

## LAWYERS AND THE LIES THEY TELL

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### TABLE OF CONTENTS

|   |     |
|---|-----|
| Introduction  | 38  |
| I. The First Amendment, Lies, and Lawyers   | 42  |
| A. The First Amendment and Lies in Public   | 43  |
| B. The Free Speech Rights of Lawyers  | 51  |
| II. Lawyers, Rules of Professional Conduct, and Lying                             | 66  |
| A. Lying in the Practice of Law   | 70  |
| B. Lying Outside the Professional Setting   | 79  |
| C. Do Political Lies Fall Through the Cracks?                                     | 84  |
| III. Assessing Lawyers' Political Lies  | 87  |
| A. What Level of Scrutiny Should Be Applied to Lawyers' Political Lies in Public? | 87  |
| B. Government Interests in Regulating Lawyers' Political Lies                     | 90  |
| C. The Problem in Regulating Political Lies                                       | 118 |
| Conclusion  | 123 |

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## INTRODUCTION

There is a whole genre now on the demise of democracy. One of its central concerns is disinformation: How is a democracy to survive if people are unable to discern truth from untruth? What happens if ideologues distort fact so frequently to suit political goals that the whole notion becomes obsolete? It may leave us with a population susceptible to manipulation, hungry for a powerful leader whose truth comports with its desires, immune to discernible fact. More disturbing still, what if a class of experts and professionals leads the way, paving a path for this sort of degradation of truth?<sup>2</sup> We start with the sense, shared by many, that this is a deeply concerning and even existential crisis for democracy. While we hope our analysis will have some implication for this larger debate, this piece addresses a narrower question: What can we and should we do about lawyers who lie about government or politics in public?

Often, our first inclination when we see wrongful behavior is to demand punishment. This is especially so when the perpetrator belongs to our group and seems to have betrayed its ideals. The outrage is understandable. It is natural to want to use the power of regulation or the state to proscribe this behavior and enforce the group norms we so proudly embrace. But sometimes regulation does more damage than good. That is the central theme we address in this Article. If a lawyer lies about politics in public life, should courts sanction the lawyer, strip him of his license to practice law, or otherwise punish his behavior? We do not dispute the reprehensible nature of these sorts of lies, but rather argue that government regulation runs counter to constitutional law and norms and poses an even greater danger than the lies themselves.

The justice system, often described as a truth-seeking process, is one of the central ways in which we uncover facts in a democratic system. It seems natural then that lawyers, as officers of the court, should have a heightened obligation to tell the truth. The Preamble to the Rules of Professional Conduct asserts that lawyers have a “special responsibility for the quality of justice” and “play a vital role in the preservation of society.”<sup>3</sup> But lawyers

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2. Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers*, N.Y. REV. BOOKS (Nov. 18, 1971) (discussing the expert role in the lies surrounding the Vietnam War).

3. MODEL RULES OF PRO. CONDUCT Preamble para. 1, 13 (AM. BAR ASS'N 1983).

are also masters of rhetoric.<sup>4</sup> As advocates and fiduciaries, they regularly spin truth on behalf of clients. Given these dual roles, our instinct that lawyers must always be more honest than others is misguided. Rather than rely on platitudes, this Article seeks to untangle lawyers' role to determine the scope of lawyers' obligation to be honest. Mapping these obligations onto First Amendment law, the Article further seeks to determine when a lawyer can be sanctioned for failing to live up to this expectation.

To address these issues, we pose three hypotheticals concerning lawyers who lie in public about government.<sup>5</sup> At times, we refer to these as "political lies," a term that goes at least as far back as 1710, when Jonathan Swift published a satirical essay on the subject.<sup>6</sup> Of course, lies about government or in public life vary depending on content and context, so we anchor our discussion with these three examples:

1. *Environmental Lie.* A radio talk-show commentator is a former civil rights lawyer who has maintained her license to practice law. While the city council is studying whether to approve the construction of luxury housing at a site that is being used as a sports field, the lawyer-pundit urges her listeners to oppose the project, asserting, "Once they start digging the foundation, the builders will release cancer-causing pollutants that will make thousands of people sick." Later, after the city council approves the project, the lawyer-pundit tells listeners, "It's time to vote the entire city council out of office. It's obviously taking money from real estate developers to do their bidding." She knows both of these public statements are false.

2. *Election Fraud Lie.* A litigator represents an unsuccessful mayoral candidate in a lawsuit challenging the outcome of a close election. The

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4. The Greek word for frankness or truth, *parrhesia*, is defined in part as the opposite of rhetoric. Michel Foucault, *The Meaning and Evolution of the Word Parrhesia, Discourse and Truth: Problematization of Parrhesia - Six Lectures Given by Michel Foucault at the University of California at Berkeley* (Oct.–Nov. 1983), <https://foucault.info/parrhesia/foucault.DT1.wordParrhesia.en/> [<https://perma.cc/4AHD-6CJJ>].

5. Erwin Chemerinsky argues that all speech about judicial proceedings is political speech since courts are a part of the government and therefore such speech deserves the greatest First Amendment protection. Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 861 (1998). Chemerinsky does exempt lies from this analysis, reasoning that knowingly false speech is of no value, but his article pre-dates the decision in *Alvarez*. *Id.*

6. Jonathan Swift, *The Art of Political Lying*, THE EXAMINER (1710). Swift's essay focused on lying by public officials and candidates. We address political lying more broadly, to include lying by private citizens in the public sphere on issues of political concern.

lawsuit alleges that the successful candidate's supporters impersonated people who had not shown up at the polls and forged their signatures to cast additional votes. The litigator knows that the allegation is based on an unreliable poll watcher's statement and is frivolous. Even so, believing that the candidate is entitled to her day in the court of public opinion as well as the court of law, the litigator announces the lawsuit at a press conference where he tells media representatives, "This election was a sham. My client will prove that the other side's supporters stuffed the ballot boxes with votes on behalf of voters who never showed up at the polls." Later, after the trial judge dismisses the lawsuit, the litigator tells his associate, "What do you expect? The trial judge is currying favor with the other party to get a seat on the appellate court." The litigator knows all his public statements are false.

3. *Vault Theft Lie.* A criminal defense lawyer represents the owner of a company that rents safety deposit vaults. For months there has been extensive media coverage of a police investigation into the disappearance of cash and cocaine from vaults rented by the police. The media has reported that all the suspects passed lie detector tests other than the lawyer's client, and that everyone but the client was cleared. The client's business has failed as a result, and the community widely assumes he is guilty. Immediately after the client is indicted, the lawyer holds a press conference, seeking to protect the client from the substantial prejudicial effect of the recent publicity. She tells reporters that her client is innocent, having passed a lie detector test administered by an independent expert; that it was crooked cops who stole the money and drugs; and that prosecutors are abetting a cover-up. The lawyer knows that her public statements are false because, after failing a lie detector test administered by an expert the lawyer hired, the client had admitted to her in confidence that he robbed the vaults.

