information about lawsuits and raise concerns about voting security. Rudy Giuliani was the most famous. A respected former U.S. Attorney for the Southern District of New York, dubbed "America's Mayor" for his leadership after 9/11, Giuliani perplexed many by becoming the President's personal lawyer.[258] This role involved representing Trump in questionable matters, starting with Trump's effort to negotiate a deal with the Ukrainian president to launch an investigation into Hunter Biden in exchange for military funding, which resulted in Trump's first impeachment.[259] Giuliani made frequent media appearances defending the Ukraine deal and publicly weighed in on other Trump legal woes, for example, taking to the airwaves to stress that Trump used personal funds (rather than corporate funds from the Trump Organization, which issued the checks) to reimburse Michael Cohen's 2016 payoff to adult actress Stormy Daniels to keep her silent about her alleged affair with Trump.[260]

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258.   Dan Barry, *From 'America's Mayor' to Criminal Defendant: Giuliani's Long Tumble*, N.Y. TIMES (Aug. 15, 2023), https://www.nytimes.com/2023/08/15/nyregion/rudy-giuliani-trump-indictment.html [https://perma.cc/8ZA9-HRBN] (suggesting that Giuliani's "years long reputational tumble" was due to his obsession to be "relevant"). *See generally Giuliani: What Happened to America's Mayor?* (CNN original series 2023).

259.   Jim Rutenberg, *The Untold Story of 'Russiagate' and the Road to War in Ukraine*, N.Y. TIMES MAG. (Nov. 7, 2022), https://www.nytimes.com/2022/11/02/magazine/russiagate-paul-manafort-ukraine-war.html [https://perma.cc/F3Y4-VJ32]; Luke Broadwater, *Giuliani Meets with Jan. 6 Committee for Over 7 Hours*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/2022/05/20/us/politics/giuliani-jan-6-committee.html [https://perma.cc/M85G-GPFZ].

260.   *See* Josh Gerstein, *How Giuliani's Remarks on Trump and Stormy Daniels Change the Legal Landscape*, POLITICO (May 3, 2018), https://www.politico.com/story/2018/05/03/trump-giuliani-legal-landscape-568333 [https://perma.cc/ND64-E3P5].

In the lead-up to the election, Giuliani was a frequent media presence, appearing on right-wing outlets like Newsmax and his own *America's Mayor Live* podcast, while coordinating with former White House advisor Steve Bannon to promote the unproven story that information retrieved from Hunter Biden's laptop demonstrated that then-Vice President Joe Biden benefited from his son's corrupt dealings in Ukraine and China.[261] As reports circulated that Giuliani would head Trump's election law team, he also appeared on Fox's *Lou Dobbs Tonight*, where he stated that the Democratic Party was "basically a criminal organization, from Obama, to Hillary, to Biden. So, of course, they're going to cheat."[262] Another lawyer on the Trump team was Jenna Ellis, who had been dismissed as a prosecutor in rural Colorado before entering private practice and self-publishing a book on interpreting the Constitution according to biblical principles.[263] After becoming director of the evangelical Dobson Policy Institute, she was a frequent public presence defending Trump, who asked her to become a campaign advisor in 2019.[264] Ellis's role in the pre-election phase centered on media engagement. In this role, she drafted public statements such as one challenging Nevada's plan to send mail-in ballots to all registered voters, which she called "unconstitutional legislation [that] implements the exact universal vote-by-mail system President Trump has been warning against for months."[265] These legal influencers operated autonomously from the Clark-led campaign lawyers and did not always see eye to eye with them on strategy.

C.   Weaponize Fraud Claims in Court

Having assembled a team of lawyers and planted seeds of distrust, the next stage of the campaign involved weaponizing that distrust through post-election litigation—once it became clear that the election was too close to call and would hinge on the outcome of ongoing absentee and mail-in ballot counting in battleground states.[266] In the wake of the election, there were fifty-eight post-election lawsuits filed in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin seeking relief ranging from disqualifying specified ballots to

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261.   Dan Friedman, *Hunter Biden Sues Rudy Giuliani over "Total Annihilation" of His Privacy*, MOTHER JONES (Sept. 26, 2023), https://www.motherjones.com/politics/2023/09/hunter-biden-sues-rudy-giuliani-over-total-annihilation-of-his-privacy/ [https://perma.cc/7RDE-PFYS]; Andrew Rice & Olivia Nuzzi, *The Sordid Saga of Hunter Biden's Laptop*, N.Y. MAG. (Sept. 12, 2022), https://nymag.com/intelligencer/article/hunter-biden-laptop-investigation.html [https://perma.cc/KX4E-SDPK].

262.   *Lou Dobbs Tonight*, Interview with Rudy Giuliani (Fox television broadcast Oct. 8, 2020).

263.   Jeremy W. Peters & Alan Feuer, *How Is Trump's Lawyer Jenna Ellis 'Elite Strike Force' Material?*, N.Y. TIMES (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/us/politics/jenna-ellis-trump.html [https://perma.cc/X8ZB-7VJQ].

264.   *Id.*

265.   *See* Kumar, *supra* note 218.

266.   Alana Wise, Camila Domonoske & Rachel Treisman, *Where It Stands: Election Hinges on Key States, Final Results May Take a While*, NPR (Nov. 3, 2020), https://www.npr.org/2020/11/03/931042936/biden-secures-early-electoral-vote-lead-but-swing-state-crown-jewels-still-in-pl [https://perma.cc/8W8L-Z63U].

decertifying the election results.[267] This litigation occurred in a compressed time frame—from the November 3 election date through the January 6 date for Congress to certify Electoral College votes—and involved three waves of lawsuits handled by different lawyers. Overall, the cases focused on consistent themes: mail-in votes were defective or fraudulent, voter eligibility requirements were not enforced, Republican poll watchers were excluded, unmonitored drop boxes and canvassing centers were rife with fraud, voting machines were compromised, and outside private funding improperly influenced voters. Although some individual cases immediately after the election raised legitimate claims of improper voting rules and ballot processing, lawsuits grew increasingly implausible. Taken as a whole, they painted a picture of a shadowy conspiracy to steal the election funded by powerful elites and implemented through illicit counting of fake votes by workers at secretive polling centers or hacked computer systems.

The first wave of lawsuits commenced on Election Day, building on claims crafted in the pre-election phase. Some, but not all, of these cases were filed on behalf of the Trump campaign, though they all raised objections to state vote counting that, if successful, would have benefitted Trump. Representing the campaign in Pennsylvania, Porter Wright's Hicks teamed with Philadelphia-based Linda Kerns, a solo civil litigator who had worked with Hicks on a pre-election challenge to Pennsylvania's voting laws,[268] and other small-firm lawyers to bring a flurry of cases soon after the election. These suits challenged the exclusion of Republican poll watchers,[269] the extension of time for absentee and mail-in voters to provide valid identification,[270] and the acceptance of

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267. The total number of cases was determined from review of the COVID-Related Election Litigation Tracker database based on a search of Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin with a date range of November 3, 2020, to January 6, 2021. *Covid-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/ [https://perma.cc/4W4W-47TN]. The total is less than the sixty-four cases identified in a report by mainstream conservatives because that report's total includes six cases filed pre-election not counted here. *See* DANFORTH ET AL., *supra* note 3, at 51–52, 59–60.

268. *See* Emergency Election Petition, Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections, No. 200902035 (Pa. Phila. Cnty. C.P. Oct. 3, 2020), 2020 WL 6260837 (filed by Hicks and Kearns) (petitioning court to permit campaign representatives to be present in satellite election offices where voters could receive, fill out, and submit mail-in ballots).

269. Petition, *In re* Canvassing Observation, No. 201107003 (Pa. Phila. Cnty. C.P. Nov. 3, 2020) (filed by Kerns and Hicks); Complaint and Motion for Emergency Injunction, Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections, No. 2:20-CV-05533 (E.D. Pa. Nov. 5, 2020) [hereinafter *Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections* Complaint], 2020 WL 6535282 (filed by Hicks and Jerome Marcus of Marcus & Marcus in Merion Station), https://www.courthousenews.com/wp-content/uploads/2020/11/trump-philly.pdf [https://perma.cc/KMM9-M4XW].

270. Petition for Review, Donald J. Trump for President, Inc. v. Boockvar, No. 602 M.D. 2020 (Pa. Commw. Ct. Nov. 4, 2020) (filed by Hicks).

absentee and mail-in ballots with various claimed defects.[271] Similarly, in Michigan, lawyers from Rhoades McKee and the Thomas More Society (which had sued to stop Michigan from allowing voters to apply for absentee ballots online[272]) filed a post-election suit challenging vote "curing" (the practice of permitting voters to rectify minor defects in ballots) without Republican poll watchers,[273] while Mark (Thor) Hearne II, founder of True North Law in St. Louis, Missouri (and licensed in Michigan), sued on behalf of the campaign and a poll worker who claimed to have been excluded from the absentee voter ballot review.[274] Similar suits were filed in other battleground states challenging technical rules for poll watching and ballot counting.[275]

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271. Petition, Donald J. Trump for President, Inc. v. Montgomery Cnty. Bd. of Elections, No. 2020-18680 (Pa. Montgomery Cnty. C.P. Nov. 5, 2020) (filed by Hicks and Jonathan Goldstein of Goldstein Law Partners in Hatfield, Pennsylvania) (challenging roughly 600 ballots); Notice of Appeal, Donald J. Trump for President, Inc. v. Bucks Cnty. Bd. of Elections, No. 20-05786-35 (Pa. Bucks Cnty. C.P. Nov. 9, 2020) (filed by Goldstein and Hicks) (challenging 2,175 ballots); Petition, *In re* Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 General Election, Nos. 201100874–201100878 (Pa. Phila. Cnty. C.P. Nov. 11, 2020) (filed by Kearns) (challenging over 8,300 ballots). Other cases raising similar issues of voting irregularities were filed by lawyers on behalf of Republican candidates in other races. Thomas Breth of Dillon, McCandless, King, Coulter & Graham in Butler, Pennsylvania, was retained by Republican state and federal candidates to challenge the use of provisional ballots to cure defects on absentee and mail-in ballots. Petitioners' Application for Special Relief, Hamm v. Boockvar, No. 600 M.D. 2020 (Pa. Commw. Ct. Nov. 3, 2020). Matthew Haverstick of Kleinbard LLC in Philadelphia represented state senate candidate Nicole Ziccarelli challenging the validity of mail-in ballots in Allegheny County containing undated voter declarations on the secrecy envelope. Petition for Review in the Nature of a Statutory Appeal, *In re* 2,349 Ballots in the 2020 General Election, No. GD-20-011654 (Pa. Allegheny Cnty. C.P. Nov. 12, 2020). The case was consolidated with the *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 General Election* cases for appeal to the Pennsylvania Supreme Court, which held that the state election code did "not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged." 241 A.3d 1058, 1062 (Pa. Nov. 23, 2020). The court split on the issue of whether undated ballots could be counted, with a majority of the justices ruling that the failure to date the voter declaration should invalidate the ballot. *Id.* at 1079 (Wecht, J., concurring in part and dissenting in part); *id.* at 1090 (Dougherty, J., concurring in part and dissenting in part, joined by Saylor, C.J., and Mundy, J.). Justice Wecht concluded that the rule prohibiting undated ballots would only be applied prospectively and thus agreed to permit undated mail-in and absentee ballots to be counted in the 2020 election. *Id.* at 1080 (Wecht, J., concurring in part and dissenting in part).

272. Verified Complaint for Immediate Declaratory and Injunctive Relief, Election Integrity Fund v. Benson, No. 20-000169 (Mich. Ct. Cl. Aug. 24, 2020).

273. Verified Complaint for Emergency and Permanent Injunctive Relief, Stoddard v. City Election Comm'n of the City of Detroit, No. 20-014604-CZ (Mich. Cir. Ct. Nov. 4, 2020) (challenging counting of ballots and poll-watching procedures).

274. Verified Complaint, Donald Trump for President, Inc. v. Benson, No. 20-000225-MZ (Mich. Ct. Cl. Nov. 4, 2020). Hearne and colleague Stephen Davis filed suit a week later asking the federal district court to enjoin Wayne County from certifying votes cast "fraudulently and unlawfully" and those cast after election day and without challengers present. Complaint at 3, Donald Trump for President, Inc. v. Benson, No. 1:20-CV-01083 (W.D. Mich. Nov. 11, 2020).

275. *See* Petition to Command Enforcement of Election Laws at 5, *In re* Enforcement of Election Laws and Securing Ballots Cast or Received after 7:00 P.M. on November 3, 2020, No. SPCV20-00982-J3 (Ga. Super. Ct. Chatham Cnty. Nov. 4, 2020) (filed by Vincent Russo of the Robbins Firm and Bryon Tyson of Taylor English Duma, both from Atlanta, along with Passantino from the Trump campaign

While the focus of first-wave suits was on compliance with state voting law, some raised constitutional violations with an eye toward Supreme Court review. For example, in *Trump v. Boockvar*, Hicks filed federal suit on behalf of the campaign challenging the Pennsylvania results on constitutional grounds. The complaint alleged that variation in vote counting procedures by jurisdiction advantaged mail-in voters, creating a "two-tiered" system that violated the rights of Republican voters who disproportionately voted in person, and that decisions to liberalize mail-in voting due to COVID usurped state legislative power under ISL theory.[276] Similarly, in *Barnette v. Lawrence*, Andrew Teitelman, a solo lawyer from Huntingdon Valley representing congressional candidates, argued that variation in pre-canvassing procedures by Pennsylvania county officials violated the Equal Protection Clause by allowing some voters to cure defects and not others.[277] These cases asserted aggressive, though not frivolous, interpretations of the Constitution based on the *Bush v. Gore* precedent, which held that the procedures for counting ballots must ensure that all votes are treated equally.[278]

Other cases, in contrast, made more extreme claims that augured things to come. Lawyers in Arizona and Nevada, in cases representing individual voters and the Trump campaign, challenged election results based on purported problems with voting machines.[279] James Bopp, Jr. (appearing pro hac vice) led

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legal team) (alleging that Chatham County provided poll watcher with "no information to confirm the source of . . . absentee ballots" but providing no evidence that Chatham County had violated any law); Verified Complaint, Ariz. Republican Party v. Fontes, No. CV 2020-014533 (Ariz. Super. Ct. Maricopa Cnty. Nov. 12, 2020) (filed by Dennis Wilenchik, John Wilenchik, and Lee Miller of the Phoenix firm Wilenchik & Bartness) (arguing that Maricopa County violated state law procedures requiring a hand count of a random sample of ballots read through voting machines).

276. Verified Complaint for Declaratory and Injunctive Relief at 4, 6, 82, Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899 (M.D. Pa. Nov. 9, 2020) (No. 4:20-cv-02078).

277. Complaint ¶¶ 38–41, Barnette v. Lawrence, No. 2:20-cv-05477 (E.D. Pa. Nov. 3, 2020), 2020 WL 6440273 (challenging pre-election ballot canvassing procedures adopted by some, but not all, counties allowing voters to cure defects in their mail-in ballots). Teitelman's firm focused on commercial, business, and real estate transactional and litigation matters.

278. Bush v. Gore, 531 U.S. 98, 104–05 (2000).

279. Verified Complaint for Special Action at 3–6, Aguilera v. Fontes, No. CV2020-014083, (Ariz. Super. Ct. Maricopa Cnty. Nov. 4, 2020), 2020 WL 6537629 (filed by Alexander Kolodin of the Kolodin Law Group from Phoenix and Sue Becker of the Public Interest Legal Foundation in Indiana) (alleging that voters were improperly instructed to use Sharpie markers to complete in-person voting); Verified Complaint at 6–7, 9–15, Aguilera v. Fontes, No. CV2020-014562 (Ariz. Super. Ct. Maricopa Cnty. Nov. 12, 2020) (filed by Kolodin and Becker) (claiming that election machines failed to properly scan ballots of two individuals and seeking declaration that plaintiffs' voting rights were violated); Verified Complaint at 2, Donald Trump for President, Inc. v. Hobbs, No. CV 2020-014248 (Ariz. Super. Ct. Maricopa Cnty. Nov. 7, 2020) (filed by Kory Langhofer of Statecraft, Inc. and Brett Johnson from Snell & Wilmer, both based in Phoenix) (claiming election officials unlawfully disqualified ballots by overriding electronic tabulation errors for overvotes); Complaint at 6, Donald Trump for President, Inc. v. Gloria, No. A-20-824153-C (Nev. 8th Jud. Dist. Ct. Nov. 3, 2020) (filed by Brian Hardy of Las Vegas-based Marquis Aurbach Coffing) (asking for polling places to stay open based on malfunctioning voting machines in Clark County); Complaint at 3, Stokke v. Cegavske, No. 2:20-cv-02046 (D. Nev. Nov. 5, 2020) (filed by David O'Mara from Reno) (challenging the use of Agilis machines to verify ballot signatures).

a team of local lawyers in Georgia, Michigan, Pennsylvania, and Wisconsin who filed suits on behalf of voters claiming equal protection violations and seeking to set aside the presidential election results based on officially sanctioned voter fraud.[280] Bopp, Jr. was a conservative movement lawyer with a solo practice in Terre Haute, Indiana—known as the legal mastermind of the strategy to overturn *Roe v. Wade* and gut campaign finance laws—who appeared on behalf of True the Vote, a Texas organization leading the voter fraud movement.[281] In another Michigan case, *Costantino v. Detroit*, lawyers David Kallman and Erin Mersino from the Great Lakes Justice Center—a conservative legal nonprofit based in Lansing, Michigan—argued that poll workers in Detroit's TCF Center were instructed not to verify signatures on absentee ballots and coached voters to vote for Biden.[282]

One Pennsylvania case upended normal procedures by jumping between state and federal courts when it seemed that one was likely to issue an adverse ruling.[283] Other cases involved high-profile instances of sketchy lawyering. In Michigan, True North Law lawyer Hearne filed suit supported by a single affidavit by someone claiming to have received a note from an election inspector who asserted that mail-in ballots had been backdated, which the court rejected as inadmissible hearsay.[284] In Pennsylvania, Hicks and Philadelphia lawyer

280.   Verified Complaint for Declaratory and Injunctive Relief at 21, Brooks v. Mahoney, No. 4:20-cv-00281-RSB-CLR (S.D. Ga. Nov. 11, 2020) (filed by Ray Smith III from Smith & Liss in Atlanta with Bopp, Jr.) (alleging that officials counted votes by felons, noncitizens, and other "phantom" voters); Verified Complaint for Declarative and Injunctive Relief at 9, Bally v. Whitmer, No. 1:20-cv-1088 (W.D. Mich. Nov. 11, 2020) (filed by Maxwell Goss from Birmingham, Michigan, with Bopp, Jr.) (alleging "sufficient evidence to place in doubt the November 3 presidential-election results in identified key counties, including issues with transparency, fraudulent changing of dates, a software glitch, clerical errors, illegal votes, and many other issues and irregularities"); Motion for Declaratory and Injunctive Relief, Pirkle v. Wolf, No. 4:20-cv-02088 (M.D. Pa. Nov. 12, 2020) (filed by local counsel Walter Zimolong from Villanova, Pennsylvania, with Bopp, Jr. and Anita Milanovich from Butte, Montana) (promising to provide statistical evidence to buttress vote dilution claims but voluntarily dismissing the case a few days later); Verified Complaint for Declaratory and Injunctive Relief ¶¶ 20–43, Langenhorst v. Pecore, No. 1:20-cv-01701 (E.D. Wis. Nov. 12, 2020) (filed by local counsel Michael Dean of Brookfield, Wisconsin, with Bopp, Jr.) (alleging absentee ballots linked to fraud).

281.   Cassandra Jaramillo, *She Helped Create the Big Lie. Records Suggest She Turned It into a Big Gift*, REVEAL (June 8, 2022), https://revealnews.org/article/true-the-vote-big-lie-election-fraud/ [https://perma.cc/NKE3-A3R7]. Bopp, Jr. subsequently sued True the Vote, alleging that the organization failed to pay him for legal work on several election cases in 2020 and 2022. Verified Complaint, Bopp Law Firm v. True the Vote, Inc., No. 2:23-cv-00120-JRS-G (S.D. Ind. Mar. 16, 2023).

282.   Complaint ¶ 3.e., Costantino v. City of Detroit, No. 20-014780-AW (Mich. Cir. Ct. Nov. 9, 2020) (asserting that "Defendants systematically used false information to process ballots, such as using incorrect or false birthdays").

283.   In the Pennsylvania poll watcher challenge, on the same day Kerns and Hicks appealed the Court of Common Pleas order to the Commonwealth Court of Pennsylvania, Hicks and Marcus filed in federal court on the very issues pending on state court appeal. *See* Brief of Appellant, *In re* Canvassing Observation, No. 1094 C.D. 2020 (Pa. Commw. Ct. Nov. 5, 2020), 2020 WL 6551492; *Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections* Complaint, *supra* note 269, at 1–2.

284.   Verified Complaint for Immediate Declaratory and Injunctive Relief at 1, Donald Trump for President, Inc. v. Benson, No. 20-000225-MZ (Mich. Ct. Cl. Nov. 4, 2020); Mich. Ct. of Claims,

Jerome Marcus claimed that the County Board of Elections was refusing to allow any representatives of the Republican Party to observe; however, when pressed during oral argument, Marcus admitted that the party had "a nonzero number of people in the room."[285] Despite this, the first wave of suits did yield a few Trump victories,[286] though none of the cases challenging vote counts involved enough ballots to affect the outcome.[287]

Donald J. Trump for President, Inc. v Jocelyn Benson—#20-000225-MZ, YOUTUBE (Nov. 5, 2020), https://www.youtube.com/watch?v=ELnXCQcjgWQ [https://perma.cc/8SXB-6L36] (beginning at 5:35 timestamp).

285.   *Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections* Complaint, *supra* note 269, at 1; Aaron Blake, *Trump Lawyers Suffer Embarrassing Rebukes from Judges over Voter Fraud Claims*, WASH. POST (Nov. 11, 2020), https://www.washingtonpost.com/politics/2020/11/11/trump-lawyers-suffer-embarrassing-rebukes-judges-over-voter-fraud-claims/ [https://perma.cc/W7LV-EHX 4]. There were other examples of lawyers making unsubstantiated claims. In Michigan, Greim of the Thomas More Society and Northon from Rhoades McKee alleged that Democratic vote inspectors were "curing" rejected mail-in ballots without Republican inspectors based on what the court called "speculation and conjecture." Verified Complaint for Emergency and Permanent Injunctive Relief at 1, Stoddard v. City Election Comm'n of the City of Detroit, No. 20-014604-CZ (Mich. Cir. Ct. Nov. 4, 2020); Katelyn Polantz, Erica Orden, Laura Jarrett & Jessica Schneider, *Trump and GOP Lawsuits Challenging Election Fail in Court*, CNN (Nov. 6, 2020), https://www.cnn.com/ 2020/11/06/politics/trump-and-gop-lawsuits-to-challenge-election-flail-in-court/index.html [https:// perma.cc/YR9P-TC3N]. In Georgia, Bryan Tyson of Taylor English Duma in Atlanta and Trump campaign lawyer Passantino challenged absentee ballots purportedly counted after the voting deadline. Petition to Command Enforcement of Election Laws, *In re* Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on November 3, 2020, No. SPCV20-00982-J3 (Ga. Super. Ct. Chatham Cnty. Nov. 4, 2020). However, the case was promptly dismissed after a hearing in which the lawyers could not provide actual evidence of any late ballots being counted other than arguing that it was "fishy" that there were so few late ballots compared to the previous election. Rosie Manins, *Ga. Judge Won't Block Counting of Absentee Ballots*, LAW360 (Nov. 5, 2020), https://www.law360.com/articles/1326235/ga-judge-won-t-block-counting-of-absentee-ballots [https:// perma.cc/Q3DJ-ZJLR].

286.   Order at 2, Donald J. Trump for President v. Boockvar, No. 602 M.D. 2020 (Pa. Commw. Ct. Nov. 12, 2020) (ruling that secretary of state guidance extending proof of identification deadline exceeded her authority and enjoining the counting of ballots received after that deadline); Order at 1, Hamm v. Boockvar, No. 600 M.D. 2020 (Pa. Commw. Ct. Nov. 6, 2020) (granting preliminary injunction to ensure elections board segregated the provisional ballots of individuals who voted on election day and whose mail-in ballots had been timely received); Memorandum Opinion at *3–4, *In re* Canvassing Observation, No. 1094 C.D. 2020 (Pa. Commw. Ct. Nov. 5, 2020), 2020 WL 6551316 (reversing trial court's ruling in Philadelphia Court of Common Pleas Case No. 201107003 and ordering that poll observers be allowed to stand within six feet of ballot counting for "meaningful observation"), *vacated by In re* Canvassing Observation, 241 A.3d 339, 350 (Pa. Nov. 17, 2020) (No. 30 EAP 2020) (reversing the Commonwealth Court's invalidation of the board's decision to impose distance requirements where the statute at issue provided none).

