

RUTGERS JOURNAL OF LAW & PUBLIC POLICY

EDITORIAL BOARD

Editor-in-Chief

SIMON SCHMITT-HALL

Executive Editors

ZACHARY CARR

KRISTINA INGERSOLL

Managing Articles Editors

MICHELLE MASON

SHAMNAZ ZAMAN

Managing Notes Editors

SALLY ABDULRAOUF

MARISSA TERWILLIGER

Submissions and Symposium Editors

ALLIE CAPECCI

PRIYA VAISHAMPAYAN

Managing Research Editor

OLGA ROMADIN

Managing Senior Editor

EMMA ROTH

Business and Marketing Editor

PAIGE KAERCHER

Managing Publications Editor

NADIA AL KHUNAIZI

Senior Staff Editors

FLORENCE HULBERT

MATT LAMORGESE

BYRON MITCHELL

RANDALL PETRONKO

YASLIN REYES

CLAUDIA SANCHEZ

AARON USCINOWICZ

3L Staff Editors

DIANA DIAZ

JIBRI DOUGLAS

RYAN FISHER

DEIDRA HOPKINS

SARAH KUSNIRAK

CHRISTINA RAMELLI

JUSTIN ZARAGOZA

2L Staff Editors

OLIVIA FARNESKI

NINA GLIKSHTERN

KRISTINA GOSHORN

CATRINA GUTESCU

TYLER HARTMAN

JOSEPH KELMON

DONISHA KENDRICK

ALEXIS MATTE

JESS MEYERS

LEIGH NASPO

BRENDALIZ POLANCO

MEGAN SHARP

THOMAS STIMSON

PATRICK WALSH

JESSICA WILLOX

PAYTON WILLIAMS

SHAHAB ALHADAD

ZACHARY BALL

TAYLOR BELLMAN

MIRANDA BOTTURA

PAMELA BREWSTER

PORSHA BRYANT

ALI CHAUDHRY

GREGORY DANCY

Faculty Advisor

ALEC WALEN

About the Rutgers Journal of Law & Public Policy

The *Rutgers Journal of Law and Public Policy* (ISSN 1934-3736) is published two times per year by students of the Rutgers School of Law – Camden, located at 217 North Fifth Street, Camden, NJ 08102.

The views expressed in the *Rutgers Journal of Law & Public Policy* are those of the authors and not necessarily of the *Rutgers Journal of Law & Public Policy* or the Rutgers School of Law – Camden.

Form: Citations conform to The Bluebook: A Uniform System of Citation (21st ed. 2021).

Please cite the Rutgers Journal of Law & Public Policy as 20 RUTGERS J.L. & PUB. POL'Y __ (2024).

Copyright: All articles copyright © 2024 by the *Rutgers Journal of Law & Public Policy*, except where otherwise expressly indicated. For all articles to which it holds copyright, the *Rutgers Journal of Law & Public Policy* permits copies to be made for classroom use, provided that (1) the author and the *Rutgers Journal of Law & Public Policy* are identified, (2) the proper notice of copyright is affixed to each copy, (3) each copy is distributed at or below cost, and (4) the *Rutgers Journal of Law & Public Policy* is notified of the use.

For reprint permission for purposes other than classroom use, please submit request as specified at <http://www.rutgerspolicyjournal.org/>.

Manuscripts: The *Rutgers Journal of Law & Public Policy* seeks to publish articles making original contributions in the field of public policy. The Journal accepts both articles and compelling essays for publication that are related to the expansive topic of public policy. Manuscripts must contain an abstract describing the article or essay which will be edited and used for publication on the website and in CD-ROM format. The Journal welcomes submissions from legal scholars, academics, policy makers, practitioners, lawyers, judges and social scientists.

Electronic submissions are encouraged. Submissions by email and attachment should be directed to submissions.rjlpp@gmail.com.

Paper or disk submissions should be directed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North Fifth Street, Camden, New Jersey 08102.

Subscriptions: Subscription requests should be mailed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North Fifth Street, Camden, New Jersey 08102, or emailed to info@rutgerspolicyjournal.org.

Internet Address: The *Rutgers Journal of Law & Public Policy* website is located at <http://www.rutgerspolicyjournal.org>.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY

RUTGERS LAW SCHOOL

OFFICERS OF THE UNIVERSITY

JONATHAN HOLLOWAY, A.B., M.A., M.Phil., Ph.D., *President of the University*
NANCY CANTOR, A.B., Ph.D., *Chancellor of Rutgers University—Newark and Distinguished Professor*
ANTONIO D. TILLIS, B.A., M.A., Ph.D., *Chancellor of Rutgers University—Camden and Professor of Law*
DANIEL HART, B.A., Ed.D., *Provost of Rutgers University—Camden and Professor and Executive Vice Chancellor*
ASHWANI MONGA, B.TECH., M.B.A., Ph.D., *Provost of Rutgers University—Newark and Executive Vice Chancellor*

JOHANNA BOND, B.A., J.D., *Dean and Professor of Law*
SHANI KING, B.A., J.D., *Vice Dean and Professor of Law*
ARTHUR LABY, B.A., J.D., *Vice Dean and Professor of Law*
VICTORIA CHASE, B.A., J.D., *Associate Dean for Academic Affairs, Associate Clinical Professor of Law*
RONALD CHEN, B.A., J.D., *Associate Dean for Academic Affairs, Associate Professor*
NANCY TALLEY, B.A., M.S., J.D., *Senior Associate Dean for Information Services*
CAROLINE YOUNG, B.A., J.D., *Senior Associate Dean for Information Services*
JON C. DUBIN, A.B., J.D., *Associate Dean for Clinical Education and Board of Gov. Dist. Public Service Professor of Law*
WEI FANG, B.S., M.L.I.S., M.S.C.S., *Associate Dean for Information Technology and Head of Digital Services*
JILL FRIEDMAN, B.A., J.D., *Associate Dean of Pro Bono & Public Interest and Professor of Law*
ELLEN P. GOODMAN, A.B., J.D., *Associate Dean of Strategic Initiatives & Special Projects and Professor of Law*
VANESSA WILLIAMS, B.A., Ph.D., *Assistant Dean of New Programs*
SUZANNE KIM, B.A., J.D., *Associate Dean of Academic Research Centers and Professor of Law*
DAVID NOLL, B.A., J.D., *Associate Dean for Faculty Research and Development and Professor of Law*
SARAH K. REGINA, B.A., J.D., *Associate Dean for Student Affairs*
ANDREW ROSSNER, B.A., M.A., J.D., *Associate Dean for Professional & Skills Education and Distinguished Professor of Law*
ROBERT STEINBAUM, B.A., J.D., *Associate Dean for Advancement*
AMY MILLER, B.A., J.D. Ed.D., M.S.Ed., *Associate Dean of Students Affairs*
SARAH K. REGINA, B.A., J.D., *Associate Dean of Students Affairs*
ELIZABETH ACEVEDO, B.S., J.D., *Assistant Dean for Career Development*
CLIFFORD DAWKINS, B.A., J.D., *Assistant Dean, Minority Student Program*
RHASHEDA DOUGLAS, B.A., J.D., *Assistant Dean, Minority Student Program*
SUSAN FEATHER, B.A., M.A., J.D., *Assistant Dean for Public Interest and Pro Bono*
LINDA GARBACCIO, B.S., *Assistant Dean for Academic Services*
MATTHEW SALEH, B.A., J.D., Ph.D., *Assistant Dean of Admissions*

ROBIN L. TODD, B.A., *Assistant Dean for Development*
 REBEKAH VERONA, B.S., J.D., *Assistant Dean for Career Development*
 JEFFREY BALOG, *Director of Finance and Administration*
 JOANNE GOTTESMAN, B.A., J.D., *Director of Clinical Programs and Clinical Associate Professor*
 JOHN C. LORE, III, B.A., J.D., *Director of Trial Advocacy and Distinguished Clinical Professor of Law*
 Margaret McCarthy, *Director of Communications and Marketing*
 PAM MERTSOCK-WOLFE, B.A., M.A., *Director of Pro Bono and Public Interest*
 ELIZABETH MOORE, B.A., *Director of Communications*
 THOMAS RYAN, *Director of Information Technology*
 CAROL WALLINGER, B.S., J.D., *Director of Lawyering and Clinical Professor of Law*

PROFESSORS OF LAW EMERITI

FRANK ASKIN, B.A., J.D.,
Distinguished Professor of Law Emeritus, Robert E. Knowlton Scholar, and Director of the Constitutional Rights Clinic
 PAUL AXEL-LUTE, B.A., M.L.S.,
Deputy Director of the Law Library Emeritus
 CYNTHIA A. BLUM, B.A., J.D.,
Professor of Law Emerita
 A HAYS BUTLER, B.A., J.D., M.S. (LIS),
Law Librarian Emeritus
 NORMAN L. CANTOR, A.B., J.D.,
Professor of Law Emeritus
 EDWARD E. CHASE, B.A., J.D.,
Professor of Law Emeritus
 ROGER S. CLARK, B.A., LL.B., LL.M., J.S.D., LL.D.,
Board of Governors Professor and Distinguished Professor of Law Emeritus
 RUSSELL M. COOMBS, B.A., J.D.,
Professor of Law Emeritus
 LUCY COX, B.A., M.S., Ph.D., M.L.S., *International & Foreign Law Librarian Emerita*
 ANNE V. DALESANDRO, A.B., M.L.S., J.D.,
Law Library Director Emerita and Professor of Law Emerita
 JOHN H. DAVIES, B.S., LL.B., LL.M.,
Professor of Law Emeritus
 STUART L. DEUTSCH, B.A., J.D., LL.M., *University Professor and Willard Heckel Scholar*
 JACK FEINSTEIN, B.A., J.D.,
Clinical Professor of Law Emeritus
 GEORGE GINSBURGS, B.A., M.A., Ph.D.,
Distinguished Professor of Law Emeritus

ARNO LIIVAK, B.A., M.L.S., J.D.,
Professor of Law Emeritus
 JONATHAN MALLAMUD, A.B., J.D.,
Professor of Law Emeritus
 CRAIG N. OREN, A.B., J.D.,
Professor of Law Emeritus
 JAMES GRAY POPE, A.B., J.D., Ph.D.,
Distinguished Professor of Law and Sidney Reitman Scholar
 PATRICK J. RYAN, B.A., M.A., J.D., LL.M., J.S.D.,
Associate Professor of Law Emeritus
 CAROL ROEHRENBECK, B.A., M.L.S., J.D.,
Professor of Law and Director of the Law Library Emerita
 RAND E. ROSENBLATT, B.A., M.Sc., J.D.,
Professor of Law Emeritus
 DIANA SCLAR, B.A., J.D.,
Professor of Law
 PETER SIMMONS, A.B., LL.B.,
University Professor Emeritus and John M. Payne Scholar
 RICHARD G. SINGER, B.A., J.D., LL.M., J.S.D.,
Distinguished Professor of Law Emeritus
 E. HUNTER TAYLOR, B.A., LL.B., LL.M.,
Professor of Law Emeritus
 PAUL L. TRACTENBERG, B.A., J.D.,
Board of Governors Distinguished Service Professor and Professor of Law
 ROBERT M. WASHBURN, A.B., J.D., LL.M.,
Professor of Law Emeritus
 ROBERT F. WILLIAMS, B.A., J.D., LL.M.,
Distinguished Professor of Law Emeritus

FACULTY OF LAW

AARON ARI AFILALO, A.B., J.D., LL.M.,
Professor of Law
 CHARLES AUFFANT, B.A., J.D.,
Clinical Professor of Law
 SAHAR AZIZ, B.SC., M.A., J.D.,
Professor of Law
 CARLOS A. BALL, B.A., J.D., LL.M.,
Distinguished Professor of Law
 BERNARD W. BELL, B.A., J.D.,
Professor of Law
 VERA BERGELSON, J.D., Ph.D.,
Distinguished Professor of Law
 AMY BITTERMAN, B.A., J.D.,
Assistant Clinical Professor of Law
 ELISE BODDIE, B.A., M.P.P., J.D.,
Professor of Law
 LINDA S. BOSNIAK, A.B., M.A., J.D., Ph.D.,
Distinguished Professor of Law
 ESTHER CANTY-BARNES, B.A., J.D.,
Clinical Professor of Law
 MICHAEL A. CARRIER, B.A., J.D.,
Board of Governors Professor
 VICTORIA CHASE, B.A., J.D.,
Associate Dean for Academic Affairs and
Associate Clinical Professor of Law
 RONALD K. CHEN, A.B., J.D.,
University Professor and Distinguished
Professor of Law
 TODD CLEAR, B.A., M.A., Ph.D.,
University Professor
 LAURA COHEN, B.A., J.D.,
Distinguished Clinical Professor of Law
 JEAN-MARC COICAUD, Doctorat D'Etat, Ph.D.,
Distinguished Professor of Law
 JORGE CONTESSE, LL.B., LL.M.,
Associate Professor of Law
 ROSE CUISON-VILLAZOR, B.A., J.D., LL.M.,
Professor of Law and Chancellor's Social
Justice Scholar
 SARAH DADUSH, B.A., J.D., LL.M.,
Professor of Law
 PERRY DANE, B.A., J.D.,
Professor of Law
 KELLY DEERE, J.D.,
Assistant Clinical Professor of Law
 DONNA I. DENNIS, B.A., M.A., J.D., Ph.D.,
Professor of Law
 JON C. DUBIN, A.B., J.D.,
Associate Dean for Clinical Education and
Board of Governors Distinguished Public Service
Professor of Law
 DOUGLAS S. EAKELEY, B.A., A.B. (Oxon.), M.A., J.D.,
Alan V. Lowenstein Professor of Corporate and
Business Law and Distinguished Professor of
Professional Practice

KATIE EYER, B.A., J.D.,
Professor of Law
 JAY M. FEINMAN, B.A., J.D.,
Distinguished Professor of Law
 GARY L. FRANCIONE, B.A., M.A., J.D.,
Board of Governors Professor and Distinguished
Professor of Law
 DAVID M. FRANKFORD, B.A., J.D.,
Professor of Law
 ANN E. FREEDMAN, B.A., J.D.,
Associate Professor of Law
 SANDY FREUND, B.A., J.D., LL.M.,
Clinical Professor of Law
 STEVEN F. FRIEDEL, B.A., J.D.,
Professor of Law
 MATTEO GATTI, J.D., LL.M., S.J.D.,
Professor of Law
 RACHEL GODSIL, B.A., J.D.,
Distinguished Professor of Law
 STEVE C. GOLD, A.B., J.D.,
Professor of Law
 SALLY F. GOLDFARB, B.A., J.D.,
Professor of Law
 CARLOS GONZÁLEZ, B.A., M.A., J.D.,
Professor of Law
 ELLEN P. GOODMAN, A.B., J.D.,
Associate Dean of Strategic Initiatives and
Special Projects, Professor of Law
 JOANNE GOTTESMAN, B.A., J.D.,
Clinical Professor of Law
 BARBARA GOTTHELF, B.A., J.D.,
Professor of Professional Practice of Law
 STUART P. GREEN, B.A., J.D.,
Distinguished Professor of Law
 ANJUM GUPTA, B.A., J.D.,
Professor of Law
 YULIYA GUSEVA, LL.B., M.A., S.J.D., LL.M.,
Professor of Law
 PHOEBE HADDON, B.A., J.D., LL.M.,
Professor of Law
 ADIL A. HAQUE, A.B., J.D.,
Professor of Law
 PHILIP L. HARVEY, B.A., J.D., Ph.D.,
Professor of Law
 STACY HAWKINS, B.A., J.D.,
Vice Dean and Professor of Law
 NORRINDA HAYAT, B.A., J.D.,
Associate Clinical Professor of Law and Director
of the Civil Justice Clinic
 TAJA-NIA Y. HENDERSON, A.B., M.A., J.D., Ph.D.,
Professor of Law
 CHRISTINA S. HO, A.B., M.P.P., J.D.,
Professor of Law
 BARBARA HOFFMAN, A.B., J.D.,
Clinical Associate Professor of Law

ROBERT HOLMES, B.A., J.D.,
Distinguished Clinical Professor of Law
 ALAN S. HYDE, A.B., J.D.,
Distinguished Professor of Law
 RICHARD HYLAND, A.B., M.F.A., J.D., D.E.A.,
Distinguished Professor of Law
 PAM JENOFF, B.A., M.A., J.D.,
Clinical Professor of Law
 JOHN JOERGENSEN, B.A., M.S., M.A.L.S., J.D.,
Professor of Law
 THEA JOHNSON, A.B., J.D.,
Associate Professor of Law
 MARGO KAPLAN, B.S., M.P.A., J.D.,
Professor of Law
 ALEXIS KARTERON, B.A., J.D.,
Clinical Professor of Law
 JOHN R. KETTLE, III, B.A., J.D.,
Clinical Professor of Law
 SUZANNE A. KIM, B.A., J.D.,
Associate Dean of Academic Research Centers,
Professor of Law
 EMILY KLINE, B.A., J.D.,
Assistant Clinical Professor of Law
 DONALD KOROBKIN, B.A., A.M., J.D.,
Professor of Law
 KATHRYN E. KOVACS, B.A., J.D.,
Professor of Law
 ARTHUR B. LABY, B.A., J.D.,
Vice Dean, Professor of Law
 JOHN LEUBSDORF, B.A., M.A., J.D.,
Distinguished Professor of Law
 MICHAEL A. LIVINGSTON, A.B., J.D.,
Professor of Law
 DAVID LOPEZ, B.A., J.D.,
Professor of Law, Prof. Alfred Slocum Scholar
 JOHN C. LORE, III, B.A., J.D.,
Distinguished Clinical Professor of Law
 EARL M. MALTZ, B.A., J.D.,
Distinguished Professor of Law
 RANDI MANDELBAUM, B.S., J.D., LL.M.,
Distinguished Clinical Professor of Law
 KIMBERLY MUTCHERSON, B.A., J.D.,
Professor of Law
 ALISON M. NISSEN, B.A., J.D.,
Clinical Associate Professor of Law
 DAVID L. NOLL, B.A., J.D.,
Associate Dean for Faculty Research and
Development, Professor of Law
 JOHN F. K. OBERDIEK, B.A., M.A., J.D., Ph.D.,
Distinguished Professor of Law
 CHRYSTIN ONDERSMA, B.A., J.D.,
Professor of Law
 BRANDON PARADISE, B.A., J.D.,
Associate Professor of Law
 DENNIS M. PATTERSON, B.A., M.A., J.D., Ph.D.,
Board of Governors Professor and Distinguished
Professor of Law