The second hypothetical, the Election Fraud Lie, is based loosely on what has been called "The Big Lie," the false assertion by former President Trump and his allies that the election was stolen.<sup>7</sup> Lawyers such as Rudolph Giuliani, Sidney Powell, Lin Wood, and Joshua Hawley were among those

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7. See, e.g., Thomas B. Edsall, *Why Millions Think It Is Trump Who Cannot Tell A Lie*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/19/opinion/trump-big-lie.html> [<https://perma.cc/56HM-GC6U>] (discussing Trump's "Big Lie").

who perpetuated this falsehood.<sup>8</sup> The third hypothetical, the Vault Theft Lie, is loosely based on *Gentile v. State Bar of Nevada*,<sup>9</sup> in which the Supreme Court overturned professional sanctions against a criminal defense lawyer who redressed prejudicial media coverage by holding a press conference asserting his client's innocence of theft allegations and blaming law enforcement officers. The *Gentile* Court's calculus did not take account of the lawyer's veracity, but our hypothetical, positing that the lawyer is lying to the media, raises the question of whether the trial lawyer may promote the client's right to an unbiased jury by lying to the public, making false statements like those that a criminal defense lawyer may make to a jury. Could the government punish the lies in the three hypotheticals if they were made by a nonlawyer? If not, does the speaker's bar license change the calculation? Should the courts strip these lawyers of their ability to practice law? Does it matter that the lawyers in the Election Fraud Lie and Vault Theft Lie hypotheticals are representing a client while the lawyer in the first is not?

In the end, this Article explores whether lawyers' free speech rights ought to be different from those of other speakers. The law holds lawyers to a more demanding standard of conduct than others when it comes to aspects of their fiduciary relationships with courts and clients. But how much more demanding can and should the law be when it comes to lawyers' speech—in this case, false political speech? Applying the current First Amendment framework, we question the bar's assumption that lawyers' speech outside of these contexts can be regulated more restrictively than others. We disagree with the premise that lawyers do not deserve the same robust protection for disfavored speech that the First Amendment affords speakers in general. The constitutional case law invites us to identify and scrutinize

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8. For a discussion of the origin and development of the Big Lie, see Jane Mayer, *The Big Money Behind the Big Lie*, THE NEW YORKER (Aug. 2, 2021). Complaints against the lawyers who echoed these lies have been brought before judges and disciplinary authorities. *Opinion: A Legal Reckoning May be Coming for the Lawyers Who Helped Trump Push the Election Lies*, WASH. POST (July 14, 2021), <https://www.washingtonpost.com/opinions/2021/07/14/legal-reckoning-may-be-coming-lawyers-who-helped-trump-push-election-lies/> [<https://perma.cc/86LZ-GY37>]. Many of the complaints concerned frivolous litigation, but Rudolph Giuliani, who represented Trump personally, has had his license temporarily suspended in both New York and Washington, D.C. for perpetuating lies about the election in public, in court, and in front of state legislatures. *In re Giuliani*, 146 N.Y.S.3d 266 (N.Y. App. Div. 2021); District of Columbia Order, July 7, 2021, <https://www.democracymocket.com/wp-content/uploads/sites/45/2021/07/Order-Sua-Sponte-Staying-Appeal.pdf>.

9. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

the bar's regulatory assumptions and rationales, including the idea that all lies reflect a dishonest character that presages future dishonesty in law practice, or that all lawyers' lies diminish public respect for the profession. We argue that the bar's rationales do not hold up well on close examination.

This Article proceeds in three parts. Part I analyzes relevant First Amendment law, asking first whether the speaker could be punished if he were not a lawyer, and then assuming the answer to that question is no, whether his status as lawyer changes the calculation. In Part II, we discuss lawyers' obligations of honesty by dissecting the fairly complex obligations mapped out in the rules of professional conduct and other law. In this part, we analyze what sorts of falsehoods are prohibited by the rules and how courts generally enforce these provisions. Finally, in Part III, we return to our hypothetical lawyers who have told deliberate falsehoods in political discourse with the intent to deceive their public audience. We argue that the First Amendment calls for strict scrutiny of a disciplinary rule subjecting these lawyers to punishment for lying in the public media on subjects of political concern. Although Rule 8.4(c), on its face, might seem to forbid lying by lawyers, whether in or outside professional practice, we conclude as a constitutional matter that the rule cannot sweep so broadly. When lawyers, acting in their private capacity, tell political lies to the public, the rule will often fail to closely serve an important state interest as required to satisfy this standard. The First Amendment may even protect some political lies told on clients' behalf. We think the Vault Theft Lie hypothetical is a good illustration. This is not to say that all political lies are protected. But some are. Consequently, when lawyers tell political lies in public, bar counsel must use its discretion to decide whether to seek sanctions under Rule 8.4(c), and courts must decide whether applying the rule survives constitutional scrutiny—tasks which should provoke concerns about the arbitrary exercise of state power against political speakers.

## I. THE FIRST AMENDMENT, LIES, AND LAWYERS

Before we turn in Part II to the ethics rules that bear on lawyers' false speech about the government, this Part outlines the relevant First Amendment doctrine. There are two questions that bear on whether lawyers can make false statements about the government in public with impunity. First, do lies—that is, knowingly false speech—enjoy First Amendment

protection at all? Second, even if individuals can lie with impunity in some contexts, do lawyers sacrifice that right when they join the bar? This Part will take up each of these questions in turn and then summarize how they bear on the issue at hand.

*A. The First Amendment and Lies in Public*

Not all speech is treated equally. When government seeks to restrict speech, courts examine whether there is a sufficient nexus between the words and a specific, tangible harm.<sup>10</sup> Some lies, such as incitement, defamation, obscenity, fraud, or lies to government officials, cause such concrete harm that courts have long allowed government proscription.<sup>11</sup> The Court has considered, but not decided, whether lies about government, comparable to those involved in our three hypotheticals, are similarly subject to regulation.<sup>12</sup> While the law is unsettled, it is clear that not all lies are subject to government regulation.<sup>13</sup> The difficulty arises at the intersection between speech about government, which is at the very core of the First Amendment, and lies, which are at least sometimes unworthy of protection.<sup>14</sup>

In arriving at its conclusion that libelous statements about public officials can only be proscribed if they are made with a knowing or reckless disregard of the truth, the Court in *New York Times v. Sullivan*, cautioned against designating certain categories of speech as worthless, especially in the context of political debate.<sup>15</sup> It emphasized that political speech often involves exaggeration and even falsehood, and it is necessary to protect such speech in order to provide the requisite “breathing space” for valuable ideas:

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10. See, e.g., *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 798–99 (2011) (explaining that violent video games may be distasteful, disgusting, and offensive but unless there is a proven link between the games and violence, they are nonetheless protected).