287.   *See, e.g.*, *In re* Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election, 241 A.3d 1058, 1062 (Pa. Nov. 23, 2020) (Nos. 29, 31-15 EAP 2020) (ruling on five suits challenging Philadelphia County election board decisions to count a total of 8,329 ballots); Complaint ¶¶ 20–22, Donald J. Trump for President, Inc. v. Montgomery Cnty. Bd. of Elections, No. 2020-18680 (Pa. Montgomery Cnty. C.P. Nov. 5, 2020) (challenging the election board's decision to count six hundred mail-in ballots that were defective because they lacked inner secrecy envelopes, had marked inner secrecy envelopes, or had incomplete declarations); Memorandum Opinion at 1–3, 14, *In re* Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, No. 20-05786-35, No. 1191 C.D. 2020 (Pa. Commw. Ct. Nov. 25, 2020) (addressing the Trump campaign's appeal concerning

Most of the lawyers in first-wave cases came from solo practice and small firms, many from small towns, and some with little or no election law experience. For example, David O'Mara, who represented a voter and state congressional candidates in the Nevada suit, *Stokke v. Cegavske*, claimed expertise in appeals, bankruptcy, family law, and business law.[288] Some lawyers had pre-existing ties to the conservative legal movement. Hearne, who was lead counsel in two Michigan challenges, was Bush's 2004 campaign counsel.[289] He was also general counsel to the American Center for Voting Rights, established during the Bush administration to legitimize the idea of large-scale voting fraud as a basis for passing voter identification laws that depressed turnout by low-income, disproportionately Democratic, voters.[290] Marcus, who sued Pennsylvania over poll watcher rules,[291] was involved in the legal strategy around the Paula Jones sexual harassment lawsuit that culminated in Bill Clinton's impeachment.[292] Some of the cases that most aggressively pushed fraud claims were brought by lawyers from conservative nonprofit groups, like the Thomas More Society and Great Lakes Justice Center. In Arizona, Sue Becker from the Indiana-based Public Interest Legal Foundation, a nonprofit promoting "election integrity,"[293] appeared pro hac vice as co-counsel in two cases (both titled *Aguilera v. Fontes*), the first claiming that Arizona voters were made to use Sharpies unreadable by voting machines[294] and the second claiming voting machines failed to properly record ballots.[295] Another Indiana lawyer, James Bopp, Jr. of True the Vote, was on the briefs in the Michigan case, *Bally*

2,177 absentee and mail-in ballots in Bucks County and noting that challenges to all but sixty-nine were controlled by the Pennsylvania Supreme Court's intervening decision in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*).

288. *See* David O'Mara, O'MARA LAW FIRM, https://omaralaw.net/meet-david/ [https://perma.cc/793E-PX78]. In contrast, Hearne from True North Law and Hicks from Porter Wright had significant election law expertise.

289. *See* Matthew Santoni, *Trump Unleashes Barrage of Lawsuits in Battleground States*, LAW360 (Nov. 4, 2020), https://www.law360.com/articles/1326028/trump-unleashes-barrage-of-lawsuits-in-battleground-states [https://perma.cc/2QKN-V8CE].

290. *See* Richard L. Hasen, *The Fraudulent Fraud Squad*, SLATE (May 18, 2007), https://slate.com/news-and-politics/2007/05/the-incredible-disappearing-american-center-for-voting-rights.html [https://perma.cc/N6VE-EL8W].

291. Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections, No. 2:20-cv-05533 (E.D. Pa. Nov. 5, 2020).

292. Don Van Natta Jr. & Jill Abramson, *Quietly, Team of Lawyers Who Disliked Client Kept Jones Case Alive*, N.Y. TIMES (Jan. 24, 1999), https://archive.nytimes.com/www.nytimes.com/library/politics/012499jones-lawyers.html [https://perma.cc/89R7-5EQH].

293. *About*, PUB. INT. LEGAL FOUND., https://publicinterestlegal.org/about/ [https://perma.cc/24QY-HNXY].

294. Verified Complaint for Special Action, Aguilera v. Fontes, No. CV2020-014083, *supra* note 279, at 3–6.

295. Verified Complaint, Aguilera v. Fontes, No. CV2020-014562, *supra* note 279, at 6–7, 9–15.

v. Whitmer;[296] the Pennsylvania case, *Pirkle v. Wolf*;[297] the Wisconsin case, *Langenhorst v. Pecore*;[298] and the Georgia case, *Brooks v. Mahoney*,[299] all of which alleged officially sanctioned voting fraud and were voluntarily dismissed. The first-wave cases also involved two established firms: Porter Wright and Snell & Wilmer, the latter a large national firm with offices across the country, including Phoenix. Snell & Wilmer lawyers were co-counsel in the Arizona case, *Trump v. Hobbs*, which alleged that officials disqualified lawful Sharpie-filled ballots.[300]

By mid-November, fifteen of the twenty-five cases filed in the first wave had been resolved, all but two against election challengers.[301] Trump campaign staffers advised him on November 7 that he needed to win litigation or recounts in Arizona, Georgia, and Wisconsin to win the election.[302] A physical hand recount of 2 percent of ballots in Maricopa County, Arizona (as required by state law) was completed on November 9, leading *The New York Times* to call Arizona for Biden on November 12.[303] In the face of mounting losses, and without evidence of voting fraud materializing, the established firms withdrew from campaign representation.[304] On November 12, as Porter Wright withdrew from

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296.   Verified Complaint for Declaratory and Injunctive Relief, Bally v. Whitmer, *supra* note 280, at 21.

297.   Motion for Declaratory and Injunctive Relief, Pirkle v. Wolf, *supra* note 280, at 1.

298.   Verified Complaint for Declaratory and Injunctive Relief, Langenhorst v. Pecore, *supra* note 280, at 1.

299.   Verified Complaint for Declaratory and Injunctive Relief, Brooks v. Mahoney, *supra* note 279, at 22.

300.   *Trump v. Hobbs* was brought by Phoenix-based Kory Langhofer, who was counsel to Trump's 2016 campaign, and Brett Johnson and Erick Spenser of Snell & Wilmer. Verified Complaint at 1, Donald Trump for President, Inc. v. Hobbs, No. CV 2020-014248 (Ariz. Super. Ct. Maricopa Cnty. Nov. 7, 2020). That case was dismissed on November 16 after a hearing in which Langhofer attempted to admit online affidavits that he conceded were spam. Adam Klasfeld, *Bye, Bye, 'Sharpiegate': Trump Campaign Hastily Retreats from Conspiracy-Laden Lawsuit After Brutal Hearing*, LAW & CRIME (Nov. 13, 2020), https://lawandcrime.com/2020-election/bye-bye-sharpiegate-trump-campaign-hastily-retreats-from-conspiracy-laden-lawsuit-after-brutal-hearing/ [https://perma.cc/6EN3-7B6C].

301.   The two cases were *Hamm v. Boockvar*, *supra* note 286, and *Trump v. Boockvar*, *supra* note 286. Six of the cases were voluntarily dismissed and seven were pending on appeal, where they would ultimately fail. *Covid-Related Election Litigation Tracker*, *supra* note 267.

302.   Federal Election Indictment, *supra* note 1, at 8.

303.   MARICOPA CNTY., ARIZ., GENERAL ELECTION – NOVEMBER 3, 2020, HAND COUNT/AUDIT REPORT 1, https://web.archive.org/web/20210508162809/https://azsos.gov/sites/default/files/2020_General_Maricopa_Hand_Count.pdf [https://perma.cc/BNL4-YTPR]; Luis Ferré-Sadurní, Jennifer Medina & Eileen Sullivan, *Biden Flips Arizona, Further Cementing His Presidential Victory*, N.Y. TIMES (Nov. 12, 2020), https://www.nytimes.com/2020/11/12/us/biden-wins-arizona.html?searchResultPosition=25 [https://perma.cc/2BA6-JABC].

304.   *See, e.g.*, Rachel Abrams, David Enrich & Jessica Silver-Greenberg, *Once Loyal to Trump, Law Firms Pull Back from His Election Fight*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/business/porter-wright-trump-pennsylvania.html [https://perma.cc/J6L2-JAVY] (reporting that Porter Wright had withdrawn from *Trump v. Boockvar* and Snell & Wilmer had withdrawn in *Trump v. Hobbs*; also noting Jones Day would not get involved in additional litigation).

the *Boockvar* case in Pennsylvania after the state moved to dismiss,[305] Trump's campaign lawyers sought to persuade him to give up the legal effort.[306] At this time, Giuliani pitched the idea that Dominion voting machines, being used in Georgia and some other states, were converting Trump votes to Biden votes in massive numbers—a theory circulating on far-right media.[307]

Thus began the second wave of post-election litigation, during which lawyers scrambled to bring new suits while sustaining those already filed. Starting in this wave, Trump's campaign lawyers aligned with Elections LLC were sidelined in favor of more radical lawyers, like Giuliani, while new small-firm lawyers emerged to file suits in battleground states. Second-wave cases shifted from the initial strategy of challenging individual ballots to wholesale attacks asking for election results to be set aside.[308] Nevada, which was called for Biden on November 7 but where only thirty thousand votes separated Biden from Trump,[309] was a focus of voting machine allegations. In that state, lawyers filed suits on behalf of individuals alleging problems with Agilis machines used in Clark County (home to Democratic stronghold Las Vegas). Four of these were brought by Craig Mueller—a former criminal prosecutor with his own personal injury firm in Las Vegas[310]—on behalf of individuals in their capacity as voters and state officeholders (and candidates) seeking a new election.[311] In *Law v.*

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305.   Motion for Withdrawal of Appearance at 1, Donald J. Trump for President, Inc. v. Boockvar, No. 4:20-cv-02078 (M.D. Pa. Nov. 12, 2020).

306.   Rutenberg et al., *supra* note 257.

307.   *Id.* (noting that dismissed Fox commentator Thomas McInerney made claims on Steve Bannon's *War Room: Pandemic* radio show that a supercomputer using Scorecard software would hack into voting machines to steal votes from Trump and that Arizona Congressman Paul Gosar tweeted about Dominion machine problems on November 6).

308.   In Pennsylvania, Pittsburgh lawyers Gregory Teufel of OGC Law and Brandon Shields of Gabriel & Shields sought to invalidate millions of mail-in ballots and enjoin certification of the election based on a facial challenge to the constitutionality of Act 77 of 2019, which the Pennsylvania Supreme Court had already upheld prior to the election. Kelly v. Commonwealth, No. 620 M.D. 2020 (Pa. Commw. Ct. Nov. 21, 2020). On appeal, the Pennsylvania Supreme Court dismissed the challenge as moot, holding that it violated the doctrine of laches since it could have been filed upon Act 77's enactment. Kelly v. Pennsylvania, 240 A.3d 1255, 1256 (Pa. Nov. 28, 2020), *cert. denied*, 141 S. Ct. 1449 (Feb. 22, 2021).

309.   Camila Domonoske, *AP Calls Nevada for Joe Biden*, NPR (Nov. 7, 2020), https://www.npr.org/sections/live-updates-2020-election-results/2020/11/07/932481031/ap-calls-nevada-for-joe-biden [https://perma.cc/S782-S29S].

310.   *See* MUELLER & ASSOCS., https://craigmuellerlawyer.com/ [https://perma.cc/97U7-R7AX].

311.   Petition for Writ of Mandamus, Becker v. Gloria, No. A-20-824878-W (Nev. 8th Jud. Dist. Ct. Nov. 16, 2020); Petition for Writ of Mandamus, Marchant v. Gloria, No. 20-824884-W (Nev. 8th Jud. Dist. Ct. Nov. 16, 2020); Statement of Contest of the November 3, 2020 Election, Becker v. Cannizzaro, No. A-20-825067-P (Nev. 8th Jud. Dist. Ct. Nov. 18, 2020); Petition for Writ of Mandamus, Rodimer v. Gloria, No. A-20-825130-W (Nev. 8th Jud. Dist. Ct. Nov. 19, 2020). In the *Cannizzaro* suit, Mueller alleged that Clark County had illegally lowered the factory settings on Agilis machines to scan lower-resolution signatures. Statement of Contest of the November 3, 2020 Election, *supra*, at 3–4. The suit was voluntarily dismissed two days after filing. Notice of Voluntary Dismissal, *Cannizzaro*, No. A-20-825067-P (Nev. 8th Jud. Dist. Ct. Nov. 20, 2020). The other listed cases were dismissed for lack of

Whitmer, Las Vegas civil litigator Shana Weir brought suit on behalf of Trump voters and elector candidates asking for 130,000 mail-in ballots to be invalidated due to alleged improper verification by the Agilis machines and for another 3,188 ballots to be rejected due to improper human inspection.[312] Of eleven cases filed between November 13 and November 21, five were dismissed at the trial court level by Thanksgiving;[313] in the end, all but one (a Pennsylvania case involving 270 votes[314]) were ultimately decided against the plaintiffs.

The second wave of cases involved familiar lawyers while introducing new ones.[315] In the familiar category, Northon from Rhoades McKee and Mersino from the Great Lakes Justice Center (appearing as special counsel for the Thomas More Society) teamed up again in Michigan (with Robert Muise of the American Freedom Law Center) seeking to enjoin results on the grounds that state officials "flooded the electoral process" with absentee ballots and counted

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jurisdiction with the courts also finding no merit to the substantive claims. *See* Order at 2–3, *Becker*, No. A-20-824878-W (Nev. 8th Jud. Dist. Ct. Dec. 2, 2020); Order at 2–3, *Marchant*, No. 20-824884-W (Nev. 8th Jud. Dist. Ct. Nov. 23, 2020); Decision and Order at 3, *Rodimer*, No. A-20-825130-W (Nev. 8th Jud. Dist. Ct. Nov. 25, 2020).

312. Statement of Contest at 10, Law v. Whitmer, No. 10 OC 00163 1B (Nev. 1st Jud. Dist. Ct. Nov. 17, 2020); Miriam Valverde, *Fact Checking Republican Claim of Illegal Votes in Nevada*, POLITIFACT (Nov. 6, 2020), https://www.politifact.com/factchecks/2020/nov/06/nevada-republican-party/fact-checking-republican-claim-illegal-votes-nevad/ [https://perma.cc/N6MU-43MJ]. Weir was joined pro hac vice by Virginia lawyer Jesse Binnall, who publicized the suit at a news conference with the former Nevada AG Adam Laxalt and American Conservative Union chair Matt Schlapp. Colton Lochhead & Rory Appleton, *Nevada GOP Announces Another Legal Challenge to State Election Results*, LAS VEGAS REV.-J. (Nov. 17, 2020), https://www.reviewjournal.com/news/politics-and-government/nevada/nevada-gop-announces-another-legal-challenge-to-state-election-results-2185335/ [https://perma.cc/5TWN-A7CH]. In another Nevada suit, Joel Hansen from Hansen & Hansen in Las Vegas sued on behalf of The Election Integrity Project and an individual voter (and former state officeholder) challenging the legality of the state's recently enacted voting law, Assembly Bill 4 (AB4), for authorizing voting centers allowing voter "impersonation" and other bad acts by "nefarious voters" outside their home precincts; facilitating "duplicated" voting, "double voting," and "delayed cancellations" allowing thousands to vote illegally; permitting mailed ballots to be sent to registrants "aged 105+" and eliminating signature verification; and permitting "ballot harvesting" on behalf of voters over sixty-five years old, with disabilities, or unable to read. Complaint for Preliminary Injunction, Permanent Injunction, and Declaratory Relief at 5–11, Elections Integrity Project of Nev. v. Cegavske, No. A-20-820510-C (Nev. 8th Jud. Dist. Ct. Nov. 16, 2020). The complaint argued that these and other problems with AB4 eliminated procedural safeguards and thus allowed "unequal evaluation" of mail-in ballots, making "voter fraud and other ineligible voting inevitable," thus creating vote dilution requiring that AB4 be enjoined. *Id.* at 19, 21, 27.

313. *Covid-Related Election Litigation Tracker*, *supra* note 267.

314. The case was filed by Haverstick on behalf of Republican state senate candidate Ziccarelli seeking to block the count of 270 provisional ballots that lacked proper signatures or were otherwise defective. *In re* Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election, No. GD 20-011793 (Pa. Allegheny Cnty. C.P. Nov. 16, 2020). The state commonwealth court ruled in Ziccarelli's favor. Opinion, *In re* Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election, No. 1161 C.D. 2020 (Pa. Commonw. Ct. Nov. 20, 2020), *petition for allowance of appeal denied*, No. 338 WAL 2020 (Pa. Nov. 23, 2020).

315. *See* Bryon Tau & Sara Randazzo, *Trump Cries Voter Fraud. In Court, His Lawyers Don't*, WALL ST. J. (Nov. 13, 2020), https://www.wsj.com/articles/trump-cries-election-fraud-in-court-his-lawyers-dont-11605271267 [https://perma.cc/RT8A-5T8M] (quoting lawyers Langhofer and Goldstein as well as former Nevada AG Laxalt).

illegal ballots at Detroit's TCF Center.[316] On November 20, before the Wisconsin recount was complete, Minneapolis lawyer Erick Kaardal, special counsel for the Thomas More Society's Amistad Project (created specifically to contest the election), filed an emergency petition to the Wisconsin Supreme Court to enjoin election certification on the ground that the Mark Zuckerberg-funded Center for Technology and Civic Life gifted $6,000,000 to facilitate absentee voting in Democratic-friendly cities like Madison, resulting in the counting of illegal votes in numbers that exceeded the election margin for Biden.[317] These cases suggested that encouraging absentee and mail-in voting must have enabled fraud.

One of the new faces was L. Lin Wood, a Georgia personal injury lawyer who rose to fame bringing defamation suits for accused 1996 Atlanta Olympics bomber Richard Jewell.[318] Wood served as plaintiff in an ISL suit challenging the Georgia secretary of state's handling of absentee ballots with nonmatching signatures, which he argued was dictated by a settlement agreement with "Democratic Party Agencies" in violation of the "Electors & Election Clauses" and "Equal Protection Clause" of the Constitution, thereby prohibiting election certification.[319] Then came Giuliani, who was by no means unfamiliar as an influencer—but was unaccustomed to the courtroom. On November 7, Giuliani led a bewildering press conference in front of Four Seasons Total Landscaping in Philadelphia, where he introduced himself as "here on behalf of the Trump Campaign, as an attorney for the president," and then accused the city of having "a sad history of voter fraud" that included the dead former heavyweight boxing champion Joe Frazier "still voting."[320] On November 17, in *Trump v. Boockvar*,

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316. Complaint at 2, 5–6, 26, Johnson v. Benson, No. 1:20-cv-01098 (W.D. Mich. Nov. 15, 2020) (alleging numerous acts of official "malfeasance," including deliberately counting ballots from voters whose names were not on registration lists, backdating ballots, and counting "tens of thousands, if not more," late absentee ballots at the TCF Center).

317. Emergency Petition for Original Act at 2–3, Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA (Wis. Sup. Ct. Nov. 20, 2020) (alleging that over 140,000 illegal votes were cast by voters who voted where they did not reside, were not "indefinitely confined" by COVID, and who resided out of state). Kaardal was past secretary of the Republican Party of Minnesota and advisory board member of the Minnesota Chapter of the Federalist Society. *Erick G. Kaardal, Chief Counsel*, FAM. PRESERVATION FOUND., https://familypreservationfoundation.org/about/chief-counsel [https://perma.cc/Q22J-3ULR].

318. Jeremy W. Peters & Alan Feuer, *How Richard Jewell's Lawyer Became a Pro-Trump Conspiracy Theorist*, N.Y. TIMES (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/us/politics/lin-wood-georgia-trump.html [https://perma.cc/JR2B-5EV3].

319. Verified Complaint for Declaratory and Injunctive Relief at 11, 14, 19, 24, 27, Wood v. Raffensperger, 501 F. Supp. 3d 1310 (N.D. Ga. Nov. 13, 2020) (No. 1:20-cv-04651-SDG) (filed by Ray Smith III) (alleging that rules adopted for counting ballots under a prior settlement caused disparate treatment among voters). The case was dismissed for lack of standing. *Wood*, 501 F. Supp. 3d at 1323 (N.D. Ga. Nov. 20, 2020), *aff'd*, 981 F.3d 1307 (11th Cir. Dec. 5, 2020), *cert. denied*, 141 S. Ct. 1379 (Feb. 22, 2021).

320. *Transcript, Rudy Giuliani Trump Campaign Philadelphia Press Conference at Four Seasons Total Landscaping*, REV (Nov. 7, 2020), https://www.rev.com/blog/transcripts/rudy-giuliani-trump-campaign-philadelphia-press-conference-november-7 [https://perma.cc/LU7K-C2TN].

Giuliani was admitted pro hac vice to replace Porter Wright.[321] That same day, in an online hearing, Giuliani gave a confusing performance in which he seemed not to understand the levels of constitutional scrutiny and contradicted himself (and his own brief) by stating he was alleging voter fraud.[322] Just over a week later, the Third Circuit dismissed the *Boockvar* case, opening its opinion by stating: "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here."[323]

The third wave of lawsuits, in which conspiracy claims took center stage, began right before Thanksgiving and ran through the end of the year. On November 19, just after the TCF Center voting fraud case brought by Northon, Muise, and Mersino was voluntarily dismissed in Michigan for lack of evidence,[324] outlandish new evidence was offered in the RNC lobby by a team of lawyers calling themselves Trump's "elite strike force."[325] The team was led by Giuliani, who made the case for carrying on legal challenges despite the growing number of losses: "What I'm describing to you is a massive fraud. It

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321. In the Matter of Application for Pro Hac Vice Admission to Practice in This Court, Petition of Rudolph William Giuliani, Donald J. Trump for President, Inc. v. Boockvar, No. 4:20-cv-02078 (M.D. Pa. Nov. 17, 2020); *see also* Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 906–10 (M.D. Pa. Nov. 21, 2020) (No. 4:20-CV-02078) (recounting procedural history of the case). Giuliani stated he helped to draft the original complaint with Hicks but did not sign it because he was not admitted to practice in Pennsylvania. Giuliani believed that the fraud allegations were wrongfully deleted by Hicks and so he drafted a second amended complaint after the hearing that included fraud allegations. Report and Recommendation of Ad Hoc Hearing Committee at 7–8, D.C. Bd. on Prof. Resp. Ad Hoc Hearing Comm., Docket No. 2020-D253 (July 7, 2023).

322. Giuliani had not been in a courtroom since his days as a prosecutor in New York. *See* Jon Swaine & Aaron Schaffer, *Here's What Happened When Rudolph Giuliani Made His First Appearance in Federal Court in Nearly Three Decades*, WASH. POST (Nov. 18, 2020), https://www.washingtonpost.com/politics/giuliani-pennsylvania-court-appearance/2020/11/18/ad7288 dc-2941-11eb-92b7-6ef17b3fe3b4_story.html [https://perma.cc/8VVT-J77W] (noting that when asked what standard of review should apply, Giuliani said, "I think the normal one").

323. Donald J. Trump for President, Inc. v. Boockvar, 830 F. App'x 377, 381 (3d Cir. Nov. 27, 2020) (No. 20-3371). The appeal was brought by Marc Scaringi and Brian Caffrey of Scaringi Law in Harrisburg. Plaintiffs-Appellants' Opening Brief, Donald J. Trump for President, Inc. v. Boockvar, No. 20-3371 (3d Cir. Nov. 23, 2020), 2020 WL 6940235.

324. Voluntary Dismissal, Johnson v. Benson, No. 1:20-cv-01098 (W.D. Mich. Nov. 18, 2020). The same lawyers filed a direct petition with the Michigan Supreme Court just over a week later making the same claims. Petition for Extraordinary Writs & Declaratory Relief, Johnson v. Benson, No. 162286 (Mich. Nov. 26, 2020). The case was rejected on December 9. Johnson v. Benson, 951 N.W.2d 310, 312–13 (Mich. Dec. 9, 2020) (Clement, J., concurring) (stating that the court lacked jurisdiction to rule on the canvassing board's decision and the challenge to certification was moot).