TWILLA PERRY, B.A., M.S.W., J.D.,
Professor of Law
 LOUIS S. RAVESON, B.A., J.D.,
Professor of Law
 HARRY M. RHEA, B.A., M.S., M.A., Ph.D.,
Associate Professor of Criminal Justice and Law
 SARAH RICKS, B.A., J.D.,
Distinguished Clinical Professor of Law
 RUTH ANNE ROBBINS, B.A., J.D.,
Distinguished Clinical Professor of Law
 ANDREW ROSSNER, B.A., M.A., J.D.,
Associate Dean for Professional & Skills
Education and Distinguished Professor of Law
 ANDREW J. ROTHMAN, B.A., M.F.A., J.D.,
Professor of Professional Practice and
Managing Attorney of Rutgers Law Associates
 JACOB HALE RUSSELL, B.A., M.A., J.D.,
Associate Professor of Law
 SABRINA SAFRIN, B.A., J.D.,
Professor of Law
 ADAM SCALES, B.A., J.D.,
Professor of Law
 MEREDITH SCHALICK, B.A., M.S., J.D.,
Clinical Professor of Law
 FADI SHAHEEN, LL.B., LL.M., S.J.D.,
Professor of Law
 MATTHEW SHAPIRO, A.B., D.PHIL., J.D.,
Associate Professor of Law
 SANDRA SIMKINS, B.A., J.D.,
Distinguished Clinical Professor of Law
 AMY SOLED, B.A., J.D.,
Clinical Associate Professor of Law
 RAYMAN SOLOMON, B.A., M.A., J.D., Ph.D.,
University Professor
 ALLAN R. STEIN, B.A., J.D.,
Professor of Law
 BETH STEPHENS, B.A., J.D.,
Distinguished Professor of Law
 RICK SWEDLOFF, B.A., J.D.,
Professor of Law
 GEORGE C. THOMAS III, B.S., M.F.A., J.D., LL.M.,
 S.J.D., *Board of Governors Professor and*
Distinguished Professor of Law
 DAVID DANTE TROUTT, A.B., J.D.,
Distinguished Professor of Law
 JENNIFER ROSEN VALVERDE, B.A., M.S.W., J.D.,
Distinguished Clinical Professor of Law
 PENNY VENETIS, B.A., M.A., J.D.,
Distinguished Clinical Professor of Law
 JACOB VICTOR, A.B., J.D.,
Assistant Professor of Law
 ALEC WALLIN, B.A. J.D., Ph.D.,
Professor of Law
 CAROL WALLINGER, B.S., J.D.,
Clinical Professor of Law
 MARK S. WEINER, A.B., J.D., Ph.D.,
Professor of Law

REID K. WEISBORD, B.S., J.D.,
Professor of Law
AMY WIDMAN, B.A., J.D.,
Clinical Associate Professor of Law

ADNAN ZULFIQAR, B.A., M.A., M.L.S., J.D., *Associate
Professor of Law*

LAW LIBRARY FACULTY

MARJORE E. CRAWFORD, B.A., M.L.I.S.
WEI FANG, B.S., M.L.I.S., M.S.C.S.
DENNIS KIM-PRieto,
B.A., M.S.L.I.S., M.F.A., J.D.
REBECCA KUNKEL, B.A., J.D., M.L.I.S.
JOOTAEK LEE, M.A., J.D., M.L.S.
HEATHER MITCHELL, B.A., M.A., M.L.I.S.

CHARLOTTE D. SCHNEIDER, B.B.A., J.D.,
M.B.A., M.S.L.I.S.
JUDITH SIMMS, B.A., J.D.
NANCY B. TALLEY, B.A., J.D., M.S.
CAROLINE YOUNG, B.A., M.S.L.I.S., J.D.
JINGWEI ZHANG, LL.B, LL.M

ADJUNCT FACULTY

BRUCE AFRAN
ABED AWAD
MEGAN BANNIGAN
RICHARD BARKASY
CHRISTINE V. BATOR
MAUREEN BEHM
BRIAN BERKLEY
JONATHAN D. BICK
PABLO N. BLANCO
JAY BLUMBERG
PAUL BOND
ANDREW BONDAROWICZ
HAL BRAFF
SUSAN BRICKLIN
SHELDON BROSS
JOHN M. CANNEL
CAROLYN CAMPANELLA
ROBERT D. CHESLER
HON. JAMES B. CLARK III
ROGER W. CLARK
ARNOLD S. COHEN
ROBERT COOPER
MARC DAVIES
MEGAN DAVIES
DEREK DECOSMO
RAQUEL DESTEPHANO
MICHAEL R. DICHARA
HON. ANN DONIO
LINDA EFFENBEIN
BRENDA EUTSLER
BARRY EVENCHICK
HON. MARK FALK
VERONICA FINKELSTEIN
BRIAN FOLEY
HON. TRAVIS L. FRANCIS
DAVID FRIZELL
ANGIE GAMBONE
KEVIN GARDNER
DANIEL GARRIE

J. PATRICK GERAGHTY
ROBERT S. GOLDSMITH
BRUCE I. GOLDSTEIN
FAITH GREENFIELD
DEBRA E. GUSTON
JANET HALLAHAN
RYAN A. HANCOCK
HON. DOROTHY HARBECK
HON. NOEL HILLMAN
HERB HINKLE
RAQUIBA HUQ
NANCY IANNONE
CYNTHIA JACOB
MARC JOAQUIN
JOHN KEARNEY
ALEX KEMENY
GEORGE KENNY
BARRY KITAIN
TRAVIS LASTER
RONALD J. LEVINE
MICHAEL MACKO
ROBERT J. MACPHERSON
ANN MALLGRAVE
IRA B. MARCUS
ROBERT E. MARGULIES
BRUCE MATEZ
JOHN MCMAHON
WILLIAM MCNICHOL
ANGELLA MIDDLETON
SHERYL MINTZ GOSKI
T. GARY MITCHELL
LOUIS MOFFA
ERIC MORAN
ALISON MORRIS
HON. EDWARD M. NEAFSEY
BRIAN NEARY
PHILIP NEUER
MITCHEL M. NOVITZKY
LAWRENCE ORLOFF

GWEN ORLOWSKI
MICHAEL PARKER
CYMIE PAYNE
TARA PELLICORI
CAROLINE PETRILLA
TODD POLAND
ROBERT S. POPESCU J
ONATHAN I. RABINOWITZ
HON. DAVID RAGONESE
HON. EDUARDO ROBRENO
BRUCE ROSEN
HERB SABLOVE
HON. JOEL SCHNEIDER
MATTHEW SCHORR
WILLIAM SCHROEDER
ALEXANDER SHALOM
GERALD SHANKER
LINDA SHASHOUA
VICTORIA SHILTON
HON. PATTY SHWARTZ
BILL SLOVER
HEATHER STAPLETON
HON. GARY STEIN
HEIDI A. TALLENTIRE
DENNIS TALTY
JANESA URBANO
MARCUS WASHINGTON
RICHARD WEST
TIM WEST
NEIL WISE
ELSPETH ABEL
ELIZABETH ACEVADO
ANGELICA AGUIRRE
LISA ALSTON
REBECCA BAEHR
JEFFREY BALOG
JOANN BREA
PATRICIA BROWN
LORETTA BURR

ANGELA CAMPIONE
VIRGINIA CAPUTO
MAYRA CARABALLO
DEBORAH CARR
BERNADETTE CARTER
ROSELENE CORREIA
GINA DAVILA
CLIFFORD DAWKINS
FRANNIE DESIMONE
TIMOTHY DIVITO
CHRISTINE DOUGHERTY
RHASHEDA DOUGLAS
GRACE DUFFIN
SUSAN FEATHERS
ANDREW FINN
JILL FRIEDMAN
SONDRA FURCAJG

LINDA GARBACCIO
ROBERTA GEDDIS
TAI GEDEON
ELAINE GIORDANO
ARBANA GJOCA
KATRINA HALL
JASON HERNANDEZ
DENISE HIGGINS
DAVID HORAN
CASSANDRA HUNTER
YVENA HYPOLITE
WANDA JAMES
HABIBAH JOHNSON
DENISE JOHNSON-STEINERT
MELISSA JORDAN
DEBORAH LEAK
ARLENE LENTINI

CASSANDRA LESTER-KEY
MARGARET MCCARTHY
PAM MERTSOCK-WOLFE
ELIZABETH MOORE
JOSEPHINE NAGLE
NATHANIEL NAKAO
EDGAR OTIENO
LENORE PEARSON
MARIE PEEKE
MILDRED PEREZ
CHRISTOPHER PHILLIPS
SARAH K. REGINA
NANCY RUBERT
THOMAS RYAN
DANIEL SANDERS

STAFF AND ADMINISTRATION

CAROL SHANER
CHRISTOPHER SLATER
STAN SNIECIKOWSKI
DONNA TAGLIAFERRO
MARTHA TAYLOR
WENDI L. TAYLOR

AMY TIMKO
ROBIN TODD
GWEN TOLBERT
CHERYL TURK
MARVIN VELASCO
REBECCA VERONA

ELIZABETH YEAGER
ANITA WALTON
CLAIRE WHITE
NEIL WISE

RUTGERS
JOURNAL OF LAW & PUBLIC POLICY

VOLUME 22

FALL 2024

ISSUE 1

CURRENT ISSUES
IN PUBLIC POLICY

© 2024 by Rutgers University School of Law – Camden
ISSN 1934-3736



RENEWING OUR VOWS: THE LAWYER'S OATH AND OUR PLEDGE TO DEMOCRACY

*Colin M. Black**

*Colin M. Black is Associate Professor of Legal Writing at the Suffolk University School of Law. The author especially thanks Dyane O'Leary, Andrew Perlman, and David Yamada for comments on earlier drafts of this article. Thanks also to Gregory Ewing and Tiffany Souza of Suffolk University's Moakley Law Library for additional research assistance and support.

TABLE OF CONTENTS

INTRODUCTION.....	4
I. A BRIEF HISTORY OF THE OATH AND ITS EVOLUTION IN U.S. LAW.....	6
<i>A. The Early Oaths.....</i>	7
<i>B. The “Do no Falsehood” Oath.....</i>	9
<i>C. American Colonies Adopt the Oath.....</i>	10
<i>D. The “Zealous Advocacy” Adjustment.....</i>	13
<i>E. Formalization and Codification of Legal Ethics.....</i>	14
III. LAWYER’S SPECIAL ROLE IN DEMOCRACY.....	17
<i>A. Government Lawyers.....</i>	18
<i>B. Non-Government Lawyers</i>	25
IV. CHALLENGES TO DEMOCRACY: A CASE STUDY OF THE 2020 U.S. ELECTION.....	27
<i>A. Propagation of False Claims.....</i>	28
<i>B. Fake Electors Scheme.....</i>	31
<i>C. Litigation Efforts.....</i>	35
<i>D. Pressure Campaign.....</i>	37
<i>E. The January 6, 2021 Insurrection.....</i>	41
<i>F. Voting “Nay” to Certify the Election.....</i>	43
V. MODERNIZATION OF THE OATH AND OTHER PROPOSALS.....	46
<i>A. Modernizing the Lawyer’s Oath.....</i>	46
<i>B. Additional Proposals.....</i>	54
1. Law School Curriculum.....	54
2. Continuing Legal Education.....	59
3. Rule and Discipline Reforms.....	60
a. Expanding Rule 8.3: Mandatory Reporting of Misconduct.....	62
b. Revising Rule 8.4: Conduct Prejudicial to the Administration of Justice.....	62
a. Improving the Disciplinary Process....	63
CONCLUSION.....	65

ABSTRACT

For centuries, lawyers have sworn to an oath as a prerequisite to admission. The oath, barely evolved from their historical roots, represents the guiding commitment lawyers make to democratic principles of honesty, integrity, fairness, and the rule of law. This commitment is in exchange for the power and privilege of belonging to the legal profession. However, the ethical landscape for legal practitioners has evolved, particularly in response to the alarming events of the 2020 U.S. presidential election. These events revealed significant lapses in the judgment and conduct among some lawyers, exposing the need for a recommitment to the democratic principles embedded in the oath. This article critically examines the historical development of the lawyer's oath and argues for its modernization to better reflect the ethical challenges of contemporary legal practice. It highlights the need for the oath to include explicit commitments to democratic principles, the rejection of bias, and the reinforcement of ethical responsibility. The article further explores how these modernized principles can be integrated into legal education and professional conduct to help avoid future lapses. In advocating for these reforms, the article asserts that a renewed and modernized oath is essential for the legal profession to reclaim its role as a defender of justice and public trust.

INTRODUCTION

Every lawyer takes an oath upon admission to the legal profession. This oath, of ancient origin, requires that today's lawyers swear or affirm to conduct themselves in an ethical manner. The oldest lawyer oath in the country provides that:

Whoever is admitted as an attorney shall in open court take and subscribe the oaths to support the constitution of the United States and of the commonwealth; and the following oath of office shall be administered to and subscribed by him:

I (repeat the name) solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.¹

The lawyer's oath embodies the democratic principles of the rule of law and stands as a pledge for justice, equality, and due process in a democratic legal system. Indeed, lawyers are not merely participants in the legal process; they are architects of policy, interpreters of laws, and guardians of democratic institutions. Their power must be balanced by their obligations. It is within this framework, that the lawyer's oath finds profound significance and its modernization a critical step

¹ MASS. GEN. LAWS ch. 221, § 38 (2022).

toward a professional recommitment to the principles embedded in the oath.

Reciting the lawyer's oath is more than a ceremony. It is a pledge that binds the legal profession to the highest standards of integrity, fairness, and a commitment to the rule of law. But recent history, specifically the lawyer led efforts to undermine the 2020 U.S. presidential election, has exposed serious concerns in the ethical foundations of the profession. Lawyers, who should be the bulwark against the anti-democratic movements, were instead seen at the forefront of efforts to distort the truth, manipulate the electoral process, and undermine public confidence in our democratic institutions. The consequences of these actions are not merely professional lapses—they are existential threats to the integrity of democracy.

This article considers the origin and evolution of the lawyer's oath to establish its significance in regulating lawyers as their role in the development of democratic institutions demonstrates the import of ethical conduct that obligates the lawyer to democratic ideals. It begins by exploring the historical roots of the oath in Section II, tracing its journey from ancient civilizations to its modern-day embodiment in legal practice. In this section, I rely heavily on the extensive historical exploration of the oath by Carol Rice Andrews, as well as the scholars that she cites.² The discussion reveals how the oath has long served as a moral compass, guiding lawyers in their dual roles as advocates and public servants.

In Section III, the article turns its focus to the contemporary landscape, examining the unique role that

² Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1386 (2004) [hereinafter Andrews, *Standards of Conduct*]; Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3 (2009) [hereinafter Andrews, *Lawyer's Oath*]; Geoffrey C. Jr. Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571 (1981) [hereinafter Hazard, *Legal Ethics*]; Geoffrey C. Jr. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1990) [hereinafter Hazard, *Future of Legal Ethics*]; JOSIAH HENRY BENTON, *THE LAWYER'S OATH AND OFFICE* (1909).

lawyers play in democracy today. Whether in the courtroom, the legislature, or the advisory boardroom, lawyers' decisions shape the legal and ethical standards that govern society. This section discusses the inherent challenges and ethical dilemmas that arise when a lawyer's duties conflict.

The ethical breaches during the 2020 election are the focus of Section IV.

Here, the article scrutinizes the actions of lawyers who crossed the line from advocacy to manipulation, highlighting cases where misinformation, fraudulent schemes, and incitement to violence were used as tools to subvert the democratic process.

In response, Section V offers a path forward, proposing a recommitment to the principles within the lawyer's oath. This section calls for modernizing the language of the lawyer's oath to reflect the values of today's diverse legal ethical concerns, and humbly offers a sample modification of the Massachusetts lawyers' oath. Section V further suggests various enhancements to formal legal education and continuing legal education, revisions to the ABA Model Rules of Professional Conduct, and improvements to disciplinary procedures.

By reexamining the intersection of legal ethics and democracy, this article argues for a renewed dedication to the principles of lawyer's oath as a vital safeguard for the integrity of the legal profession and, by extension, democracy itself. A recommitment to the principles inherent in the oath can enhance the public trusts in the legal system as a guardian of democracy. Modernizing the oath is an essential step to this professional recommitment.

I. A BRIEF HISTORY OF THE OATH & ITS EVOLUTION IN U.S. LAW

The lawyer's oath embodies deeply rooted principles of ethical conduct. Its evolution in democratic legal system underscores the oath's significance in our modern legal landscape. As Professor Andrews' important historical

exploration of the oath reveals, its historical context demonstrates the importance of advocating for a recommitment to its underlying principles of ethical conduct.³

A. The Early Oaths

Oath taking dates back to ancient civilizations.⁴ Oaths were essential in confirming truthfulness and loyalty.⁵ Indeed, ancient Greek and Roman societies integrated oaths in their legal systems, representing their significance in ensuring justice.⁶ For example, in Greece, advocates swore oaths to their gods, sacred altars and relics.⁷ And, Romans required oaths from witnesses, judges, and litigants, underscoring the integrity of the judicial process.⁸ These oaths served a moral function—committing advocates to ethical conduct under the threat of divine reckoning.⁹ The earliest recorded oaths can be found in

³ Andrews, *Standards of Conduct*, *supra* note 2; Andrews, *Lawyer's Oath*, *supra* note 2.