11. This list of examples of lies comes from *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

12. See, e.g., *id.*

13. Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1437 (2015) (creating a taxonomy of lies: lies that can be regulated, lies that are protected only to preserve the rights of truth tellers, and lies that must be protected for their own sake).

14. *Gertz v. Welch*, 418 U.S. 323 (1974) (“[T]here is no constitutional value in false statements of fact.”).

15. *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.<sup>16</sup>

Of course, falsehood is different from lies, and the Court in *Sullivan* was protecting the former by insisting that only the latter could be the source of a civil action.<sup>17</sup> But Justice Brennan's reasoning supports the notion that defamation is an exception to the general rule that, in the context of politics and religion and other matters of public concern, lies ought to be tolerated. His opinion for the Court quoted Judge Learned Hand's observation that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."<sup>18</sup> This is especially so where political actors are inclined (perhaps even unconsciously so) to cast their opponents' views as intentional falsehoods.

The Court in *Sullivan* presumed the Sedition Act of 1798, which, among other things, made it a crime to publish anything false about the United States government, was unconstitutional even though it was never tested in the Supreme Court. Citing the famous Virginia Resolution of 1798 as well as subsequent statements by Congress and other prominent scholars and politicians, Justice Brennan asserted that a consensus has grown over time that the Act was unconstitutional.<sup>19</sup> The opinion quoted Madison in explaining that we must leave ample room for criticism of official conduct in part because:

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16. *Id.* at 271 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

17. *Id.* (noting that there is no exception to First Amendment protection for speech that is deemed false).

18. *Id.* at 270 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y.1943)).

19. *Id.* at 274-78.



[T]he Constitution created a form of government under which “The people, not the government, possess the absolute sovereignty.” The structure of government dispersed power in reflection of the people’s distrust of concentrated power, and of power itself at all levels. This form of government was “altogether different” from the British form, under which the Crown was sovereign and the people were subjects.<sup>20</sup>

The Court in *United States v. Alvarez*<sup>21</sup> echoed the centrality of this distrust of government power, holding that the First Amendment protects some lies from government sanction.<sup>22</sup> The justices did not, however, agree on which lies are protected and how much protection they ought to have.<sup>23</sup> Xavier Alvarez had been charged under the Stolen Valor Act for falsely claiming that he had received the Congressional Medal of Honor. The Court struck down the Act, with all justices agreeing that the First Amendment allows the government to proscribe some, but not all, lies. The three opinions, however, set forth different tests for determining which lies must be protected. In his plurality opinion, Justice Kennedy (joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor) concluded that traditionally regulated lies that cause legally cognizable harm, like defamation or perjury, are the exception to the general rule that lies are protected speech.<sup>24</sup>

In an opinion joined by Justice Kagan, Justice Breyer, on the other hand, reasoned that lies about “easily verifiable facts” are of little value if they are not about “philosophy, religion, history, the social sciences, the arts” and

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20. *Id.* at 274 (quoting 4 Elliot’s Debates on the Federal Constitution (1876), p. 569–70). There is a current debate about the extent to which private businesses like Twitter or Facebook have an outsized power over speech. We do not address this discussion, which is extremely important but not directly relevant to our analysis.

21. 567 U.S. 709 (2012).

22. *Id.* at 724.

23. Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1659 (2021).

24. *Alvarez*, 567 U.S. at 717. For a discussion of how moral theory supports the conclusion in *Alvarez*, see SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 79–157 (2014).

other similar topics.<sup>25</sup> Because they are of little value, government efforts to target these sorts of lies must only pass intermediate scrutiny, meaning that the regulation at issue need only substantially further an important government interest. Breyer, like Kennedy, recognized the importance of some lies: “in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger.”<sup>26</sup> Citing the Socratic method, he reasoned that even in scientific or other debate, sometimes intentional lies provoke a conversation that can lead to a greater understanding of the truth.<sup>27</sup>

Justice Breyer also noted the significant concern about abuse and the potential chilling of truthful speech that has preoccupied the Court when it considered the validity of speech restrictions of lies in the past.<sup>28</sup> Given the pervasiveness of false speech, he cautioned, the government could use the power to proscribe falsity as a way of targeting disfavored groups.<sup>29</sup> Justice Breyer also warned that the state could use the power to punish lies to suppress the words spoken by those who hold a different beliefs from the majority or the group in power.

In applying intermediate scrutiny to the Stolen Valor Act, Justice Breyer concluded that the statute was unconstitutional because the potential harm to First Amendment values was too great. He noted that a different conclusion would allow the state to regulate lies in the political context. While the potential damage from these sorts of lies is greater, so too is the

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25. *Alvarez*, 567 U.S. at 731–32. By distinguishing different types of lies and insisting that some lies are valuable, Justice Breyer implicitly rejected an earlier statement by the Court that “there is no constitutional value in false statements of fact.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

26. *Alvarez*, 567 U.S. at 733.

27. *Id.* (stating “even in technical, philosophical, and scientific contexts, where (as Socrates’ methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth”). A number of philosophers have tried to categorize lies. Jeremy Waldron has usefully digested some of the philosophical thinking. Jeremy Waldron, *Damned Lies* (N.Y.U. Sch. of L., Working Paper No. 21-11, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3797216](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797216). Helen Norton has also summarized some of the philosophical thinking on lies. Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 168 n.27 (2012).

28. *Alvarez*, 567 U.S. at 733. Prior to *Alvarez*, the Court stated that the First Amendment protected lies because otherwise, the government will inevitably chill truthful speech. *Gertz*, 418 U.S. at 340–41 (stating that there is “no constitutional value in false statements of fact”).

29. *Alvarez*, 567 U.S. at 734.

potential for abuse. A lie about government can more easily manipulate the public into voting a particular way, for example, but punishing individuals who lie in this context runs a high risk of government bias and may result in censoring and chilling unpopular speakers and their ideas.<sup>30</sup> Breyer may be committed to a balancing approach in most cases, but he acknowledges that “Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like . . . in many contexts have called for strict scrutiny.”<sup>31</sup> He exempts the Stolen Valor Act from this list, but he might well include regulations of lies concerning government and politics in this set of topics requiring strict scrutiny.

In his dissent, Justice Alito, joined by Justice Thomas, concluded that lies have no inherent value and that the government ought to be able to target such speech if it does not simultaneously chill protected speech. Alito would subject lies about issues of public concern like religion and philosophy to strict scrutiny, because it would be perilous to allow the state to serve as the arbiter of truth and falsity in this context.<sup>32</sup> In advocating the less stringent test to evaluate the statute at issue, Alito pointed to the fact that the lies about the medal of honor were about easily verifiable facts and were highly unlikely to be tied to a particular political ideology.<sup>33</sup> Truthful speech, he continued, was unlikely to be able to address the harm in this case since there is no comprehensive database of those who have received medals.