325. *Rudy Giuliani Trump Campaign Press Conference Transcript November 19: Election Fraud Claims*, REV (2020) [hereinafter *Giuliani November 19 Transcript*], https://www.rev.com/blog/transcripts/rudy-giuliani-trump-campaign-press-conference-transcript-nove mber-19-election-fraud-claims [https://perma.cc/7DC4-QUYX]. Trump had tweeted the formation of the legal team four days before. @realDonaldTrump, TWITTER (Nov. 15, 2020, 7:11 PM), https://twitter.com/realDonaldTrump/status/1327811527123103746 [https://perma.cc/6EZM-R7UG] ("I look forward to Mayor Giuliani spearheading the legal effort to defend OUR RIGHT to FREE and FAIR ELECTIONS!").

isn't a little, teeny one."[326] Giuliani was joined by Ellis; Joseph diGenova, the former U.S. Attorney for D.C. turned Fox News commentator;[327] and Sidney Powell, a former federal prosecutor in Texas.[328] Powell had gained notoriety for representing executives involved in Enron's 2001 collapse before authoring a book, *Licensed to Lie*, alleging prosecutorial misconduct by the Obama DOJ,[329] which resulted in her rise to media prominence during the Trump administration as a critic of the Mueller investigation.[330] After the election, Powell appeared on Fox promoting the discredited theory that the Scorecard supercomputer program was used to hack voting machines for Biden.[331] These claims formed the backbone of allegations made at the November 19 press conference, where Powell unspooled a communist conspiracy involving the deceased Hugo Chavez, Antifa, George Soros, Hillary Clinton, China, and Dominion to steal Trump votes.[332] In discussions with advisors, Trump stated Powell sounded "crazy."[333] Giuliani officially distanced the campaign from Powell a few days after the press conference.[334] Nonetheless, Powell-led legal teams proceeded to file the so-called Kraken lawsuits (named after the mythological sea monster)—in Michigan and Georgia on November 25 and Arizona and Wisconsin on December 1—using a nearly identical template based on the Dominion

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326.   *Giuliani November 19 Transcript*, *supra* note 325.

327.   Joe Walsh, *Who Is Joe diGenova, the Trump Lawyer Who Called for Chris Krebs' Execution?*, FORBES (Dec. 1, 2020), https://www.forbes.com/sites/joewalsh/2020/12/01/who-is-joe-digenova-the-trump-lawyer-who-called-for-chris-krebs-execution/?sh=3b606d86ff6a [https://perma.cc/6QGL-T9XG].

328.   Quint Forgey & Alex Isenstadt, *Giuliani and Fellow Trump Lawyers Crank Out Conspiracies as Legal Challenges Implode*, POLITICO (Nov. 19, 2020), https://www.politico.com/news/2020/11/19/giuliani-trump-lawyer-conspiracy-legal-438225 **[**https://perma.cc/G9VR-YVR9**]**.

329.   *See* SIDNEY POWELL, LICENSED TO LIE: EXPOSING CORRUPTION IN THE DEPARTMENT OF JUSTICE 274–84, 518–34 (2018).

330.   Jeremy W. Peters & Alan Feuer, *What We Know About Sidney Powell*, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/article/who-is-sidney-powell.html [https://perma.cc/3FQ9-UDJX].

331.   Angelo Fichera & Saranac Hale Spencer, *Bogus Theory Claims Supercomputer Switched Votes in Election*, FACTCHECK.ORG (Nov. 13, 2020), https://www.factcheck.org/2020/11/bogus-theory-claims-supercomputer-switched-votes-in-election/ [https://perma.cc/4LTU-E3C7] (debunking claims by Dennis Montgomery about Scorecard). On November 16, Powell responded to a document from her assistant claiming Dominion machines were hacked with this reply: "IT MUST GO IN ALL SUITS IN GA AND PA IMMEDIATELY WITH A FRAUD CLAIM THAT REQUIRES THE ENTIRE ELECTION TO BE SET ASIDE." Federal Election Indictment, *supra* note 1, at 12.

332.   Forgey & Isenstadt, *supra* note 328; Glenn Kessler, *Fact-Checking the Craziest News Conference of the Trump Presidency*, WASH. POST (Nov. 19, 2020), https://www.washingtonpost.com/politics/2020/11/19/fact-checking-craziest-news-conference-trump-presidency/ [https://perma.cc/V8DN-G2TF]. Trump promoted the press conference, tweeting that Americans should tune in to watch his lawyers "on @newsmax, @OANN & maybe @FoxNews. An open and shut case of voter fraud. Massive numbers!" *Tweets of November 19, 2020*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/tweets-november-19-2020 [https://perma.cc/W3DL-RGJ2]. Trump's main campaign lawyers were not present at the press conference.

333.   Federal Election Indictment, *supra* note 1, at 12.

334.   Eric Tucker, *Trump Campaign Legal Team Distances Itself from Powell*, AP NEWS (Nov. 22, 2020), https://apnews.com/article/trump-campaign-distances-sidney-powell-c74165d465cf28b5478a65bd267fde29 [https://perma.cc/6637-JW2H].

conspiracy to seek election decertification.[335] Powell's Michigan complaint in *King v. Whitmer* was emblematic. It argued that Michigan election officials disregarded concerns about Dominion, which it claimed was founded "to make certain Venezuelan dictator Hugo Chavez never lost another election" and ignored internal "red flags" during the election showing vote manipulation (including a "glitch" that converted 6,000 votes to Biden) under the supervision of a vice president with ties to Antifa.[336] The complaint contained other incredible allegations: systematic harassment and exclusion of Republican poll watchers at the TCF Center; election workers who "illegally forged, added, removed or otherwise altered information on ballots" and "changed votes for Trump;" "illegal double voting;" 30,000 "fraudulently recorded" mail-in ballots; and "at least 289,866 more ballots processed in four Michigan counties than there was processing capacity."[337] The seventy-five-page complaint, which included confusing charts, graphs, and affidavits, alleged a hodgepodge of state and federal violations in support of its request "to decertify the results of the General Election for the Office of President."[338]

While the Kraken suits drew the most attention, they were not the only ones to strain credulity. From the end of November through early December, a group of solo and small-firm lawyers filed a series of cases in battleground states to reverse the election. Despite the Cybersecurity and Infrastructure Security Agency's November 13 statement that the election was "the most secure in

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335.   The Kraken cases were: Complaint for Declaratory, Emergency, and Permanent Injunctive Relief, Bowyer v. Duckey, No. 2:20-cv-02321-DJH (D. Ariz. Dec. 2, 2020) (filed by Powell as lead counsel with local counsel Kolodin, along with Wood and Howard Kleinhendler listed as counsel and Emily Newman, Julia Haller, and Brandon Johnson listed as of counsel); Complaint for Declaratory, Emergency, and Permanent Injunctive Relief, Feehan v. Wis. Elections Comm'n, No. 2:20-cv-1771 (E.D. Wis. Dec. 1, 2020) (filed by Powell as lead counsel with local counsel Michael Dean of Brookfield and Daniel Eastman of Mequon, along with Wood and Kleinhendler listed as counsel and Haller, Johnson, and Newman listed as of counsel); Complaint for Declaratory, Emergency, and Permanent Injunctive Relief, King v. Whitmer, No. 2:20-cv-13134-LVP-RSW (E.D. Mich. Nov. 25, 2020) [hereinafter *King v. Whitmer* Complaint] (filed by Powell as lead counsel with local counsel Scott Hagerstrom from Lansing and Gregory Rohl from Novi, along with Wood and Kleinhendler listed as counsel and Newman and Haller listed as of counsel); and Complaint for Declaratory, Emergency, and Permanent Injunctive Relief, Pearson v. Kemp, No. 1:20-cv-04809 (N.D. Ga. Nov. 25, 2020) [hereinafter *Pearson v. Kemp* Complaint] (filed by Powell as lead counsel with local counsel Harry MacDougald of Caldwell, Propst & Deloach in Atlanta, along with Wood and Kleinhendler). The Georgia suit contained embarrassing typos suggesting hasty preparation. *Pearson v. Kemp* Complaint, *supra* (including a cover page with a header that read: "In the United States Districct Court, Northern Distcoict of Georgia, Atlanta Division").

336.   *King v. Whitmer* Complaint, *supra* note 335, at 3, 43, 53, 56.

337.   *Id.* at 6–7, 21–25, 31, 35, 38. The Michigan suit's statistical claims of overvoting were supported by an affidavit by Russell James Ramsland, Jr., a self-professed cybersecurity analyst, purporting to show that voter turnout numbers in precincts like Detroit were abnormally high, some higher than the total number of registered voters. However, it was quickly revealed that the affidavit used registration information from the state of Minnesota, not Michigan. Clara Hendrickson, *Affidavit in Michigan Lawsuit Makes Wildly Inaccurate Claims About Voter Turnout in State*, DETROIT FREE PRESS (Dec. 4, 2020), https://www.freep.com/story/news/local/michigan/detroit/2020/12/04/michigan-lawsuit-makes-wild-claims-voter-turnout/3829654001/ [https://perma.cc/G2SF-YLS8].

338.   *King v. Whitmer* Complaint, *supra* note 335, at 72.

American history" and AG Barr's announcement on December 1 that "we have not seen fraud on a scale that could have effected a different outcome,"[339] these cases charged an array of familiar fraud claims. These included new actions in Michigan and Arizona alleging fraud in relation to Dominion machines,[340] along with a challenge to the alleged exclusion of legal observers at the counting center in Maricopa County, Arizona,[341] and two suits alleging ineligible voters and faulty signature verification in Georgia.[342] The Thomas More Society backed suits in Arizona and Georgia alleging "ballot harvesting" and other violations in connection with Zuckerberg voter outreach money,[343] and improper vote counting in Pennsylvania.[344] In Wisconsin, which concluded a recount on

339.   Rutenberg et al., *supra* note 257; Eric Tucker & Frank Bajak, *Repudiating Trump, Officials Say Election 'Most Secure,'* AP NEWS (Nov. 13, 2020), https://apnews.com/article/top-officials-elections-most-secure-66f9361084ccbc461e3bbf42861057a5 [https://perma.cc/B5QD-W5SE]**.**

340.   Verified Complaint at 4–6, 14, Bailey v. Antrim, No. 2020-9238 CZ (Mich. Cir. Ct. Nov. 23, 2020) (filed by Matthew DePerno from Portage, Michigan) (alleging that Dominion machines produced "phantom votes" and "altered and switched" votes for Biden and requesting a forensic audit); Complaint for Declaratory, Emergency and Injunctive Relief at 2–7, Burk v. Ducey, No. CV202001868 (Ariz. Super. Ct. Pinal Cnty. Dec. 7, 2020) (filed by Staci Burk from Gilbert, Arizona) (alleging a scheme to transport votes to an "election tabulation center favoring Joe Biden" where Dominion machines were used to manipulate votes).

341.   Verified Amended Complaint at 3–5, Ward v. Jackson, No. CV2020-015285 (Ariz. Super. Ct. Maricopa Cnty. Nov. 30, 2020) (filed by Dennis and John Wilenchik, and Lee Miller of Wilenchik & Bartness in Phoenix) (alleging improper exclusion of legal observers resulting in improper mail-in vote verification and improper creation of duplicate ballots by county workers to fix problems with illegible original ballots).

342.   Verified Complaint at 1–2, Boland v. Raffensperger, No. 2020CV343018 (Ga. Super. Ct. Fulton Cnty. Nov. 30, 2020) (filed by David Guldenschuh from Rome, Georgia) (alleging nonresident voting and failed signature verification); Verified Petition at 4, 16–32, 62, Donald J. Trump v. Raffensperger, No. 2020CV343255 (Ga. Super. Ct. Fulton Cnty. Dec. 4, 2020) [hereinafter *Trump v. Raffensperger* Petition] (filed by Ray Smith III of Atlanta and Mark Post of Columbus, Georgia) (alleging violations regarding signature verification, nonuniform procedures, and ineligible voters and seeking an injunction to decertify the election and order a new election due to "systemic misconduct, fraud, and other irregularities").

343.   These suits were advanced by Kaardal of the Thomas More Society appearing pro hac vice. *See* Petition for Election Contest 2–4, Wood v. Raffensperger, No. 2020CV342959 (N.D. Ga. Nov. 25, 2020) (filed by Todd Harding of Maddox & Harding in Griffin, Georgia, along with Kaardal) (alleging that Zuckerberg funded a "shadow government" operation through the Center for Tech and Civic Life, which granted $6.3 million to Fulton County to pay "ballot harvesters" and "consolidate counting centers in the urban core to facilitate the movement of hundreds of thousands of questionable ballots in secrecy," resulting in more than two hundred thousand "illegal votes counted and legal votes not counted"); Petition for Election Contest at 2–5, Stevenson v. Ducey, No. CV2020-096490 (Ariz. Super. Ct. Maricopa Cnty. Dec. 4, 2020) [hereinafter *Stevenson v. Ducey* Petition] (filed by David Spilsbury of Mesa, Arizona, along with Kaardal) (alleging the Center for Tech and Civic Life distributed grants to pay for "ballot harvesters," and that based on absentee ballot error rates, the number of illegal ballots exceeded Biden's margin of victory and thus required election certification to be vacated).

344.   Complaint for Writ of Mandamus & Request for an Emergency TRO & Injunctive Relief at 15–23, Metcalfe v. Wolf, No. 636 M.D. 2020 (Pa. Commw. Ct. Dec. 4, 2020) (filed by Thomas King III and Thomas Breth of Butler-based Dillion, McCandeless, King, Coulter & Graham as special counsel for the Amistad Project of the Thomas More Society) (alleging violations related to actions by election officials authorized by the secretary of state or state supreme court—such as the permission of drop boxes and mail-in ballot curing, and restrictions on canvassing observers—which had already been considered and rejected by the Pennsylvania Supreme Court).

November 29 confirming Biden's victory by more than 20,000 votes,[345] four suits were brought attacking the integrity of absentee and mail-in ballots, two filed after the recount by lead Wisconsin lawyer for the Trump campaign, James Troupis, seeking to block state election certification based on illegal voting.[346] Some of these cases advanced ISL theory in an effort to revert Electoral College certification to Republican-controlled state legislatures.[347] Others gained notoriety for dubious allegations. In a prominent example, after Trump tweeted the claim by truck driver Jesse Morgan (speaking at a Thomas More Society-hosted voter fraud event) to have transported ballots from New York to Pennsylvania,[348] Morgan's affidavit emerged as the linchpin of *Metcalf v. Wolfe*, a case again seeking to overturn the Pennsylvania results.[349] Within a week, after reports surfaced undermining Morgan's account and unearthing that he was an avid ghost hunter,[350] the case was dismissed as "an improper and untimely

345. *See* Reid J. Epstein, *Arizona and Wisconsin Certify Bidens Wins: 'The System Is Strong,'* N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/us/politics/wisconsin-arizona-election-results.html [https://perma.cc/W365-KDWA].

346. *See* Emergency Petition for Original Action at 4–5, Mueller v. Jacobs, No. 2020AP1958 (Wis. Nov. 27, 2020) (filed by Karen Mueller of the Chippewa Falls-based Amos Center for Justice and Liberty) (challenging, on behalf of an individual voter, Wisconsin's use of five hundred election "drop boxes" as illegal as a matter of law and requesting that all ballots from such boxes be discarded); Petition for Original Action at 2–3, Donald J. Trump v. Evers, No. 2020AP1971 (Wis. Dec. 1, 2020) (filed by James Troupis of the Troupis Law Office in Cross Plains and R. George Burnett of Conway, Olejniczak & Jerry in Green Bay, Wisconsin) (asking the court to void Wisconsin elector certification and disqualify over two hundred thousand absentee ballots alleged to be illegal because they were issued without written application, had incomplete certifications, were cast by individuals improperly claiming to be indefinitely confined, or were cast at "Democracy in the Park" events); Notice of Appeal at 2–3, Donald J. Trump v. Biden, No. 2020CV7092 (Wis. Cir. Ct. Milwaukee Cnty. Dec. 3, 2020) (filed by Troupis and Burnett) (appealing results of Wisconsin recount by challenging ballots of indefinitely confined voters, forms for mail-in ballots, officials filling in missing information, and voter outreach); Complaint for Expedited Declaratory and Injunctive Relief at 5–6, 71–72, Donald J. Trump v. Wis. Elections Comm'n, No. 20-cv-1785 (E.D. Wis. Dec. 2, 2020) [hereinafter *Trump v. Wis. Elections Comm'n* Complaint] (filed by William Bock III of Kroger, Gardis & Regas in Indianapolis, Indiana) (seeking to enjoin the Wisconsin results and remand the vote count to the state legislature based on "ultra vires" acts by state election officials including "ignoring" limits on mail-in ballots, "proliferating unmanned mail-in ballot drop boxes," processing votes "outside the visibility of poll watchers," and permitting "ballot tampering").

347. *See, e.g., Trump v. Wis. Elections Comm'n* Complaint, *supra* note 346, at 9 (stating that the state supreme court "cannot invoke a state constitution to circumscribe . . . legislative power" under Article II); *Stevenson v. Ducey* Petition, *supra* note 343, at 21 (stating that Arizona election officials violated the Elections Clause and Electors Clause of the U.S. Constitution); *Trump v. Raffensperger* Petition, *supra* note 342, at 3 (citing the Georgia legislature's right to appoint electors under the Constitution).

348. Will Sommer, *Trump 'Fraud' Witness Also Believes Ghosts Are Haunting His Family*, DAILY BEAST (Dec. 4, 2020), https://www.thedailybeast.com/trump-fraud-witness-also-believes-ghosts-are-haunting-his-family [https://perma.cc/TR76-HV4C]. The Trump tweet was over the objections of Barr and Cipollone. Rutenberg et al., *supra* note 257.

349. Affidavit of Jesse Richard Morgan, Metcalf v. Wolf, No. 636 M.D. 2020 (Pa. Commw. Ct. Dec. 4, 2020), https://www.pacourts.us/Storage/media/pdfs/20210603/212420-file-10836.pdf [https://perma.cc/8M34-RSZT].

350. Sommer, *supra* note 348.

election contest."[351] Due to weak claims and the fact that the election margins for Biden continued to grow,[352] the cases through early December were resolved quickly. By December 9, all of the Kraken cases had been dismissed and by the middle of December, all of the cases filed through December 7 met a similar fate, though some remained pending on appeal.[353]

By the first week of December, the Electoral College timeline loomed large in the litigation schedule. That timeline was set by the Constitution and the Electoral Count Act of 1887, which required state-certified electors to officially cast votes on December 14 and contained a safe harbor provision requiring Congress to accept electors certified by December 8.[354] In order to flip battleground state electors pledged to vote for Biden by the deadlines, the campaign needed to demonstrate enough fraud to change the election results in Trump's favor. Because the Kraken lawsuits and related legal challenges were failing and it was cumbersome to file new cases in every state, lawyers associated with the Trump team came up with another plan: to file suit directly with the U.S. Supreme Court asking it to overturn the election nationwide. This plan was developed by Kris Kobach, the former Kansas secretary of state well known for his anti-immigration positions, along with Mark Martin, former chief justice of the North Carolina Supreme Court and dean of Regent University School of Law.[355] The lawsuit created a legal basis to claim that the election was still in dispute despite all evidence to the contrary.

Executing this plan, on December 7, Texas AG (and Lawyers for Trump co-chair) Paxton invoked the Supreme Court's little-used original jurisdiction over controversies between two or more states to file *Texas v. Pennsylvania*,

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351. Memorandum Opinion at 1, Metcalf v. Wolf, No. 636 M.D. 2020 (Pa. Commw. Ct. Dec. 9, 2020), 2020 WL 7241120.

352. Rutenberg et al., *supra* note 257. On November 19, the Georgia hand recount was completed, confirming Biden's victory by roughly twelve thousand votes. Kate Brumback, *Georgia Hand Tally of Votes Is Complete, Affirms Biden Lead*, AP (Nov. 19, 2020), https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-1a2ea5e8df69614f4e09b47fea58 1a09# [https://perma.cc/L57W-4MRW]. A second Georgia recount done using scanners was completed on December 7, confirming Biden's victory by 11,779 votes. Kate Brumback, *Georgia Again Certifies Election Results Showing Biden Won*, AP NEWS (Dec. 7, 2020), https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-4eeea3b24f10de886bcdeab6c26b680a [https://perma.cc/5RHB-WEKV].

353. *Covid-Related Election Litigation Tracker*, *supra* note 267.

354. *See* Electoral Count Act of 1877, 3 U.S.C. §§ 5, 7 (requiring Electoral College electors to meet on the first Tuesday after the second Wednesday in December and providing safe harbor to electors certified six days before that date); U.S. CONST. art. II, § 1, cl. 3 ("The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.").

355. *See* Rutenberg et al., *supra* note 257. Kobach, a longtime proponent of baseless voter fraud claims, helped draft and defend a 2013 Kansas law requiring proof of citizenship to register to vote and was a leader of the Pence-Kobach voter fraud commission established by Trump and disbanded after finding no fraud. *See* RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY 15–46 (2020); Jessica Huseman, *How the Case for Voter Fraud Was Tested—and Utterly Failed*, PROPUBLICA (June 19, 2018), https://www.propublica.org/article/kris-kobach-voter-fraud-kansas-trial [https://perma.cc/7VSK-DW3A].

which alleged that Georgia, Michigan, Pennsylvania, and Wisconsin violated ISL theory by making unauthorized changes to election procedures that diluted Republican votes in Texas.[356] Despite the fact that this ISL claim had been repeatedly raised and rejected in other cases, the petition asked the court to enjoin election certification in the defendant states pending resolution on the merits or, alternatively, to send elector certification back to state legislatures.[357] The petition relied on a litany of recycled fraud claims and purported "glitches" in Dominion voting machines, allegedly causing the vote count for Biden to unaccountably spike.[358] For support, the petition relied on a statistical report by Charles Cicchetti, posted on Facebook days earlier by Trump,[359] which claimed based on analysis of prior election data that "the statistical improbability of Mr. Biden winning the popular vote in [Georgia, Michigan, Pennsylvania, and Wisconsin] collectively is 1 in 1,000,000,000,000,000."[360] Lawyers for Trump co-chair Paxton lobbied other Republican AGs to file an amicus brief in support, which seventeen state AGs—led by Missouri AG Eric Schmitt—did on December 9.[361] The same day, Eastman moved on behalf of the Trump campaign to intervene, reiterating the ISL argument that "there is no doubt that the officials of the Defendant States changed the rules of the contest in an unauthorized manner," specifically asserting that an "unconstitutional change" to Georgia election law "had a material impact on the outcome of the election."[362] Also on December 9, Trump tweeted, "This is the big one. Our County needs a victory,"[363] while Women for America First, formed by Tea Party activist Amy Kremer, organized an event in D.C. announcing a Stop the Steal bus tour through

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356.   Bill of Complaint at 1, Texas v. Pennsylvania, No. 220155 (U.S. Dec. 7, 2020). Lawrence Joseph, a Harvard Law School-trained solo lawyer based in Washington, D.C., was listed as special counsel and reportedly wrote the brief. *See* Rutenberg et al., *supra* note 257.

357.   Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay at 35, *Texas*, No. 220155 (U.S. Dec. 7, 2020).

358.   Bill of Complaint, *supra* note 356, at 4–5 (claiming dozens of witnesses testifying under oath about the "physical blocking and kicking out of Republican poll challengers; thousands of the same ballots run multiple times through tabulators; mysterious late night dumps of thousands of ballots at tabulation centers; illegally backdating thousands of ballots; signature verification procedures ignored; more than 173,000 ballots in the Wayne, County, MI center that cannot be tied to a registered voter").

359.   The post read: "For The Vote To Swing As Much As It Did In Biden's Favor, The Mathematical Probability Of That Happening In Just 'One' State Alone Is, 1 And 1 Quadrillion!!."

360.   Bill of Complaint, *supra* note 356, at 7.

361.   Brief of State of Missouri and 16 Other States as Amici Curiae in Support of Plaintiff's Motion for Leave to File Bill of Complaint, *Texas*, No. 220155 (U.S. Dec. 9, 2020). Several other amicus briefs were filed in support of the plaintiff's case, including by 126 members of the House of Representatives, various elected state officials, the Christian Family Coalition, Lin Wood, the Justice and Freedom Fund, Citizens United, and the states of "New California" and "New Nevada." *See* Texas, Plaintiff v. Pennsylvania, et al., No. 220155, SUP. CT. OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22o155.html [https://perma.cc/R27B-KSMN].

362.   Motion of Donald J. Trump, President of the United States, to Intervene in His Personal Capacity as Candidate for Re-election at 16, 38, *Texas*, No. 220155 (U.S. Dec. 9, 2020).