⁴ Andrews *Lawyer's Oath*, *supra* note 2, at 7; *See also* JAMES ENDELL TYLER, *OATHS; THEIR ORIGIN, NATURE, AND HISTORY* (London, John W. Parker 1834); HELEN SILVING, *ESSAYS ON CRIMINAL PROCEDURE* 4 (1964); JOSEPH PLESCIA, *THE OATH AND PERJURY IN ANCIENT GREECE* (1970); Matthew A. Pauley, *I Do Solemnly Swear: The President's Constitutional Oath – What It Means, Why It Matters* (1999) (Ph.D. dissertation, Harvard University) (on file with University Microfilms International).

⁵ *See* Andrews, *Standards of Conduct*, *supra* note 2, at 20; Jonathan Belcher, *Religion-Plus Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 WM. & MARY L. REV. 287; Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1 (2009).

⁶ Frederick B. Jonassen, “So Help Me?”: *Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 303, 312 (2013); Belcher, *supra* note 5, at 291; Andrews, *Lawyer's Oath*, *supra* note 2, at 8-9.

⁷ Milhizer, *supra* note 5 at 8; Belcher, *supra* note 5, at 291.

⁸ *See* BENTON, *supra* note 2, at 19; *see also* Milhizer, *supra* note 5, at 11-12.

⁹ *E.g.*, Milhizer, *supra* note 5, at 4. *See also* Jonassen, *supra* note 6, at 312; Andrews, *Lawyer's Oath*, *supra* note 2, at 7; William R. Nifong, *Promises Past: Marcus Atilius Regulus and the Dialogue of Natural Law Notes*, 49 DUKE L.J. 1077, 1103-04 (2000).

the Old Testament, reflecting this profound connection between faith in a god and ethical conduct.¹⁰ Professor Andrews rightfully suggests that by invoking supernatural oversight, early oath taking emphasized the importance of ethical conduct in a civilized society under the threat of lay punishment and heavenly retributions.¹¹

These early oaths served as the first formal set of standards for legal advocates.¹² Interestingly, some of these early advocate oaths read strikingly similar to modern oaths. For example, in the Justinian era, advocates were required to swear to be "true and just" and "not prosecute a lawsuit...[that] is dishonest, utterly hopeless or composed of false allegations."¹³ This oath emphasizes the balance of a lawyer's duties between client and justice.

The oath became more formalized within various legal systems in medieval Europe as litigation and courts modernized. For example, in 1221, Roman Emperor Frederic II, required advocates to renew annually that they will pursue their cause "with all good faith and truth, without any tergiversation, succor; nor will they allege anything against their sound conscience; nor will they undertake desperate causes . . . by misrepresentation . . ."¹⁴ Like the Justinian oath, this oath imposed a duty to the judicial system as well as the client.

The evolution of European oaths continued to regulate advocate conduct to protect both the client and the law. In London, a 1234 ecclesiastical decree required advocates to swear an oath to "plead faithfully, not to delay justice . . . but to

¹⁰ See *Genesis* 21:23-24 (New International) ("Now swear to me here before God that you will not deal falsely with me or my children or my descendants . . . Abraham said, 'I swear it.'"); Andrews, *Standards of Conduct*, *supra* note 2; Jonassen, *supra* note 7, at 309.

¹¹ Andrews, *Standards of Conduct*, *supra* note 2, at 1392-93; BENTON, *supra* note 2.

¹² BENTON, *supra* note 2, at 9-10; Andrews, *Lawyer's Oath*, *supra* note 2, at 6-7.

¹³ Andrews, *Lawyer's Oath*, *supra* note 2, at 9.

¹⁴ *Id.* at 10. See generally JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE AND HISTORY (1834).

defend his client both according to law and reason.”¹⁵ In France, advocates took oaths to maintain truthfulness, avoid delays, and serve the poor.¹⁶ These oaths reflected the growing recognition of the lawyer's role as a public servant with obligations beyond just client services but to the greater public expectations of the legal profession.

B. The “Do no Falsehood” Oath

Oaths continued as the primary regulatory tool of advocates in Europe.¹⁷ The English “do no falsehood” oath, dating back to 1402, required attorneys to swear they would not engage in falsehoods or deceit in their practice.¹⁸ The oath mandated that lawyers affirmatively report falsehoods to the court.¹⁹ It also barred delays, limited the fees, and required a pledge of competence.²⁰ This oath laid the groundwork for modern legal oaths, establishing a foundational commitment to honesty and integrity.²¹ Similarly, a lawyer's oath in Denmark and Norway from 1683 emphasized fairness in litigation,

¹⁵ Andrews, *Lawyer's Oath*, *supra* note 2, at 11; Nifong, *supra* note 9, at 1091.

¹⁶ See Andrews, *Lawyer's Oath*, *supra* note 2, at 7; see also BENTON, *supra* note 2, at 12, 112-21.

¹⁷ Andrews, *Lawyer's Oath*, *supra* note 2, at 25; Milhizer, *supra* note 5, at 19-27 (Oath-taking was not limited to medieval Europe. In ancient Africa, truth-telling was often pledged with animal sacrifice, blood-spilling, incantations, and swearing on nature or objects. Traditional Chinese oaths had similar themes like decapitating a chicken and writing sacred characters on paper and burning it to emphasize the truthfulness of their cause. In Aztec culture, witnesses invoked the Sun and Earth gods while touching a finger to the ground and then to their tongue to pledge their commitment to honesty).

¹⁸ BENTON, *supra* note 2, at 59; Jonassen, *supra* note 6, at 313; Andrews, *Lawyer's Oath*, *supra* note 2, at 13; Leonard S. Goodman, *The Historic Role of the Oath of Admission*, 11 AM. J. LEGAL HIST. 404, 406-07 (1967).

¹⁹ BENTON, *supra* note 2, at 43; see also Jonassen, *supra* note 6 at 347; Goodman, *supra* note 18 at 407.

²⁰ Jonassen, *supra* note 6; see also Goodman, *supra* note 18 at 406; Andrews, *Lawyer's Oath*, *supra* note 2 at 13.

²¹ See BENTON, *supra* note 2, at 44-47; see generally Jonassen, *supra* note 6.

honesty, and the avoidance of frivolous delays.²² Oaths ensured that advocates conducted themselves with a sense of duty and ethical responsibility.²³ These oaths were not merely ceremonial but integral practices emphasizing truthfulness and fair play in a judicial system.

C. American Colonies Adopt the Oath

Unsurprisingly, the English and European legal systems significantly influence the development of American legal ethics.²⁴ Early American colonies adopted oaths influenced by English, French, and other European models.²⁵ The adoption of these models was driven by the need to establish an ethical legal system in the new colonies.²⁶ Similar to Europe at this time, early American colonial oaths served as the primary regulation of the legal profession.²⁷

Like their European counterparts, oaths in the American colonies emphasized a lawyer's duties of honesty, competency, and the support of just causes. The most common adopted model was the English "do no falsehood" oath.²⁸ For example, the Massachusetts Bay Colony oath required lawyers to commit to integrity and faithfulness to justice.²⁹ In 1701, Massachusetts formally adopted a modified version of the "do no falsehood"

²² BENTON, *supra* note 2, at 24-25; Andrews, *Lawyer's Oath*, *supra* note 2, at 17.

²³ See Jonassen, *supra* note 6; BENTON, *supra* note 2, at 28; Goodman, *supra* note 18, at 409.

²⁴ See BENTON, *supra* note 2, at 9; Andrews, *Lawyer's Oath*, *supra* note 2, at 4; and Jonassen, *supra* note 6, at 323; and Goodman, *supra* note 18, at 406-07.

²⁵ BENTON, *supra* note 2; Andrews, *Lawyer's Oath*, *supra* note 2. See also Goodman, *supra* note 18, at 404-11.

²⁶ See generally Jonassen, *supra* note 6; and Andrews, *Lawyer's Oath*, *supra* note 2.

²⁷ Andrews, *Lawyer's Oath*, *supra* note 2, at 19; see Goodman, *supra* note 18, at 406-07.

²⁸ See generally BENTON, *supra* note 2. See also Andrews, *Lawyer's Oath*, *supra* note 2, at 4; see also Goodman, *supra* note 18.

²⁹ Milhizer, *supra* note 5, at 27-28.

oath.³⁰ The adoption of the English oath tradition highlighted the social need for regulatory guidance in civic matters, like jury duty, witness testimony, holding public office, and, of course, serving as an advocate.³¹

Following the American Revolution, states began adopting their own versions of the lawyer's oath, with some incorporating a pledge to state and federal constitutions.³² For example, in 1787, New York's oath required lawyers to "truly and honestly demean" themselves in their practice according to their knowledge and ability.³³ In 1799, New Jersey required lawyers to take an oath of allegiance to the state as well as an oath of honesty and faithfulness in practice.³⁴ Delaware and Pennsylvania also adopted modified "do no falsehood" oaths that include pledges of allegiance to constitutions.³⁵

The Nineteenth century marked a significant period in the formalization of legal ethics and the lawyer's oath in the United States. Legal scholars and practitioners such as David Hoffman, Simon Greenleaf, and George Sharswood played pivotal roles in shaping the ethical framework for lawyers.³⁶ However, the evolution of the oath reflected a shift from a moralistic approach to one more closely aligned with the concept of zealous advocacy for clients.³⁷

Published in 1817, David Hoffman's "A Course of Legal Study" first introduced a comprehensive set of ethical guidelines for American lawyers, emphasizing the importance

³⁰ Andrews, *Lawyer's Oath*, *supra* note 2, at 20. See also Milhizer, *supra* note 5, at 28; Goodman, *supra* note 18, at 407.

³¹ See Andrews, *Lawyer's Oath*, *supra* note 2, at 8-9, 11, 24-25, ; Herbert Pope, *The English Common Law In The United States*, 24 HARV. L. REV. 6 (1910).

³² Andrews, *Lawyer's Oath*, *supra* note 2, at 22; Goodman, *supra* note 18, at 408; see generally Herbert, *supra* note 31.

³³ Andrews, *Standards of Conduct*, *supra* note 2 at 1416 n.179.

³⁴ *Id.* at 1417 n.186.

³⁵ *Id.* at 1416 nn.206, 209.

³⁶ Michael H. Hoeflich, *Legal Ethics in the Nineteenth Century: The Other Tradition Special Issue on Professional Responsibility: Essay*, 47 U. KAN. L. REV. 793, 794 (1998).

³⁷ *Id.* at 816.

of personal morality in legal practice.³⁸ Hoffman's "Resolutions in Regard to Professional Deportment" explicitly rejected frivolous defenses, promoted honesty in legal proceedings, and underscored the lawyer's duty to both the client and the broader justice system.³⁹ This early view was tied closely to the lawyer's oath, which Hoffman and his contemporaries saw as a binding commitment to justice and the public good.⁴⁰

In his inaugural address at Harvard Law School in 1834, Simon Greenleaf emphasized this dual loyalty to a client and the public.⁴¹ Greenleaf viewed the lawyers role in society as paramount because of the lawyer's unique access to the justice system and ability to assist in the prevention or reparation of wrongs.⁴² Greenleaf argued that the lawyer's oath required lawyers to prioritize justice and the broader social good over blind alliance to their clients objectives.⁴³ Greenleaf's focus on the oath highlighted the notion that a lawyer's obligations were not simply to the client cause, but to the public good, with a duty to the legal system and democratic institutions.⁴⁴

As the century progressed, George Sharswood introduced a more nuanced perspective, acknowledging the tension between a lawyer's moral beliefs and professional duties.⁴⁵ In his 1854 seminal work "An Essay on Professional Ethics," Sharswood further developed the concept of the lawyer's oath by articulating the potentially conflicting

³⁸ See DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY (London, John Miller, 2d ed. 1836); Hoeflich, *supra* note 36, at 797.

³⁹ See HOFFMAN, *supra* note 38, at 754; Hoeflich, *supra* note 36, at 795-96.

⁴⁰ See HOFFMAN, *supra* note 36, at 798-99.

⁴¹ See Simon Greenleaf, *A Discourse Pronounced at the Inauguration of the Author as Royall Professor of Law in Harvard University*, in THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 134 (Michael H. Hoeflich ed., 1988).

⁴² See *id.* at 140.

⁴³ *Id.* at 151.

⁴⁴ See *id.* at 153.

⁴⁵ See GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 102-03 (Philadelphia, T. & J.W. Johnson, 5th ed. 1884); Hoeflich, *supra* note 36, at 803-04.

responsibilities of lawyer between the obligations as advocates for their clients and as officers of the court.⁴⁶ While Sharswood maintained that lawyers owed fidelity to their clients, he also recognized that this obligation was tempered by their role as officers of the court, bound by their official oath.⁴⁷ Sharwood's approach represented a middle ground, allowing lawyers to represent clients zealously while still adhering to a moral framework that considered the public interest. Sharswood's ideas emphasized that lawyers should balance their duty to clients with their obligation to uphold justice and the integrity of the legal system.⁴⁸

D. The "Zealous Advocacy" Adjustment

However, by the late Nineteenth century, the principles of zealous advocacy gained momentum while the notions of a societal obligation to fairness, ethical conduct and public service waned.⁴⁹ The emerging industrial economies demanded lawyers represent clients with all legal means, despite its ethical consequences.⁵⁰ This mis-aligned focus on client demands marked a significant departure from earlier ethical approaches. A lawyer's duty to the public gave way to client advocacy. This diversion reflected a broader transformation in legal ethics in the United States.

The lawyer's oath, once a lawyer's mandate of morality and public service, increasingly became a mere formality, second to client demands.⁵¹ Principles of truthfulness and justice gave way to the rise of zealous advocacy and laid the groundwork for our modern legal ethics.⁵² The shift from an

⁴⁶ Hoeflich, *supra* note 36, at 803.

⁴⁷ *Id.* at 806.

⁴⁸ *See id.* at 805-06.

⁴⁹ *See* Hoeflich, *supra* note 36, at 816; Andrews, *Lawyer's Oath*, *supra* note 2, at 29.

⁵⁰ *See* Hoeflich, *supra* note 36, at 817.

⁵¹ *See* Andrews, *Lawyer's Oath*, *supra* note 2, at 33, 39-41; Hoeflich, *supra* note 36, at 817.

⁵² *See* Hoeflich, *supra* note 36, at 815.

oath to a set of guidelines reflected the growing complexity of legal practice and the need for more detailed ethical standards.⁵³ This transition was driven by the recognition that while the oath provided a broad moral framework, there was a need for specific rules to address the diverse ethical dilemmas faced by lawyers in their practice.⁵⁴

E. Formalization and Codification of Legal Ethics

In the late Nineteenth and early Twentieth century, the legal profession in the United States continued to evolve with increasing formalization of ethical standards and oaths.⁵⁵ The American Bar Association (ABA), founded in 1878, played a crucial role in standardizing legal ethics across the country.⁵⁶ The ABA's Canons of Professional Ethics, adopted in 1908, were among the first comprehensive set of ethical guidelines for lawyers, setting the stage for modern codes of conduct.⁵⁷

As part of the Canons of Professional Ethics, the ABA also adopted a model oath in 1908.⁵⁸ In its final report the ABA committee explained that the oath served as a set of "clear and concise" set of binding duties, while the canons discussed the obligations of lawyers as they perform their specific professional role.⁵⁹ The ABA's 1908 Model Oath stated:

DO SOLEMNLY SWEAR:

I will support the Constitution of the
United States and the Constitution of
the State of . . .;

⁵³ See Andrews, *Lawyer's Oath*, *supra* note 2, at 31, 54-55.

⁵⁴ See *id.* at 28.

⁵⁵ See Hoeflich, *supra* note 36, at 813; Andrews, *Lawyer's Oath*, *supra* note 2, at 18-19.

⁵⁶ See Andrews, *Standards of Conduct*, *supra* note 2, at 1435.

⁵⁷ *Id.*

⁵⁸ Hoeflich, *supra* note 36; Andrews, *Standards of Conduct*, *supra* note 2, at 1835; *Final Report of the Committee on Code of Professional Ethics*, 31 ANNU. REP. ABA 567, 584 (1908).

⁵⁹ *Final Report of the Committee on Code of Professional Ethics*, 31 ANNU. REP. ABA 567, 570, 573, 584-85 (1908); see also Andrews, *Standards of Conduct*, *supra* note 2, at 1451-52.

I will maintain the respect due the
Courts of Justice and judicial officers;
I will not counsel or maintain any suit
or proceeding which shall appear to
me to be unjust, nor any defense
except such as I believe to be honestly
debatable under the law of the land;
I will employ for the purpose of
maintaining the causes confided to me
such means only as are consistent with
truth and honor, and will never seek to
mislead the Judge or jury by any
artifice or false statement of fact or
law;
I will maintain the confidence and
preserve inviolate the secrets of my
client, and will accept no
compensation in connection with his
business except from him or with his
knowledge and approval;
I will abstain from all offensive
personality, and advance no fact
prejudicial to the honor or reputation
of a party or witness, unless required
by the justice of the cause with which I
am charged;
I will never reject, from any
consideration personal to myself, the
cause of the defenseless or oppressed,
or delay any man's cause for lucre or
malice.
SO HELP ME GOD.⁶⁰

⁶⁰ *Final Report of the Committee on Code of Professional Ethics*, 31 ANNU. REP. ABA 567, 585 (1908). See also Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L. & SOC. INQUIRY 1 (1999).

This oath combined elements from historical oaths and emphasized supporting the Constitution.⁶¹ The oath's pledge included respect for the courts and upholding honesty in litigation.⁶² The oath also included a "just cause" provision, allowing lawyers to refuse cases deemed unjust, requiring a lawyer balance the duty to client advocacy with broader ethical considerations.⁶³ The codification of the oath suggested a potential significant milestone in providing a framework for ethical conduct and reinforcing a lawyer's role as guardians of the justice system.