All three opinions in *Alvarez* echo an important and relevant line of reasoning articulated in *Sullivan*. When the government has an incentive to view facts in a particular way, either because official reputation or a political agenda depends on it, there is a significant risk that truthful speech could be targeted. First Amendment doctrine should be reluctant, if not unwilling, to allow government regulation when this is the case.

All three opinions in *Alvarez* also embraced the notion that the First Amendment must protect some lies to preserve constitutional values. Representing five justices, Justices Breyer and Alito both agreed that lies about government, or lies in a political context, are particularly dangerous because they can threaten significant harm. They also warned that regulating such lies similarly poses a significant danger because

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30. *Id.* at 738.

31. *Id.* at 731–32.

32. *Id.* at 753.

33. *Id.* at 740–41.

government actors are likely to be biased in assessing the truth and target political adversaries in enforcing the law or regulation at issue.<sup>34</sup>

One might at first glance think the law can target lies without undermining First Amendment values such as the search for truth, fostering individual self-fulfillment, and promoting democratic self-government, but the Court in *Alvarez* and *Sullivan* makes it clear that we must protect some bad and even corrosive speech to preserve these democratic values. The danger of chilling valuable speech and the distrust of government to apply rules fairly in a charged context is at its worst where political speech is involved.<sup>35</sup> Lies in the public square about government functions fall into this category. Unlike in *Alvarez*, the lies in our hypotheticals are clearly tied to a particular partisan ideology, as was the “Big Lie” about widescale fraud in the 2020 presidential election. Consequently, even Alito in his dissent in *Alvarez* would have exempted it from his general rule that lies do not deserve First Amendment protection.

For these reasons, two federal appellate courts have applied strict scrutiny to strike down regulations directed at political campaign lies.<sup>36</sup> In *Care Comm. v. Arneson*, the Eighth Circuit Court of Appeals invalidated a Minnesota law criminalizing campaign statements made with knowing or reckless disregard of the truth. The court reasoned that regulating political lies is more dangerous than punishing the lies involved in *Alvarez*.<sup>37</sup> As such, the law at issue must be subjected to strict scrutiny even when it targets lies: “The key today, however, is that although *Alvarez* dealt with a regulation proscribing false speech, it did not deal with legislation

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34. *Id.* at 738, 753.

35. Illinois enacted a law proscribing lies after *Alvarez*, but the law is narrow and does not concern political lies. See Michael Levenson, *Illinois Lawmakers Bar Police from Using Deception When Interrogating Minors*, N.Y. TIMES (May 31, 2021), <https://www.nytimes.com/2021/05/31/us/Chicago-police-interrogation.html> [https://perma.cc/JGK9-LLJZ].

36. 281 Care Comm. v. Arneson, 766 F.3d 774, 783–84 (8th Cir. 2014); Anthony List v. Driehaus, 814 F.3d 466, 476 (6th Cir. 2016).

37. When we refer to “political lies” or “election lies” we refer to lies like the one in our Election Fraud Lie hypothetical. As Richard Hasen has argued “false speech about the mechanics of voting,” such as a flier falsely stating that polls are open on Wednesday not Tuesday, might well be subject to regulation without violating the First Amendment. See Rebecca Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. 1445, 1483–86 (2019); Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 ST. LOUIS U. L.J. 535, 548 (2020).

regulating false *political* speech.”<sup>38</sup> The Sixth Circuit used similar reasoning to invalidate an Ohio campaign law against false statements.<sup>39</sup>

One key issue in evaluating the different opinions in *Alvarez* is how to determine which lies deserve the most stringent First Amendment protection. The Court in *United States v. Stevens* rejected a simple cost-benefit analysis in which a court would compare the harm from the speech with the injury that might arise from banning it. Instead, the Court has sought to identify a historical tradition of banning speech before relegating it to the worthless category.<sup>40</sup> Professor Helen Norton argues that courts should focus both on concrete harm created by the lie and the potential for government bias in enforcing the law.<sup>41</sup> She reasons that lies with a vague, intangible, or difficult to prove harm run a greater risk of government bias or selective enforcement than those resulting in concrete damage like a harm to material or reputational interest. Similarly, if the harm is vague or intangible, it is speculative to assume that banning it will have a salutary effect that outweighs the cost.

Under Justice Kennedy’s analysis, lies such as the election lies that we outlined in our hypotheticals would likely be protected speech if they were spoken by a nonlawyer because they do not involve legally cognizable or even concrete harms, and thus any regulation or proscription would have to pass strict scrutiny, an almost impossible hurdle. According to Justice Breyer’s analysis, however, the election lies might be subject to regulation because they involved easily verifiable facts and they did not concern “history, religion, or philosophy.” Given Justice Breyer’s broader concerns, however, he would likely include this kind of political lie in his list of exempted topics. If he did not, laws addressing these sorts of lies would certainly fare worse in his balancing test than the Stolen Valor Act because

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38. *Arneson*, 766 F.3d at 783–84 (explaining that the concurring justices applied intermediate scrutiny only because the false speech at issue in *Alvarez* did not concern political speech).

39. *Driehaus*, 814 F.3d at 476.

40. *United States v. Stevens*, 559 U.S. 460, 469–70 (2010). The Court has refused to recognize any additional areas of worthless speech. In *Stevens*, the Court invalidated a law prohibiting depictions of animal cruelty, in part on the ground that this is not an area of speech that had traditionally been regulated. *Id.* Two years later, in *Brown v. Ent. Merchs. Ass’n*, the Court once again refused to carve out a particular area of worthless speech and invalidated a law regulating the sale of violent video games, reasoning that any law that targets the content of speech must pass strict scrutiny unless it has historically been subject to regulation. By resorting to history, the Court can hope to overcome its own inevitable bias in determining which speech is relatively worthless. For a discussion of this principle of First Amendment jurisprudence, see Norton, *supra* note 27, at 176.

41. Norton, *supra* note 27, at 185–200.

the danger of government bias, and therefore the risk of targeting truthful speech, would be higher.