363.   Rutenberg et al., *supra* note 257.

battleground states to convince lawmakers to reject Biden electors.[364] On December 11, the Supreme Court denied the *Texas v. Pennsylvania* petition, with Justices Alito and Thomas dissenting.[365]

D.   Blur Fact and Fiction by Mixing Law and Media

Throughout the post-election litigation, there was a synergistic relationship between legal and media strategy that blurred the line between fact and fiction, cycling conspiracy claims through legal briefs and from legal briefs into the media sphere. The Cicchetti affidavit in *Texas v. Pennsylvania*, along with evidence presented in the Kraken cases, revealed how conspiracy claims from social media made their way into court and then were disseminated back into the media ecosystem as confirmation of the very conspiracies upon which they relied. It did not matter that the claims ultimately failed on the merits. Their proponents succeeded in mixing enough fact with fiction that the fiction itself took on an aura of fact—or at least muddied the factual waters enough to obfuscate the truth.

The strategy of blurring fact and fiction was a hallmark of Stop the Steal, which predated the 2020 election. The phrase, first coined in 2016 by Trump ally and self-professed "dirty trickster" Roger Stone,[366] was originally part of a preemptive effort to delegitimize the results of the Republican primary and national election against Hillary Clinton to be deployed if Trump lost those contests.[367] The phrase was resuscitated prior to the 2020 election to organize Trump supporters and extremist groups like the Oathkeepers, led by Yale-trained lawyer Stewart Rhodes.[368] On election day, #StopTheSteal began to circulate on social media and by November 5, multiple Stop the Steal Facebook pages were launched, which became platforms for organizing protests, including "Million MAGA rallies," the first on November 14, the day before Trump's announcement of the elite strike force team, and the second on December 14, the date state electors were required to officially cast their votes.[369] Stop the Steal online forums were also used to disseminate information about Trump lawsuits challenging vote counts.[370]

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364.   *See id.* The event featured speeches by former national security advisor Michael Flynn, Overstock.com CEO Patrick Byrne, and MyPillow CEO Mike Lindell. *Id.*

365.   Texas v. Pennsylvania, 141 S. Ct. 1230 (2020).

366.   Jeffrey Toobin, *The Dirty Trickster*, THE NEW YORKER (May 23, 2008), https://www.newyorker.com/magazine/2008/06/02/the-dirty-trickster [https://perma.cc/7GAG-WHCL].

367.   Homans, *supra* note 9.

368.   Atl. Council DFR Lab, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SEC. (Feb. 10, 2021), https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/ [https://perma.cc/JX34-A22C]; Eliza Fawcett, *From Yale Law to Oath Keepers: Stewart Rhodes's Unlikely Journey*, N.Y. TIMES (Nov. 21, 2022), https://www.nytimes.com/2022/11/21/us/stewart-rhodes-oath-keepers-yale-law.html [https://perma.cc/5Z92-PN5X].

369.   Atl. Council DFR Lab, *supra* note 368.

370.   *Id.*

As these forums demonstrated, lawsuits served as vehicles by which allegations of fraud first made in legal filings could be cycled through social media in a bid to "frame a public narrative" that the election was stolen.[371] For example, after lawyers filed suit in Pennsylvania complaining about poll watcher access, Trump tweeted: "Pennsylvania prevented us from watching much of the Ballot count. Unthinkable and illegal in this country."[372] When a Nevada lawsuit (incorrectly) claimed more than three thousand people voted after moving out of state, Trump tweeted: "Nevada is turning out to be a cesspool of Fake Votes."[373]

Trump legal influencers also inundated media with conspiracy claims not alleged in any lawsuit, but whose repeated assertion in the media made it hard to distinguish actual legal arguments from those made outside of court. This strategy was organized through a "Strategic Communications Plan" launched by Giuliani in December 2020.[374] As part of this plan, Giuliani publicly propagated false claims, including that two poll workers at Atlanta's State Farm Arena pulled out suitcases containing fraudulent Biden ballots from under a table—a claim based on a redacted video repudiated by Georgia officials and contradicted by the full-length version.[375] Giuliani also used his own radio show, podcast, and appearances on other far-right outlets to broadcast false claims that Pennsylvania counted more absentee ballots than it sent out, dead people voted in Georgia, and "illegal aliens" voted in Arizona.[376] Lin Wood was another active proponent of fraud claims amplified by Trump. For example, on November 15, Trump retweeted a post by Wood alleging fraudulent ballots cast in Georgia, dismissing the Georgia recount as "a scam, means nothing."[377] Social media strategy was also integral to protests coordinated through the Stop the Steal network, which pursued actors subject to legal challenges, such as Michigan Secretary of State Jocelyn Benson, whose home was targeted on December 5 by protesters chanting "Stop the Steal."[378] The combination of these protests and the constant media drumbeat of fraud fed an increasing sense of urgency, tinged with undertones of violence, among Trump's most ardent supporters.

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371.   King v. Whitmer, 71 F.4th 511, 520 (6th Cir. June 23, 2023) (Nos. 21-1785/1786/1787/22-1010) (partly reversing district court sanctions in the Kraken case on ground that advancing a public narrative was protected speech).

372.   Tara Subramaniam & Holmes Lybrand, *Fact Check: Trump Continues to Tweet Baseless Claims of Election Fraud in Swing States*, CNN (Nov. 9, 2020), https://www.cnn.com/2020/11/09/politics/trump-tweets-swing-state-fraud-fact-check/index.html   [https://perma.cc/YM9W-7SGK].

373.   *Id.*

374.   *See* Amended Complaint at 4–5, Freeman v. Giuliani, No. 1:21-cv-03354-BAH (D.C. May 10, 2022).

375.   *See* Federal Election Indictment, *supra* note 1, at 13.

376.   In the Matter of Rudolph W. Giuliani, 146 N.Y.S. 3d 266, 272–79 (N.Y. App. Div. June 24, 2021).

377.   *See* Atl. Council DFR Lab, *supra* note 368.

378.   *See id.*

E. Create Crisis and Map Legal Path to Extraordinary Power

As the December 14 date for certified state electors to officially cast Electoral College votes drew near, and post-election litigation continued to come up empty, the Stop the Steal campaign moved into its last phase, in which it sought to heighten the sense of constitutional crisis in support of an unprecedented objective: keeping Trump in office despite his electoral loss. To do so, the campaign developed a plan to organize alternative slates of Trump electors in battleground states won by Biden.[379] According to the plan, these Trump electors would be presented on January 6 to Vice President Mike Pence—constitutionally charged with presiding over congressional certification of the Electoral College as the final act of declaring the new president—who would refuse to count the legally valid Biden electors, throwing the election to the Republican-led Congress or back to the states. As in previous campaign stages, lawyers were essential to devising this strategy and centrally involved in its execution. They conducted legal research and drafted legal memoranda outlining the alternative elector plan and justifying Pence's authority to refuse certification, drafted documents that spelled out the specific legal steps alternative electors had to take under the Electoral Count Act to claim legal legitimacy, and actively communicated with state officials and the Pence team in efforts to advance the plan. The legal materials produced by these lawyers behind the scenes were crucial to the strategy as they sought to provide legal justification to subvert the election results—and plausible deniability for Trump, who could say he was following the advice of counsel. The plan relied on keeping alive the myth of a contested election, which required filing new lawsuits based on unsubstantiated and already-rejected claims of fraud.

The groundwork for the alternative elector plan was laid days after the election and the plan took shape in mid-November, as the first wave of election lawsuits crashed out of court and the Giuliani-led legal team gained sway. On November 8, little-known conservative lawyer Ken Chesebro, a native of Wisconsin, emailed Troupis, the lead Trump lawyer in that state.[380] The email argued that the Trump campaign could file lawsuits claiming "various systemic abuses" that could be used to persuade battleground state legislatures to appoint "alternative" electors pledged to Trump. Chesebro stated: "At minimum, with such a cloud of confusion, no votes from WI (and perhaps also MI and PA) should be counted, perhaps enough to throw the election to the House."[381] Troupis then brought Chesebro onto the Trump campaign's legal team and

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379. *See* Alan Feuer & Katie Benner, *The Fake Electors Scheme, Explained*, N.Y. TIMES (July 27, 2022), https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html [https://perma.cc/JJ4N-GAPX].

380. Luke Broadwater & Maggie Haberman, *Newly Released Messages Detail Roots of the 'Fake Electors' Scheme*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/03/04/us/politics/chesebro-troupis-jan-6-messages.html [https://perma.cc/XM43-YCMX].

381. *Id.*

requested that he draft memos spelling out this alternative elector plan.[382] On November 18, after the legal team conceded Arizona and with the Wisconsin recount underway,[383] Chesebro circulated his first memo to Troupis. Chesebro had been a research assistant for famed liberal constitutional scholar Lawrence Tribe and had worked with Tribe on behalf of the Al Gore campaign to contest the Florida recount in the 2000 presidential election.[384] In the memo, Chesebro drew upon that experience to argue that the key deadline for Wisconsin courts to find in favor of Trump was January 6 and that to preserve legal rights to present Trump electors on that date, the campaign needed to ensure that such electors were eligible to be counted in Congress, which required they strictly follow federal and state rules to cast votes in favor of Trump by the December 14 statutory deadline.[385] The memo did not address the key distinction in the Bush-Gore election, which was that Gore had legitimate, unresolved challenges to the Florida recount.

The day after Chesebro's memo, Giuliani and Powell held their Kraken press conference.[386] Trump lawyers and advisors immediately began reaching out to high-ranking Republican political officials in contested states to ask them not to certify Biden electors based on voter fraud. Through late November, Giuliani met with or called leaders in Michigan, Arizona, and Pennsylvania, in some cases joined by Ellis and Trump Chief of Staff Mark Meadows.[387] On Thanksgiving, Giuliani held an event after the Pennsylvania governor certified the Biden electors, repeating the false claim that the state had received seven hundred thousand more absentee ballots than it sent out.[388] On December 3, after the Wisconsin recount was concluded in favor of Biden, Troupis filed suit seeking to strike ballots for various defects.[389] The same day, in Georgia,

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382.   *Id.*

383.   Federal Election Indictment, *supra* note 1, at 9.

384.   Ed Pilkington, *'It Baffles Me': What Drew a Mild Lawyer with a Liberal Past into Trump's Election Plot?*, GUARDIAN (Aug. 19, 2023), https://www.theguardian.com/us-news/2023/aug/19/kenneth-chesebro-trump-georgia-indictment-fake-electors [https://perma.cc/747V-VBW4].

385.   Memorandum from Kenneth Chesebro to Judge James R. Troupis, Re: The Real Deadline for Settling a State's Electoral Votes 1 (Nov. 18, 2020), https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-November-18-2020.pdf [https://perma.cc/6C9J-372E].

386.   Before the press conference started, Ginni Thomas texted Trump Chief of Staff Mark Meadows: "Sounds like Sidney and her team are getting inundated with evidence of fraud. Make a plan. Release the Kraken and save us from the left taking American down." Danny Hakin, Jo Becker & Alan Feuer, *Texts Show Ginni Thomas's Embrace of Conspiracy Theories*, N.Y. TIMES (Mar. 26, 2022), https://www.nytimes.com/2022/03/26/us/politics/ginni-thomas-donald-trump.html [https://perma.cc/28FE-D88U]. Ginni Thomas sat on the board of CNP Action, a political advocacy group involved in the grassroots effort to pressure state officials to appoint Trump electors, which would later be involved in organizing the January 6 rally. Hakim & Becker, *supra* note 120.

387.   Georgia Indictment, *supra* note 1, at 20–24.

388.   Federal Election Indictment, *supra* note 1, at 19.

389.   Notice of Appeal, Donald J. Trump v. Biden, No. 2020CV7092 (Wis. Cir. Ct. Milwaukee Cnty. Dec. 3, 2020).

Eastman and Ellis reached out to state legislators to advocate the appointment of Trump electors, and Atlanta attorney Ray Smith III (who had already filed two election suits and would file a third the next day) testified in front of a Georgia Senate subcommittee that Dominion machines wrongly cast six thousand votes for Biden and roughly ten thousand dead people voted.[390] In response, Trump tweeted: "Wow! Blockbuster testimony taking place right now in Georgia."[391]

On December 6, Chesebro circulated a new, much broader memo that charted a strategy for assembling Trump electors in all six battleground states to be eligible for counting on January 6.[392] In it, Chesebro argued that "it seems feasible that the Trump campaign can prevent Biden from amassing 270 electoral votes on January 6, and force the Members of Congress, the media, and the American people to focus on the substantive evidence of illegal election and counting activities in the six contested States," provided the alternative electors met to vote on December 14 in the prescribed legal fashion and that in each state there was "at least one lawsuit" pending."[393] The pending lawsuits were essential to provide the veneer of ongoing election disputes. Because he believed this plan would be leaked, Chesebro recommended that "there should be messaging that presents this as a routine measure" necessary to preserve Trump's rights on January 6 if courts later declared him the winner.[394] The memo provided detailed legal instructions on how alternative electors should proceed to mimic the requirements for certification in each state.[395]

In the wake of this memo, the campaign's state-by-state approach kicked into high gear. On December 8, the Electoral College safe harbor date (and the day after Texas AG Paxton filed *Texas v. Pennsylvania*), Eastman called the RNC to ask for support for the alternative elector plan.[396] The next day, Chesebro sent Troupis a streamlined memo outlining specific legal steps for alternative electors in the battleground states and then began sending emails to Republican officials in those states with the memo and draft legal documents for the electors to use.[397] Because the entire plan hinged on showing enough fraud to change results, Giuliani hit the road to make that case, stating to the Georgia House of Representatives on December 10 that "election workers were stealing votes" at State Farm Arena and that poll worker Ruby Freeman and her daughter were "quite obviously surreptitiously passing around USB ports as if they're vials of

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390.   Georgia Indictment, *supra* note 1, at 26.

391.   Federal Election Indictment, *supra* note 1, at 12; Georgia Indictment, *supra* note 1, at 26.

392.   Memorandum from Kenneth Chesebro to James R. Troupis, Re: Important That All Trump-Pence Electors Vote on December 14 (Dec. 6, 2020), https://int.nyt.com/data/documenttools/chesebro-dec-6-memo/ce55d6abd79c2c71/full.pdf [https://perma.cc/3DGA-JZA8].

393.   *Id.* at 1. The memo suggested that if Pence refused to count contested votes, it would keep Biden below 270 and force him to challenge the Electoral Count Act in court. *Id.* at 2.

394.   *Id.* at 2–3.

395.   *Id.* at 5–6.

396.   *See* Georgia Indictment, *supra* note 1, at 30.

397.   *Id.* at 31.

heroin or cocaine."[398] Eastman reached out to Georgia political officials to instruct them on how to legally validate Trump electors.[399]

As it became increasingly clear that legal cases would not alter the election results, the plan shifted from Chesebro's initial conception of assembling alternative electors in battleground states (to allow Pence to count them should legal disputes be resolved in Trump's favor) to something more radical: persuading Pence not to count Biden electors based solely on the campaign's own purported evidence of fraud. To succeed, this plan required a legal justification for Pence to reject certified electors without validation of fraud from courts or state officials, combined with a pressure campaign to force Pence to act.

To build legal justification, on December 13, Chesebro sent an email to Giuliani outlining strategies for "disrupting and delaying" the January 6 vote count—which would culminate in Pence announcing that he "cannot and will not" count any votes with two slates, forcing the election to be redone or Republican state legislatures to appoint their own electors.[400] Chesebro, seeming to acknowledge the plan was not consistent with existing law, argued that the Pence strategy was "preferable to allowing the Electoral Count Act to operate by its terms."[401] On December 14, Trump tweeted that AG Barr would resign and Deputy AG Jeff Rosen would become the acting AG.[402] The same day, all six battleground states certified their electoral votes in favor of Biden.[403] This was after fifty-four lawsuits challenging the election results had been filed in those states—nearly all of them already resolved and none of them finding fraud—along with conclusive recounts in Georgia and Wisconsin, in addition to multiple state investigations and hearings.

Although Chesebro's plan no longer depended on official findings of fraud, it did require some basis for continuing to suggest that the election was in dispute because of fraud to justify the presentation of alternative slates to Pence. To keep the bogus voter fraud argument alive, lawyers continued to file new lawsuits. On December 14, the campaign filed suit in New Mexico, where Trump electors were convened.[404] The Wisconsin Supreme Court dismissed Troupis's recount

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398.   *Id.* at 34.

399.   *Id.* at 28.

400.   Robert Legare, *Email to Giuliani Reveals Plan to Keep Trump in Office on Jan. 6, Court Records Show*, CBS NEWS (June 3, 2022), https://www.cbsnews.com/news/trump-news-giuliani-kenneth-chesebro-email-plan-january-6 [https://perma.cc/WM8J-49FG]**.**

401.   Georgia Indictment, *supra* note 1, at 38.

402.   @realDonaldTrump, TWITTER (Dec. 14, 2020, 5:39 PM), https://twitter.com/realDonaldTrump/status/1338614514493878273 [https://perma.cc/K2ZU-4NSK].

403.   Federal Election Indictment, *supra* note 1, at 26.

404.   *Id.* at 25–26. Three days earlier, Giuliani had emailed an Arizona lawyer to file a certiorari petition. *Id.* at 24. On that day, Dennis and John Wilenchik filed a petition in the case of *Ward v. Jackson*, which had been decided against plaintiffs on December 8. Petition for a Writ of Certiorari, Ward v. Jackson, No. 20-809 (U.S. Dec. 11, 2020), 2020 WL 7391537.

lawsuit, *Trump v. Biden*, the same day.[405] On December 18, Trump met with Overstock.com CEO Patrick Byrne, former national security advisor Michael Flynn, Giuliani, and Powell to develop a plan for blocking congressional certification, at one point discussing appointing Powell as special counsel to investigate fraud in Georgia.[406] Also on that day, Wood filed a last-ditch lawsuit challenging the Georgia results based on a litany of already-rejected claims.[407] On December 21, Eastman and local counsel Bruce Marks filed a petition to the U.S. Supreme Court challenging three previous decisions by the Pennsylvania Supreme Court on signature verification, poll watching, and ballot envelope requirements, arguing those decisions had usurped the legislature's power to set rules for elections under ISL theory.[408] One of these Pennsylvania decisions (barring counties from rejecting absentee/mail-in ballots based on third-party signature verification challenges) had been decided prior to the election,[409] while the other two (denying Trump poll watchers more proximate access to absentee/mail-in ballot canvassing in Philadelphia and preventing such ballots from being rejected for not having names and addresses on their outer envelopes) had been decided in November.[410] None of those cases alleged outcome-determinative numbers of votes, and none of the original lawyers had sought U.S. Supreme Court review. The ISL argument raised by Eastman and Marks had been at the heart of the *Texas v. Pennsylvania* Supreme Court petition, which had been denied ten days earlier.

Eastman's lawsuit was followed by his two-page December 23 "Memo on Jan 6 scenario" outlining a theory for Pence to discard certified Biden electors from battleground states.[411] Eastman's memo picked up where Chesebro's had

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405. Opinion at 3, Trump v. Biden, No. 2020AP2038 (Wis. Dec. 14, 2020) (rejecting the campaign's challenge to indefinitely confined voter ballots as "meritless on its face" and the other challenges as barred "under the doctrine of laches"). The Wisconsin governor certified the election results for Biden on November 30. Governor Tony Evers, Certificate of Ascertainment for President, Vice President and Presidential Electors, General Election – November 3, 2020 (Nov. 30, 2020), https://www.archives.gov/files/electoral-college/2020/ascertainment-wisconsin.pdf [https://perma.cc/TZ62-9JLJ].

406. Georgia Indictment, *supra* note 1, at 43; Rutenberg et al., *supra* note 257.

407. Verified Complaint for Declaratory and Injunctive Relief, Wood v. Raffensperger, No. 1:20-cv-05155 (N.D. Ga. Dec. 18, 2020).

408. Petition for Writ of Certiorari, Donald J. Trump for President, Inc. v. Boockvar, No. 20-845 (U.S. Dec. 21, 2020).

409. *In re* November 3, 2020 General Election, 240 A.3d 591, 595–96 (Pa. Oct. 23, 2020) (No. 149 MM 2020).

410. *In re* Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 General Election, 241 A.3d 1058 (Pa. Nov. 23, 2020) (Nos. 29, 31–35 EAP 2020); *In re* Canvassing Observation, 241 A.3d 339 (Pa. Nov. 17, 2020) (No. 30 EAP 2020).

411. Memorandum from John Eastman, January 6 Scenario, at 2 (Dec. 23, 2020), https://cdn.cnn.com/cnn/2021/images/09/20/eastman.memo.pdf [https://perma.cc/M86S-5HD8]. Eastman joined the president's Election Integrity Working Group in September 2020 and was formally retained by candidate Trump and the Trump campaign on December 6, 2020. Decision and Order of Involuntary Inactive Enrollment at 9, In the Matter of: John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

left off: moving beyond the legal technicalities of constructing alternative electors state by state to concentrating on Pence's constitutional authority to deliver the presidency to Trump. After stating that "7 states have transmitted dual slates of electors to the President of the Senate," Eastman argued that the Electoral Count Act was likely unconstitutional since it allowed the two chambers of Congress "acting separately" to resolve election disputes, while the 12th Amendment required votes be counted by a joint session; he also suggested the act violated ISL theory by permitting state judges and elections officials to play a role in reviewing vote counts.[412] The claimed unconstitutionality was used as a predicate to then argue that Pence could break the procedures of the act, announcing that "because of the ongoing disputes in the 7 States, there are no electors that can be deemed validly appointed," leading to a count of the remaining ballots in favor of Trump: "Pence then gavels President Trump as re-elected."[413] Anticipating Democratic objections to this, Eastman argued that Pence could alternatively send the matter to the House, which Republicans controlled, or call a stalemate, giving state legislatures more time.[414] For all of these proposals, Eastman stated that "the main thing here is that Pence should do this without asking for permission," forcing objectors to file a lawsuit that Eastman thought would be deemed "non-justiciable."[415] In an email to Chesebro attaching the memo, Eastman suggested that it was "Better for [Pence] just to act boldly and be challenged, since the challenge would likely lead to the Court denying review on nonjusticiable political question grounds."[416] On the same day, Trump retweeted a memo called "Operation 'PENCE' Card" asserting Pence had legal authority to disqualify electors,[417] while lawyer Todd Harding—from a small personal injury and family law firm in Griffin, Georgia, who had earlier joined the Thomas More Society in challenging alleged Zuckerberg-financed "ballot harvesting"—filed yet another suit seeking election decertification for fraud at State Farm Arena in Atlanta, Georgia, including allegations that poll watchers believed ballots were fraudulent because they were not creased.[418]

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412. Memorandum from John Eastman, *supra* note 411, at 1. New Mexico was the seventh state with alternative electors.

413. *Id.* at 2. Eastman suggested that he was following the reasoning advanced by Lawrence Tribe in relation to the 2000 Bush-Gore election. *Id.*

414. *Id.*

415. *Id.*

416. Georgia Indictment, *supra* note 1, at 44.

417. Federal Election Indictment, *supra* note 1, at 32.

418. Petition for Declaratory and Injunctive Relief at 4–5, Favorito v. Cooney, No. 2020CV343938 (Ga. Super. Ct. Fulton Cnty. Dec. 23, 2020). On December 27, Congressman Louie Gohmert sued the vice president of the United States, arguing that he was not authorized to count votes on January 6 because the Electoral Count Act, in existence since 1876, was unconstitutional. Complaint for Expedited Declaratory and Emergency Injunctive Relief at 3, Gohmert v. Pence, 510 F. Supp. 3d. 435 (E.D. Tex. Dec. 27, 2020) (No. 6:20-cv-660-JDK).

Trump lawyers' efforts intensified the following week. On December 29, Trump asked top DOJ lawyers to file a lawsuit challenging the election, which they refused to do.[419] On December 30, at a Georgia Senate Judiciary Committee hearing, Giuliani repeated false statements that felons and dead people voted in that state.[420] On New Year's Eve in Georgia, Eastman and Kurt Hilbert (the founding member of the Hilbert Law Firm in Roswell specializing in business, real estate, and employment law) filed *Trump v. Kemp*, which included similar claims in seeking decertification under ISL theory,[421] even though Eastman had conceded to Trump campaign lawyers that some allegations were not accurate.[422] In a memo to Trump on the "Constitutional Analysis of Vice President Authority for January 6," Ellis offered the clearest instructions yet, directly asserting that "the Vice President should . . . not open any of the votes" from battleground states.[423] On New Year's Day 2021, Trump tweeted five times to promote the January 6 rally at the White House Ellipse, while Missouri Senator Josh Hawley, on the Stop the Steal bus tour, stated he would object to Electoral College certification.[424]

On January 2, with Foley & Lardner law firm partner Cleta Mitchell on a recorded line, Trump called Georgia Secretary of State Brad Raffensperger urging him to "find" 11,780 votes—the margin required to give Trump a victory

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419. HOUSE JANUARY 6TH COMM., *supra* note 2, at 395.