The ABA Model Rules of Professional Conduct, first adopted in 1983 and subsequently revised, incorporate many principles inherent in the lawyer's oath.⁶⁴ These rules emphasize core values such as competence, confidentiality, and loyalty, reflecting the enduring importance of the lawyer's oath in guiding ethical behavior.⁶⁵ The formulation of these rules was driven by the recognition that the oath alone was insufficient to address the complex ethical issues faced by modern lawyers, necessitating a more detailed and standardized set of guidelines.⁶⁶ The ABA's efforts to codify ethical standards were motivated by the need to address inconsistencies in the ethical practices of lawyers across different states.⁶⁷ The Model Rules provided a comprehensive framework that could be adopted by state bar associations, ensuring that all lawyers adhered to the same high

⁶¹ See generally Hoeflich, *supra* note 36; see Andrews, *Standards of Conduct*, *supra* note 2, at 1425-26 n.278, 1438-39, 1442; see also Goodman, *supra* note 18.

⁶² Hoeflich, *supra* note 36, at 812-13.

⁶³ *Id.* at 801, 805-06.

⁶⁴ Andrews, *Standards of Conduct*, *supra* note 2, at 1434-35; Martha F. Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 COLUM. HUM. RTS. L. REV. 157, 178-179 (2010); Eric C. Chaffee, *Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law*, 28 GEO. J. LEGAL ETHICS 323, 332-33 (2015).

⁶⁵ Andrews, *Lawyer's Oath*, *supra* note 2, at 60; see Hoeflich, *supra* note 36; Davis, *supra* note 64, at 176; Chaffee, *supra* note 64, at 365.

⁶⁶ Andrews, *Lawyer's Oath*, *supra* note 2, at 34; Chaffee, *supra* note 64, at 331-32.

⁶⁷ See Chaffee, *supra* note 64, at 333; Andrews, *Lawyer's Oath*, *supra* note 2, at 34; Jonassen, *supra* note 6.

standards of professional conduct.⁶⁸ Consequently, the adoption of the ABA rules across jurisdictions overshadowed the oath as a beacon for ethical conduct.

II. LAWYER'S SPECIAL ROLE IN DEMOCRACY

In democratic societies, the rule of law serves as the bedrock upon which justice, equality, and the protection of individual rights are built.⁶⁹ Lawyers, as key players within a democratic legal system, occupy positions of significant power, privilege, and influence.⁷⁰ Their reach extends far beyond the courtroom. Lawyers serve in both government and non-government roles. In government roles, lawyers serve as legislators, judges, government attorneys, and advisors who shape public policy, interpret the law, and ultimately influence the trajectory of democratic governance.⁷¹ Lawyers serving in non-government roles also hold significant power, privilege and influence in their client advocacy.⁷² Lawyers, in any capacity, who lend their professional credibility to false claims about critical components of

⁶⁸ See Chaffee, *supra* note 64, at 334; Andrews, *Lawyer's Oath*, *supra* note 2, at 43; Davis, *supra* note 64, at 165.

⁶⁹ Bruce A. Green, *The Lawyer's Role in a Contemporary Democracy*, Foreword, 77 FORDHAM L. REV. 1229, 1229-32 (2009); Rakesh K. Anand, *The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role*, the Role of the Lawyer in American Democracy, 77 FORDHAM L. REV. 1611 (2009).

⁷⁰ Anand, *supra* note 69, at 1619-20; Green, *supra* note 69, at 1239-40; Alex Goldstein, *The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 744 (2022). See also DELIBERATIVE DEMOCRACY—ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1999); CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18-20 (1993).

⁷¹ See Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250, 251, 153, 266-67 (2011).

⁷² See Colin Marks & Nancy B. Rapoport, *The Lawyer's Role in a Contemporary Democracy, Promoting the Rule of Law, the Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269 (2009); Green, *supra* note 69, at 1240.

our democratic institutions pose a significant risk to democracy, itself.⁷³

Lawyers possess unparalleled access to the mechanisms of power within democratic societies.⁷⁴ As legislators, judges, and executive branch lawyers, they play a central role in shaping laws, policies, and societal norms.⁷⁵ As non-government lawyers, they influence democratic norms through their representative capacities. This access is a double-edged sword. While it enables lawyers to effectuate justice and uphold the rule of law, it also places them in positions where ethical lapses can have dire consequences for democracy.⁷⁶

A. Government Lawyers

Lawyers serving in legislative capacities are entrusted with the significant responsibility of safeguarding and promoting democracy through their lawmaking and policymaking roles. Their legal expertise, coupled with a deep understanding of constitutional principles, positions them uniquely to influence the creation of laws that uphold democratic ideals. These role place lawyers at the heart of governance, where they must ensure that the laws they create align with constitutional principles and democratic values.⁷⁷

Lawyer-legislators play a critical role in ensuring that the laws they draft reinforce and protect the core values of

⁷³ Andrew M. Perlman, *The Legal Ethics of Lying About American Democracy*, 22-2 SUFFOLK UNIV. L. SCH. LEGAL STUD. RSCH. PAPER SERIES 1 (2023).

⁷⁴ Green, *supra* note 69, at 1239; Goldstein, *supra* note 70, at 745-46, 748, 754, 756, 763.

⁷⁵ See generally Deborah M. Hussey Freeland, *What Is a Lawyer - A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS UNIV. PUB. L. REV. 425 (2012); see also Green, *supra* note 69, at 1238-41; Kruse, *supra* note 71, at 264-65.

⁷⁶ Goldstein, *supra* note 70, at 747-48, 753-54, 758.

⁷⁷ See *id.* at 739-41, 744; Green, *supra* note 69, at 1230, 1232-33; Mary L. Smith, *Lawyers Must Act Now to Save Our Democracy*, US NEWS & WORLD REP. (July 28, 2024), <https://www.usnews.com/opinion/articles/2024-07-28/lawyers-must-act-now-to-save-our-democracy>.

democracy.⁷⁸ This responsibility is heightened by their legal training, which equips them to foresee potential constitutional challenges and to design legislation that not only complies with the Constitution but also promotes broader democratic principles such as equality, transparency, and participation.⁷⁹ Their duty extends beyond merely ensuring legal compliance; they must also work to enhance democratic governance by crafting laws that empower citizens and protect individual rights.⁸⁰

As policymakers, lawyers must navigate the complexities of modern governance, where laws must balance the needs of diverse constituencies while upholding the rule of law. This is particularly important in areas such as civil rights and electoral laws, where the potential for laws to either bolster or undermine democratic processes is significant.⁸¹ The democratic duty of lawyer-legislators is to ensure that such laws enhance citizen participation and safeguard against disenfranchisement or discrimination.⁸²

Lawyers in legislative roles must also balance their legal ethical obligations with their obligations to the electorate.⁸³ This requires a careful consideration of both legal principles and the democratic will of the people. Lawyer-legislators are not only public servants but also stewards of the public trust, responsible for ensuring that their legislative actions reflect the

⁷⁸ Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Anand, *supra* note 69, at 1614.

⁷⁹ Lawson, *supra* note 78.

⁸⁰ *Id.* See also Anand, *supra* note 69, at 1620.

⁸¹ Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1860-61 (2023).

⁸² *Id.* at 1877-78.

⁸³ Christopher F. Zurn, *Deliberative Democracy and Constitutional Review*, (2002), <https://papers.ssrn.com/abstract=2271598> (last visited Aug 10, 2024); Dale Bumpers, *The Congressional Oath of Office*, 24 U. ARK. LITTLE ROCK. L. REV. 803 (2001); Vic Snyder, *You've Taken an Oath to Support the Constitution, Now What - The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK. L. REV. 897 (2000).

will of the people while adhering to constitutional norms.⁸⁴ This balance is essential to maintaining both the legitimacy of the legislative process and the public's faith in democratic institutions. The principle of democratic accountability requires that lawyer-legislators engage in meaningful deliberation and debate, ensuring that the laws they propose are thoroughly vetted and debated in public forums. This process is crucial for fostering transparency and ensuring that the legislative process remains open and responsive to the needs of all citizens.⁸⁵

Beyond drafting laws, lawyers who influence policy must ensure that the policies they develop are aligned with democratic values. Whether working within government agencies, think tanks, or advocacy groups, lawyers have a duty to advocate for policies that enhance transparency, protect civil liberties, and promote equal access to justice.⁸⁶ Their legal expertise enables them to identify potential legal and constitutional challenges early in the policy-making process, ensuring that policies are both legally sound and democratically robust.⁸⁷ In this capacity, lawyer- policymakers must remain vigilant against the erosion of democratic norms. This includes resisting efforts to undermine the rule of law or to concentrate power in ways that threaten democratic governance. By upholding their duty to democracy, lawyers in these roles contribute to a legal and political framework that supports the flourishing of democratic principles and practices.

⁸⁴ J. Michael Luttig, *American Democracy in Peril 121st Sibley Lecture*, 58 GA. L. REV. 1 (2023). See also Kruse, *supra* note 71, at 263; Anand, *supra* note 69, at 1629.

⁸⁵ Ross L. Malone, *The American Lawyer's Role in Promoting the Rule of Law*, 43 MARQ. L. REV. 3 (1959); Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513, 605 (2024); Goldstein, *supra* note 70, at 745.

⁸⁶ Barry Daniel Malone, *The Burden of Our Privilege*, ABA, https://www.americanbar.org/groups/young_lawyers/resources/tyl/practice-management/the-burden-of-our-privilege/ (last visited Aug 10, 2024). See generally Bulman-Pozen, *supra* note 81; Cummings, *supra* note 85.

⁸⁷ Cummings, *supra* note 85. See also Malone, *supra* note 85; Goldstein, *supra* note 70, at 645.

Lawyer-judges also play a significant role in ensuring democratic integrity. Judicial power in a democracy is a cornerstone of maintaining the balance of power among the branches of government and ensuring the protection of constitutional rights. Judges wield significant authority, as their rulings not only resolve individual disputes but also set precedents that can shape the law for generations.⁸⁸ This power underscores the need for judges to exercise their authority with the utmost integrity, impartiality, and adherence to the rule of law.⁸⁹ It is important to note that this article does not address the current state of judicial ethics. Separate and apart from specific judicial ethical obligations (or the lack thereof) is an independent analysis that is deserving of its own analysis. Here, the focus remains on lawyer-judge obligations stemming not from independent judicial oaths but from the same lawyer oath taken by most judges.

The doctrine of judicial review grants judges the power to determine the constitutionality of legislative and executive actions, effectively serving as a check on the other branches of government.⁹⁰ As guardians of the Constitution, judges are tasked with ensuring that all laws and government actions align with the foundational principles of democracy.⁹¹ However, the

⁸⁸ See Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 PERSPECTIVES ON POL. 805 (2009); Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 669-70 (2001).

⁸⁹ See generally Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy Symposium: The Lawyer's Role in a Contemporary Democracy: Promoting Social Change and Political Values*, 77 FORDHAM L. REV. 1591 (2008); Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 190 (2006); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L. J. 153, 162 (2003).

⁹⁰ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803); Shapiro, *supra* note 90, at 669.

⁹¹ Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined Conference: Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 929, 938 (2006). See also AKHIL REED AMAR, *AMERICA'S*

exercise of judicial review requires a delicate balance; judges must avoid the perception of overreach, where the judiciary might be seen as encroaching on the roles of the legislative and executive branches.⁹²

The power of judicial interpretation also extends to the creation of common law, where judges set legal standards that will guide future cases.⁹³ This lawmaking function is critical in areas where statutory law is silent or ambiguous, allowing judges to fill gaps in the law through reasoned analysis and precedent.⁹⁴ However, this creative aspect of judicial power must be exercised with restraint, as judges are unelected officials, and excessive judicial activism can lead to accusations of undemocratic governance.⁹⁵

Moreover, judicial decisions often reflect broader societal values, making the judiciary a powerful agent of social change.⁹⁶ Landmark rulings, such as those in *Brown v. Board of Education*, *Roe v. Wade*, *Citizens United v. FEC*, *Dobbs v. Jackson Women's Health Organization*, illustrate how judicial interpretations can have profound implications for civil rights and liberties.⁹⁷ These judicial opinions demonstrate the judiciary's role in shaping the moral and legal fabric of the

UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 29 (2012).

⁹² See Dinh, *supra* note 91, at 11; Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations Conference: Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 909, 912-13 (2006).

⁹³ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 20 (1921); Shapiro, *supra* note 90, at 669; Zurn, *supra* note 83, at 528.

⁹⁴ RICHARD A. POSNER, *HOW JUDGES THINK*, 85-86 (2008). See also Burbank, *supra* note 92 at 914

⁹⁵ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 16 (1962); see generally Geyh, *supra* note 89.

⁹⁶ Owen M. Fiss, *The Forms of Justice Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 2 (1979).

⁹⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). See also, Geyh, *supra* note 89.

nation, further highlighting the ethical responsibilities that accompany judicial power.

Accordingly, judicial impartiality is not only a professional duty but also a constitutional mandate. The Due Process Clause of the Fifth and Fourteenth Amendments guarantees every litigant the right to a fair trial before an impartial judge.⁹⁸ The appearance of bias or the perception that a judge has a personal stake in the outcome of a case can undermine the integrity of the entire judicial system.⁹⁹ Consequently, judges must meticulously avoid conflicts of interest and any behavior that could compromise their neutrality. The ethical imperatives that guide judicial behavior are not only foundational to the individual judge's role but also crucial to maintaining the public's confidence in the legal system. The judiciary's power, while immense, must always be exercised with a profound sense of responsibility, grounded in ethical principles that safeguard the integrity of the democratic process.

Government lawyers also occupy a unique and powerful position within the legal system, as they are responsible not only for representing the government in legal matters but also for ensuring that the actions of government officials comply with the law. This dual role places them at the intersection of legal advocacy and public accountability, where their decisions can profoundly impact the interpretation and enforcement of laws.¹⁰⁰

Government lawyers, including attorneys general and agency, are key players in the implementation of government policy.¹⁰¹ They provide legal counsel to government officials,

⁹⁸ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

⁹⁹ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009). *See also* Dinh, *supra* note 91.

¹⁰⁰ *See* W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law Symposium: The Lawyer's Role in a Contemporary Democracy: Promoting the Rule of Law*, 77 *FORDHAM L. REV.* 1333, 1337 (2008).

¹⁰¹ *Id.*

draft legislation, and represent the government in court.¹⁰² Their work often involves complex legal issues that require a deep understanding of both the law and the broader policy objectives of the government.¹⁰³ For instance, when advising on matters related to national security, environmental regulation, or civil rights, government lawyers must navigate the fine line between advancing the policy goals of the administration and ensuring that these policies do not violate constitutional principles.¹⁰⁴

The influence of government lawyers extends beyond the courtroom. Their legal opinions and interpretations of the law can shape the direction of government policy and influence public perception of the legality and legitimacy of government actions.¹⁰⁵ This is particularly true in high-stakes situations where the legality of executive actions is in question. For example, during the Trump administration, government lawyers played a pivotal role in defending executive orders related to immigration, environmental deregulation, and national security, each of which sparked significant legal and public debate.¹⁰⁶

The ethical responsibilities of government lawyers are paramount, given their role in upholding the rule of law while serving the interests of their government clients.¹⁰⁷ These lawyers must adhere to professional ethical standards that require them to act with integrity, honesty, and impartiality.¹⁰⁸ This can be particularly challenging in politically charged

¹⁰² See generally Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009). See also Wendel, *supra* note 100.

¹⁰³ See generally Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2018).

¹⁰⁴ See *id.* at 2183-88.

¹⁰⁵ See Reinstein, *supra* note 102.

¹⁰⁶ Susan S. Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education After the Trump Administration: Lessons and Legacies for the Legal Profession*, 69 WASH. U. J. L. & POL'Y 17 (2022).

¹⁰⁷ *Id.*; Wendel, *supra* note 100 at 1335; see also Kent et al., *supra* note 103 at 2118.

¹⁰⁸ See Wendel, *supra* note 100 at 1335. See generally Reinstein, *supra* note 102.

environments where there may be pressure to prioritize political loyalty over legal objectives.

One of the most significant ethical challenges for government lawyers is the duty to uphold the Constitution and the law, even when it conflicts with the directives of their clients. This duty is codified in the Model Rules of Professional Conduct, which state that a lawyer representing a government agency must prioritize the public interest and the integrity of the legal system over the interests of individual government officials.¹⁰⁹ This means that government lawyers must be prepared to refuse to defend actions or policies that they believe are unconstitutional or unlawful, even at the risk of political or professional repercussions. The power wielded by government lawyers carries with it a significant ethical responsibility. As guardians of the rule of law within the government, they must navigate the complexities of legal advocacy while maintaining their commitment to constitutional principles and public trust.

B. Non-Government Lawyers

Non-government lawyers also play a crucial role in upholding democratic institutions.¹¹⁰ Non-government lawyers include (1) lawyers in private practice; (2) in-house lawyers representing institutions; and (3) lawyers in the non-profit sector, ranging from legal aid/legal services to public interest law reform advocacy.¹¹¹ These lawyers, whether in private practice or corporate settings, carry a broad responsibility to society that extends beyond their duties to individual clients.¹¹² Their actions and decisions can have far-reaching implications

¹⁰⁹ See MODEL RULES OF PRO. CONDUCT r. 1.7, 1.9 & 1.11 (AM. BAR ASS'N 2024); Wendel, *supra* note 100.

¹¹⁰ See Green, *supra* note 69.

¹¹¹ Rosen, *supra* note 89 at 168; Zacharias, *supra* note 89 at 1599. See also Irma S. Russell, *The Lawyer as Public Citizen: Meeting the Pro Bono Challenge Symposium on Innovations in Pro Bono Practice*, 72 UMKC L. REV. 439, 445 (2003); Wendel, *supra* note 100 at 11.