If the Court were to engage in a historical analysis as the *Stevens* Court insists, the lies about the election would likely be afforded full protection. The only example of a similar prohibition is the Sedition Act, which is from the distant past and is widely vilified. Drawing on Norton's theory of the degree of tangible harm caused by the lie, one might argue that these lies cause harm not only to listeners but also to the political system itself. But this damage is vague and intangible, which, as she suggests, invites a subjective analysis that can readily be abused and should lead courts to ask whether banning the lies will address the harm without doing greater damage to democracy.<sup>42</sup>

The reasoning in all three opinions in *Alvarez*, the historical analysis, as well as Norton's focus on the nature of the harm all lead to the conclusion that most of the 2020 election lies told by nonlawyers were protected speech. This is not to say that they were not damaging, but rather that means other than government sanction ought to be used to address the harm. One other factor points in this direction. First Amendment scholars have warned that government regulation can backfire.<sup>43</sup> By targeting speech that such a large group of citizens believe, government can inadvertently cause the speech to migrate to darker, unmoderated places where it can become more insidious. This is a particularly relevant concern with the election lies. Banning the lie may not reduce the ranks of its proponents, but rather embolden them. This concern relates to the point raised by Justice Breyer in his opinion in *Alvarez*: allowing false speech might be the best of all the imperfect ways to promote true speech in the face of disinformation.<sup>44</sup>

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42. Norton, *supra* note 27, at 185–200.

43. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 38–39 (1996) (discussing the backlash after the post-World War I assault on freedom of speech); W. Bradley Wendel, *The Banality of Evil and the First Amendment*, 102 MICH. L. REV. 1404, 1418–19 (2004) (discussing the potential backlash when a particular popular albeit harmful or false belief is banned).

44. *United States v. Alvarez*, 567 U.S. 709, 731–32 (2012).

*B. The Free Speech Rights of Lawyers*

Lawyers do not relinquish their First Amendment rights when they obtain a law license, and the First Amendment limits the regulation of lawyers' speech even when they are engaged in law practice. Lawyers can nonetheless be subject to speech restrictions to which the general public would not, such as evidentiary and ethics rules that restrict what they can say in court.<sup>45</sup> Assuming political lies cannot generally be restricted, as we argued in Section A, the question remains whether political lies, such as those in our hypotheticals, may be restricted because the speaker is a lawyer.

The answer to this question rests in part on the function the lawyer is serving at the time he speaks. Is the lawyer acting as an agent of the state, whose speech rights must be constrained to ensure a proper government function; is he challenging government authority or conventional wisdom for clients; or is he acting on his own behalf?<sup>46</sup> There is no separate category of professional speech that is, by its nature, subject to regulation, but states can regulate lawyers' conduct when necessary to ensure the proper functioning of the judicial process even if the regulation directly or incidentally interferes with speech.<sup>47</sup> As Robert Post argues, expert communities may need to regulate speech in the context of practice to produce specialized knowledge, but if an expert chooses to engage in political discourse, his speech is fully protected.<sup>48</sup> In the context of the courtroom, this certainly applies to lawyers as well. The administration of justice relies in part on the profession to promote its ends. Truth-telling is key to this endeavor. The question we address in this section is when and whether a lawyer's words outside the courtroom, and particularly a lawyer's political remarks in the public sphere, are part of the expert discourse that must, of necessity, produce its own speech rules as opposed to when they comprise "a site where democratic opinion is forged," for which free speech

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45. *E.g.*, MODEL RULES OF PRO. CONDUCT r. 3.3, 3.4(b), 3.5 (AM. BAR ASS'N 1983).

46. Robert W. Gordon, *Independence of Lawyers*, 68 BOSTON L. REV. 1, 9–30 (1988) (delineating the different roles lawyers play and the importance of their purpose in challenging state power and their related role in remaining independent of clientele so as to function within the confines of the law).

47. *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2365 (2018) ("[T]his Court has never recognized 'professional speech' as a separate category of speech subject to different rules.").

48. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 43, 43–44 (2012).

is critical.<sup>49</sup> Is the attorney engaged in speech as a private citizen on behalf of himself or another or is he serving as a professional who must uphold the system of justice? The best way to answer this question is by assessing whether the lawyer's speech would undermine the system of justice.<sup>50</sup>

Scholars have proposed different theories to explain the regulation of lawyers' speech. For instance, Margaret Tarkington suggests that we view lawyers' speech as worthy of protection if it furthers their role in ensuring access to justice or the fair administration of the laws,<sup>51</sup> and Claudia Haupt offers the notion of professions as "knowledge communities" as a way to assess speech regulations.<sup>52</sup> Others have suggested a functional approach that does not treat lawyers as categorically distinct from other speakers, but rather relies on existing caselaw to assess the nature and content of the speech along with the government interest.<sup>53</sup> We include ourselves in this latter category. In determining whether lawyers' free speech rights should be limited, courts should and do analyze whether the lawyer, acting on his own or as a fiduciary, is challenging the state or functioning as its minister,

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49. *Id.*

50. *Sweezy v. New Hampshire*, 354 U.S. 234, 250–51 (1957) (concluding that Sweezy, a professor, was engaged in core political speech because his words did not affect his work at the university).

51. Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 35 (2011); Margaret Tarkington, *The Role of Attorney Speech and Advocacy in the Subversion and Protection of Constitutional Governance*, 69 WASH. U. J.L. & POL'Y 287 (2022).

52. Claudia E. Haupt argues that lawyers should be seen as part of a "knowledge community" and the contours of their First Amendment rights ought to be defined by that concept. Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1248–54 (2016).

53. There are essentially two types of arguments about lawyers' speech. Some scholars treat lawyers' speech as analogous to the speech of others. They analyze limits on the speech by looking at the function of the speech and drawing on caselaw addressing speech in similar circumstances. *See, e.g.*, Kathleen M. Sullivan, *The Intersection of Free Speech Rights and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 584–88 (1998) (suggesting that lawyers' First Amendment rights are similar to that of other public employees, who at times act in a public capacity and at others as private employees ensuring a government function); W. Bradley Wendel, *Free Speech of Lawyers*, 28 HASTINGS CONST. L. Q. 305, 305–14 (2001) (arguing that lawyers' free speech rights depend on what function they are serving at the time and must be assessed by analogizing to similar First Amendment cases); Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 49 EMORY L.J. 859, 861–62 (1998) (arguing that lawyers' speech is not categorically different from others and most regulation of that speech ought to be subject to strict scrutiny); Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers*, 66 FL. L. REV. 961, 967 (2014) (arguing that we should ask whether the lawyer is acting as an insider or an outsider in determining whether to allow restrictions on speech). We count ourselves among these scholars in that we too believe that a lawyer's speech is not categorically different from that of other speakers and must be assessed in context.



and whether he is speaking as a lawyer as part of a representation or a private citizen. These questions help inform the central issue when regulating lawyers' speech: whether the speech restriction is necessary to ensure the integrity of the judicial process, prevent the obstruction of justice, or protect clients and other parties from specific harm that itself will interfere with the administration of justice.<sup>54</sup>

Courts and commentators often reflexively frame First Amendment rights of lawyers as categorically different from those of lay people.<sup>55</sup> In exchange for the privilege of practicing law, these critics reason that attorneys must sacrifice their right to free speech. Put another way, the government has a right to regulate lawyers' speech because they are officers of the court.<sup>56</sup> While this concept lurks around the edges of the analysis, it is misleading. It does not help explain the scope of permissible restrictions on lawyers' speech and it casts the profession as an arm of the state, ignoring the profession's role as watchdog. If one looks beyond this rhetoric, most courts allow restrictions on lawyers' speech only when necessary to further a fundamental government interest related to the practice of law.<sup>57</sup> Regulating a lawyer's speech must promote a specific government interest related to the function that lawyers serve.