420. Georgia Indictment, *supra* note 1, at 47.

421. Verified Complaint for Emergency Injunctive and Declaratory Relief at 5, Trump v. Kemp, 511 F. Supp. 3d 1325 (N.D. Ga. Dec. 31, 2020) (No. 1:20-cv-05310) [hereinafter *Trump v. Kemp* Complaint] (claiming Georgia officials permitted votes by "convicted felons" and "deceased individuals"), https://storage.courtlistener.com/recap/gov.uscourts.gand.285271/gov.uscourts.gand.285271.1.0_5.pdf [https://perma.cc/7J3H-PMXN]. Earlier, on December 4, lawyers Ray Smith III and Mark Post had filed an emergency petition seeking to have the election set aside under state law based on "systemic irregularities and violations of the Georgia Election Code." *Trump v. Raffensperger* Petition, *supra* note 342, at 16. After the emergency petition was voluntarily dismissed and the election challenge was set to proceed in normal course, the Trump lawyers appealed to the Georgia Supreme Court and filed additional motions for emergency injunctive relief and to have their election challenge heard by an administrative law judge. *Kemp*, 511 F.3d. at 1329 (recounting procedural history). On December 29, the *Raffensperger* lawyers agreed to withdraw their appeal, and the election challenge was set for hearing with a judge after the January 6 election certification date. *Id.* On December 31, Hilbert and Eastman filed *Kemp* to decertify the election, arguing among other things that Georgia had violated the Electors Clause by "not even assigning a judge to hear the Plaintiff's statutory election contest as provided by Georgia law"—even though a judge had, in fact, just been assigned in *Raffensperger*. *Trump v. Kemp* Complaint at 2, *supra*. The federal district court dismissed *Kemp* on January 5. *Kemp*, 511 F. Supp. 3d at 1328. Two weeks earlier, Hilbert had filed another suit on behalf of an "Official Presidential Elector" challenging the recount in Coffee County, Georgia, which confirmed Biden's victory, on the ground that Secretary of State Raffensperger set an arbitrary deadline to certify the results producing inaccurate results. Verified Petition for Emergency Injunctive and Declaratory Relief at 7–8, Still v. Raffensperger, No. 2020CV343711 (Ga. Super. Ct. Fulton Cnty. Dec. 12, 2020). The *Still* case was voluntarily dismissed on January 7.

422. Georgia Indictment, *supra* note 1, at 49; Federal Election Indictment, *supra* note 1, at 15.

423. Georgia Indictment, *supra* note 1, at 48.

424. Rutenberg et al., *supra* note 257.

in that state.[425] The same day, Trump, Giuliani, and Eastman conducted a Zoom meeting with three hundred legislators from battleground states, urging them to endorse alternative electors based on voter fraud.[426] On January 3, Eastman circulated a revised six-page memo in which he engaged in more developed "war gaming" alternatives for Pence to refuse certification.[427] Asserting that "important state election laws were altered or dispensed with altogether in key swing states," Eastman offered a list of "significant violations," including already-rejected claims that poll observers were illegally barred in Michigan and Pennsylvania, and that Nevada ballot signatures were not correctly inspected.[428] The memo stated that because the election was corrupted by "outright fraud," when handed "multiple ballots" from battleground states, Pence had the legal authority to "determine[] on his own which [slate of electors] is valid" or "adjourn[] the joint session of Congress" despite the fact that the governors of all states had certified the Biden electors as required by law.[429] Under scenarios labeled "TRUMP WINS," Eastman suggested that Pence could reject certified electors outright based on "ongoing election disputes," thereby "throwing the election to the House" where Trump would prevail, or that Pence could adjourn Congress and delay the count until the challenges were resolved.[430] Eastman ended the memo by stating that the plan was "BOLD, Certainly. But this Election was Stolen by a strategic Democratic plan to systematically flout existing election laws for partisan advantage; we're no longer playing by Queensbury Rules."[431]

F. Coopt Gatekeepers and Mobilize Distrust

As the Chesebro and Eastman memos pointed the campaign toward its final objective—thwarting Pence's constitutional duty to count certified electoral votes on January 6—efforts to persuade Pence to cooperate escalated. These efforts split along two tracks. The first involved an attempt to coopt legal gatekeepers in the DOJ by convincing leadership to legally endorse fraud claims

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425.   Jeremy Herb & Sunlen Serfaty, *How GOP Lawyer Cleta Mitchell Joined Trump's 'Team Deplorables' Advancing His False Election Fraud Claims*, CNN (Oct. 13, 2021), https://www.cnn.com/2021/10/13/politics/trump-mitchell-georgia-election/index.html [https://perma.cc/G6RU-XECC].

426.   Barbara McQuade, *United States v. Donald Trump*, JUST SEC. (Feb. 22, 2022), https://www.justsecurity.org/80308/united-states-v-donald-trump-model-prosecution-memo/#_ftnref78 [https://perma.cc/6Q3H-2MAN].

427.   Memorandum from John Eastman, January 6 Scenario, at 4 (Jan. 30, 2020), https://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--.jan.3.memo.on.jan.6.scenario.pdf [https://perma.cc/WS3C-YX26].

428.   *Id.* at 1–2. The memo relied on objections to Pennsylvania election protocols rejected by the Pennsylvania Supreme Court in the canvassing cases, suggesting that they still might be valid because Eastman and Mark's *Trump v. Boockvar* petition for writ of certiorari, *supra* note 408, had recently been filed. *Id.* at 1.

429.   *Id.* at 1, 4–5.

430.   *Id.* at 5.

431.   *Id.*

that had been discredited in every other venue but that were essential underpinnings of the Pence legal plan. The second track involved ramping up public pressure on Pence to participate in the plan, which was to culminate in the January 6 rally at the Ellipse, where supporters were invited to "be there, will be wild."[432]

The DOJ gambit developed immediately after AG Barr's resignation was announced on December 14. The next day, Trump summoned Acting AG Rosen and Deputy AG Richard Donoghue to push Atlanta State Farm Arena fraud claims, which the DOJ officials rebuffed as without merit.[433] Undeterred, the following week, Trump summoned little-known DOJ attorney Jeffrey Clark: a Federalist Society member and former Kirkland & Ellis lawyer, then serving as assistant AG for the Environment and Natural Resources Division, where he had previously worked under President George W. Bush.[434] Clark kept the meeting secret from DOJ leaders, who had instructed him not to communicate with Trump.[435] On December 27, Trump called Rosen to say he was considering replacing Rosen with Clark.[436] The next day, Clark sent Rosen and Donoghue a draft letter addressed to the Georgia governor, house speaker, and senate president, stating that the DOJ had "identified significant concerns that may have impacted the outcome of the election in multiple states, including the State of Georgia," and recommending that the Georgia General Assembly (which had already held hearings on alleged election fraud) convene a special session to "receive new evidence, and deliberate on the matter."[437] Rosen refused to send the letter and again instructed Clark not to communicate with Trump.[438] On January 2, Clark told Rosen and Donoghue that he would decline Trump's offer to make him acting AG if they would sign the letter.[439] When Rosen and Donoghue again refused, Clark redrafted the letter to more aggressively state that there was, in fact, "evidence of significant irregularities that may have impacted the outcome of the election in multiple states" and met with Trump and White House Counsel Pat Cipollone, who tried to dissuade Clark from becoming acting

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432.   Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All but Circled the Date*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html [https://perma.cc/8QRW-LBSP].

433.   Federal Election Indictment, *supra* note 1, at 14.

434.   Katie Benner & Charlie Savage, *Jeffrey Clark Was Considered Unassuming. Then He Plotted with Trump*, N.Y. TIMES (Jan. 24, 2021), https://www.nytimes.com/2021/01/24/us/politics/jeffrey-clark-trump-election.html [https://perma.cc/7L2E-SFHA].

435.   Federal Election Indictment, *supra* note 1, at 27.

436.   *Id.* at 28.

437.   Draft Letter from Jeffrey A. Rosen, Acting Attorney General, Richard Donoghue, Acting Deputy Attorney General & Jeffrey Bossert Clark, (Acting) Assistant Attorney General, to the Honorable Brian P. Kemp, Governor, the Honorable David Ralston, Speaker of the House & the Honorable Butch Miller, President Pro Tempore of the Senate, Re: Georgia Proof of Concept 1–2 (Dec. 28,   2020),   https://www.nytimes.com/interactive/2022/06/23/us/jeffrey-clark-draft-letter.html [https://perma.cc/9G3X-XD54].

438.   Federal Election Indictment, *supra* note 1, at 29.

439.   *Id.*

AG.[440] When Clark told Rosen he was going to take the position, Rosen scheduled a January 4 meeting with Trump, attended by Clark, Cipollone, and OLC lawyers, in which Rosen said he and senior DOJ officials and White House Counsel would resign en masse if Clark became acting AG.[441]

Trump stood down but did not give up, instead turning up the heat on Pence. After the DOJ meeting on January 4, Trump and Eastman met with Pence, his chief of staff, and counsel Greg Jacob in the Oval Office, where Eastman argued that Pence had the power to reject or delay certification on January 6, while Jacob pushed back.[442] The next day, after another Ellis memo recommending Pence "not open the purported certification" for Arizona, Trump tweeted: "The Vice President has the power to reject fraudulently chosen electors."[443] As Eastman made a last-ditch effort to persuade Pence's chief of staff to go along with the plan, Trump met directly with Pence, reportedly stating—in language that precisely echoed the Eastman memo—that even though Democrats had cheated, Pence still wanted to "play by Marquess of Queensbury rules."[444]

The next day—January 6—at the Ellipse, Giuliani and Eastman both spoke at a rally organized by Turning Point USA and coordinated by the White House with input from House GOP leaders.[445] Each lawyer affirmed that Pence had legal authority not to certify the election because of fraud. Giuliani, speaking first, asserted that "every single thing that has been outlined as the plan for today is perfectly legal" and then recounted options laid out in Eastman's memo, before stating that "last night" an expert who had examined Dominion machines found "absolutely what he believes is conclusive proof that . . . the votes were deliberately changed."[446] Eastman then took the stage and, apparently alluding to his last-ditch Supreme Court petition against Pennsylvania, claimed that "we've got petitions pending before the Supreme Court that identify . . . the number of times state election officials ignored or violated state law in order to put Vice President Biden over the finish line. We know there was fraud, traditional fraud that occurred. We know that dead people voted."[447] After, the crowd—which included armed far-right militia groups that had been organizing since the election through Stop the Steal networks—stormed the Capitol and disrupted the Electoral College vote proceeding (Pence was rushed out by Secret

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440.   *Id.* at 30.

441.   *Id.* at 31.

442.   Georgia Indictment, *supra* note 1, at 57. Cipollone was excluded from the meeting. Federal Election Indictment, *supra* note 1, at 34.

443.   Georgia Indictment, *supra* note 1, at 58, 60.

444.   *Id.* at 61. Eastman allegedly told Jacob that he wanted to avoid judicial review because he believed the plan would be "unanimously rejected by the Supreme Court." Federal Election Indictment, *supra* note 1, at 35.

445.   Rutenberg et al., *supra* note 257.

446.   *Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat,'* REV (Jan. 6, 2021), https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat [https://perma.cc/ZQ6E-ZCSP].

447.   *Id.*

Service).[448] Congress reconvened that night and, after multiple objections to electoral votes from battleground states, Pence counted the legally certified Biden electors, officially sanctioning the Biden presidential victory in the wee hours of January 7.[449] Trump left the White House two weeks later, without attending Biden's inauguration and never conceding defeat.

Figure 4. Antidemocratic Legal Mobilization
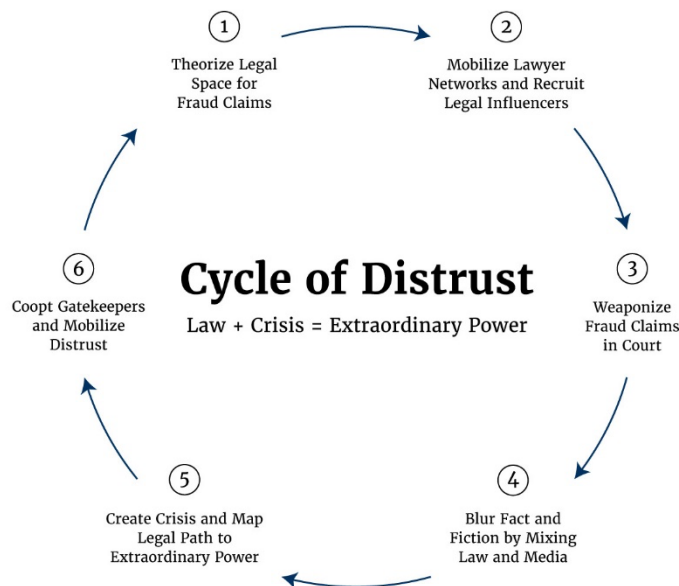
This Part has traced antidemocratic legal mobilization in the Stop the Steal campaign, showing how law was a critical tool in Trump's attacks on the key foundation of American democracy: free and fair elections. False claims of election fraud were made in court and the public sphere to promote a *cycle of distrust*: undermining faith in the election outcome toward the end of provoking a constitutional crisis to justify Trump's reach for extraordinary power. By mapping the role of lawyers at each stage of this cycle, the case study illuminates

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448. HOUSE JANUARY 6TH COMM., *supra* note 2, at 465.

449. During the January 6 Attack, Eastman emailed Jacob to ask Pence to "consider one more relatively minor violation and adjourn for 10 days to allow the legislatures to finish their investigations, as well as to allow a full forensic audit." Georgia Indictment, *supra* note 1, at 64. In December, Powell had contracted with a forensic auditing firm, Sullivan Strickler, to investigate Dominion voting machines in Georgia and other states; the firm has been accused of several data breaches, including tampering with machines in Coffee County, Georgia, on January 7 in an unsuccessful effort to show fraud. Danny Hakim, Neil Vigdor & Richard Fausset, *Election Data Breach Attracts Georgia Investigators*, N.Y. TIMES (Aug. 27, 2022), https://www.nytimes.com/2022/08/27/us/georgia-trump-coffee-county-election.html [https://perma.cc/R2CZ-7YUH].

how law may be deployed to weaken the rule of law, which has important implications for future research on lawyers in backsliding democracy.

A crucial takeaway from the case study is that the Stop the Steal campaign did not reject law but rather purported to follow its letter by rationalizing legal grounds for overturning the election results. In so doing, the campaign mobilized the *symbolic power* of law to shape public opinion by disseminating the false narrative that the legal system was not working, stymied by corrupt voting officials and judges, and could only be redeemed by authorizing Trump to override the flawed legal system in the national interest. The campaign, in short, made the case that it was on the side of legality. In this effort, lawyers played critical roles *out in front*, as litigators and legal influencers, and *behind the scenes*, theorizing a legal pathway to retain power and advising the president on how to follow it.

In these roles, lawyers were called upon to provide essential legal support at every stage in the mobilization cycle, contributing conventional professional skills—research, fact-gathering, litigation, and advice—toward end goals antithetical to professional values. Before the election, lawyers conducted legal research to identify potential risks of election fraud and legal arguments to challenge them (stage 1) and organized collectively as Lawyers for Trump to publicly advance the campaign's voting fraud agenda and build a legal network to prepare for election lawsuits (stage 2). After the election, lawyers litigated in court, raising increasingly untenable and sometimes conspiracy-filled fraud claims (stage 3), while legal influencers made public statements outside of court endorsing the same unsubstantiated theories (stage 4). As lawsuits failed, lawyers recruited outside of Trump's main campaign team advanced legal opinions justifying the alternative elector scheme and Pence's authority to reject electors on January 6, and advised Trump and third parties essential to the plan (including the Trump electors and political officials in battleground states) on the steps required to effectuate it (stage 5). In the end, Trump sought to place the DOJ in service of his plan by identifying government lawyers to support it, while mobilizing outside lawyers to pressure Pence, in private and public, to block election certification—contributing to the frenzied atmosphere before the January 6 Attack (stage 6).

As the cycle progressed, the composition of the legal team changed, eventually taken over by more radical lawyers as the campaign itself pursued more radical ends. While the initial Lawyers for Trump group was dominated by legal elites from the conservative legal establishment and Big Law, the lawyers recruited to execute post-election legal challenges, particularly after the first wave of cases failed to change the results, were primarily from solo and small firms, many from nonurban parts of battleground states without election law expertise, and in some of the most extreme cases, assisted by movement lawyers from conservative legal nonprofits. As the campaign entered the conspiracy litigation and alternative elector phases, mainstream lawyers—in established law

firms, inside government, and on the campaign—distanced themselves as Giuliani, Eastman, and others took over as outside counsel to Trump and his campaign. By retaining outside lawyers to represent him in his candidate and campaign capacities—which American presidents are permitted to do—Trump was able to maneuver around the government lawyers hired to keep him within democratic guardrails.

These outside lawyers produced facially legitimate legal work product— briefs, opinions, and forms—that asserted illegitimate challenges to legal rules securing presidential elections and ensuring that losing candidates accept the results. For instance, in the conspiracy litigation phase of the campaign, lawyers assembled a portfolio of *worst practices*: cookie-cutter voting fraud lawsuits with similar formats, legal claims, and unverified facts disseminated through legal networks and used across battleground states. The most egregious example of this was the Powell-led Kraken lawsuits in Arizona, Georgia, Michigan, and Wisconsin, which included verbatim language framing the complaints, nearly identical false factual allegations about voting machines, reliance on similar dubious expert statistical claims, almost identical legal arguments, and equivalent prayers for relief.[450] Other instances included Kaardal's Arizona and Georgia lawsuits, which contained similar allegations that Zuckerberg funding to facilitate voter outreach and voting by mail caused local governments to violate state election law and the federal constitution, producing outcome-determinative fraud,[451] and Bopp, Jr.'s cases in Georgia, Michigan, Pennsylvania, and Wisconsin seeking the exclusion of allegedly illegal votes in Democratic counties to invalidate those states' presidential election results.[452]

During the fake elector scheme, Trump lawyers invoked progressive legal precedents in support of goals deeply hostile to their principles, asserting *ideological equivalency* between prior good-faith efforts to protect a presidential candidate's legal rights in legitimate election contests and their own bad-faith efforts to undo the legal results of a settled outcome. This strategy was deployed by Eastman and Chesebro, who sought to justify discarding legally valid Electoral College votes when there were no longer legitimate legal disputes over the 2020 election outcome by invoking liberal legal scholar Lawrence Tribe's analysis of the 2000 Florida recount in the Bush-Gore election—when there was, in fact, a legitimate ongoing legal dispute casting the outcome in real doubt.

In advancing the fake elector scheme, these same lawyers also deployed cynical *legal mimicry* that sought to use legal formalism to subvert law's substantive content. Chesebro masterminded this approach with his detailed instructions on how to assemble Trump electors in battleground states by strictly following the letter of the Electoral Count Act to mimic elector voting by its December 14 deadline—even as doing so would subvert the legally valid electors

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450. *See* cases collected in *supra* note 335.
451. *See* cases collected in *supra* note 343.
452. *See* cases collected in *supra* note 280.

for Biden certified by those states. These instructions underscore just how important legal memos, like those of Chesebro and Eastman, were to the overall campaign. Their significance was not just in presenting a legal theory but actualizing it on the ground. The memos were tools to convince relevant legal actors—the electors themselves, state officials necessary to provide legal resources, and the vice president—that their cooperation was necessary to preserve the campaign's legal rights in the face of claimed electoral uncertainty, while also providing a blueprint to frame the public narrative that legal authority existed and should be exercised on January 6.

While the case study maps the legal strategy of attack, it also gives insight into how the attack was ultimately thwarted. As a cadre of radical lawyers broke professional boundaries to challenge the election without merit, lawyers (including judges) closer to the professional mainstream resisted. In the end, Stop the Steal was foiled by the decisions of judges to systematically reject the campaign's post-election challenges and of some lawyers within the Trump administration who performed their gatekeeping roles under enormous counterpressure. AG Barr ultimately refused to lend the DOJ's authority to election fraud conspiracy claims, reportedly calling them "bullshit," while top AG brass and White House counsel squashed the effort to install Trump loyalist Clark as an acting AG willing to endorse fraud.[453] Pence's legal counsel also held firm, refusing to endorse Eastman's "TRUMP WINS" scenarios in which Pence would reject legitimate Biden electors.

Yet, despite this successful resistance, a year after the election, polls showed that precisely because of Stop the Steal's coordinated media and legal campaign, 70 percent of Republicans believed that the election was not "free and fair" and Biden was not the legitimate president—a figure that remained virtually unchanged in 2023.[454] That Trump's popularity among Republican voters has held in the face of four criminal indictments suggests that he has achieved the most coveted—and dangerous—autocratic asset: authorization by core supporters to commit wrongdoing with impunity.[455] This has been achieved by Trump's ongoing efforts to delegitimize the election (and prosecutions against him), carrying forward tactics honed in Stop the Steal to lay the groundwork for another run for power, in which the courts and lawyers who helped ensure that the campaign was a "near miss" the first time around will be subject to new,

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453.   HOUSE JANUARY 6 COMM., *supra* note 2, at 376–402.

454.   Catherine Kim, *Poll: 70 Percent of Republicans Don't Think the Election Was Free and Fair*, POLITICO (Nov. 9, 2020), https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488 [https://perma.cc/J6Q6-EBEG]; Jennifer Agiesta & Ariel Edwards-Levy, *CNN Poll: Percentage of Republicans Who Think Biden's 2020 Win Was Illegitimate Ticks Back Up Near 70%*, CNN (Aug. 3, 2023), https://edition.cnn.com/2023/08/03/politics/cnn-poll-republicans-think-2020-election-illegitimate/index.html [https://perma.cc/9Y38-HUPM].

455.   Philip Bump, *Getting Indicted Does Seem to Have Helped Trump*, WASH. POST. (Sept. 12, 2023), https://www.washingtonpost.com/politics/2023/09/12/trump-polling-indictments/ [https://perma.cc/TKR2-N3PV]. As this Article went to press, Trump had been selected by primary voters as the 2024 Republican presidential nominee.

more vigorous attacks.[456] The damage done by using law to promote a cycle of distrust creates ongoing democratic risk.

IV.
THE LEGAL PROFESSION AS INFRASTRUCTURE OF DEMOCRACY

In response to the twin democratic threats of slow erosion and fast attack analyzed in Parts II and III, this Part considers how the legal profession may better serve as an "infrastructure of democracy" critical to "maintaining and defending an inclusive and equally open public sphere in between market and state pressures."[457] Drawing upon lessons from the U.S. case, Part IV examines what can be done to strengthen this infrastructure domestically and what can be learned by studying backsliding in other countries to predict and preempt further attacks at home. Toward this end, the first Section examines how to promote greater professional *resilience* against backsliding by disabling fast-track democratic attacks and fortifying lawyers' democratic role against slow-road decline. The next Section then asks what comparative study can teach about collective *resistance* to autocracy: highlighting the need to examine how transnational networks and individual incentives influence the development of antidemocratic lawyering around the globe and how legal context shapes diverse forms of legal mobilization against the rule of law.

A. Toward Professional Resilience

While Stop the Steal exposed significant vulnerabilities in professional regulation and values, it also spotlighted the importance of ethical resistance in the struggle against democratic backsliding by lawyers in cornerstone institutions of the legal profession: the bar, courts, and law schools. Reflecting on the complex legacy of Trump lawyering and the broader professional challenges that contributed to its emergence, this Section provides a preliminary accounting of what the profession has done—and could do better—to reduce the risk of future election attacks, while exploring changes in regulation and education to address underlying currents of professional erosion. These changes are not meant to substitute for a more radical restructuring of the profession or rethinking of professional identity, but rather to complement such efforts through concrete action to address specific democratic concerns that may be achievable in the near term.

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456.   *See generally* Tom Ginsburg & Aziz Z. Huq, *Democracy's "Near Misses,"* 4 J. DEMOCRACY 16 (2018).

457.   I borrow this term from Antoine Vauchez and Mikael Madsen, who are leading a project on legal infrastructures of democracy. *Legal Infrastructures of Democracy*, MAX PLANCK LAW, https://law.mpg.de/event/legal-infrastructures-of-democracy/ [https://perma.cc/PPE3-BGE2].