¹¹² Green, *supra* note 69 at 1236; Russell, *supra* note 111 at 444; Zacharias, *supra* note 89 at 1600.

for the rule of law, public trust, and the integrity of democratic institutions.¹¹³ Non-governmental lawyers do face unique ethical challenges, however, particularly when balancing their duty to zealously represent clients with their broader responsibilities to the legal system and society.¹¹⁴ While the duty to advocate for clients is fundamental, it must be balanced against a lawyer's ethical obligations to the court, the public, and the democratic system.¹¹⁵

This tension is especially pronounced in corporate law, where lawyers must navigate complex issues involving legal compliance, ethical business practices, and the societal impact of corporate actions. For instance, corporate lawyers advising businesses must ensure that their legal guidance not only advances the interests of their clients but also aligns with democratic values such as transparency, accountability, and social responsibility.¹¹⁶ This ethical balancing act is critical in maintaining the integrity of both the legal profession and the democratic system.

Further, non-governmental lawyers are often at the forefront of defending democratic principles through litigation and advocacy. Public interest litigation, for example, has historically been a powerful tool for advancing democratic ideals and protecting individual rights.¹¹⁷ Lawyers engaged in this type of work challenge unjust laws, defend civil liberties, and hold powerful entities accountable, thereby playing a pivotal role in societal progress.¹¹⁸ For example, lawyers outside of government roles were instrumental in ensuring the integrity of the electoral process and protecting the democratic right to

¹¹³ See Green, *supra* note 69; Malone, *supra* note 86.

¹¹⁴ See Green, *supra* note 69; Freeland, *supra* note 76; Bruce A. Green & Russell G. Pearce, *Public Service Must Begin at Home: The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207 (2008).

¹¹⁵ See generally Rosen, *supra* note 89. See also Kruse, *supra* note 71 at 251.

¹¹⁶ Green, *supra* note 69 at 1231. See generally Marks & Rapoport, *supra* note 72.

¹¹⁷ Rosen, *supra* note 89 at 166-67; Alfred S. Konefsky & Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 BUFF. L. REV. 659, 663 (2014).

¹¹⁸ Rosen, *supra* note 89; Galperin, *supra* note 117.

vote during the election challenges related to the 2020 U.S. election.¹¹⁹ These efforts underscore the essential role that non-governmental lawyers play in upholding democracy.

Public trust in the legal system is foundational to a functioning democracy.¹²⁰ Lawyers, through their actions and behavior, significantly influence this trust.¹²¹ Ethical lapses or misconduct by lawyers can erode public confidence in the justice system, undermining the very foundation of democratic governance.¹²² Conversely, acts of integrity and justice by lawyers can reinforce public trust and the legitimacy of legal institutions.¹²³

The behavior of lawyers, particularly in high-profile cases or those with public policy implications, can shape public attitudes toward the legal profession and the justice system. When lawyers act with integrity, transparency, and a commitment to justice, they help build confidence in the legal system, ensuring it is perceived as fair and impartial. Consequently, government and non-governmental lawyers occupy a pivotal role in democratic societies, wielding significant influence in shaping the legal system and public policy. This position comes with a corresponding responsibility to defend democratic ideals, uphold the rule of law, and maintain public trust. Upholding the highest standards of ethical conduct is essential for maintaining public trust and ensuring that the legal system functions effectively in a democratic society.

¹¹⁹ Goldstein, *supra* note 70.

¹²⁰ See generally Rosen, *supra* note 89; Freeland, *supra* note 75. See also Cummings, *supra* note 86 at 537; Martin Bohmer, *The Lawyer's Role in a Contemporary Democracy, Promoting Access to Justice and Government Institutions, Equalizers and Translators: Lawyer's Ethics in a Constitutional Democracy*, 77 FORDHAM L. REV. 1363 (2009).

¹²¹ Rosen, *supra* note 89 at 189.

¹²² See Green, *supra* note 69.

¹²³ Ascanio Piomelli, *The Lawyer's Role in a Contemporary Democracy, Promoting Access to Justice and Government Institutions, The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1400 (2009). See generally Bohmer, *supra* note 120.

III. CHALLENGES TO DEMOCRACY: A CASE STUDY OF THE 2020 U.S. ELECTION

The 2020 U.S. presidential election was marked by unprecedented efforts to subvert democracy. And, lawyers spearheaded a significant number of these efforts. These actions include (a) the propagation of false claims of voter fraud, (b) the orchestration of the fake electors plot, (c) the filing of baseless lawsuits, (d) the pressure campaign to “find votes,” (e) the involvement in the January 6th insurrection, and (f) voting not to certify the election. Each of these actions represented a deliberate attempt to overturn the will of the American electorate and posed a grave threat to the integrity of democratic institutions. While it is true that many of these lawyers are facing consequences, both criminally and professionally,¹²⁴ the conduct alone underscoring the critical need for a professional recommitment to the ethical obligations expected by the oath.

A. Propagation of False Claims

Concerted efforts, by lawyers, to undermine and delegitimize the results of a free and fair election underscores the critical need for a recommitment to the oath’s ethical guidance. These lawyers played pivotal roles in spreading misinformation and perpetuating the false narrative that the election was “rigged” or “stolen.”¹²⁵ This disinformation campaign was not confined to courtrooms. Instead, it extended into the public sphere, where these legal professionals used

¹²⁴ Alison Durkee, *All Of Trump’s Lawyers Who Have Faced Consequences—As Jenna Ellis Takes Deal*, FORBES (Sep. 26, 2024)

<https://www.forbes.com/sites/alisondurkee/2024/08/06/kenneth-chesebro-charged-in-wisconsin-here-are-all-the-former-trump-lawyers-now-facing-legal-consequences/>.

¹²⁵ Cummings, *supra* note 85; see also William L. Wheeler, *When the Dust Has Settled: Fallout from the 2020 Presidential Election and S.B. 202 Placed Georgia’s Election Code in the Nation’s Crosshairs* Comments, 74 MERCER L. REV. 409, 411 (2022).

media appearances, public statements, and social media to sow doubt about the integrity of the electoral process.¹²⁶

One of the central lawyers in this misinformation campaign was Rudy Giuliani, who served as Trump's personal attorney.¹²⁷ Giuliani repeatedly made unfounded claims of widespread voter fraud, asserting that the election had been stolen through illegal votes, manipulation of voting machines, and other fraudulent activities.¹²⁸ Despite the lack of evidence to support these claims, Giuliani continued to push this narrative in various media appearances and press conferences, thereby amplifying the misinformation to a broad audience.¹²⁹

Sidney Powell, another attorney closely associated with the Trump campaign, was also instrumental in propagating the "rigged" election narrative.¹³⁰ Powell advanced a particularly outlandish theory that involved an international conspiracy to manipulate voting machines.¹³¹ She claimed that this conspiracy involved foreign actors, including Venezuela and China, and that it was orchestrated to ensure Trump's defeat.¹³² Powell's assertions were widely discredited, yet she persisted in making these claims in public forums, further spreading misinformation and undermining public confidence in the electoral process.¹³³

The misinformation campaign was not limited to these two lawyers. Several other attorneys associated with Trump and his allies engaged in similar efforts to delegitimize the election results.¹³⁴ These lawyers often appeared on conservative media outlets, where they repeated the baseless allegations of voter fraud and a stolen election.¹³⁵ By doing so, they played a significant role in shaping the perceptions of

¹²⁶ Luttig, *supra* note 84 at 3-4.

¹²⁷ Cummings, *supra* note 85; Wheeler, *supra* note 125, at 410-11.

¹²⁸ *Id.*

¹²⁹ See Cummings, *supra* note 85 at 563.

¹³⁰ Cummings, *supra* note 85 at 576.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 562.

¹³⁵ *Id.*

millions of Americans, many of whom came to believe that the election had indeed been stolen despite all evidence to the contrary.¹³⁶

One of the most concerning aspects of this misinformation campaign was its impact on public trust in the electoral process. Polls conducted in the months following the election revealed that a significant portion of the American public, particularly among Republican voters, believed that the election had been stolen from Trump.¹³⁷ This belief was directly attributable to the relentless efforts of lawyers and other Trump allies who continued to propagate these false claims, even in the face of overwhelming evidence that the election was free and fair.¹³⁸

The spread of misinformation by these lawyers also had tangible consequences beyond merely shaping public opinion. It contributed to an atmosphere of mistrust and hostility that ultimately culminated in the January 6th insurrection at the U.S. Capitol.¹³⁹ Many of those who participated in the attack were motivated by the belief that the election had been stolen, a belief that was fueled by the disinformation campaign led by Trump's legal team and their allies.¹⁴⁰

The actions of these lawyers in spreading false claims about the 2020 election represent a significant breach of their ethical obligations.¹⁴¹ As officers of the court, lawyers have a duty to uphold the integrity of the legal system and the rule of law.¹⁴² By engaging in a campaign of misinformation aimed at undermining the electoral process, these lawyers not only violated their ethical duties but also contributed to a broader erosion of trust in American democracy.¹⁴³

¹³⁶ Cummings, *supra* note 85 at 597.

¹³⁷ *Id.*

¹³⁸ *Id.* at 597-98.

¹³⁹ *Id.* at 595; Luttig, *supra* note 84 at 9.

¹⁴⁰ Smith, *supra* note 78.

¹⁴¹ See Rosen, *supra* note 89 at 185.

¹⁴² *Id.*; Cummings, *supra* note 85 at 528-529.

¹⁴³ Galperin, *supra* note 117; Rosen, *supra* note 89.

Furthermore, the continued propagation of these false claims has had a lasting impact on the political landscape in the United States. The narrative of a "rigged" election has become a central tenet of the political discourse among Trump supporters, leading to ongoing efforts to challenge and undermine future elections.¹⁴⁴ This persistent undermining of the electoral process poses a serious threat to the stability of American democracy and highlights the dangerous consequences of the misinformation spread by lawyers in the aftermath of the 2020 election. Such conduct demands that the profession reflect and recommit its founding principles embedded in the oath.

B. Fake Electors Scheme

One of the most audacious and troubling aspects of the efforts to overturn the 2020 presidential election was the fake electors scheme. This plan involved creating and submitting false slates of electors in several key battleground states that had been won by Joe Biden.¹⁴⁵ The intent was to replace the legitimate electors who were bound to vote for Biden with Trump supporters, thereby creating a pretext for rejecting the official electoral votes and potentially throwing the election to Donald Trump.¹⁴⁶ Lawyers played a central role in orchestrating and legitimizing this scheme, which represented a direct attack on democratic processes.¹⁴⁷

The fake electors scheme was conceived as part of a broader strategy to overturn the 2020 election results through both legal and extralegal means. The plan centered around the idea that if multiple states submitted competing slates of electors, Vice President Pence, who was presiding over the certification of the electoral votes on January 6, 2021, could

¹⁴⁴ Cummings, *supra* note 85 at 593.

¹⁴⁵ SELECT COMM. TO INVESTIGATE THE JAN. 6 ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 341 (2022); Cummings, *supra* note 85, at 582.

¹⁴⁶ Cummings, *supra* note 85 at 582-584. *See also* Luttig, *supra* note 84 at 3-4.

¹⁴⁷ Cummings, *supra* note 85 at 514-515.

declare the election results invalid in those states.¹⁴⁸ If successful, the plan would have resulted either in Trump being declared the winner or, more likely, throw the decision to the House of Representatives, where Republicans controlled a majority of state delegations.¹⁴⁹

The scheme required the cooperation of Republican officials in several battleground states, including Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.¹⁵⁰ In each of these states, Trump's legal team and their allies pressured local Republican leaders to submit alternate slates of electors who would cast their votes for Trump, despite the fact that Biden had won the popular vote in those states.¹⁵¹ These fake electors would then send their votes to Congress, where they would be presented as legitimate alongside the official slates.¹⁵²

Lawyers were deeply involved in the planning and execution of the fake electors scheme. One of the key figures in this effort was John Eastman, a conservative legal scholar and attorney who advised Trump and his allies on how to use the fake electors to overturn the election.¹⁵³ Eastman drafted memos outlining the legal rationale for the scheme, arguing that the Vice President had the authority to reject the official electoral votes and recognize the fake electors instead.¹⁵⁴ These memos were widely circulated among Trump's legal team and served as the blueprint for the scheme.¹⁵⁵

Eastman's legal theory was based on a distorted interpretation of the Constitution and the Electoral Count Act of 1887.¹⁵⁶ Eastman argued that because there was precedent for Congress to resolve disputes over electoral votes, the Vice

¹⁴⁸ *Id.* at 582.

¹⁴⁹ *Id.*

¹⁵⁰ Cummings, *supra* note 85 at 582.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Cummings, *supra* note 85 at 543.

¹⁵⁴ *Id.* at 591.

¹⁵⁵ *See id.*

¹⁵⁶ *Id.* at 584, 589.

President could unilaterally decide which slate of electors to recognize.¹⁵⁷ This interpretation was widely rejected by legal scholars and was ultimately dismissed by Pence, who refused to go along with the plan.¹⁵⁸ Nonetheless, Eastman and other lawyers continued to push this theory, using it to justify the submission of fake electors.¹⁵⁹

Giuliani also played a crucial role in coordinating the efforts to submit the fake slates, working closely with Republican officials in the targeted states.¹⁶⁰ He pressured these officials to convene meetings of the state legislatures to formally approve the alternate electors, even though there was no legal basis for doing so.¹⁶¹ Giuliani's efforts were part of a broader campaign to create chaos and confusion around the certification of the electoral votes, thereby providing a pretext for rejecting Biden's victory.¹⁶²

The fake elector's scheme was executed with varying degrees of success across the targeted states. In some states, Republican officials were persuaded to sign certificates falsely claiming that they were the duly appointed electors of their state.¹⁶³ These certificates were then sent to Congress and the National Archives, where they were intended to be presented alongside the legitimate electoral votes on January 6, 2021.¹⁶⁴ In Michigan, for example, a group of Republican officials met in the state capitol on December 14, 2020, the same day that the legitimate electors were meeting to cast their votes for Biden.¹⁶⁵

¹⁵⁷ *Id.* at 543, 584, 589, 591.

¹⁵⁸ *Id.* at 584, 587.

¹⁵⁹ *Id.*

¹⁶⁰ Cummings, *supra* note 85, at 591.

¹⁶¹ *Id.* at 560-65.

¹⁶² Cummings, *supra* note 85, at 562-64.

¹⁶³ See *id.*; Alan Feuer & Katie Benner, *The Fake Electors Scheme, Explained*, N.Y. TIMES (Aug. 3, 2022), <https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html>.

¹⁶⁴ See Cummings, *supra* note 85, at 584.

¹⁶⁵ Laurence H. Tribe, *Anatomy of a Fraud: Kenneth Chesebro's Misrepresentation of My Scholarship in His Efforts to Overturn the 2020 Presidential Election*, JUST SECURITY (Aug. 8, 2023),

The group signed a certificate declaring themselves the “duly elected and qualified electors” of Michigan, even though Biden had won the state by over 150,000 votes.¹⁶⁶ Similar actions took place in other states, including Georgia and Pennsylvania, where alternate slates of electors were also assembled and their votes submitted to Congress.¹⁶⁷

These actions were not just symbolic. The efforts were intended to create a genuine dispute over the election results that could be used to justify further legal challenges or even direct intervention by the Vice President or Congress.¹⁶⁸ The lawyers involved in this scheme were fully aware of its potential to disrupt the constitutional process and to undermine the peaceful transfer of power.¹⁶⁹ Their actions represented a profound breach of their ethical obligations as officers of the court and as defenders of the rule of law.

The fake electors scheme ultimately failed, largely due to the refusal of Vice President Pence and other key officials to go along with it.¹⁷⁰

On January 6, 2021, as Congress met to certify the electoral votes, Pence rejected the efforts to recognize the fake electors and proceeded with the certification of the legitimate votes.¹⁷¹ However, the scheme contributed to the broader effort to delegitimize the election and played a role in inciting the violent attack on the U.S. Capitol that followed.¹⁷²

The involvement of lawyers in the fake electors scheme has led to significant legal and ethical repercussions. Some of the lawyers involved, including John Eastman, have faced investigations and disciplinary actions for their roles in

<https://www.justsecurity.org/87498/kenneth-chesebros-misrepresentation-of-laurence-tribe-scholarship-in-his-efforts-to-overturn-the-2020-presidential-election/>.

¹⁶⁶ *Id.*; Cummings, *supra* note 86; Proposals for Reform, *supra* note 138.

¹⁶⁷ Cummings, *supra* note 85.

¹⁶⁸ *Id.* at 584.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 592-94, 606.

¹⁷¹ *Id.*

¹⁷² *Id.*

attempting to subvert the election.¹⁷³ The conduct of the lawyers involved in this scheme fall well below the ethical expectations of the profession. Through false and misleading information, these lawyers used their position of power and influence to manipulate the electoral process for the purpose of interrupting the peaceful transfer of power after a democratic election. Such conduct is violative of a lawyer's obligations to the democratic principles of honesty, fairness, and rule of law, demonstrating a need to recommit to the ethical guidance provided in the oath.

C. Litigation Efforts

In the wake of the 2020 United States presidential election, a wave of lawsuits was launched across the country, all aiming to overturn the results of the election that had declared Joe Biden as the winner. Once again, lawyers spearheaded these baseless legal efforts.¹⁷⁴ Despite the lack of credible evidence, these lawsuits were aggressively pursued in numerous courts, reflecting a broader strategy to delegitimize the election and maintain Trump's hold on the presidency.¹⁷⁵

One of the most prominent legal efforts was led by Sidney Powell, who infamously referred to her lawsuits as releasing the "Kraken."¹⁷⁶ Powell filed multiple lawsuits in key battleground states, including Georgia, Michigan, Wisconsin, and Arizona, alleging widespread voter fraud and conspiracy theories involving the voting machines.¹⁷⁷ Powell's lawsuits claimed that votes were switched from Trump to Biden through the manipulation of voting machines, and she further alleged that this was part of an international plot to rig the election.¹⁷⁸

¹⁷³ *Id.* at 516 n.11.

¹⁷⁴ *See generally* Cummings, *supra* note 85.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 576.

¹⁷⁷ *Id.* at 576-77.

¹⁷⁸ *Id.* at 576 n.331.