The government cannot require a lawyer to sacrifice the right to free speech in exchange for the right to practice law, in part because the government is not allowed to impose "unconstitutional conditions" on a government benefit.<sup>58</sup> In other words, the state cannot require an individual

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54. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074–75 (1991).

55. *In re Giuliani*, 146 N.Y.S.3d 266, 268, 272, 274 (N.Y. App. Div. 2021). Renee Knake Jefferson, *Don't Just Let Lawyers Lie: Giuliani, Powell, and Others Should Be Disbarred for Good*, N.Y. DAILY NEWS (Dec. 7, 2021), <https://www.nydailynews.com/opinion/ny-oped-dont-let-lawyers-lie-20211207-jphgzst545gahjct4ebdszf7w4-story.html>.

56. Justice Holmes famously quipped, "a policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892). But the Court no longer adheres to this reasoning. *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting). It has abandoned this approach in favor of barring what it terms "unconstitutional conditions" on government benefits, an area of First Amendment law that is notoriously murky. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). This area of law is notoriously difficult, and our explanation is no doubt oversimplified. As Kathleen Sullivan put it, the doctrine is a "minefield to be traversed gingerly." *Id.* at 1415.

57. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

58. Sullivan, *supra* note 53; *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (holding that an individual cannot be forced to speak about his political associations as a condition of becoming a member of the bar). We can, however, distill this basic distinction between the permissible restriction of words spoken as a part of the practice of law and impermissible restriction on those that are unrelated.

to relinquish a constitutional right to obtain a government benefit, like a license to practice law. If, on the other hand, the speech at issue is unique to the privilege bestowed by the state—here, the practice of law—the rule of unconstitutional conditions does not bar regulation. This caveat justifies most restrictions of lawyer speech. For example, a lawyer has no independent right to speak in the courtroom, so the government can restrict speech during witness questioning or closing argument without running afoul of the doctrine of unconstitutional conditions. The doctrine is relevant, however, if courts apply the rules to speech that is outside of the lawyers' practice, as in *Election Fraud Lie* hypothetical, when the speech is made during a legal representation but does not pertain to any ongoing proceeding or judicial matter.

Of course, First Amendment rights of lawyers vary depending on context because the nature of the professional role itself shifts. While acting on behalf of clients in the courtroom, lawyers behave, for the most part, like government agents responsible for the proper functioning of the judicial system and can be subject to greater regulation than most.<sup>59</sup> But lawyers also engage in classic political speech, challenging state power on behalf of clients and in their own personal capacity, and in this regard are entitled to the same robust protection as private citizens.

#### 1. Speech Tied to the Lawyer's Professional Representation or to Judicial Proceedings

In order to prevent concrete harm to individuals and institutions, rules of professional conduct and evidentiary rules can limit what lawyers may say in the context of a professional representation or an ongoing judicial proceeding. For example, rules governing lawyers' communications with clients in the course of a representation arise out of lawyers' fiduciary role and give expression to their fiduciary obligations to promote their clients' interests and avoid harming clients.<sup>60</sup> Likewise, existing rules regulating lawyers' communications with nonclients in the course of a legal

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59. *Connick v. Myers*, 461 U.S. 138 (1983) (holding that speech of public employees is only protected when they speak on matters of public concern).

60. *E.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2(c), 1.4, 1.6, 1.7 (AM. BAR ASS'N 1983).

representation can be justified by the interest in protecting nonclients from overreaching.<sup>61</sup>

Similarly, lawyers' speech in court and in the context of litigation can be regulated to protect the integrity of judicial proceedings.<sup>62</sup> No one seriously argues, for instance, that a rule barring hearsay interferes with a witness's freedom of speech. Nor would anyone suggest that rules preventing a lawyer from making frivolous arguments in courtroom advocacy or in motion papers violate the First Amendment. These are easy cases because the government interest in the orderly and effective administration of justice in judicial proceedings is clear and restrictions on attorney expression no doubt further that goal.

Even inside the court, however, the government does not have absolute power to dictate the content of lawyer speech, because sometimes the speech facilitates rather than frustrates the lawyer's role. In *Legal Services Corporation v. Velazquez*, the Court invalidated a condition on government funding for indigent defense that denied funds to any organization that challenged or sought to modify welfare law.<sup>63</sup> Writing for the majority, Justice Kennedy designated lawyers' advocacy on behalf of clients as "private speech."<sup>64</sup> While courts rely on lawyers to properly carry out their function, Kennedy emphasized that "an informed independent judiciary presumes an informed independent bar."<sup>65</sup> By regulating lawyers' speech in this context, Congress undermined the bar's role as independent advocate.<sup>66</sup> Even inside the courtroom, lawyers' speech may be restricted only in a way that furthers, rather than undermines, the administration of justice. Allowing lawyers to zealously represent and articulate client interests, even when those interests conflict with that of the state, is critical to that purpose.

Another set of cases interpreting lawyers' First Amendment rights both within and outside of court concerns lawyers' public comments about judges and judicial conduct. We discuss these cases more fully below, but for the purposes of this section, they provide an example of how carefully

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61. *E.g.*, *id.* r. 1.13(f), 4.2, 4.3.

62. *See* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) ("It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever 'free speech' rights an attorney has is extremely circumscribed.").

63. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 536–37 (2001).

64. *Id.* at 544.

65. *Id.* at 545.

66. *Id.* at 544.

courts scrutinize speech restrictions even in the context of lawyers' advocacy. The Court in *New York Times v. Sullivan*<sup>67</sup> protected the rights of the press and private citizens to criticize government officials by insulating certain false statements about public figures from liability. The Court held that a public figure must show that a party acted with actual malice to make out a claim that he was defamed.<sup>68</sup> In effect, a public official can successfully sue for defamation only if he can show that the speaker knew or recklessly disregarded the fact that statements were false.