1. *Disabling Democratic Attacks on the Fast Track*

As the Stop the Steal campaign underscored, aspiring autocrats target the legitimacy of elections as a central strategy to seize power.[458] Disabling election attacks is therefore critical to prevent democracy from jumping onto the fast track to autocracy. While election attacks occur through coordinated efforts by multiple actors across different venues, lawyers can play vanguard roles by legitimizing legal challenges that undermine public confidence in election integrity. Accordingly, while professional reform cannot by itself stop election interference, it may be used to more effectively police lawyer conduct in relation to elections—holding lawyers to a higher standard of accountability because of the democratic stakes.[459]

The 2020 presidential election attacks have brought a heightened sense of urgency to this effort. This is due in part to the emergence of new civil society organizations launched after the election, including States United Democracy Center and The 65 Project, which have filed numerous ethics complaints and waged a sophisticated media campaign to promote professional enforcement.[460]

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458.   GINSBURG & HUQ, *supra* note 51, at 10, 113 (noting competitive elections are a key aspect of liberal constitutional democracy and outlining measures "that can be used to push an election off the tracks").

459.   Alex Goldstein, *The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 739–40 (2022) (making the case for a heightened standard of disciplinary review for lawyers accused of ethics violations in connection with elections); Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J.F. 114, 115 (2021) (arguing that "ethics rules governing candor in the courtroom and frivolous litigation require sanctions for lawyer lies designed to sabotage valid election results").

460.   The 65 Project has filed nearly eighty ethics complaints since its inception. *See Ethics Complaints*, THE 65 PROJECT, https://the65project.com/ethics-complaints/ [https://perma.cc/3BQJ-GN3V]. States United Democracy Center filed complaints against John Eastman and Jenna Ellis. *See* Letter from Ambassador Norman Eisen (ret.), Founder and Exec. Chair, States United Democracy Ctr., to George S. Cardona, Chief Trial Counsel, State Bar of Cal., Re: Request for Investigation of John C. Eastman (Oct. 4, 2021), https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf [https://perma.cc/7E7T-VC5E]; Letter from Aaron Scherzer, Senior Counsel, States United Democracy Ctr., to Jessica E. Yates, Att'y Regul. Couns., Colo. Sup. Ct., Re: Request for Investigation of Jenna L. Ellis (May 4, 2022), https://statesuniteddemocracy.org/wp-content/uploads/2022/05/2022.05.04-Jenna-Ellis-complaint.pdf [https://perma.cc/7DLF-YVF2]. Other lawyers have filed complaints with state bar grievance committees regarding election lawsuits. *See, e.g.*, Patrick A. Malone, *Ethics Complaint to D.C. Bar Disciplinary Counsel re* Gohmert v. Pence, PATRICK MALONE & ASSOCS. (Feb. 25, 2021), https://www.patrickmalonelaw.com/wp-content/uploads/2021/02/Gohmert-Complaint-022521.pdf [https://perma.cc/E9L8-XJZ2] (seeking sanctions against Julia Z. Haller, Lawrence Joseph, and Brandon Johnson for *Gohmert v. Pence*, "a frivolous election-related lawsuit"); Dana Nessel, Attorney General for the State of Michigan, *Grievance Form to State Bar of Texas re: Sidney Powell* (Feb. 1, 2021), https://www.michigan.gov/documents/ag/Powell_atty_complaint_-_signed_714982_7.pdf [https://perma.cc/T5F6-CV98] (describing Powell's conduct in the Michigan Kraken case); Press Release, Mich. Dept. of Att'y Gen., AG Nessel, Gov. Whitmer, Secretary Benson Seek Disbarment of Attorneys for Pushing Election Fraud Narrative (Feb. 1, 2021), https://www.michigan.gov/ag/news/press-releases/2021/02/01/ag-nessel-gov-whitmer-secretary-benson-seek-disbarment-of-attorneys [https://perma.cc/BYQ8-W8HF] (indicating that Michigan officials filed complaints with the state bars of Michigan and Texas against three attorneys who helped Powell in the Michigan Kraken case—Greg Rohl, Scott Hagerstrom, and Stefanie Junttila).

In response, state bar associations, empowered to license and discipline lawyers for ethical misconduct and long viewed as conservative and out of touch, have responded to public demands for accountability by initiating disciplinary proceedings against pivotal Trump lawyers. These include the bars in California (Eastman),[461] Colorado (Ellis),[462] D.C. (Giuliani and Clark),[463] Georgia (Wood),[464] New York (Giuliani),[465] and Texas (Powell and Paxton).[466] In prosecuting Giuliani, the D.C. Bar explicitly emphasized that interference with the right to vote is a particularly "destructive" act requiring the ultimate sanction: disbarment.[467] For election subversion to be deterred in the future, it is essential that lawyers proven to have broken ethical rules be stripped of the privilege to practice law. While pending cases demonstrate the tools that bars have to discipline lawyers for election interference, however, they also highlight challenges to successful prosecution.

The disciplinary cases brought against Trump lawyers involve a suite of ethical rules that prohibit lawyer lies. These rules require candor to courts (which includes making truthful statements and filing nonfrivolous claims) and third parties during representation,[468] while also prohibiting dishonesty outside of representation and action prejudicial to the administration of justice.[469] A key challenge in Trump cases is overcoming the lawyers' central line of defense: they have a right to make what turn out to be false claims based on weak evidence

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461.   Notice of Disciplinary Charges at 3–4, In the Matter of: John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Jan. 26, 2023).

462.   Opinion Approving Stipulation to Discipline Under C.R.C.P. 242.19(c), at 1, People v. Jenna Ellis, 526 P.3d 958, 959 (Colo. Mar. 8, 2023) [hereinafter *Ellis* Opinion Approving Stipulation] (approving the settlement agreed to by Ellis and the Colorado Office of Attorney Regulation Counsel).

463.   Specification of Charges at 3–4, In the Matter of Jeffrey B. Clark, No. 2021-D193 (D.C. July 19, 2022); Report and Recommendation of Ad Hoc Hearing Committee, *supra* note 321, at 2. Clark has repeatedly contested the pending D.C. Bar case, first by attempting to have it removed to federal court, then by asking for a stay pending the Georgia election interference case, in which he is indicted, and most recently by seeking to block DOJ witnesses against him on a theory of executive privilege. Emily Sawicki, *Ex-DOJ Official Wants Witnesses Barred from DC Ethics Case*, LAW360 (Feb. 16, 2024), https://www.law360.com/articles/1803547/ex-doj-official-wants-witnesses-barred-from-dc-ethics-case [https://perma.cc/88HY-VE9W]. On April 4, a D.C. Bar disciplinary committee ruled that Clark violated his professional duties and should face discipline for writing a letter on behalf of the DOJ claiming likely voting fraud and urging Georgia to hold hearings on the 2020 election. Keith L. Alexander, *Justice Official Clark Violated Ethics in Aiding Trump, D.C. Bar Panel Finds*, WASH. POST (Apr. 4, 2024), https://www.washingtonpost.com/dc-md-va/2024/04/04/justice-jeffrey-clark-bar-trump/ [https://perma.cc/68BG-8V8X].

464.   Notice of Dismissal of Formal Complaints at 1, In the Matter of L. Lin Wood, Nos. S22B0488 & S22B0645 (Ga. July 5, 2023) [hereinafter *Wood* Notice of Dismissal].

465.   In the Matter of Rudolph W. Giuliani, 146 N.Y.S. 3d 266, 268 (N.Y. App. Div. June 24, 2021).

466.   Original Disciplinary Petition at 1, Comm'n for Law. Discipline v. Sidney Powell, No. DC-22-02562 (Dallas Cnty. Tex. Mar. 1, 2023) [hereinafter *Powell* Original Disciplinary Petition]; Original Disciplinary Petition at 1, Comm'n for Law. Discipline v. Warren Kenneth Paxton, Jr., No. 471-02574-2022 (Dallas Cnty. Tex. May 25, 2022).

467.   Report and Recommendation of Ad Hoc Hearing Committee, *supra* note 321, at 2.

468.   MODEL RULES OF PRO. CONDUCT r. 3.1, 3.3, 4.1 (AM. BAR ASS'N 2023).

469.   *Id.* r. 8.4(c), (d).

provided to them at the time. This defense—that the lawyers' election claims were "true enough"[470]—is combined with the "hired gun" advocacy excuse—that the lawyers were simply providing the most zealous defense of their client's position in a frenzied, high-stakes situation.[471]

The ethics prosecutions of Giuliani and Eastman highlight the challenge of overcoming these defenses. Both the D.C. and New York bars charged Giuliani with frivolous claim-making and false statements in relation to his involvement in *Trump v. Boockvar*, the federal lawsuit disputing the Pennsylvania presidential election results. As described in Part III, in that case, Giuliani alleged election fraud in a November 17 hearing although fraud was not included in the complaint.[472] Giuliani later amended the complaint to include fraud claims unsupported by evidence, specifically alleging that observational barriers for poll workers enabled ballot fraud on a massive scale requiring election decertification.[473] In the New York State Bar case, Giuliani argued that the entire disciplinary investigation violated his First Amendment right to free speech.[474] He modified his position in front of the D.C. Bar, which held disciplinary hearings in December 2022, arguing that he did not make frivolous claims because he reasonably relied on poll worker statements in the chaotic period after the election, when the "fastmoving" case "did not permit him to investigate fully."[475]

Eastman adopted a similar defense in response to disbarment proceedings in California, where he was charged with committing "moral turpitude" by using false or misleading claims (such as "7 states have transmitted dual slates of electors" and the election was tainted by "outright fraud") in his memos on the "Jan 6 scenario" to make legally unsupported arguments purporting to authorize Vice President Pence to refuse Electoral College certification for Biden.[476] In his

470.   ROSENBLUM & MUIRHEAD, *supra* note 195, at 28.

471.   DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 19–64 (2009) (Chapter 1 on "the adversary system excuse"). *See generally* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978).

472.   In the Matter of Rudolph W. Giuliani, 146 N.Y.S. 3d 266, 273 (N.Y. App. Div. June 24, 2021); Report and Recommendation of Ad Hoc Hearing Committee, *supra* note 321, at 8.

473.   Report and Recommendation of Ad Hoc Hearing Committee, *supra* note 321, at 27.

474.   *In the Matter of Giuliani*, 146 N.Y.S. 3d at 270. Sidney Powell defended her case in the Texas State Bar by arguing that she had an "unfettered" free speech right to file the Kraken lawsuits. Mike Scarella, *Texas Bar Fights Sidney Powell's Bid to Toss Ethics Case*, REUTERS (June 15, 2022), https://www.reuters.com/legal/legalindustry/texas-bar-fights-sidney-powells-bid-toss-ethics-case-2022 -06-15/ [https://perma.cc/2VMU-4LJ6].

475.   Report and Recommendation of Ad Hoc Hearing Committee, *supra* note 321, at 14, 24; Kelly Garrity, *Giuliani Defends 2020 Election Challenge at D.C. Bar Hearing*, POLITICO (Dec. 5, 2022), https://www.politico.com/news/2022/12/05/giuliani-d-c-bar-ethics-hearing-00072218) [https://perma. cc/4AFL-42U7].

476.   Notice of Disciplinary Charges at 6–8, In the Matter of: John Charles Eastman, *supra* note 461. Eastman was charged with eleven counts, eight of which involved acts of "moral turpitude," which under the statutory State Bar Act (but not the California Rules of Professional Conduct) may be punished by disbarment. CAL. BUS. & PROF. CODE § 6106 (West 2022). The charges against Eastman centered

response, Eastman doubled down on debunked claims of fraud, arguing that there was "significant evidence" at the time of a "strategic Democratic plan to systematically flout existing election laws" in Pennsylvania, repeating claims about the illegality of state mail-in protocols that had been rejected by the Pennsylvania Supreme Court well before he authored the memos, and asserting that he did not know his statements were false since "evidence of 'fraud' was hotly contested at the time and remains so."[477]

While the D.C. and New York proceedings have thus far gone against Giuliani,[478] and the California State Bar Court has recommended Eastman's disbarment,[479] these cases could be decided on appeal, where the scope of First Amendment protection for lawyer speech and the ability of lawyers to make statements based on evidence of dubious validity would be central issues. While a full assessment of the merits is outside the scope of this Article, two observations can be made. First, although there are serious questions about the degree to which the First Amendment should protect lawyer lies in the course of representation,[480] the Trump cases involve lawyer speech in connection with legal proceedings, where the justification for truth-telling to protect the administration of justice is strongest.[481] Giuliani and Eastman's out-of-court

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on his memos but also were based on Eastman's public statements in the media and at the Ellipse on January 6, as well as his role in filing the Georgia case of *Trump v. Kemp*. Notice of Disciplinary Charges, *supra* note 461, at 6, 10–11, 20.

    477.   Respondent John Charles Eastman's Answer to Notice of Disciplinary Charges at 11, 23, In the Matter of: John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Feb. 15, 2023) (relying on Charles Cicchetti's statistical prediction of Biden's "one in a quadrillion" odds of winning after Trump's early reported lead and Jesse Morgan's claim that he drove bins of fraudulent mail-in ballots from New York to Pennsylvania); *see also* Hillel Aron, *Facing Disbarment, Trump Attorney John Eastman Testifies About Evidence Gleaned from Bad Statistics and Amateur Ghost Hunters*, COURTHOUSE NEWS SERV. (June 23, 2023), https://www.courthousenews.com/facing-disbarment-trump-attorney-john-eastman-testifies-about-evidence-gleaned-from-bad-statistics-and-amateur-ghost-hunters/ [https://perma.cc/WB6J-RRAZ].

    478.   In New York, the Appellate Division of the New York Supreme Court, which is the intermediate appellate court with authority over bar discipline cases, ordered Giuliani's interim suspension under authority discussed below, *infra* note 496. Under New York court rules, a lawyer suspended under this procedure has a right to a full post-suspension hearing. N.Y. COMP. CODES R. & REGS. tit. 22, § 1240.9(a) (2016). Final disciplinary decisions by the Appellate Division may be appealed to the New York Court of Appeals, which is the state's highest court. *See* N.Y. C.P.L.R. § 5601 (detailing appeal as of right when a case raises constitutional issues); *id.* § 5602 (detailing appeal by permission). In D.C., the Ad Hoc Hearing Committee overseeing Giuliani's case recommended disbarment in July 2023. Report and Recommendation of Ad Hoc Hearing Committee, *supra* note 321, at 2. Hearing Committee decisions may be reviewed upon party motion by the full Board on Professional Responsibility, whose decisions may be appealed to the District of Columbia Court of Appeals. BOARD RULES r. 13.1, 13.9 (D.C. CT. APP. BD. ON PROF. RESP. 2020).

    479.   Decision and Order of Involuntary Inactive Enrollment at 1–2, In the Matter of: John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024). In California, State Bar Court rulings may be reviewed by the California Supreme Court upon petition by the disciplined lawyer. Cal. R. Ct. r. 9.13 (2022).

    480.   Bruce Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J. LAW & POL'Y 37, 114 (2022).

    481.   *See* Jefferson, *supra* note 459, at 123.

statements were intrinsically connected to pending legal proceedings in which they were both involved. Second, allowing the First Amendment to protect lying lawyers against discipline in this context would create a significant moral hazard problem. As a practical matter, permitting lawyers to successfully invoke a "true enough" defense based on their own understanding of events, no matter how attenuated from reality, would set a dangerous precedent by inviting other lawyers to justify false statements to courts and the public in reference to conspiracy claims, easily accessible on the web—creating a slippery slope away from ethical enforcement.

Another challenge to prosecuting Trump lawyers in the context of U.S. bar federalism is state-by-state variation in procedures and standards for imposing professional discipline. State bars have discretion in ordering a range of sanctions, negotiating settlements, and permitting voluntary resignation in lieu of sanction—and some have exercised this discretion in Trump cases, raising concerns about ethical accountability.[482] In Colorado, Ellis settled her ethics case for the lenient penalty of public censure (soon before being criminally charged and pleading guilty to a felony in the Georgia election interference case), while the Georgia bar allowed Lin Wood to resign without sanction.[483] States also have different procedures for reviewing ethics complaints that may produce disparate results. For example, while California prosecuted Eastman in front of a dedicated state bar court with full-time ethics judges, in Texas (where Powell is being prosecuted), general state trial courts with elected judges[484] review disciplinary actions upon request of the prosecuted lawyer.[485] These differences raise the potential for variation in case treatment. In California, the Eastman case has resulted in State Bar Court Judge Yvette Roland's 128-page ruling recommending disbarment after a bitterly contested months-long trial.[486] In Texas, by contrast, Powell's bar prosecution—alleging that she violated Texas rules prohibiting frivolous lawsuits, unreasonable litigation cost and delay, false

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482.   *Id.* at 132 (arguing that permitting lawyers to voluntarily surrender their licenses through confidential settlements undermines the rules' deterrent effect and should be rejected).

483.   *See Wood* Notice of Dismissal, *supra* note 464, at 1; *Ellis* Opinion Approving Stipulation, *supra* note 462, at 1. After Ellis's guilty plea in Georgia on October 23, 2023, the Colorado Supreme Court's Office of Attorney Regulation Counsel petitioned for her to receive new sanctions based on her felony conviction. *See* Complaint ¶¶ 11–13, Colorado v. Ellis (Colo. Jan. 9, 2024), https://statesuniteddemocracy.org/wp-content/uploads/2024/01/Complaint-Ellis-23-2914-23-4417.pdf [https://perma.cc/6TGE-JVRA]; Bailey & Gardner, *supra* note 11.

484.   *See generally* MARK P. JONES, THE SELECTION OF JUDGES IN TEXAS: ANALYSIS OF THE CURRENT SYSTEM AND OF THE PRINCIPAL REFORM OPTIONS 1 (2017).

485.   TEX. RULES OF DISCIPLINARY PROC. § 2.15 (2023).

486.   In November 2023, Judge Roland issued a preliminary finding. After the trial concluded, the parties were permitted to file post-trial briefs in the case, which both sides did on December 1, 2023. Dr. Eastman's Post-Hearing Brief, In the Matter of: John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Dec. 1, 2023); State Bar's Closing Brief, In the Matter of: John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Dec. 1, 2023). Judge Roland issued a final decision on March 27. *See* Decision and Order of Involuntary Inactive Enrollment, In the Matter of: John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

statements to court, false evidence, and misrepresentation in connection with the four Kraken lawsuits[487]—was dismissed with prejudice in February 2023 by Texas District Court Judge Andrea Bouressa.[488] In her ruling, Judge Bouressa refused to consider four of the six exhibits submitted by bar counsel in response to Powell's summary judgment motion because they were misnumbered.[489] The rejected exhibits included documents related to Powell's Georgia Kraken lawsuit, which had already been submitted in a previous filing, and Powell's response to document production and interrogatory requests.[490] In May, after the Texas dismissal, the Michigan Attorney Grievance Commission, invoking the bar's authority to discipline out-of-state lawyers for infractions committed in-state, filed a complaint against Powell and other lawyers behind the Kraken suit, including non-Michigan licensees Wood and Craig Mauger.[491] Sanctions against out-of-state lawyers may preclude future practice in that state, and any sanctions may also be enforced in the lawyers' home jurisdictions under rules of disciplinary reciprocity.[492]

Although retroactive discipline of lawyers is critical for accountability and deterrence, the challenges facing bar prosecution suggest the need for proactive

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487.   *Powell* Original Disciplinary Petition, *supra* note 466, at 3–4. A Texas lawyer may be disciplined for conduct occurring outside of the state. TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 8.05 (2022).

488.   Final Summary Judgment at 4, Comm'n for Law. Discipline v. Powell, No. DC-22-02562 (Dallas Cnty. Tex. Feb. 22, 2023) [hereinafter *Powell* Final Summary Judgment]; *see also* Zoe Tillman, *Sidney Powell's Tossed Ethics Case Appealed by Texas Bar Panel*, BLOOMBERG LAW (May 22, 2023), https://news.bloomberglaw.com/legal-ethics/sidney-powells-tossed-ethics-case-appealed-by-texas-bar-panel [https://perma.cc/8YKS-4HHU].

489.   *Powell* Final Summary Judgment, *supra* note 488, at 2.

490.   Brief of Appellant at 24–25, Comm'n for Lawyer Discipline v. Powell, No. 05-23-00497-CV (Tex. 5th Ct. App. July 21, 2023). The trial court only considered two correctly labeled exhibits—the complaint and defendants' motion to dismiss in the Georgia Kraken case—and sustained Powell's objections to both as "not competent summary judgment evidence" with respect to matters stated therein. *Powell* Final Summary Judgment, *supra* note 488, at 3. The Texas Court of Appeals recently heard argument in the case. Spencer Brewer, *Texas Bar, Sidney Powell Trade Jabs over Each Other's Errors*, LAW360 (Feb. 7, 2024), https://www.law360.com/pulse/articles/1795481/texas-bar-sidney-powell-trade-jabs-over-each-other-s-errors [https://perma.cc/LE2G-4P5E]. Powell's guilty plea in the Georgia election interference case may affect her bar disciplinary proceeding since "serious crimes" are grounds for disbarment. Jack Newsham, *Sidney Powell Could Finally Be Disbarred After Pleading Guilty*, BUSINESS INSIDER (Oct. 20, 2023), https://www.businessinsider.com/sidney-powell-disbarred-guilty-plea-dark-money-2023-10 [https://perma.cc/78JS-RTBT]. States United Democracy Center and Lawyers Defending American Democracy have requested the State Bar of Texas to seek Powell's disbarment based on her guilty plea. Letter to Seana Willing, Chief Disciplinary Counsel, State Bar of Tex., Re: Request for Disciplinary Action Against Sidney Powell Pursuant to Texas Rule of Disciplinary Procedure 8.01 (Nov. 8, 2023), https://statesuniteddemocracy.org/wp-content/uploads/2023/11/2023-11-08-SBOT-Letter-Sidney-Powell-SUDC-LDAD-With-Attachments.pdf [https://perma.cc/75Z2-RM5J].

491.   Craig Mauger, *Michigan Commission Accuses Lawyers Who Tried to Overturn 2020 Election of Misconduct*, DETROIT FREE PRESS (May 5, 2023), https://www.detroitnews.com/story/news/politics/michigan/2023/05/05/commission-accuses-lawyers-who-tried-to-reverse-2020-election-of-misconduct/70187627007/ [https://perma.cc/SD72-WLGW].

492.   *See* MODEL RULES OF PRO. CONDUCT r. 8.5(a) (AM. BAR ASS'N 2023).

strategies and highlight the importance of other legal actors in the enforcement regime. As the ethics cases against Trump lawyers underscore, the slow-moving system of ethical prosecution, which can take years to conclude, is ill suited to the fast-paced demands of real-time election attacks, which threaten imminent democratic harm. Because of this, some state bars are considering tools to strengthen lawyers' obligations to protect elections.[493] One such tool would provide immediate injunctive relief, akin to a temporary restraining order (TRO), in cases where there is substantial evidence that a lawyer is engaged in conduct that threatens the integrity of an election or imposes other serious democratic harm. Upon motion by affected parties or the bar, this remedy would permit the bar to temporarily suspend an offending lawyer's right to practice, providing an additional lever for defusing imminent election threats—at a minimum, allowing bars to pause lawyer activity that raises significant concerns of public harm. Such a remedy raises difficult issues of timing and proof. It may be hard for bars to ascertain the seriousness of fraudulent claims by lawyers without lengthy investigation and, even in TROs, parties are entitled to due process. Nonetheless, such a tool might have made a difference in Stop the Steal, where several lawyers were repeat players, filing a series of lawsuits designed to create confusion and cause delay (for example, Powell in the Kraken cases, or Eastman in the late challenges in Pennsylvania and Georgia) and providing legal support to local counsel ill equipped to quickly file complex election challenges outside their areas of expertise (for example, Kaardal on behalf of the Thomas More Society in the Arizona and Georgia cases challenging Zuckerberg money or Bopp, Jr. in the Georgia, Michigan, Pennsylvania, and Wisconsin cases alleging voting fraud).