However, these lawsuits were based on unfounded claims and lacked credible evidence. Courts across the country dismissed Powell's cases, often in scathing terms, citing the absence of any substantive proof to support her allegations.¹⁷⁹ Judges criticized the lawsuits for being filled with speculative and implausible assertions, noting that they failed to meet even the basic standards of legal pleading.¹⁸⁰

Despite these dismissals, Powell and her legal team continued to push these lawsuits, using them as a platform to propagate the false narrative that the election had been stolen.¹⁸¹ This strategy was not just about winning in court; it was about sowing doubt and confusion among the public, with the ultimate goal of undermining confidence in the electoral process.¹⁸²

These lawsuits were emblematic of the broader legal strategy to use the courts not necessarily to win, but to create a narrative of a flawed and illegitimate election.¹⁸³ By filing these lawsuits, the Trump lawyers sought to cast doubt on the validity of the election results and to keep the possibility of overturning the outcome alive, even as the courts consistently rejected their claims.¹⁸⁴

One of the more brazen legal efforts came from the State of Texas, whose attorney general filed a lawsuit directly with the U.S. Supreme Court seeking to invalidate the election results in four battleground states: Georgia, Michigan, Pennsylvania, and Wisconsin.¹⁸⁵ The Texas lawsuit, backed by Trump's legal team

¹⁷⁹ See Cummings, *supra* note 85, at 577; Alexandra Just, *Trumping Unmeritorious Election Contests: The Need for Uniform Election Contest Laws in the Wake of 2020 Election Litigation Notes*, 62 U. LOUISVILLE L. REV. 167, 184 (2023).

¹⁸⁰ Just, *supra* note 179, at 184.

¹⁸¹ Cummings, *supra* note 85 at 588.

¹⁸² See Luttig, *supra* note 84, at 4.

¹⁸³ Cummings, *supra* note 85.

¹⁸⁴ *Id.*

¹⁸⁵ Texas v. Pennsylvania, 2020 U.S. LEXIS 5994 (2020); Adam Liptak, Texas Files An Audacious Suit with the Supreme Court Challenging the Election Results, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/us/politics/texas-files-an->

and supported by several Republican attorneys general and members of Congress, argued that these states had violated the Constitution by changing their election procedures in response to the COVID-19 pandemic.¹⁸⁶ The lawsuit claimed that these changes had led to widespread voter fraud and that the results in these states should be invalidated, thereby handing the election to Trump.¹⁸⁷ However, the U.S. Supreme Court swiftly rejected the lawsuit, stating that Texas lacked standing to challenge the election results in other states.¹⁸⁸ The Court's decision effectively ended one of the most significant and far-reaching legal efforts to overturn the 2020 election.¹⁸⁹ The Texas lawsuit highlighted the extreme lengths to which Trump's legal team and their allies were willing to go in their efforts to overturn the election. Despite the lack of any credible evidence to support their claims, they were prepared to engage in unprecedented legal action that, if successful, would have subverted the will of millions of voters across multiple states.¹⁹⁰

The multiple lawsuits filed after the 2020 election raised significant ethical concerns within the legal profession. Lawyers are bound by ethical obligations to uphold the rule of law, to refrain from filing frivolous lawsuits, and to avoid engaging in conduct that undermines public confidence in the legal system. However, the post-election lawsuits filed by Trump's legal team and their allies violated these fundamental ethical principles. These lawsuits were widely seen as an abuse of the legal system, using the courts as a tool to pursue a political agenda rather than to seek justice.¹⁹¹ By filing baseless lawsuits and making unsupported allegations of voter fraud, these lawyers violated the ethical obligations explicit in the Rules of Professional Conduct, as well as the guiding principles of the

[audacious-suit-with-the-supreme-court-challenging-the-election-results.html](#).

¹⁸⁶ *Id.*

¹⁸⁷ See Just, *supra* note 179 at 194 n.171.

¹⁸⁸ See *Texas*, 2020 U.S. LEXIS 5994 (2020).

¹⁸⁹ See Cummings, *supra* note 85.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 559-60.

oath, suggesting the need for a recommitment to these ethical guidelines.

D. Pressure Campaign

In addition to the multiple lawsuits, a fake electors scheme, and widespread misinformation campaign, another critical component of the efforts to subvert the 2020 election results was a targeted pressure campaign directed at state officials. Lawyers closely aligned with former President Donald Trump played a pivotal role in this campaign, attempting to coerce and intimidate state officials into overturning the certified election results in key battleground states.¹⁹²

The pressure campaign on state officials was another concerted effort to reverse the outcome of the 2020 presidential election by influencing state legislatures, governors, secretaries of state, and election officials.¹⁹³ The central goal was to convince these officials to decertify the election results, declare the election invalid, or appoint alternate slates of electors who would cast their votes for Trump instead of Biden.¹⁹⁴ This campaign targeted states where Biden had won by narrow

¹⁹² See Barbara McQuade, *United States v. Donald Trump: A 'Model Prosecution Memo' on the Conspiracy to Pressure Vice President Pence*, JUST SECURITY (Feb. 22, 2022), <https://www.justsecurity.org/80308/united-states-v-donald-trump-model-prosecution-memo/>; Amy Gardner, 'I just want to find 11,780 votes': In extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in his Favor, WASH. POST (Jan. 3, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html; Leigh Ann Caldwell, Josh Dawsey & Yvonne Wingett Sanchez, *Trump Pressured Arizona Gov. Doug Ducey to Overturn 2020 Election*, WASH. POST (July 1, 2023), <https://www.washingtonpost.com/nation/2023/07/01/trump-2020-election-arizona-governor-doug-ducey/>; *Here's Every Word From the Fourth Jan. 6 Committee Hearing on its Investigation*, NPR (June 21, 2022), <https://www.npr.org/2022/06/21/1105848096/jan-6-committee-hearing-transcript>.

¹⁹³ *Id.*

¹⁹⁴ Cummings, *supra* note 85.

margins, including Georgia, Michigan, Pennsylvania, and Arizona.¹⁹⁵

Lawyers played a crucial role in this campaign by providing legal arguments, drafting memos, and directly engaging with state officials.¹⁹⁶ They sought to exploit ambiguities in state election laws, as well as the heightened political tensions following the election, to achieve their objectives. The pressure campaign was not limited to private conversations. It also included public statements, media appearances, and coordinated efforts to mobilize Trump's supporters to apply additional pressure on state officials.¹⁹⁷

One of the most prominent lawyers involved in the pressure campaign was again, Rudy Giuliani. Giuliani was at the forefront of efforts to persuade state legislators and election officials to overturn the election results.¹⁹⁸ In multiple public hearings organized by Republican lawmakers in states like Michigan, Pennsylvania, and Arizona, Giuliani presented baseless claims of voter fraud and urged lawmakers to take action to nullify the election's results.¹⁹⁹ These hearings, though unofficial and lacking any legal authority, were used as platforms to propagate the false narrative of a stolen election and to pressure state officials into compliance.²⁰⁰

Giuliani's strategy involved a mix of legal arguments and inflammatory rhetoric. He argued that state legislatures had the constitutional authority to override the popular vote and appoint electors directly, a claim that was widely discredited by constitutional scholars.²⁰¹ Despite the lack of legal merit, Giuliani persisted, using his position and influence to push state officials towards taking unprecedented and illegal actions.²⁰² Attorney John Eastman also played a key role in the pressure

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Cummings, *supra* note 85, at 852-53.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

campaign. Eastman authored legal memos that were circulated among state officials, outlining the supposed constitutional and statutory grounds for decertifying the election results.²⁰³ These memos argued that states could declare the election results invalid due to alleged irregularities and appoint new electors.²⁰⁴ Like Giuliani, Eastman's arguments were based on a distorted interpretation of the law, but they were instrumental in providing a legal veneer to the pressure campaign.²⁰⁵

One of the most infamous examples of the pressure campaign involved a phone call between Trump, his lawyers, and Georgia Secretary of State Brad Raffensperger.²⁰⁶ During this call, Trump, with Giuliani's involvement, pressured Raffensperger to "find" enough votes to overturn Biden's victory in Georgia.²⁰⁷ Giuliani played a crucial role in framing the conversation, repeatedly asserting that widespread voter fraud had occurred in Georgia and that Raffensperger had the authority to correct the alleged wrongdoing.²⁰⁸ This call, which was later made public, exemplified the direct and coercive tactics employed by Trump's legal team to subvert the election results.²⁰⁹

This pressure campaign continued in other key states. In Michigan and Arizona, Giuliani and other lawyers pressured Republican members of the state legislature to decertify the

²⁰³ Cummings, *supra* note 85, at 588-91; BOB WOODWARD & ROBERT COSTA, PERIL 131, 209-12 (2021); *Read: Trump Lawyer's Memo on Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021), <https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html> [hereinafter "Two Page Memo"]; *Read: Trump Lawyer's Full Memo on Plan For Pence to Overturn the Election*, CNN (Sept. 21, 2021), <https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-penceoverturn-election/index.html> [hereinafter "Full Memo"].

²⁰⁴ *Two Page Memo*, *supra* note 204; *Full Memo*, *supra* note 204.

²⁰⁵ WOODWARD & COSTA, *supra* note 204, at 209-12.

²⁰⁶ Cummings, *supra* note 85, at 587-88; Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 *FORDHAM L. REV.* 335, 368 (2021).

²⁰⁷ Just, *supra* note 179, at 184 n. 124.

²⁰⁸ See Cummings, *supra* note 85, at 584.

²⁰⁹ See *id.*

election results and appoint an alternate slate of electors.²¹⁰ They held a series of meetings with state legislators, presenting them with dubious affidavits and testimonies alleging voter fraud.²¹¹ Despite these efforts, Michigan and Arizona lawmakers refused to comply, citing the lack of credible evidence and their duty to uphold the certified election results.²¹²

The involvement of lawyers in the pressure campaign raised serious legal and ethical concerns. The actions of Giuliani, Eastman, and other lawyers involved in the pressure campaign clearly violated democratic principles of rule of law, truthfulness, and integrity in the system. By attempting to coerce state officials into overturning the certified election results, these lawyers not only engaged in unethical conduct but also potentially violated state and federal laws.²¹³

The pressure campaign also contributed to the broader erosion of trust in the democratic process.²¹⁴ This campaign undermined public faith in the integrity of the electoral process and set a dangerous precedent for future elections. These lawyers continued to misrepresent the facts, push false legal claims, and pressure state actors to violate election procedures for the purpose of changing the results of the election.

These actions are violative of the ethical obligations of lawyers and underscores the need for a recommitment to the high ethical standards the oath expects.

²¹⁰ See *id.* at 586-88; Just, *supra* note 179, at 183.

²¹¹ Cummings, *supra* note 85, at 582.

²¹² Just, *supra* note 179 at 187. See also Cummings, *supra* note 85, at 587; Margaret Tarkington, *After the Trump Administration: Lessons and Legacies for the Legal Profession: The Role of Attorney Speech and Advocacy in the Subversion and Protection of Constitutional Governance*, 69 WASH. U. J.L. & POL'Y 287 (2022).

²¹³ See Just, *supra* note 179, at 186-87; Cummings, *supra* note 85, at 587-88.

²¹⁴ Just, *supra* note 179, at 186. See generally Cummings, *supra* note 85; Luttig, *supra* note 84.

E. The January 6, 2021 Insurrection

The January 6th, 2021 insurrection at the Capitol was a watershed moment in American history, as a violent mob sought to overturn the results of the 2020 presidential election by disrupting the certification of the Electoral College votes.²¹⁵ Among those who participated in or supported the insurrection were several individuals who were members of the legal profession.²¹⁶ These lawyers played various roles, from providing legal advice and justification for the actions of the rioters to directly participating in the events of that day.²¹⁷

Before and during the events of January 6th, several lawyers were instrumental in providing the legal arguments that underpinned the attempts to overturn the 2020 election results.²¹⁸ These lawyers advanced theories that the Vice President could unilaterally reject the certified electoral votes from certain states or that state legislatures could appoint alternate slates of electors.²¹⁹ These arguments were central to the narrative that the election had been "stolen" and that extraordinary measures were justified to prevent Joe Biden from taking office.²²⁰

Once again, Attorney Eastman was one of the most influential figures in this regard. Eastman authored memos and gave public speeches in the days leading up to January 6th, arguing that Vice President Pence had the authority to reject the electoral votes from contested states.²²¹ Though Eastman's legal

²¹⁵ Michael Sozan & William Roberts, *Trump and His Allies Must be Held Accountable for the January 6 Insurrection* (Apr. 2023), <https://www.americanprogress.org/wp-content/uploads/sites/2/2023/04/Jan6insurrection-report.pdf>. See generally Cummings, *supra* note 85.

²¹⁶ See FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, H.R. REP. NO. 117-663, at 65-83.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

theories were legally flawed, they also served as a key justification for the actions of the mob that stormed the Capitol.²²² His arguments were cited by those who believed that the insurrection was necessary to "save" the country from a fraudulent election.²²³

Attorney Giuliani was also involved. On the day of the insurrection, Giuliani spoke at the rally that preceded the attack on the Capitol, where he called for "trial by combat" to resolve the election dispute.²²⁴ This rhetoric, combined with his previous efforts to delegitimize the election results, helped incite the mob and contributed to the violence that ensued.²²⁵

In addition to those who provided legal justification for the insurrection, there were also lawyers who directly participated in the attack on the Capitol. One notable example is Paul Davis, a Texas attorney who was filmed outside the Capitol on January 6th, expressing his support for the rioters and making statements that aligned with the false narrative of a stolen election.²²⁶ Davis, who was employed as an in-house counsel for a company at the time, was later fired from his position due to his involvement in the insurrection.²²⁷ He has since faced legal and professional repercussions, including investigations by the State Bar of Texas.²²⁸ William Calhoun, a Georgia attorney who openly boasted on social media about breaching the Capitol and participating in the violence.²²⁹

²²² *Id.*

²²³ *Id.*; Cummings, *supra* note 85, at 593-94.

²²⁴ Rudy Giuliani, Speech at Donald Trump's "Save America" Rally (Jan. 6, 2021), <https://www.rev.com/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat>. *See also* Cummings, *supra* note 85, at 593 n. 446.

²²⁵ Cummings, *supra* note 85 at 593-94.

²²⁶ Debra C. Weiss, *Lawyer Lost His Job, His Fiancée and His Friends After Presence Outside Capitol Riot*, ABA JOURNAL, (Feb. 17, 2022, 11:07 AM), <https://www.abajournal.com/news/article/lawyer-lost-his-job-his-fiancee-and-his-friends-after-presence-outside-capitol-riot>.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Debra C. Weiss, *Georgia Lawyer Who Bragged of Shutting Down "Stolen Election Shenanigans" is Found Guilty in Jan. 6 Case*, ABA JOURNAL, (Mar. 21,

Calhoun's actions, including his statements that he was part of an "armed revolution" to overturn the election, were emblematic of the extremism that motivated many of the rioters. He was later arrested, charged and convicted with several federal crimes.²³⁰

The involvement of lawyers in the January 6th insurrection raises serious legal and ethical concerns. The actions of the lawyers involved in the insurrection, whether through providing legal justification or directly participating in the violence, represent a stark violation of these ethical obligations.²³¹ The participation of lawyers in an insurrection that sought to overturn a democratic election highlights the dangers of politicizing the legal profession and using legal arguments to justify unlawful actions.²³² It also underscores the need for the legal community to reaffirm its commitment to the democratic principles embedded in the lawyers' oath.

F. Voting "Nay" to Certify the Election

Despite the attack on the Capitol, several lawyers spearheaded another effort to alter the outcome of the 2020 election. After a violent mob stormed the U.S. Capitol in an attempt to prevent the certification of the Electoral College results, Congress reconvened to complete the certification process.²³³ Despite the unprecedented attack on the Capitol and the clear results of the election, a significant number of lawmakers, including several who were also attorneys, voted to

2023, 9:21 AM), <https://www.abajournal.com/news/article/georgia-lawyer-who-bragged-of-shutting-down-stolen-election-shenanigans-is-found-guilty-in-jan-6-case>.

²³⁰ *Id.*

²³¹ See Cummings, *supra* note 85, at 599, 600.

²³² Luttig, *supra* note 84.

²³³ *Id.*; Susan S. Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education After the Trump Administration: Lessons and Legacies for the Legal Profession*, 69 WASH. U. J. L. & POL'Y 17 (2022).

reject the electoral votes from certain states that had been won by Joe Biden.²³⁴

These lawyer-legislators, who had been trained in the law and had taken oaths to uphold the Constitution, argued that the election results in certain states were tainted by fraud.²³⁵ However, these claims were based on the same baseless allegations that had been repeatedly rejected by courts across the country.²³⁶ Despite the lack of credible evidence, these legislators used their legal knowledge and positions of authority to lend legitimacy to the false narrative that the election had been stolen.²³⁷ One prominent example of a lawyer-legislator who voted not to certify the election results was Senator Josh Hawley of Missouri.²³⁸ A graduate of Yale Law School and a former clerk for Chief Justice John Roberts, Hawley had established himself as a legal scholar and a rising star within the Republican Party.²³⁹ Despite his legal background, Hawley was the first senator to announce that he would object to the certification of the electoral votes, citing unfounded claims of voter fraud in Pennsylvania.²⁴⁰ His decision to lead this objection, despite the lack of evidence, was widely criticized as a political maneuver that undermined the rule of law.²⁴¹

²³⁴ Cummings, *supra* note 85; Just, *supra* note 179; Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html>.

²³⁵ Cummings, *supra* note 85, at 582.

²³⁶ *See id.* at 591.

²³⁷ Press Release, Sen. Josh Hawley, Sen. Hawley Will Object During Electoral College Certification Process On Jan 6, (Dec. 30, 2020), <https://www.hawley.senate.gov/sen-hawley-will-object-during-electoral-college-certification-process-jan-6/>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Press Release, Sen. Josh Hawley, Sen. Hawley Will Object During Electoral College Certification Process On Jan 6, (Dec. 30, 2020), <https://www.hawley.senate.gov/sen-hawley-will-object-during-electoral-college-certification-process-jan-6/>.