Notwithstanding the significant interest in promoting public confidence in the judiciary, courts apply a similar standard to the regulation of lawyers' criticism of judges and courts. The professional conduct rule proscribing lawyers' attacks on judges' integrity requires a showing that the attacks are knowingly and recklessly false.<sup>69</sup> As we explain below, the rule applies to lawyers' statements outside the context of a legal representation as well as in the context of lawyers' advocacy, where regulators most often enforce the rule (and where lawyers are most often tempted to violate it).<sup>70</sup> But in either case, the rule has a limited reach in light of the need for a compelling interest to justify restrictions on lawyers' speech. It applies only to a narrow range of lawyers' attacks on judges and only to those that are knowingly or recklessly unfounded, which reflects the importance of a strong connection between restrictions on speech and a compelling judicial interest such as the interest in preserving the integrity of adjudication.<sup>71</sup>

## 2. Law Licenses and Free Speech

When a lawyer speaks outside of a representation or an adjudication, the regulation of speech becomes more questionable because it is not as

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67. 376 U.S. 254 (1964).

68. *Id.* at 279–81.

69. See *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995); *State ex rel. Okla. Bar Ass'n v. Porter*, 766 P.2d 958 (Okla. 1988); MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS'N 1983).

70. See, e.g., *United States v. Nolen*, 473 F.3d 362 (5th Cir. 2005).

71. See, e.g., *In re Green*, 11 P.3d 1078, 1083–87 (Colo. 2000); *In re Westfall*, 808 S.W.2d 829 (Mo. 1991). Compare Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 584–87 (1998) (explaining that lawyer speech in the courtroom can be constrained), with Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 53 *B.C. L. REV.* 363 (2010) (arguing that lawyers ought to have a free speech right to criticize judges).

clearly linked to the lawyer's core government function—facilitating the administration of justice. The bar and state courts police admission to the bar and have at times sought to exclude applicants based on their speech. While the administration of justice in a particular case is not at issue, the goal is to prevent those who are not suited to the job from acquiring the right to practice.

During and after the McCarthy era, courts considered whether states could withhold licenses to practice law because an individual associated with a subversive organization. In some of these cases, lawyers were denied licenses simply because they declined to answer whether or not they belonged to such an entity.<sup>72</sup> In upholding the character and fitness inquiry, the Supreme Court endorsed the notion that only some people have the character necessary to practice law and the bar plays a role in weeding out those who do not.<sup>73</sup> To balance this legitimate interest with the First Amendment rights of applicants, the Court required that the state bar consider only those attributes that directly bear on the applicant's suitability to practice.<sup>74</sup> While insisting that state courts could not deny licenses based on political beliefs, for instance, the Supreme Court allowed state bars to require applicants to attest that they do not advocate the violent or unlawful overthrow of the government or belong to an organization advocating this.<sup>75</sup>

The Court refused to allow states to penalize an applicant based on her beliefs alone but permitted inquiries into such tenets insofar as necessary to determine whether the individual personally advocated violence or unlawful conduct.<sup>76</sup> Beliefs that betrayed such a mindset would disqualify an applicant from practice presumably because she could not uphold the law. The difficulty, however, lies in distinguishing this incapacity to perform a basic function of the profession from a strong desire to change the law through advocacy. Restrictions based on the former have the requisite

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72. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 253–55 (1957); *Baird v. State Bar of Ariz.*, 401 U.S. 1, 708 (1971).

73. Scholars have criticized the notion that such an inquiry can be fruitful. *See infra* note 232 and accompanying text (citing Levin and Rhode).

74. *Konigsberg*, 353 U.S. at 40–43.

75. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 166 (1971).

76. *Konigsberg*, 353 U.S. at 40–43.

connection to a valid government interest in preserving the role of the legal profession, while those based on the latter do not.<sup>77</sup>

One of the lessons of the McCarthy era is that challenges to unjust laws or government practices can easily be interpreted as a violation of a lawyer's duty as an officer of the court to respect the law. Civil rights and feminist lawyers who challenged the validity of laws, were, after all, viewed as subversive in the middle of the last century.<sup>78</sup> If courts had the power to exclude such lawyers for undermining the rule of law, we might well be living in a very different country, or at least a country with a different history of civil rights activism. Part of the legacy of the legal profession in America is a mechanism to give voice to outsiders and dissenters. Vague government interests like preserving the rule of law or the reputation of the profession do not suffice to justify limitations on lawyers' political speech precisely because they leave room for targeting unpopular groups agitating for change. Limitations on lawyers' First Amendment rights have been confined to those necessary to protect clients and ensure the proper functioning of the courts.

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77. The Illinois state bar refused to admit an applicant, Matthew Hale, who was an avowed white supremacist. The hearing panel justified its decision not by suggesting that he ought to be excluded because of his views on race or his likelihood to commit violence or break other laws, but rather because he would be incapable of abiding by an Illinois disciplinary rule barring racial bias and discrimination. W. Bradley Wendel, *supra* note 53, at 314–22. This somewhat circular reasoning ignores the fact that the anti-bias rule itself only defines the proper practice of law if it too can withstand a First Amendment challenge. Recently, state bar rules barring bias and discrimination related to the practice of law have proliferated, as have challenges to their constitutionality. *See Greenberg v. Haggarty*, 491 F. Supp. 3d 12, 26–33 (2020) (striking down Pennsylvania's version of Rule 8.4(g)); *In re Abrams*, 488 P.3d 1043, 1050–54 (Co. 2021) (upholding Colorado's version of the rule).

78. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965) (a case brought by civil rights lawyer William Kunstler among others against the governor of Louisiana and the House Un-American Activities Committee, alleging that the defendants were using laws to persecute civil rights groups and their lawyers by labeling them subversive). For a portrait of former Supreme Court Justice Ruth Bader Ginsburg's career and how she was viewed as radical at the time, see ON THE BASIS OF SEX (Focus Features 2018).

### 3. Speech on Matters of Public Concern Unrelated to a Representation or Proceeding

Lawyers' speech outside the courtroom is less likely to be subject to regulation because it is less likely to be linked to a proper functioning of the legal system. But courts can regulate extra-judicial speech if it interferes with the administration of justice or undermines the fiduciary relationship with a client or other obligations to third parties in an ongoing legal matter.

This principle was reaffirmed in a recent case in which the Virginia Supreme Court reviewed sanctions issued against a lawyer, Horace Hunter, for a blog he wrote on his firm's website.<sup>79</sup> The Virginia State Bar found that his statements violated a rule against disclosing information about a representation that would be embarrassing or detrimental to the client. In reviewing the decision, the court concluded that attorney speech about public information can be regulated only if there is a substantial likelihood that it will prejudice an ongoing proceeding.<sup>80</sup> Because the public information at issue in Hunter's blog concerned cases that had concluded before he published his comments, it was unconstitutional to apply the rule to him: "[A] lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom."<sup>81</sup>

The key distinction is whether the speech is being made as part of a professional service where restrictions are permitted or to communicate a matter of public concern when they are not. For instance, a dentist can be sued for malpractice or disciplined for telling a patient that certain professionally accepted dental treatments are unsafe, but if the dentist makes the same controversial argument about the dental treatment in a public forum his speech would be protected.<sup>82</sup> Dentists, like lawyers, are

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79. Hunter v. Va. State Bar, 285 Va. 485 (2013).