The template for such a TRO-style action already exists. California has a rule allowing the State Bar Court to "order the involuntary inactive enrollment of an attorney," without a full-blown disciplinary hearing, if it finds the "attorney has caused or is causing substantial harm to . . . the public" and there is "a reasonable probability" that the bar "will prevail on the merits of the underlying disciplinary matter."[494] The bar has used this mechanism for suspension through "trial on paper" infrequently, but it was recently invoked against a lawyer accused of stealing client funds in relation to the Girardi scandal.[495] Similarly, in New York, the bar is empowered to suspend lawyers on "an interim basis . . . upon a finding by the court that the respondent has engaged in conduct

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493.   *See generally* Dan Kittay, *In Effort to Preserve Rule of Law, Some Bars Focus on Voting Rights*, ABA J. (July 22, 2022), https://www.americanbar.org/groups/bar-leadership/publications/bar_leader/2021_22/july-august/in-effort-to-preserve-rule-of-law-some-bars-focus-on-voting-rights/ [https://perma.cc/S4R4-YKRK].

494.   CAL. BUS. & PROF. CODE § 6007 (West 2019).

495.   Brandon Lowrey, *Calif. Bar to Seek Quick Suspension of Girardi's Son-in-Law*, LAW360 (Sept. 25, 2023), https://www.law360.com/articles/1725072/calif-bar-to-seek-quick-suspension-of-girardi-s-son-in-law [https://perma.cc/3ZPL-7R8C].

immediately threatening the public interest."[496] This was the provision under which the New York State Bar suspended Giuliani—although that suspension came six months after Trump left office.[497]

As the Giuliani case suggests, bar action can complement, though not replace, efforts to protect elections by other actors. In particular, as Stop the Steal highlighted, courts play an essential role on the front lines of election attack. Courts wield powerful tools that hold lawyers to account and protect themselves against being used for election subversion: they can demand facts, reject unsubstantiated claims, and dismiss frivolous suits. Overall, courts performed these functions well in the 2020 election, and U.S. judicial independence has been rightly credited as a central reason for why the Trump election attack failed. In a small number of cases since, courts have exercised their inherent authority to impose sanctions on attorneys involved in the most egregious election lawsuits. In a prominent case, *King v. Whitmer*, Powell and several other lawyers were ordered to pay the State of Michigan and City of Detroit's attorney's fees for the Kraken suit.[498] While important to promote accountability, the imposition of sanctions against lawyers after the fact may not provide a full remedy to state actors due to unrecoverable time and reputation costs, and because not all courts are willing to incur the time to impose sanctions (which can involve extensive satellite litigation)—and not all sanctions motions prevail.[499] This highlights the importance of coordinated action between courts and the bar to ensure lawyer accountability in election cases. While sanctioning courts should swiftly notify the bar to facilitate the disciplinary process, the bar must also take proactive steps

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496.   N.Y. COMP. CODES R. & REGS. tit. 22, § 1240.9(a) (2016).

497.   In the Matter of Rudolph W. Giuliani, 146 N.Y.S. 3d 266, 268 (N.Y. App. Div. June 24, 2021).

498.   *See* King v. Whitmer, 71 F.4th 511, 533 (6th Cir. June 23, 2023), *cert. denied*, Powell v. Whitmer, No. 23-486; Wood v. Whitmer, No. 23-497 (U.S. Feb. 20, 2024) (upholding reduced sanctions against Powell and five other lawyers; dismissing the order against Wood to pay sanctions to the state defendants since they had not sought sanctions against him (while upholding the order for Wood to pay sanctions to the City of Detroit); and dismissing the sanctions order in its entirety against Michigan attorneys Newman and Junttila, whose involvement in the case was minimal); Mike Scarcella, *Attorney Sanctions Upheld in "Utterly Baseless" Lawsuit Challenging 2020 Election*, REUTERS (Dec. 13, 2022), https://www.reuters.com/legal/legalindustry/attorney-sanctions-upheld-utterly-baseless-lawsuit-challen ging-2020-election-2022-12-13/ [https://perma.cc/H44M-VDBH]. A federal judge sanctioned lawyers for filing a bogus 2020 election challenge in Colorado that sought to invalidate results in the battleground states. O'Rourke v. Dominion Voting Sys., No. 20-cv-03747-NRN (D. Colo. Aug. 3, 2021), *aff'd*, No. 21-1442 (10th Cir. Dec. 13, 2022), *cert. denied*, No. 22-1084 (U.S. Oct. 2, 2023); *see also* Jacob Shamsian, *Federal Judge Sanctions Lawyers Who Brought Conspiracy Theory-Filled Lawsuit Trying to Overturn the 2020 Election, Reap $160 Billion in Damages*, BUS. INSIDER (Aug. 4, 2021), https://www.businessinsider.com/judge-sanctions-colorado-lawyers-challenging-2020-presidential-election-2021-8?r=US&IR=T [https://perma.cc/F3G6-UVGS]. In addition, Trump and his lead attorney, Alina Habba, were ordered to pay more than $937,000 in sanctions for filing suit against Hillary Clinton claiming she and her campaign engaged in a malicious conspiracy to impugn his reputation and rig the 2016 election in Clinton's favor. Trump v. Clinton, No. 22-14102, 2023 WL 333699, at *26 (S.D. Fla. Jan. 19, 2023).

499.   *See* Feehan v. Evers, No. 22-2704, 2023 WL 4928520, at *6 (7th Cir. Aug. 2, 2023) (rejecting sanctions against plaintiff and lawyers for Wisconsin Kraken lawsuit).

to establish regular channels of communication with judges on the front lines to facilitate timely access to information of lawyer misconduct.

Even as courts held the line against the 2020 election attack, and some have taken action against lawyers leading the charge, the attack also exposed structural weaknesses and the limits of judicial power. Most significantly, the ease of access to courts by lawyers motivated to legitimize fraud claims enabled the Stop the Steal campaign to keep cases in play long enough to advance the alternative elector scheme all the way to January 6. Courts have discretionary power over one little-appreciated tool that might have made a difference: pro hac vice admission, which permits out-of-state lawyers to appear for a specific case if associated with local counsel and the court determines the lawyer is fit to practice.[500] In the Trump post-election lawsuits, there were forty-three instances of pro hac vice admission, including by Giuliani in Pennsylvania and Powell in the Kraken suits. Table 1 shows lawyers with more than one admission.

Table 1. Pro Hac Vice Admissions by 2020 Election Lawyers

Lawyer	No. Pro Hac Vice	Jurisdictions
Sidney Powell	4	AZ, GA, MI, WI
Howard Kleinhendler	4	AZ, GA, MI, WI
Julia Haller	4	AZ, GA, MI, WI
Emily Newman	4	AZ, GA, MI, WI
James Bopp, Jr.	4	GA, MI, PA, WI
Lin Wood	3	AZ, MI, WI
Brandon Johnson	2	AZ, WI
Erick Kaardal	2	AZ, GA
William Mohrman	2	AZ, GA
Sue Becker	2	AZ
Richard Coleson	2	MI, WI
Mark Hearne	2	MI

As this shows, pro hac vice was used in many of the most extreme cases, with Powell, Kleinhendler, Haller, Newman, and Johnson part of the Kraken team; Bopp, Jr. (True the Vote) and Coleson involved in two voting fraud suits voluntarily dismissed within days for lack of evidence; Kaardal (Thomas More Society) and Mohrman on the briefs in suits challenging Zuckerberg money and claiming massive overvoting; and Becker (Public Interest Legal Foundation) involved in two voting machine error cases. In thirty of these cases, lawyers filed briefs without actually having been admitted yet, indicating that their pro hac vice applications were pending. More rigorous scrutiny of these applications by

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500.   *See* Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678, 698–99 (1986).

courts might have prevented admission of Trump lawyers, potentially limiting their impact given that local counsel may have been more reluctant (because of market consequences) or ill equipped to make unsupported fraud arguments on their own.

Finally, while underscoring the importance of coordinated court and bar action in strengthening democratic resilience, the election attacks also spotlighted the role of new actors in ethical enforcement. In addition to lawyer-led groups (like Lawyers Defending American Democracy and States United Democracy Center) filing bar complaints, private companies and individuals injured by Trump lawyer disinformation have mobilized profit-driven lawsuits that buttress the rule of law. Voting machine maker Dominion sued lawyer Sidney Powell for defamation based on her false claims about its machines being hacked for Biden.[501] Powell's defense to this suit was nearly as astonishing as the facts she alleged in it. She argued that her claims of Dominion's fraud could not meet the legal definition of defamation because "[n]o reasonable person would conclude that the statements were truly statements of fact"[502]—an assertion that appears to constitute an ethical admission against interest by conceding her complaint was frivolous. Similarly, in a defamation lawsuit by the mother-daughter pair of Georgia poll workers accused of counting illicit ballots from suitcases, Giuliani was forced to concede his racially tinged statements (that the Black women were passing USB ports with ballot information like "vials of heroin or cocaine") were false.[503] To the extent these private efforts succeed in imposing monetary damages against lawyers for false statements in connection with legal representation, they may prove to have the most consequential deterrent effect on lawyer lies over the long haul.

2. *Rebuilding Professional Legitimacy on the Slow Road*

While short-term action to protect elections from lawyer interference is crucial to strengthening professional resilience against fast-track democratic attacks, efforts to address long-term backsliding trends outlined in Part II are important to address professional erosion on the slow road. Responding to those trends—inequality, polarization, and disinformation—requires a multifaceted approach beyond singular action by the legal profession. Against the scale of the

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501. US Dominion, Inc. v. Powell, 554 F. Supp. 3d 42, 51 (D.D.C. Aug. 11, 2021).

502. Jane C. Timm, *Sidney Powell's Legal Defense: "Reasonable People" Wouldn't Believe Her Election Fraud Claims*, NBC NEWS (Mar. 23, 2021), https://www.nbcnews.com/politics/donald-trump/sidney-powell-s-legal-defense-reasonable-people-wouldn-t-believe-n1261809 [https://perma.cc/F57V-UV65].

503. *See* Alan Feuer, *Giuliani Concedes He Made False Statements About Georgia Election Workers*, N.Y. TIMES (July 26, 2023), https://www.nytimes.com/2023/07/26/us/politics/giuliani-georgia-election-workers.html [https://perma.cc/2N4G-69RJ]. The judge in the Geogia poll worker case awarded plaintiffs $148 million in damages against Giuliani. Alan Feuer, *Judge Orders Giuliani to Pay $148 Million Damage Award Immediately*, N.Y. TIMES (Dec. 20, 2023), https://www.nytimes.com/2023/12/20/us/politics/judge-giuliani-pay-damages.html [https://perma.cc/R8BZ-QURN].

challenge, this Section outlines modest steps bar regulators and legal educators could take to address some of the profession's democracy deficits while more effectively training the next generation of lawyers in their democratic responsibilities.[504]

In terms of bar regulation, potential changes fall into three main categories: structural renovations, rule revisions, and enforcement reforms. First, with respect to bar structure, the 2020 election attacks have fueled calls for greater democratic responsiveness—seizing the opportunity provided by public mobilization around ethics to strengthen bar transparency and accountability.[505] Stung by the Girardi scandal discussed in Part II, the California State Bar has instituted significant governance reform, seeking to rebuild public confidence by strengthening board requirements for inclusion of representatives from client communities and public officials well positioned to identify misconduct.[506] Although these reforms were not motivated by election concerns—and do not address more serious problems with the professional monopoly—their inclusionary requirements serve as one model for thinking about how to expand public oversight in areas of democratic importance. For instance, bars in battleground states could build on these inclusionary requirements by experimenting with special units of nonlawyer experts to monitor lawyer interference in election "hot spots," empowering such units to make recommendations for expedited bar review and prosecution.

Second, with respect to ethics rules, as bars grapple with the challenge of proving Trump lawyers made knowingly false statements of election fraud, they should consider ways to revise ethical standards to reduce the risk of false claims while respecting free speech. Toward this end, the ABA—which promulgates the Model Rules of Professional Conduct that all state bars generally follow—could exercise leadership to strengthen lawyers' duty to investigate and authenticate the veracity of assertions made in legal proceedings (Rule 3.3) and in the public domain (Rule 4.1). Rule 3.3 requires candor to the tribunal, making a lawyer subject to discipline for "a false statement of fact or law" or offering "evidence that the lawyer knows to be false."[507] Both of these provisions

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504. *See*, *e.g.*, Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO J. LEGAL ETHICS 155, 161 (2006); Michael Miller, *Lawyers Have a Special Obligation to Our Democracy*, N.Y.L.J. (Aug. 27, 2018), https://www.law.com/newyorklawjournal/2018/08/27/lawyers-have-a-special-obligation-to-our-democracy/ [https://perma.cc/BYT5-DAFZ].

505. *See* Dahlia Lithwick & Mark Joseph Stern, *Jack Smith's Indictment of the Entire Legal Profession*, SLATE (Aug. 2, 2023), https://slate.com/news-and-politics/2023/08/rudy-giuliani-co-conspirators-jack-smith-indictment.html [https://perma.cc/6MGM-48RW]; *see also* Leah Litman, *Lawyers' Democratic Dysfunction*, 68 DRAKE L. REV. 303, 306 (2020) (arguing that bar secrecy creates a "zone of unaccountability").

506. *Frequently Asked Questions: May and Lazar Reports on Past Handling of Girardi Complaints*, STATE BAR OF CAL. (2023), https://www.calbar.ca.gov/About-Us/News/FAQ-May-and-Lazar-Reports-on-Handling-of-Girardi-Complaints [https://perma.cc/LSG4-CYDX] (noting changes to Board of Trustees to promote accountability).

507. MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2023).

incorporate an actual knowledge standard, upon which Giuliani and other Trump lawyers have relied in efforts to avoid discipline by suggesting that third-party affidavits of fraud gave them plausible deniability, even when affidavits were shoddily completed or attested to by politically motivated actors in coordination with campaign leaders.[508] Given the risk of affidavits being used as a smoke screen for false statements in court filings, reformers have advocated for a stronger standard of verification. This standard would make clear that lawyers have a heightened duty of diligence to vet the credibility of affiant claims, especially in election cases and despite the fast-paced nature of litigation, and may not avoid discipline under Rule 3.3 through deliberate indifference to indicia of unreliability or by failing to conduct an appropriate investigation.

This same standard could also be applied to Rule 4.1, which prohibits knowingly false statements to third parties during representation[509]—a rule applicable to the elite strike force lawyers' press conference statements about Dominion voting machines. Although such out-of-court statements may be entitled to greater free speech protection,[510] it is crucial—especially in high-stakes elections—for the public to be provided with accurate information. Lawyers should not be able to undermine election integrity by exploiting media attention to disseminate false claims, particularly when those claims have been rejected in court or by other credible official action. When out-of-court speech is part of a coordinated litigation campaign, the standards for truthfulness should be uniform.

Finally, the election has reenergized efforts to reconsider Rule 8.3, requiring lawyers to report the misconduct of other lawyers.[511] Currently, the rule only requires reporting if a lawyer has actual knowledge of another lawyer's misconduct that raises a substantial question about the offending lawyer's "honesty, trustworthiness or fitness" and is not based on confidential information.[512] Making the rule mandatory—by overriding confidentiality—in situations where there is reason to believe lawyers are engaged in action compromising democratic institutions could increase public trust that the profession prioritizes the rule of law over client interests. It could also deter lawyer complicity in election fraud schemes by making lawyers directly subject

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508. *See, e.g.*, Hendrickson, *supra* note 337. While Rule 3.3's actual knowledge standard has been interpreted not to establish a duty to inquire into factual allegations, *see* George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 117 (2014), Rule 3.1's prohibition against frivolous claims requires lawyers to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions," MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 2 (AM. BAR ASS'N 2023). The D.C. Bar concluded that Giuliani violated Rule 3.1. Report and Recommendation of Ad Hoc Hearing Committee, *supra* note 321, at 2.

509. MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 2023).

510. *See* Green & Roiphe, *supra* note 480, at 112.

511. *See* Veronica Root Martinez & Caitlin-Jean Juricic, *Toward More Robust Self-Regulation Within the Legal Profession,* 69 WASH UNIV. J.L. & POL'Y 241, 267 (2022).

512. MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2023).

to bar discipline for remaining silent in the face of other lawyers' misconduct. This is especially important to motivate internal watchdogs to police the conduct of lawyers, like Eastman and Chesebro, whose misconduct occurs behind closed doors.

Additional rule changes could address problems illuminated by the 2020 election attack. Under Rule 2.1, when lawyers counsel clients, including through legal memos, they must "exercise independent professional judgment and render candid advice"—giving clients good and bad news, not just telling them what they want to hear.[513] As the election interference prosecutions by the DOJ special counsel and the Fulton County, Georgia district attorney make clear, the legal memos drafted by Chesebro and Eastman were critical elements in the alleged conspiracies, serving as roadmaps for overturning the election. The memos outlined the legal steps required to negate the Biden electors and provided instruction manuals for how to effectuate them. As the case study reveals, the memos rested on the false premise that genuine legal disputes existed about voter fraud affecting election results. In the context of such memo writing, which occurs behind the scenes where no one may see the memo except the client, it is even more important that there be standards for verifying evidence. The danger of faulty memos being used to protect clients against liability for illegal conduct is highlighted by Trump's effort to rely on an "advice of counsel" defense—which seeks to negate criminal intent by purporting to follow lawyer instructions—to avoid liability in the federal election interference case.[514] Rule 2.1 should be strengthened to require that independent professional judgment by lawyers in the counseling setting must be based on rigorously investigated factual claims—an even higher standard than in litigation given that there are external checks on the accuracy of factual claims in court.

The bar should further reconsider standards governing public lawyers. Generally, government lawyers (particularly prosecutors) are held to higher standards because they are deemed to represent the public and thus required to act with the public interest in mind.[515] The election attack involved lawyers, like Giuliani, who did not work for the government but were retained as outside counsel to a sitting president, Trump, acting both in his official and candidate capacities.[516] In this context, because outside lawyers were performing functions analogous to government counsel (and in this case were representing the

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513. *Id.* r. 2.1.
514. *See* Harry Litman, *Trump Could Try to Blame His Lawyers for Jan. 6. But It Just Got a Lot More Difficult*, L.A. TIMES (Nov. 13, 2023), https://www.latimes.com/opinion/story/2023-11-13/donald-trump-jan-6-tanya-chutkan-jack-smith-advice-of-counsel-defense-harry-litman [https://perma.cc/KNC5-85TB].
515. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2023). Government lawyers generally are deemed to have public responsibilities. *See generally* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000).
516. Peter Joy & Kevin C. McMunigal, *The Ethics of Trump's Shadow Lawyers?*, 69 WASH. U. J.L. & POL'Y 127, 135–38 (2022).

president precisely because he had sidelined the White House and DOJ lawyers whose job was to keep him within legal limits), they should meet the higher public interest standards of representation—negating the "zealous advocacy" excuse.

In perhaps the most important rule change, the bar should reconsider its basic standards of democratic conduct for lawyers. As it stands, the ABA Model Rules express a weak commitment to democratic values that is overshadowed by its authorization of zealous client advocacy as the dominant professional value. The obligation of lawyers to act in the public interest is tucked away in vague language in the preamble, which lacks an enforcement mechanism, and the only reference to democracy is in relation to the suggestion that lawyers "should further the public's understanding of and 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 value."[517] If this had been an enforceable rule, not just an ethical aspiration, many Trump lawyers would have violated it for their conduct in relation to the 2020 election. In the election's wake, the ABA should give lawyers' commitment to democracy more bite. Toward this end, the bar should consider elevating democratic obligations to the status of an enforceable formal rule (not an aspirational ideal in the preamble) that requires affirmative conduct by lawyers to protect core democratic institutions—free elections and judicial and prosecutorial independence—such that interference with their functions would subject a lawyer to discipline.

With respect to professional discipline, as state bars consider how to promote attention to democratic values, they should consider how to give greater priority to enforcing public-facing ethical rules designed to protect the justice system and rule of law. The bar has historically underenforced rules not explicitly targeted to prevent client harm, like 8.4(d), which prohibits action "prejudicial to the administration of justice."[518] As a result, there is little precedent defining "prejudicial" conduct of the sort directly implicated in the Trump lawyer cases.[519] The limited ethics opinions referencing Rule 8.4(d) tend to treat it as a basis for discipline in relation to violations of other rules protecting against client harm.[520] Prioritizing enforcement of this rule, and clarifying its

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517.   MODEL RULES OF PRO. CONDUCT pmbl. 6 (AM. BAR ASS'N 2023). The language urging lawyers to promote the rule of law was added in 2002 as part of amendments to the Model Rules resulting from the Ethics 2000 Commission. ETHICS 2000 COMM'N, REPORT ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2002), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home/ [https://perma.cc/62RJ -TY24].

518.   MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 2023).

519.   Giuliani was charged with violating Rule 8.4(d) by the D.C. Bar. Report and Recommendation of Ad Hoc Hearing Committee, *supra* note 321, at 33.

520.   A search for D.C. Bar cases imposing discipline for violations of Rule 8.4(d) found fifty-five cases, fifty-two of which involved violations of other rules. *See, e.g.*, *In re* Silverman, Report and Recommendation of the Board on Professional Responsibility, No. 11-BD-090 (D.C. May 19, 2017)

relationship to the Model Rule preamble's assertion that lawyers should further "confidence in the rule of law," would help deepen professional understanding of what justice-supporting conduct looks like, legitimizing public-facing rules as independent constraints on lawyer conduct with deterrence value. Additional changes to disciplinary enforcement practices could enhance accountability. Specifically, bars should reduce the use of negotiated settlements, in which lawyers are not required to admit misconduct (as in the Georgia ethics case of Wood), and public reprimands without practice restrictions (as in the Colorado case of Ellis). Bars should altogether eliminate private reprimands,[521] which prevent the public from even knowing about lawyer misconduct.[522]

While bars can do more to align their practices with professed democratic values, law schools must also take a leadership role in training future lawyers to be effective democratic citizens. Commentators have argued that Trump lawyering is a symptom of a broader disease that legal education incubates: an ideology that allows lawyers to pretend "evil deeds are not evil when done in the service of a paying customer."[523] Addressing the root causes of that disease requires law schools to attend to lawyers' public responsibilities not as a niche topic but as a core part of the curriculum supported at the highest levels of institutional leadership. Especially given the threat to truthful discourse highlighted by the Stop the Steal campaign, it is critical that legal educators reinforce and expand their commitment to training lawyers to produce rigorous, fact-based argument in an ecosystem of disinformation. It is also essential that educators directly engage with students on how commitment to that rigor supports the rule of law by enabling courts to make legitimate decisions that cannot be undermined by accusations of bias or reference to "alternative facts." This is not to suggest that better education could have prevented Stop the Steal, but rather to highlight areas where law school leaders might effectively rethink educational practices to advance the long-sought goal of training lawyers to be more than just client advocates in this critical moment.

(recommending respondent be suspended for violations of Rules 1.1, 1.4, 3.1, 3.3, 8.4(d); respondent subsequently consented to disbarment); *In re* Frison, 89 A.3d 516, 516–17 (D.C. 2014) (disbarring respondent for violations of Rules 1.1, 1.3, 1.4, 3.1, 3.3, 3.4, 8.4(c) and (d)); *In re* Smith, 70 A.3d 1213, 1214–16 (D.C. 2013) (disbarring respondent for violating Rules 1.1, 1.3, 1.4, 3.3, 8.4(c) and (d)). The three cases involving only violations of Rule 8.4(d) resulted in informal admonitions for failing to comply with a subpoena, *In re* Anne P. Hovis, No. 2003-D309 (D.C. 2003); filing an affiant declaration without verification, *In re* Denise J. Baker, No. 2013-D435 (D.C. 2013); and taking papers from opposing counsel's table, *In re* James R. Newland, Jr., No. 2017-D144 (D.C. 2017).

521.		*See* AM. BAR ASS'N, *Recommendation 7*, *in* LAWYER REGULATION FOR A NEW CENTURY (2018) (recommending publicizing all sanctions).

522.		Other proposals include seeking public input on how to adjust enforcement to ensure fairness. *See* Leslie Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 30 (2007). Greater transparency may help address documented racial disparities in ethics enforcement. *See*, *e.g*., Harriett Ryan & Matt Hamilton, *As Tom Girardi Skated, California State Bar Went After Black Attorneys*, L.A. TIMES (Dec. 16, 2022), https://www.latimes.com/california/story/2022-12-16/as-tom-girardi-skated-the-state-bar-went-after-black-attorneys [https://perma.cc/H526-BT2M].