²⁴¹ Just, *supra* note 179.

Following his lead, another lawyer-legislator who played a key role in the objections was Senator Ted Cruz of Texas.²⁴² Cruz, a graduate of Harvard Law School and a former Solicitor General of Texas, also objected to the certification of the electoral votes from Arizona.²⁴³ Cruz argued that the objections were necessary to address concerns about the integrity of the election, despite the fact that these concerns were based on debunked conspiracy theories.²⁴⁴ Cruz's legal background and his role as a constitutional lawyer lent credibility to the objections, even as they were widely dismissed by legal experts and courts as meritless.

The decision by lawyer-legislators to vote against certifying the election results raised obvious and serious legal and ethical questions. As attorneys, these legislators were bound by professional and ethical obligations to uphold the law and to avoid conduct that undermines the legal system.²⁴⁵ By voting to reject the certified election results based on unfounded claims, these lawyer-legislators violated these ethical obligations and contributed to the erosion of public trust in the electoral process. Their conduct contributed to the broader effort of undermining elections and the peaceful transfer of power by using their legal expertise and positions of authority to advance baseless objections.²⁴⁶ By advancing baseless objections and lending credibility to unfounded claims of election fraud, these legislators undermined the rule of law and contributed to the erosion of public trust in the democratic process.

All of the lawyer-led schemes to overturn the 2020 U.S. Presidential election were designed to undermine the electoral

²⁴² Yourish et al., *supra* note 237; Luttig, *supra* note 84.

²⁴³ *Id.*

²⁴⁴ Press Release, Sen. Ted Cruz, Sen. Cruz: We Have an Obligation To the Constitution To Ensure That This Election Was Lawful (Jan. 03, 2021), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-we-have-an-obligation-to-the-constitution-to-ensure-that-this-election-was-lawful>.

²⁴⁵ See generally Rosen, *supra* note 89.

²⁴⁶ Luttig, *supra* note 84.

process, create public mistrust, and install, as president, the loser of the election - the antithesis of democracy. These actions have had far-reaching implications for public trust in the legal profession and the integrity of democratic institutions. The audacity to knowingly, or recklessly, advance false claims of fraud in multi-faceted schemes to overturn the will of the people, underscores the importance for the legal profession to recommit to ethical conduct that our oath expects.

V. MODERNIZATION OF THE OATH AND OTHER PROPOSALS

The lapses identified in section IV underscoring the need for a renewed professional commitment to the oath's principles of honesty, integrity, fairness, and the rule of law. Indeed, the ABA Task Force for American Democracy recently published a report highlighting the alarming rise of misinformation, political violence, and polarization.²⁴⁷ The report urged a renewed focus on ethical training and a reaffirmation of the lawyer's oath.²⁴⁸ Below are recommendations for modernizing the lawyer's oath. In addition, I offer some additional proposals to reinforce the ethical foundations of the legal profession through reforms for law school education, continuing legal education (CLE), state disciplinary procedures. To be sure, none of these recommendations alone, or in cooperation with each other, will not deter or prevent a lawyer intent on violating their ethical obligations. However, these recommendations will serve to reemphasize the importance of ethical conduct given the critical role lawyers play in a democratic society.

²⁴⁷ ABA TASK FORCE FOR AMERICAN DEMOCRACY, ANALYSIS: OVERCOMING SERIOUS THREATS TO OUR DEMOCRACY (2024), <https://www.americanbar.org/content/dam/aba/administrative/news/2024/aba-democracy-task-force.pdf>.

²⁴⁸ *Id.*

A. Modernizing the Lawyer's Oath

While several states have recently updated the language of their oaths, many still contain problematic language.²⁴⁹ Modernizing the lawyer's oath serves to reinvigorate the solemn obligations it represents - justice, fairness, and the rule of law. These commitments flow from a lawyer's unique position of privilege within a democratic society.²⁵⁰ Serving as both advocates for individuals and gatekeepers of the legal system, lawyers are entrusted with the duty to uphold justice, protect the rights of their clients, and contribute to the public good.²⁵¹ Accordingly, the lawyer's oath must be more than just a ceremonial recitation; it should be a powerful reminder of the responsibilities that come with the privilege of practicing law. Modernizing the lawyer's oath by addressing outdated language, emphasizing democratic principles, and eliminating bias should reinforce the ethical principles inherent in the oath.

Moreover, by modernizing the oath to explicitly include commitments to democratic values and human rights, the legal profession can reinforce its aspirational guidance for fulfilling the lawyer's role in protecting democracy.

Unfortunately, many current lawyer's oaths contain language that is archaic, biased, and complex, which can obscure the significance of these commitments and alienate many lawyers.²⁵² Oddly, Kentucky requires applicants to the bar to promise that they have not and will not participate in a duel.²⁵³ Traditional oaths, like the Massachusetts or Missouri oath, frequently include terms that are unfamiliar to modern practitioners, such as "lucre" and "artifice," which diminish the oath's impact and make it feel more like an antiquated formality

²⁴⁹ Lauren E. Bartlett, *Human Rights and Lawyer's Oaths*, 36 GEO. J. LEGAL ETHICS 411, 429, 432 (2023).

²⁵⁰ Anand, *supra* note 69; Green, *supra* note 69; Luttig, *supra* note 84, at 16.

²⁵¹ Luttig, *supra* note 84, at 16; Green, *supra* note 69, at 1232; Rosen, *supra* note 89, at 55.

²⁵² See generally Bartlett, *supra* note 250.

²⁵³ KY. CONST. § 228.

than a meaningful pledge.²⁵⁴ Advocates for plain language argue that the oath should be revised to be more accessible, ensuring that every lawyer fully understands the ethical standards they are committing to.²⁵⁵

For example, instead of swearing to avoid pursuing claims for “lucre or malice,” a modern oath would eliminate these archaic terms and add more relevant and operative words like “fairness” and “honesty.”²⁵⁶ Simplifying the language makes the oath a more powerful and clear declaration of ethical responsibility.²⁵⁷

Many oaths fail to explicitly reference a lawyer’s commitment to democratic principles.²⁵⁸ For example, the Connecticut, Massachusetts, and New Hampshire oaths do not include a pledge to uphold the U.S. Constitution.²⁵⁹ While the Massachusetts’ lawyer’s oath statute mentions the constitutions, absent in the actual oath is any such language.²⁶⁰

To reinvigorate democratic principles, it is essential that the oath reflect a lawyer’s responsibility to protect these principles.²⁶¹ The omission of such language undermines these critical obligations.²⁶² To address this gap, modern oaths should include language that explicitly commits lawyers to defending

²⁵⁴ Bartlett, *supra* note 250, at 422-24, 441. *See also* Stephen C. O’Neill, *The History of the Lawyer’s Oath*, 5 MASS. LEGAL HIST. 91 (1999).

²⁵⁵ *See* Bartlett, *supra* note 250, at 426.

²⁵⁶ *See id.*; Frances M. Moran, *An Oath for the Legal Profession*, 35 WOMEN LAW. J. 15 (1949).

²⁵⁷ *See* Joseph Kimble, *Plain Language: Time for a Clearer, Plainer Alternative to our Lawyer’s Oath?*, 98 MICH BAR J. 36 (May 2019); Bartlett, *supra* note 250, at 439.

²⁵⁸ *See* Bartlett, *supra* note 250, at 439.

²⁵⁹ Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide*, 30 CARDOZO L. REV. 1843, 1844 (2008); Bartlett, *supra* note 250, at 413; CONN. GEN. STAT. § 1-25 (2017); MASS. GEN. LAWS. ch. 221, § 38 (2022); N.H. REV. STAT. ANN. § 311:6 (2023).

²⁶⁰ MASS. GEN. LAWS. ch. 221, § 38 (2022).

²⁶¹ *See* Green, *supra* note 69, at 43-44; Luttig, *supra* note 84, at 16. *See generally*, Bartlett, *supra* note 250 (describing concerns about pledge to constitution).

²⁶² Travis Pickens, *The Meaning in a Lawyer’s Life*, 93 OKLA. BAR J., April 2022, at 6.

the rule of law, promoting justice, and safeguarding the rights of all individuals. For instance, a revised oath might include specific language related to the protection of federal and state constitutions.²⁶³ This addition would reinforce the lawyer's role as a guardian of these essential values, ensuring that their practice aligns with the broader goals of justice and equality.²⁶⁴

Existing oaths also fail to confront language of bias, discrimination, and inequality within the legal profession.²⁶⁵ Despite the legal profession's emphasis on fairness and justice, current oaths do not explicitly require lawyers to combat systemic biases or advocate for equality.²⁶⁶ Indeed, many oath's contain problematic language. For example, the Maine, Massachusetts, and Rhode Island oaths all have exclusionary male-gender specific language, suggesting a male dominated profession.²⁶⁷ Similarly, many states' oaths, including Florida, New York, Massachusetts and Texas, have religious language stemming from its Christian influences, potentially alienating non- Christians, non-religious, and others.²⁶⁸ These issues can perpetuate inequalities and allow discriminatory practices to persist unchallenged. A modernized oath should eliminate the problematic language and include clear statements obligating lawyers to recognize and oppose bias in all its forms.²⁶⁹ For example, the oath could require lawyers to oppose all forms of discrimination and commit toward a more just and equitable legal system.²⁷⁰ By incorporating these commitments, the oath would reaffirm the lawyer's dedication to ethical practice and contribute to creating a more inclusive and fair legal profession.

²⁶³ Bartlett, *supra* note 250, at 424.

²⁶⁴ Andrews, *Lawyer's Oath*, *supra* note 2, at 30, 59-62.

²⁶⁵ Bartlett, *supra* note 250, at 430.

²⁶⁶ Bartlett, *supra* note 250, at 419-420.

²⁶⁷ ME. REV. STAT. ANN. tit. 4, § 806 (2023); MASS. GEN. LAWS ch. 221, § 38 (2022); R.I. SUP. CT. R. art. II, R. 8 (2023).

²⁶⁸ In re Oath of Admission to the Fla. Bar, 73 So. 3d 149, 150 (Fla. 2011). N.Y. CONST. art. XIII, § 1; MASS. GEN. LAWS. ch. 221, § 38 (2022); TEX. CONST. art. XVI, § 1.

²⁶⁹ See Bartlett, *supra* note 250, at 419-420; Andrews, *supra* note 2, at 52-53, 60-61.

²⁷⁰ See Bartlett, *supra* note 250, at 442-43.

The Massachusetts' lawyer's oath is the oldest American oath—a prime example of an archaic, biased, and confusing oath—ripe for modernization.²⁷¹ Below, the Massachusetts' lawyer's oath is used as a template for potential modernization.

Currently, the full text of the Massachusetts statute enacting the lawyer's oath provides:

Whoever is admitted as an attorney shall in open court take and subscribe the oaths to support the constitution of the United States and of the commonwealth; and the following oath of office shall be administered to and subscribed by him:

I (repeat the name) solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.²⁷²

A review of the oath's language exposes several critical concerns of archaic language, bias and poor writing. As the oldest oath in the country, it is not surprising that it contains outdated language like "lucre" instead of "profit" and "wittingly or willingly" rather than "knowingly or intentionally."²⁷³ The oath also contains biased language that undermine the professions efforts at inclusivity. The use of gender specific

²⁷¹ See Andrews, *Lawyer's Oath*, *supra* note 2, at 19-21.

²⁷² MASS. GEN. LAWS ch. 221, § 38 (2024).

²⁷³ *Id.*

terms like “him” and “man” in the oath is exclusionary and more inclusive language must be substituted. The oath also assumes a belief in a monotheistic deity. By swearing “So help me, God,” the oath excludes followers of other religions, the non-religious, and those that belong to a belief system that prohibits such conduct. A modern oath would eliminate gendered language and all religious references, thereby eliminating exclusionary language and replacing with more inclusive terminology.

Furthermore, the oath is poorly written for the modern context. First, the entire oath is written as a single run-on sentence, which makes it difficult to read and understand. The oath also repeats the prohibition of false claims. Oath-takers first “swears” to “do no falsehood” in the first segment of the sentence, and then, to not “promote or sue any false...suit” in the second section. Breaking the oath into shorter, more concise sentences would improve clarity and understanding.

Finally, the Massachusetts lawyer’s oath, as written, references three separate oaths. The first line of the oath statute seems to require that attorneys take the supporting oaths for both the United States and Commonwealth Constitutions. However, following that language, the statute provides the specific oath of attorney office. The separate treatment of these oaths suggests a disconnect between what is required and what is actually sworn to by newly minted lawyers. At best, the mere reference to the constitutions but failure to include in the actual oath demonstrates ambiguity and a lack of consistency in writing. At worst, the omission of constitutional commitments in the oath undermines the intent of the oath and the attorney’s duty to uphold the democratic principles contained in these constitutions.

To modernize the Massachusetts oath, it is critical to draft language that addresses the ethical demands of today’s legal practice.²⁷⁴ This includes simplifying the language,

²⁷⁴ Luttig, *supra* note 84; James Podgers, *A New Look: ABA Plans First Comprehensive Review of Disciplinary Enforcement Rules in 20 Years*, ABA JOURNAL (Nov. 1, 2012, 8:00 AM), [https://www.https://www.https://www.abajournal.com/magazine/article/a_new_look_aba_plans_first_comprehensive_review_of_disciplinary_enforcement](https://www.abajournal.com/magazine/article/a_new_look_aba_plans_first_comprehensive_review_of_disciplinary_enforcement).

eliminating bias language, as well as adding specific commitments to democratic principles. An effective modern oath will provide a simple statement connecting a lawyer's privilege to their obligations to client, the public, and the justice system in a democratic society.

Drawing from existing oath languages, including from several revised state oaths, and various human rights oath variations, can provide some guidance toward a more modern and impactful oath. For example, all but four state constitutions include a pledge to uphold the U.S. Constitution.²⁷⁵ A few states have eliminated gender-specific language.²⁷⁶ And still others include language related to the dignity, honesty and fairness.²⁷⁷

However, none of the current lawyer oaths explicitly mention human rights.²⁷⁸ Fortunately, we can look to human rights organizations for guidance on language that supports and defends human rights. For example, the Universal Declaration of Human Rights (UDHR) provides guidance for explicit language for recognition of the inherent rights and freedoms, like equality under the law, dignity, non-discrimination, speech, religious and political participation and affiliation, personhood, access to justice, and so on.²⁷⁹

Applying these modifications, a more modern version of the Commonwealth of Massachusetts' oath could read:

I promise to support the Constitutions
of the United States and the
Commonwealth.

²⁷⁵ See Bartlett, *supra* note 250, at 413 n.7.

²⁷⁶ E.g. Rule 6: Admission of Attorneys, TENN. ADMIN. OFF. OF THE CTS., <https://www.tncourts.gov/rules/supreme-court/6> (last visited Aug 22, 2024).

²⁷⁷ *Id.* See generally Bartlett, *supra* note 250.

²⁷⁸ BARTLETT, *supra* note 250, at 437.

²⁷⁹ G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, at 71 (Dec. 10, 1948). See generally Risa E. Kaufman, *By Some Other Means: Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971 (2011); Davis, *supra* note 64.

I will employ and defend the principles of fairness and the impartial administration of justice.

I commit to practice with honesty, integrity, and respect, and oppose all forms of discrimination and injustice. Recognizing the profound responsibility that comes with the license's privileges, I will use my legal knowledge only to protect my clients and the justice system with the highest ethical standards.

This revised oath maintains the core commitments of the original while incorporating modern ethical considerations that are essential for today's legal practice. By explicitly addressing issues such as bias, human rights, and democratic values, the modernized oath provides a simple yet comprehensive ethical framework that aligns with the responsibilities of contemporary lawyers.

The proposed changes, including the use of plain language and the incorporation of commitments to democracy, human rights, and the elimination of bias, reflect the evolving responsibilities of lawyers in society source might be good here. The revised Massachusetts Lawyer's Oath serves as a template for these changes, demonstrating how traditional ethical commitments can be updated to meet contemporary challenges. By modernizing the oath, the legal profession can reinforce its commitment to justice, equality, and the rule of law, ensuring that lawyers continue to serve as guardians of these vital democratic principles.

A. Additional Proposals

1. Law School Curriculum

Law schools play a critical role in the development of professional lawyers.

Accordingly, law schools are an appropriate place for considered reforms to integrate the principles inherent in the lawyer's oath source might be good here. Integrating these principles — honesty, integrity, fairness, and the rule of law — into Professional Responsibility (PR) courses would find faculty support if the MPRE assessed these ethical principles. Legal ethics involve not just adherence to the law but also embodying professional aspirations that guide lawyers in navigating moral complexities within the legal system.²⁸⁰ The challenges exposed by recent events, particularly the attempts to undermine democratic processes during the 2020 presidential election, underscore the critical need to reinforce these principles from the outset of legal education.²⁸¹

The MPRE should be revised to assess these broader foundational ethical principles. This would force PR courses to not merely focus on the Model Rules of Professional Conduct; these courses would then delve deeper into the historical and philosophical foundations of the legal profession's commitment to democracy and the rule of law. This approach would help students understand that their responsibilities as lawyers extend beyond client representation to include upholding the very structures that sustain democratic governance. Incorporating case studies and simulations that present students with real-world ethical dilemmas is essential for bridging the gap between theory and practice.²⁸² For instance, scenarios based on the legal challenges surrounding the 2020

²⁸⁰ See Hazard, *supra* note 2, at 574.

²⁸¹ See Luttig, *supra* note 84, at 2-7.

²⁸² Robert P. Burns, *Teaching the Basic Ethics Class Through Simulations: The Northwestern Program in Advocacy and Professionalism*, 58 L. & CONTEMP. PROBS. 37, 38 n.4 (1995).

election can be utilized to illustrate the importance of ethical decision-making in preserving democratic integrity.²⁸³ These exercises not only enhance students' critical thinking skills but also instill a deep appreciation for the lawyer's role in safeguarding the rule of law.