523.		Lithwick & Stern, *supra* note 505.

Toward this end, professional self-reflection ignited by the Trump lawyer crisis provides a historic opportunity for law schools (and the ABA that governs them) to consider significant changes to the way legal ethics is taught. Over thirty years after the ABA mandated professional responsibility (PR) in response to Watergate, the Carnegie Report on the state of U.S. legal education cited "inadequate concern with professional responsibility" as one of the two "major limitations of legal education."[524] This inadequacy is supported by anecdotal evidence that students generally do not highly value PR courses, downgrade them in course evaluations, and seek ways to circumvent them through other experiences, like clinics, that confer PR credit.[525] The Carnegie Report expressed the widely held view of legal educators that a free-standing ABA-mandated course on PR is not the best way to train students to be ethical lawyers with a commitment to democracy. While the motivations of the ABA when it mandated PR were laudable, the effect of requiring ethics in its current form has undermined the very goals that the ABA sought to advance. The PR course, rather than serving as fertile ground for ethical inquiry and democratic reflection, has come to be viewed by students, at best, as a necessary evil and, at worst, an affront to their independence and intelligence: an attempt to carve time out of a curriculum that otherwise teaches moral relativism to preach the gospel of moral action, causing many students to experience the discussion as hectoring and hypocritical. Unlike other law school courses, including first-year standards, PR stands apart as an ABA-imposed graduation requirement.[526] This requirement has made PR appear as if it has no value that students can independently ascertain, which undermines their ability to select according to criteria used for other courses: importance, interest, and utility.

Critics of ethics education have long argued that getting students to think more deeply about the connection between individual ethics and public values transcends the one-class model; it requires a culture shift in which ethics is taught "pervasively" throughout the curriculum, receiving high-level institutional endorsement and adequate resource allocation.[527] Yet ethics training has trended in the opposite direction. Its content typically focuses on how to pass the Multistate Professional Responsibility Examination, a multiple-choice test required for bar admission in most states. While the ABA accreditation standard

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524.   WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6 (2007) [hereinafter CARNEGIE REPORT].

525.   *See*, *e.g.*, Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBLEMS 139, 141–48 (1995) (detailing challenges teaching PR (including low student responsiveness) and suggesting that, although clinics might prove more effective in teaching ethics in action, to give clinics "a monopoly on professional responsibility instruction would further marginalize its significance").

526.   STANDARDS AND RULES OF PROC. FOR APPROVAL OF LAW SCHOOLS § 303(a)(1) (AM. BAR ASS'N 2023–2024).

527.   *See generally* Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).

was changed after Watergate to require "instruction in the duties and responsibilities of the legal profession," it was not until 2014, when the ABA also decided to require six units of experiential learning, that Standard 303(a)(1) was modified to require "one course of at least two credit hours in professional responsibility."[528] This has put downward pressure on the course, with student demand predictably focused on meeting the two-credit minimum requirement in the least onerous fashion. While a small number of schools have heeded the Carnegie Report's call to "Join 'Lawyering,' Professionalism and Legal Analysis from the Start,"[529] most avoid curricular integration and permit "teaching to the test" to crowd out space for conversation about lawyers' duties to promote access, independence, and legal authority as core democratic functions. In this context, law schools generally do not prioritize PR hiring over "core" needs, like first-year courses, or cutting-edge areas, like technology and innovation. As a result, not only is legal ethics poorly integrated throughout the curriculum, the individual PR course at many law schools is often taught by part-time faculty, signaling marginal status. This is a major hurdle since realizing curricular innovation necessary to educate lawyers in how to effectively respond to democratic backsliding as a paramount issue of our times will require substantial investment in faculty and support structures.

Beyond PR, legal educators need to tackle head-on the problem of how to train students to address conflict over sources of legitimate knowledge in research and argument, both in law school and in the world of practice. In an era in which such sources of knowledge are fragmented and deeply contested and information silos can reinforce intolerance, law schools have an important role to play in convening conversations on how to evaluate knowledge according to criteria of credibility and objectivity and on the democratic importance of fact-based disagreement and mutual respect. This does not mean that law schools should be arbiters of authoritative knowledge, take sides in policy disputes, or diminish the importance of protest critical to the formation of new legal norms.[530] Rather, the focus should be on equipping students with new tools to navigate the thicket of disinformation and reinforcing norms of practice that delineate

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528. STANDARDS AND RULES OF PROC. FOR APPROVAL OF LAW SCHOOLS § 303(a)(1) (AM. BAR ASS'N 2014–2015). In 2001, the standard was changed to say that a "law school should involve members of the bench and the bar" in PR instruction, emphasizing the course's association with practice and promoting the use of adjuncts. STANDARDS AND RULES OF PROC. FOR APPROVAL OF LAW SCHOOLS § 302(b) (AM. BAR ASS'N 2001–2002).

529. CARNEGIE REPORT, *supra* note 524, at 9; *see also* Ann Southworth & Catherine L. Fisk, *Our Institutional Commitment to Teach About the Legal Profession*, 1 U.C. IRVINE L. REV. 73, 81 (2011).

530. As debates over so-called "cancel culture" reveal, there are difficult questions about the relationship between legitimate speech and that which creates an atmosphere harmful to students. *See, e.g.*, Vimal Patel, *At Stanford Law School, the Dean Takes a Stand for Free Speech. Will It Work?*, N.Y. TIMES (Apr. 9, 2023), https://www.nytimes.com/2023/04/09/us/stanford-law-school-free-speech.html [https://perma.cc/U89S-QPJD].

appropriate legal argument from inappropriate factual distortion.[531] In this regard, while law schools have focused justifiable attention on how to address artificial intelligence—both as a threat to academic integrity and lawyers' jobs[532]—they have done little to directly engage with students on the integrity of information produced by real humans in the media and online, perhaps stymied by how to navigate the political sensitivity of the topic.

As law schools work to promote commitment to a common fact base, even while teaching how to disagree on the interpretation of facts, they must also reclaim space for common experiences that reinforce shared professional values. In this regard, law schools will need to address barriers they have erected to the integrative socialization necessary to build collective commitment to rule-of-law norms. While many of the problems with legal education have deep roots,[533] changes to law schools' economic model over the past quarter-century have contributed to fragmentation that makes it more difficult to foster common professional experiences and commitments. An important driver of fragmentation has been the shift toward rankings-induced return-on-investment metrics for evaluating law schools.[534] These metrics motivate schools to elevate marketable skills facilitating job placement and bar preparation, crowding out space for serious investigation of the profession's democratic role. An important, but underexamined, consequence of rankings pressure has been an increase of privately funded centers and specializations,[535] which canalize the law school experience into separate curricular streams. Specialized curricula in public interest lawyering, business law, and other practice areas train students to have high attachment to clients in those specific settings, honing skills necessary for success in those arenas but failing to promote broad-based professional learning. This educational "silo-ization" may feed into the already-strong "hired gun" professional ideology that weakens mutual tolerance and public commitment. Incorporating greater attention to democracy in legal education requires reckoning with the centripetal force of curricular specializations that split upper-division legal education along separate tracks and considering how to build greater accountability into these privately funded programs to ensure that they

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531.   *See* William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 257 (1998) (explicating the difference between argument and assertion).

532.   *See* John Villasenor, *How AI Will Revolutionize the Practice of Law*, BROOKINGS (Mar. 20, 2023), https://www.brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/ [https://perma.cc/RXY7-LS4F].

533.   Before the 1970s, when the first cohorts of women and students of color began to enter law school, the student bodies were almost entirely white and male. ABEL, *supra* note 83, at 83.

534.   TAMANAHA, *supra* note 124, at 78.

535.   *See* Leigh Jones, *Schools Turn Up Funding Efforts*, ALM MEDIA (May 9, 2005), https://www.bloomberglaw.com/document/X1JEUO8C000000?jcsearch=900005428665#jcite [https://perma.cc/LND2-ACP9] (stating that because of fundraising pressure, law schools turn to donors to support new programs to "differentiate themselves"); *see also* Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 SAINT MARY'S L.J. 301, 349–50 (2003) (discussing how rankings influence schools to offer "specialized" degrees).

support law schools' overall mission of training lawyers in common democratic values.

Finally, rethinking professional training in times of democratic crisis requires broadening who gets to define ethics in the first instance: incorporating the voices of those historically and currently excluded from control over its meaning and content. A key theme of this Article is that legal ethics is profoundly influenced by the political culture that surrounds it. Legal ethics can ask lawyers to be more responsible for their own actions and those of clients, but it cannot ask them to be heroic while democratic systems fail and it cannot expect students and lawyers to buy into a system that does not reflect their input and experiences. Increasing the democratic legitimacy of the profession going forward requires addressing barriers to diversity outlined in Part II, both in terms of who gets to become lawyers and who has access to them. Although law schools cannot fix the access to justice problem, they can play a leadership role by admitting diverse students committed to addressing it,[536] while helping all students understand how the professional monopoly impedes access and why supporting the innovative use of nonlawyers (and nonhumans) in disseminating legal knowledge is an essential democratic responsibility.[537]

B.   Toward Democratic Resistance

While this Article focuses on the U.S. legal profession, it seeks to set an agenda for investigating the role of lawyers in other national contexts where democratic backsliding occurs. Comparative analysis is critical to understanding the different pathways by which lawyers are enlisted as authors of autocracy and the specific strategies and legal materials they deploy. It is also critical to better appreciate how particular segments of the bar become radicalized to support autocratic agendas. This subject is not merely of academic interest but one necessary to help opposition leaders and the public counter autocratic legal moves. In this regard, while the U.S. case has much to teach about autocratic legal strategy and democratic resistance, America also has much to learn from other countries where autocratic legalism has taken different forms and methods of resistance have been more or less successful. This final Section offers ideas

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536.   Law school policies targeting financial support to recruit those with the highest grades and LSAT scores can hinder diversity by disadvantaging students who are Black or Latinx and first-generation college graduates, all of whom are more likely to assume increased educational debt. *See* LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2016 ANNUAL SURVEY RESULTS, LAW SCHOOL SCHOLARSHIP POLICIES: ENGINES OF INEQUITY 7–14 (2017). Because such disadvantage has resulted, in part, from rankings-driven admissions criteria, the recent movement by top law schools to withdraw from the rankings system could provide space for experimentation. *See* Ruth Graham, *After Boycott from Law Schools, U.S. News & World Report Changes Ranking System*, N.Y. TIMES (Jan. 2, 2023), https://www.nytimes.com/2023/01/02/us/after-boycott-from-law-schools-us-news-world-report-chang es-ranking-system.html [https://perma.cc/TQ9H-6TL9]. The elimination of race-based affirmative action in *Students for Fair Admissions v. Harvard*, 601 U.S. 181 (2023), will require law schools to formulate new admissions criteria to sustain diversity.

537.   *See* GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD 4 (2016).

for how to approach comparative inquiry in relation to the central questions with which this Article began: *why* some lawyers choose to attack the rule of law and *how* they do it.

In terms of *why* lawyers mobilize law against democratic institutions, this Article has highlighted structural forces shaping the professional environment in which such mobilization emerges, leaving open two important avenues of future research to fill out a more comprehensive picture of the forces shaping lawyering in contexts of rising autocracy.[538] The first avenue of inquiry is into the role of *transnational autocratic networks* in spreading legal knowledge and strategies. This inquiry is of critical importance since there is evidence that autocratic playbooks are being circulated globally—with America both an importer and exporter of autocratic legalism. For example, in Hungary, President Orbán's Fidesz party used a two-thirds majority won in 2010 to manipulate voting rules and redraw parliamentary districts to entrench power,[539] a practice echoing U.S. gerrymandering. Directly following the Stop the Steal template, prior to the 2022 election, Orbán accused the opposition party of "election fraud" for texting political messages to more than a million voters, even as he simultaneously rewrote voter eligibility rules to boost his support.[540] Fidesz's success in using its parliamentary supermajority to reshape the Hungarian courts—by forcing the retirement of independent judges and restricting the authority of the Constitutional Court[541]—has served as inspiration to authoritarian leaders in other countries, including Trump. In another instance of the global transmission of autocratic scripts, former Brazilian President Jair Bolsonaro used control over the legal system to devise new rules to remove content limits on social media platforms[542]—fueling the rise of disinformation to strengthen his political position—and to preempt local lockdown measures during the pandemic to rally

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538. For a discussion of how opportunity structure influences legal mobilization, see generally Lisa Conant, Andreas Hofmann, Dagmar Soennecken & Lisa Vanhala, *Mobilising European Law*, 25 J. EUROPEAN PUB. POL'Y 1376 (2018).

539. *See* Nicholas Kulish, *Foes of Hungary's Government Fear 'Demolition of Democracy,'* N.Y. TIMES (Dec. 21, 2011), https://www.nytimes.com/2011/12/22/world/europe/foes-of-hungarys-government-fear-demolition-of-democracy.html [https://perma.cc/D8H6-794A]; Matt Apuzzo & Benjamin Novak, *In Hungary, Viktor Orban Remakes an Election to His Liking*, N.Y. TIMES (Mar. 31, 2022), https://www.nytimes.com/2022/03/31/world/europe/hungary-viktor-orban-election.html [https://perma.cc/4CLH-U7LE].

540. Apuzzo & Novak, *supra* note 539; Bruno Waterfield, *I'll Keep Us Out of War, Viktor Orban Tells Hungary Before Election*, THE TIMES (Apr. 2, 2022), https://www.thetimes.co.uk/article/ill-keep-us-out-of-war-viktor-orban-tells-hungary-before-election-3svxzqcc3 [https://perma.cc/7Y68-S534].

541. *See generally* Gábor Halmai, *The Early Retirement Age of the Hungary Judges*, *in* EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 471 (Fernanda Nicola & Bill Davies eds., 2017); Zoltán Szente, *Court-Packing Accomplished—The Changing Jurisprudence of a Subordinate Constitutional Court*, 9 CONST. REV. 277 (2023).

542. *See* Billy Perrigo, *Brazil's Restrictive New Social Media Rules Could Be an Omen for the Future of the Internet*, TIME (Sept. 10, 2021), https://time.com/6096704/brazil-social-media-rules/ [https://perma.cc/7TZ3-TWBY].

supporters against progressive local governments.[543] Again directly following Stop the Steal, Bolsonaro pushed claims of voter fraud prior to the 2022 election, attacking the top elections court and claiming he could only lose due to fraud.[544] When the Brazilian Supreme Court stood firm in the face of his election loss, terminating social media accounts promoting false fraud claims, his supporters took to the streets, storming the Brazilian capital in a spectacle eerily reminiscent of the January 6 Attack.[545] As these examples highlight, understanding how autocratic legal strategies circulate, the influence of legal networks, and the role of lawyers within them are crucial open questions.

The second avenue of comparative inquiry focuses on the role of *individual autocratic motivation*—the psychological factors and incentive structures that shape a lawyer's choice to cosign autocratic agendas. Key to this inquiry is understanding the *process of radicalization* by which particular lawyers and law firms break from established professional norms to ally themselves with leaders intent on dismantling the rule of law. Are such lawyers driven by ideology, the lure of power and fame, or the promise of a specific position? Is radicalization part of ideological contestation within established legal networks, like the Federalist Society, or does it occur by transgressing the professional norms of such networks and establishing alternatives? In the U.S. context, intense speculation has focused on why formerly reputable lawyers, like Giuliani, opted for an alliance with Trump despite its obvious perils and pre-existing tension. What Giuliani's career trajectory reveals is that to be a public lawyer in the context of rising autocracy requires having to make a stark set of career choices: *resist* or *enable*. Giuliani, for reasons that are the subject of increasing examination,[546] along with other formerly respected lawyers, chose to go "all in," necessitating a set of lawyerly commitments that almost invariably required willingness to violate professional rules. As the Stop the Steal case study highlighted, where lawyers work may shape the choice to go all in. In particular, nonelite, ideologically aligned lawyers in the small-firm sector may be an

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543.   *See* Lucas Ferrante, Luiz Duczmal, Wilhelm Alexander Steinmetz, Alexandre Celestino Leite Almeida, Jeremias Leão, Ruth Camargo Vassão, Unaí Tupinambás & Philip Martin Fearnside, *How Brazil's President Turned the Country into a Global Epicenter of COVID-19*, 42 J. PUB. HEALTH POL'Y 439, 440 (2021).

544.   Caleb Ecarma, *Bolsonaro, Brazil's Biggest Trump Fanboy, Apparently Setting Up His Own Stolen-Election Conspiracy*, VANITY FAIR (May 6, 2022), https://www.vanityfair.com/news/2022/05/jair-bolsonaro-stolen-election-conspiracy [https://perma.cc/Q74B-GKYB].

545.   *See Brazilian Authorities Clear Government Offices of Rioters, Official Says*, N.Y. TIMES (Jan. 8, 2023), https://www.nytimes.com/live/2023/01/08/world/brazil-congress-protests-bolsonaro [https://perma.cc/4UL3-QKKW].

546.   *See, e.g.*, Devlin Barrett, *How Rudy Giuliani, Once a National Hero, Ruined His Own Reputation*, WASH. POST (Sept. 16, 2022), https://www.washingtonpost.com/outlook/2022/09/16/how-rudy-giuliani-once-national-hero-ruined-his-own-reputation/   [https://perma.cc/TH6V-B3FH] (suggesting Giuliani's quest for the limelight as a causal factor in his decision to align with Trump despite risks).

especially ripe target for autocratic recruitment given the upside potential of visibility and status within communities of practice.[547]

In terms of *how* lawyers mobilize law against democracy, comparative analysis can map the ways that political and legal context shapes the nature of lawyering in relation to backsliding, while examining the boundary between the legitimate and illegitimate mobilization of law. While legal mobilization theory developed to study the role of law in progressive democratic movements, exploring law's power as a resource to advance bottom-up change by subordinated groups,[548] the theory has come in for reconsideration by a new generation of scholars who contest its meaning.[549] This scholarship illuminates how law is used as both a "weapon" of and "shield" against authoritarianism[550]—countering progressive democratic movements[551] and resisting right-wing populist ones[552]—with "mixed and paradoxical" success.[553] In addition, scholars have begun to debate whether legal strategies like those deployed in Stop the Steal constitute a troubling, though legitimate, form of legal mobilization or an illegitimate cooptation and distortion of legal institutions and tools—a form of "lawfare" that threatens the rule of law.[554]

This Article opens a new line of comparative study by mapping how law is mobilized *against* legality, defining the concept of *antidemocratic legal mobilization* (introduced in Part III) in relation to four key features: (1) it is deployed by *powerful actors* against democratic institutions to undermine legal checks on their authority; (2) it combines *legitimate and illegitimate* forms of legal practice, deliberately blurring the line between the two in an effort to give attacks on democracy a patina of legal justification; (3) it proceeds *through and outside of courts*, leveraging the symbolic power of court claims to craft out-of-

547.   LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 41 (2001).

548.   MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 8–10, 45–46 (1994).

549.   *See* Emilio Lehoucq & Whitney K. Taylor, *Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?*, 45 LAW & SOC. INQUIRY 166, 168 (2020) (conceptualizing legal mobilization as "the use of law in an explicit, self-conscious way through the invocation of a formal institutional mechanism").

550.   Silva, *supra* note 26, at 194.

551.   *See generally* Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 LAW & SOC. INQUIRY 449 (2014).

552.   *See generally* Johannes Vullers & Sebastian Hellmeier, *Does Counter-Mobilization Contain Right-Wing Populist Movements? Evidence from Germany*, 61 EUR. J. POL. RES. 21 (2022).

553.   Lynette J. Chua, *Legal Mobilization and Authoritarianism*, 15 ANN. REV. L. &. SOC. SCI. 355, 355 (2019).

554.   While it has been used primarily to describe the use of law as a weapon of war, "lawfare" has been more broadly defined as abuse of legal process for the purpose of delegitimizing or damaging an opponent. *See* ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 4 (2016) (defining lawfare as the "use of law as a weapon of war"); Jeff Handmaker, *Researching Legal Mobilisation and Lawfare* 10–11 (Int'l Inst. of Soc. Stud. Working Paper 641, 2019) (characterizing democracy-threatening strategies as lawfare and excluding them from legal mobilization).

court theories to persuade institutional actors and the public to weaken constraints on executive power; and (4) it operates *in coordination with media strategies* that weaponize disinformation, blurring fact and fiction, to subvert confidence in the legal system. A critical finding of the case study is that the symbolic power of law can be deployed as a political weapon toward profoundly antidemocratic—and even illegal—ends by eroding public trust in the integrity of essential democratic institutions and practices. This finding makes a novel contribution to legal mobilization theory, which has traditionally focused on how law's "indirect effects"—its expressive commitment to individual rights and equal justice—gives less powerful groups discursive tools to shift culture and make democracy live up to its promise of inclusion.[555] Antidemocratic legal mobilization turns law's indirect effects upside down. By decoupling the symbolism of legality from underlying facts (for example, sounding the drumbeat of "illegal" voter fraud where none exists), crafty autocrats and their lawyers cynically deploy the language of defending law to reshape public opinion in support of extraordinary action that undermines law's force.

This cynical approach, pioneered by Trump lawyers in the 2020 election attack, was facilitated by contextual factors structuring the U.S. system: the decentralized nature of U.S. voting law, easy access to state and federal courts to assert claims, the existence of a well-developed legal support structure and network of lawyers to file lawsuits, and media channels willing to disseminate false statements combined with weak ex ante legal restrictions on disinformation. As comparative inquiry of lawyers in backsliding democracy develops, a key question will be how variation in legal opportunity and organizational support structures at the domestic and supranational levels shape the specific features and format of antidemocratic legal mobilization—and its potential for success.

CONCLUSION

This Article has introduced and analyzed the role of lawyers in democratic backsliding: presenting a framework for understanding how backsliding contributes to the slow erosion of lawyers' democratic functions and connecting that erosion to the role of lawyers in real-time democratic attacks. In so doing, the Article has illuminated democratic vulnerabilities in the U.S. legal system and the pressure points exploited by Trump-aligned lawyers in the effort to overturn the 2020 presidential election. Identifying structural changes contributing to lawyer radicalization and the strategies deployed by lawyers to undermine the rule of law raises critical questions about the profession's collective responsibility for democratic decline and whether the current crisis is, in fact, different in kind than those that have convulsed the country before. While this Article does not directly answer those questions, it suggests that profound

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555.   For discussion of law's indirect effects, see JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 214–22 (1978).

changes in politics and the profession have contributed to a new and more dangerous ethical environment in which Trump lawyering emerged—and almost succeeded.

Precisely because lawyers have been a central part of America's democracy problem, the legal profession must be part of any solution. This Article has argued that rethinking the role of the profession at this moment necessarily focuses attention on the failings of lawyers and legal institutions to do their part to protect democracy, which has always been incredibly flawed but is now also revealed to be incredibly fragile. The Article's ideas for reform are designed to strengthen the profession's capacity to stop attacks by lawyers against democratic institutions while placing democracy at the center of professional regulation and training.

Yet while legal reforms are necessary, they can only be part of the solution to democratic backsliding. Indeed, one of the most striking lessons from the Trump era is the degree to which democracy rests not just on law but on a scaffolding of norms that surround and buttress it: norms like presidents divesting themselves of financial holdings that present conflicts of interests, accepting adverse legal rulings and not denigrating the judges who issue them, supporting checks and balances, and respecting the press. That these norms matter profoundly is underscored by just how easily they can be shattered. Thinking about how to protect and rebuild these norms is the crucial collective challenge of our times. In rising to meet that challenge, bar leaders must be willing to engage more directly with popular movements, not just for lawyer accountability but for broader democratic viability. Only by strongly aligning the profession with pro-democracy forces can the profession restore confidence in its role as democratic defender.[556]

Although big changes are needed, smaller changes can make a difference. Indeed, perhaps one of the most enduring lessons of the Trump election attack is that, in times of democratic peril, legal ethics matter on the margins—and that the margins matter. In a very real sense, the lawyers who pushed back on Trump's effort to overturn the election—campaign lawyers who refused to cooperate, election lawyers who withdrew, and government lawyers who resisted—played a decisive part in thwarting its realization. In fortifying legal ethics going forward, while bar leaders must keep the role lawyers play in creating democratic crisis at the center of reform conversations, they must also take inspiration from the lawyers and nonlawyers who show ethical courage to fight back. For every Giuliani and Eastman, there are others who risk money, careers, and physical safety to speak truth to power: people who do not make the news but are essential bulwarks of a system that is worth working to make better.

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556. In a precedent that garnered worldwide attention, Pakistani lawyers led a movement to protect judicial independence from military interference beginning in 2007. *See* James Traub, *The Lawyers' Crusade*, N.Y. TIMES MAG. (June 1, 2008), https://www.nytimes.com/2008/06/01/magazine/01PAKISTAN-t.html [https://perma.cc/6NP4-LAYP].

To prevent another attempt to Stop the Steal, the bar must look backward to learn lessons from past mistakes. But it also must look forward by building upon everyday ethical resistance to strengthen democratic resilience for an uncertain future.