Moreover, PR courses could include specialized modules on constitutional ethics, emphasizing the lawyer's duty to uphold constitutional principles even when faced with conflicting pressures.²⁸⁴ The intersection of legal rules and professional aspirations requires lawyers to navigate complex moral landscapes, where the preservation of democratic institutions often hangs in the balance.²⁸⁵ Further, guest lectures and workshops featuring practitioners who have confronted significant ethical challenges in their careers can further enrich the learning experience.²⁸⁶ These interactions provide students with firsthand insights into the real-world implications of ethical practice and the vital role that lawyers play in defending democratic values.

Embedding the principles of the lawyer's oath into PR courses is not just about teaching future lawyers to follow the rules but about cultivating an enduring commitment to the ethical foundations of the legal profession. By doing so, law schools can prepare students to meet the demands of a profession that is integral to the preservation of democracy and the rule of law.²⁸⁷

Law schools should also consider incorporating similar learning objectives in courses involving Professional Identity Formation (PIF). The concept of PIF in legal education has gained significant traction in recent years, particularly with the

²⁸³ See generally Luttig, *supra* note 84.

²⁸⁴ See *Rule of Law in an American Life: A long and Intentional Tradition*, AM. BAR ASS'N., https://www.americanbar.org/groups/public_education/resources/rule-of-law/rule-of-law-in-american-life--a-long-and-intentional-tradition/ (last visited Aug 12, 2024).

²⁸⁵ Hazard, *supra* note 2.

²⁸⁶ Luttig, *supra* note 84.

²⁸⁷ Hazard, *supra* note 2; See Luttig, *supra* note 84, at 16.

American Bar Association's (ABA) adoption of Standard 303(b)(3), which mandates that law schools provide substantial opportunities for students to develop their professional identities.²⁸⁸ This shift in legal education recognizes that the process of becoming a lawyer involves more than just acquiring knowledge of the law; it also requires the internalization of the values and responsibilities that define the legal profession.²⁸⁹

At its core, PIF “focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society.”²⁹⁰ This involves an intentional exploration of the values, guiding principles, and well-being practices that are foundational to successful legal practice.²⁹¹ Law schools play a crucial role in shaping these identities by helping students integrate these professional values with their personal values, ultimately fostering a healthy, integrated professional identity.²⁹²

One of the key challenges in PIF, however, is the concern that the values and obligations of the legal profession are not just taught, but be internalized by students.²⁹³ As noted in the Carnegie Report, legal education constitutes a powerful moral apprenticeship that profoundly shapes students' values, perceptions, and interpretations of the legal world.²⁹⁴ This underscores the importance of a deliberate and thoughtful approach to PIF, one that acknowledges the transformative impact of legal education on students' professional identities.²⁹⁵ Through this deliberative process, law students get a better

²⁸⁸ Timothy W. Floyd, *Lawyers and Civil Discourse: Respect and Civility as a Matter of Professional Identity*, 76 BAYLOR L. REV. 90, 91-92 (2024).

²⁸⁹ Kellye Y. Testy & Zachariah J. DeMeola, *Leading the Way: The Power of Professional Identity Formation for Lawyers*, 76 BAYLOR L. REV. 115, 147 (2024).

²⁹⁰ Floyd, *supra* note 289.

²⁹¹ *Id.* at 92.

²⁹² See Testy & DeMeola, *supra* note 290, at 143-49.

²⁹³ SHAILINI GEORGE, *THE LAW STUDENT'S GUIDE TO DOING WELL AND BEING WELL* (2021).

²⁹⁴ Floyd, *supra* note 289, at 92.

²⁹⁵ Testy & DeMeola, *supra* note 290, at 143-49.

understanding of their personal role within the bounds of professional expectations.

A successful PIF program requires law schools to be intentional in their educational practices, ensuring that students are not only aware of the ethical obligations of lawyers but also committed to understanding how these obligations impact their professional lives.²⁹⁶ This involves creating opportunities for students to engage with the core values of the legal profession—such as honesty, integrity, fairness, and the rule of law—in a way that resonates with their personal experiences and aspirations.²⁹⁷

In practical terms, this means incorporating PIF into the curriculum in a way that goes beyond traditional classroom instruction. Experiential learning opportunities, such as clinics and externships, are particularly effective in helping students internalize professional values by providing real-world contexts in which to apply them.²⁹⁸ These experiences allow students to develop an understanding of the profession's expectation that lawyers balance the interests of client and their obligations to democratic principles.²⁹⁹

Professional Identity Formation is a critical component of legal education, one that requires deliberate effort and thoughtful integration into the curriculum. By focusing on the development of a professional identity that is grounded in the core values of the legal profession, law schools can prepare students to not only excel in their legal careers but also to fulfill their roles as ethical leaders in a democratic society.

²⁹⁶ See Floyd, *supra* note 290, at 92.

²⁹⁷ *Id.* at 134-35. See also Patrick Emery Longan, Daisy Hurst Floyd & Timothy W. Floyd, *A Virtue Ethics Approach to Professional Identity: Lessons for the First Year and beyond Symposium: Professional Identity Formation and Its Pedagogy*, 89 UMKC L. REV. 645, 660 (2020); Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions The Formation of an Ethical Professional Identity in the Peer-Review Professions*, 5 U. ST. THOMAS L.J. 366, 390-91 (2008).

²⁹⁸ Testy & DeMeola, *supra* note 291 at 134-35.

²⁹⁹ Floyd, *supra* note 290.

The development of a lawyer's professional identity should not be confined to the traditional curriculum of doctrinal courses and clinical experiences. To cultivate a well-rounded understanding of the legal profession's role in a democratic society, law schools should offer additional learning opportunities that emphasize the civic obligations of lawyers. These can take the form of specialized courses, seminars, workshops, and speaker series that focus on the intersection of law, democracy, and civic engagement.

Civic-related law courses can also help prepare students to fulfill their roles as public citizens, a concept enshrined in the Preamble to the ABA Model Rules of Professional Conduct.³⁰⁰ Civic-related courses can equip students with the knowledge and skills they need to navigate these challenges and to advocate for justice and the rule of law in their professional lives.³⁰¹ These courses can cover a wide range of topics, including the lawyer's role in democratic institutions, the importance of the rule of law, and the ethical obligations lawyers have to society at large.³⁰² By exposing students to these broader themes, law schools can help them develop a deeper understanding of how their work as lawyers can contribute to the preservation and enhancement of democratic institutions.

In addition to formal courses, law schools should create opportunities for students to engage with these topics through seminars, workshops, and speaker series. These formats allow for more interactive and in-depth exploration of civic-related issues, fostering a space where students can discuss and reflect on the challenges facing the legal profession and society. For example, workshops on constitutional law and democracy, or speaker series featuring prominent legal scholars and practitioners, can provide students with valuable insights into the complexities of legal practice in a democratic society.³⁰³

³⁰⁰ *Id.* at 94-95.

³⁰¹ Luttig, *supra* note 84.

³⁰² See Testy & DeMeola, *supra* note 290.

³⁰³ See Floyd, *supra* note 289, at 104.

These opportunities can be particularly effective in helping students understand the importance of civic obligations and public service as integral components of their professional identity. The values of respect, empathy, and commitment to the truth are core to the legal profession and are essential for maintaining a healthy democracy.³⁰⁴ By integrating these values into civic-related courses and extracurricular opportunities, law schools can encourage students to see their legal careers not just as a means of personal advancement but as a way to contribute to the greater good.³⁰⁵

2. Continuing Legal Education

The legal profession's commitment to maintaining high ethical standards and upholding the rule of law requires ongoing education beyond the initial stages of a lawyer's career. Continuing Legal Education (CLE) programs serve a critical role in ensuring that lawyers remain knowledgeable about evolving legal standards, ethical obligations, and professional responsibilities.³⁰⁶ Democracy themed CLE programs would continually reinforce the profession's obligation to these principles.

CLE programs are particularly crucial in the realm of legal ethical training. Lawyers must continually maintain their competence with regards to professional responsibility.³⁰⁷ Without continuous education, the evolving nature of ethical considerations could lead to lapses in ethical judgment, resulting in malpractice or disciplinary action.³⁰⁸ Indeed, CLE is

³⁰⁴ *Id.* at 90.

³⁰⁵ See Testy & DeMeola, *supra* note 290.

³⁰⁶ Randall T. Shepard, *Celebrating Twenty Years of Continuing Legal Education: The Art and Science of Educating Attorneys: The Scope of the Issue: Defining Continuing Legal Education: The "L" in "CLE" Stands for "Legal"*, 40 VAL. U. L. REV. 311, 323-24 (2006).

³⁰⁷ Marcia L. Proctor, *Legal Education: Continuing Education in Professional Responsibility*, 77 MICH. B. J. 678, 678 (1998).

³⁰⁸ *Id.*

integral to ensuring that lawyers are not only competent in their legal knowledge but also in their ethical obligations.³⁰⁹

To be sure, CLE programs devoted to professional ethics do exist. For example, the ABA provides members hundreds of CLE courses focused solely on ethics.³¹⁰ Many states, including Massachusetts, also provide CLE on ethical issues.³¹¹ Notwithstanding these continuing educational opportunities, CLE programs designed specifically to address the issues defined by the recent lapses related to the 2020 U.S. election would emphasize a practicing attorney's continued obligations to these ethical considerations and expectations.

CLE programs can provide a critical link between the structured environment of law school and the ad hoc, often uneven, environment of practice. While law school offers a broad overview of professional responsibility, CLE allows for more focused and contextual teaching, concentrating on the ethical issues that arise within specific areas of legal practice.³¹² This contextual approach ensures that lawyers can apply their ethical knowledge directly to their practice, making CLE an indispensable tool for ethical competence. This ongoing education helps lawyers avoid the pitfalls of outdated knowledge and reinforces their commitment to ethical practice.³¹³ By ensuring that lawyers continue to engage with their ethical obligations, the profession can help practicing lawyers recommit to the ethical obligations they promised at the beginning of their careers.

3. Rule and Discipline Reforms

³⁰⁹ See Shepard, *supra* note 307, at 324.

³¹⁰ *Free CLE Member Benefit Library*, ABA, <https://www.americanbar.org/cle-marketplace/cle-library/search/> (last visited Aug 22, 2024).

³¹¹ *About MBA CLE*, MASSBAR ASS'N, <https://massbar.org/education> (last visited Aug 22, 2024).

³¹² Proctor, *supra* note 308.

³¹³ Shepard, *supra* note 307, at 317-18.

To address the ethical lapses, it is also important to consider revisions and enhancements to the ABA Model Rules of Professional Conduct (ABA Rules) and the corresponding disciplinary procedures. Disciplining a lawyer for ethical conduct often hinges upon whether the lawyer was acting within their representative role.³¹⁴ There is no real debate that lawyers in representative roles should be disciplined for unlawful and unethical conduct.³¹⁵

However, disciplining lawyers for conduct in a nonrepresentative role raises serious constitutional and political concerns.³¹⁶ In his chapter on disciplining lawyers related to the 2020 presidential election subversion efforts, Dean Perlman explains that the disciplining lawyers for conduct outside of their representative capacity is more limited.³¹⁷ This is true mostly because the rules do not address a lawyer's conduct outside of their professional roles.³¹⁸ Dean Perlman notes two important exceptions: (1) conduct so egregious to question fitness or character to practice and (2) conduct involving dishonesty, fraud, deceit or misrepresentation.³¹⁹

It is the significance of these two exceptions that speaks to the principles embedded in the oath. These two exceptions are precisely where the oath can provide support for the enforcement of these principles outside a lawyer's representative role. Conduct by a lawyer that undermines democratic institutions is unethical, regardless of whether the conduct was within a representative capacity, or not. The following proposed changes aim to reinforce the legal profession's commitment to the democratic principles inherent in the lawyer's oath, emphasizing deterrence over punishment. A careful application of these exceptions can help reinforce the importance of ethical conduct whether acting in representative

³¹⁴ Perlman, *supra* note 73, at 2.

³¹⁵ *Id.* at 3; Luttig, *supra* note 84.

³¹⁶ *See* Perlman, *supra* note 73, at 1, 8.

³¹⁷ *Id.* at 10.

³¹⁸ *Id.*

³¹⁹ *Id.*

capacity or not. Furthermore, simple revisions to the Rules can also capture some conduct of lawyers in non-representative roles.

a. Expanding Rule 8.3: Mandatory Reporting of Misconduct

One area for potential enhancement is Rule 8.3, which currently requires lawyers to report serious professional misconduct by their peers.³²⁰ Broadening this rule to mandate reporting of misconduct that threatens democratic processes, such as attempts to undermine election integrity could prove effective.³²¹ The adoption of a similar rule by the California Supreme Court, which compels attorneys to report any criminal acts or conduct involving fraud or dishonesty, serves as a precedent for this type of expansion.³²² Enhancing Rule 8.3 to reflect the profession's duty to protect democratic principles could serve promote the principles inherent in the lawyer's oath.³²³ Such a revision would underscore the legal profession's role as a guardian of democracy, ensuring that unethical actions related to democratic institutions are reported and addressed.

b. Revising Rule 8.4: Conduct Prejudicial to the Administration of Justice

Another key consideration is revising Rule 8.4, which addresses conduct prejudicial to the administration of justice. Specifically, the rule could be amended to explicitly include actions that undermine democratic institutions, thereby providing clearer grounds for disciplinary action against

³²⁰ MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N. 2024).

³²¹ See Rosen, *supra* note 89.

³²² Balassone, *supra* note 322.

³²³ See Luttig, *supra* note 84, at 15; Rosen, *supra* note 89, at 158.

lawyers involved in activities like election subversion.³²⁴ The complex ethical challenges faced by government lawyers suggests that existing rules may be inadequate for addressing these challenges, further supporting the need for such a revision.³²⁵ By expanding Rule 8.4 to cover conduct that threatens democracy, the legal profession would reaffirm its commitment to safeguarding the institutions that are vital to democracy.

c. Improving the Disciplinary Process

In addition to rule enhancements, improvements to the disciplinary process itself are essential to ensure that unethical conduct is addressed promptly and effectively. These improvements should focus on increasing the efficiency, transparency, and deterrent effect of disciplinary proceedings.³²⁶

The current disciplinary processes are too slow and lenient, which can erode public trust in the justice system.³²⁷ To address this, the ABA should consider implementing reforms that streamline the process, particularly in cases involving significant ethical violations like those related to the 2020 election. A more efficient process would not only ensure timely accountability but also serve as a stronger deterrent against future misconduct. Indeed, a more effective disciplinary process could play a crucial role in preserving the rule of law.³²⁸

Transparency in disciplinary proceedings also is crucial for maintaining public confidence in the legal profession. Consideration should be given to mandating that disciplinary

³²⁴ See Podgers, *supra* note 275. See generally Luttig, *supra* note 84.

³²⁵ Susan Saab Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education*, 69 WASH. U. J.L. & Pol'y 17 (2022).

³²⁶ Podgers, *supra* note 275.

³²⁷ *Id.*

³²⁸ *Id.* See generally Luttig, *supra* note 84.

actions, especially those involving significant ethical violations, be made public whenever possible.³²⁹ Publicizing sanctions could reinforce the profession's commitment to ethical behavior and serve as a powerful deterrent to future misconduct.³³⁰ Moreover, increased transparency in the disciplinary process would help restore public trust in the legal system, particularly in cases where lawyers' actions have had a direct impact on democratic processes.³³¹

To ensure that cases involving election-related misconduct are handled with the necessary expertise and seriousness, the establishment of specialized oversight bodies should be considered. These bodies would focus exclusively on cases that involve attempts to undermine democratic processes, ensuring that such cases receive the attention and resources they warrant.³³² Specialized oversight could improve the consistency and rigor of disciplinary actions in these cases, reinforcing the legal profession's role in protecting the integrity of democratic institutions.

The proposed revisions and enhancements to the ABA Model Rules of Professional Conduct and state disciplinary procedures are some steps toward reinforcing the legal profession's commitment to the democratic ideals enshrined in the lawyer's oath. By expanding reporting obligations, revising existing rules to address democratic integrity, and improving the disciplinary process through increased efficiency, transparency, and specialized oversight, the legal profession can better deter unethical behavior and uphold the values that are fundamental to a functioning democracy.

³²⁹ Goldstein, *supra* note 70, at 769.

³³⁰ Jon J. Lee, *Private Sanction, Public Harm?*, 48 *BYU L. REV.* 1255, 1324-25, 1337-39 (2023).

³³¹ See Luttig, *supra* note 84.

³³² Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 *HOFSTRA L. REV.* 275 (2007); Luttig, *supra* note 84; Fortney, *supra* note 235.

CONCLUSION

The lawyer's oath is not just a relic of tradition. It is a pledge that embodies the core values of a legal profession in a democratic society — honesty, integrity, and a steadfast commitment to the rule of law. As we have seen, this oath has evolved over centuries, reflecting the moral and ethical standards that society expects from its legal practitioners. Yet, the events of recent years, particularly those surrounding the 2020 presidential election, exposed critical weaknesses in how these standards are upheld. Lawyers, who should be the guardians of democratic integrity, have instead, in some cases, become the very instruments of its erosion.

The proposals outlined herein are not a cure-all, but offer a roadmap for a recommitment to the principles inherent in the lawyer's oath. By modernizing the language of the oath, integrating the principles of the lawyer's oath more deeply into legal education, revising the ABA Model Rules of Professional Conduct, and enhancing disciplinary procedures, the legal profession can renew its dedication to democracy. These measures expressly recommend a recommitment to democratic principles as a vital professional obligation.

In conclusion, the lawyer's oath is more than just the words — it is a covenant with a democratic society, a promise that lawyers will uphold the highest ethical standards in the service of justice. In a time when the very fabric of democracy is under strain, the legal profession must look inward, recommit to these values, and ensure that the oath remains a powerful and relevant guide for all who enter the profession. By doing so, the profession reinforces its role as a bulwark of democracy.