80. *Id.* at 503–04. The court went on to conclude that Hunter's speech was commercial speech because its primary purpose was advertising and so it was subject to a lower level of scrutiny and could be regulated as potentially misleading statements. *Id.* at 504.

81. *Id.* at 504.

82. POST, *supra* note 48, at 12 (citing Bailey v. Huggins Diagnostic & Rehabilitation Ctr., Inc., 952 P.2d 768, 772 (Colo. App. 1997) ("The expression of opinions upon matters of public concern is the core value protected by the First Amendment. To subject authors of such opinions to the risk of multiple claims for personal injuries, at least in those instances, as here, in which the opinions do not address or impugn any specific individual, based solely upon the majoritarian view that the opinion is 'false,' would impose an intolerable burden upon the author of such opinions. And, the imposition of such a burden would have a ruinous and unjustifiable chilling effect upon free speech.")).

allowed to argue in public that the accepted professional view is wrong. This is desirable because otherwise a professional consensus that was popular but incorrect might become calcified.

There are a whole host of rules that limit attorney speech outside the courtroom, such as Rule 4.2, which bans a lawyer from knowingly communicating about a matter with a person who is represented by counsel.<sup>83</sup> This rule is constitutional even insofar as it reaches attorney speech presumably because the “overreach” involved in such contact would undermine “the proper functioning of the legal system.”<sup>84</sup> The same would be true of the rule governing contact with unrepresented parties<sup>85</sup> and rules regarding trial publicity.<sup>86</sup> Professional conduct rules requiring competence and communication with a client similarly affect an attorney’s speech outside the courtroom, but they are justified limitations because they are narrowly tailored to ensure that the lawyer is abiding by his fiduciary obligation to a client.<sup>87</sup>

Restrictions that limit an attorney’s speech outside a courtroom but have no clear effect on a pending proceeding or on the fiduciary relationship, on the other hand, likely violate the First Amendment. This is especially true if the restrictions limit core political speech, or as Post would put it, speech that contributes to public discourse or the formation of public opinion.<sup>88</sup>

As both Kathleen Sullivan and Brad Wendel explain, lawyers, while not quite public employees, share certain qualities with them.<sup>89</sup> While lawyers represent private parties and at times challenge the state, they are also required to do so within the bounds of the law and function within a public system of justice. In this latter role, their work is analogous to that of public employees. A public employee’s work cannot be conditioned on sacrificing speech rights unless the speech will disrupt or impair the efficiency of a government function.<sup>90</sup> Relatedly, the forum in which the employee’s speech occurs can bear on the First Amendment analysis. If the forum is public, then it is less likely that the speech will impair the government

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83. See MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS’N 1983).

84. *Id.* r. 4.2 cmt. 1.

85. *Id.* r. 4.3.

86. *Id.* r. 3.6.

87. *Id.* r. 1.3, 1.1, 1.4.

88. POST, *supra* note 48, at 43–44.

89. Sullivan, *supra* note 53, at 587; Wendel, *supra* note 53, at 381.

90. Sullivan, *supra* note 53, at 586.



function. If it is a non-public forum, like a courtroom, it is more likely that the government will need to impose speech restrictions to ensure that the function is properly preserved, and the government may do so as long as the speech restrictions do not discriminate based on viewpoint.<sup>91</sup> This is one reason why lawyers are subject to greater restrictions in courtrooms than outside of them. It is far more likely their speech in the courtroom is necessary for a government function, like that of many other government employees.

When lawyers speak outside the courtroom, one key question is whether they are acting more like government employees or private critics. In *In re Sawyer*, an attorney was suspended from practice for giving a speech criticizing the prosecution of her clients for violation of the Smith Act, which made it a crime to advocate overthrowing the government.<sup>92</sup> Specifically, the attorney publicly claimed that her clients were being prosecuted for reading books like the *Communist Manifesto*. According to the lawyer, they were targeted for their thoughts and beliefs, with the government using this prosecution as a pretext to dismantle labor unions.<sup>93</sup> Justice Brennan, writing for a plurality of the Court, explained, “We start with the proposition that lawyers are free to criticize the state of the law.”<sup>94</sup> He also noted that lawyers can criticize the prosecution and the investigation of a client. They can suggest the judge is wrong, even egregiously so, but cannot impugn the integrity of the court in a way that interferes with its function. The plurality concluded that the facts did not support the conclusion that the lawyer had done the latter, but rather showed that she had merely criticized the state of the law and the prosecution of the case.<sup>95</sup>

The Court in *Sawyer* considered the fact that the lawyer made these scathing remarks while the case was still pending. It would be, one might argue, impermissible to “litigate by day and castigate by night.”<sup>96</sup> In rejecting this argument, the plurality acknowledged that there is a danger that the lawyer’s speech might obstruct justice if it occurs before the prosecution is complete, but noted that in *Sawyer*’s case, obstruction was not at issue. The grounds for sanction were impugning the judge’s integrity,

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91. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

92. *In re Sawyer*, 360 U.S. 622, 623–26 (1959); 18 U.S.C. § 2385.

93. *Id.* at 627–29.

94. *Id.* at 631.

95. *Id.*

96. *Id.*

not interfering with the administration of justice.<sup>97</sup> Part of this analysis depends on the forum in which the speech was made. The speech was not made inside the courtroom where the presumption may be that it would affect the trial but rather in a public setting. Even if the words were uttered during the course of a trial, the court's contempt power would be limited to targeting speech that poses a direct danger to the proceedings.<sup>98</sup> The public has an interest not only in the orderly process of judicial proceedings, but also in the lawyer's special role in policing those proceedings and ensuring they are fair. None of these were at issue in *Sawyer* because the speech occurred outside the courtroom, and no one argued that they interfered in any way with the proceedings.

In upholding the trial publicity rule limiting speech outside the courtroom that has a substantial likelihood of prejudicing the proceedings, the Supreme Court warned that such rules must be drafted narrowly to preserve First Amendment rights.<sup>99</sup> In *Gentile v. State Bar of Nevada*, Gentile made a speech after his client was indicted, criticizing the government for scapegoating an innocent man, blaming the police, and criticizing government witnesses.<sup>100</sup> Six months later, a jury acquitted the client of all charges and the State Bar issued a private reprimand against Gentile for violating a state rule that barred speech the lawyer knows or reasonably should know "will have a substantial likelihood of materially prejudicing a proceeding."<sup>101</sup> In a split decision, the Court upheld the rule, explaining that it was necessary to promote the interest in fair criminal trials.<sup>102</sup>

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97. *Id.* at 635–36.

98. *United States v. Neal*, 101 F.3d 993, 997–98 (4th Cir. 1996) (holding that a court cannot directly find someone in contempt when the conduct occurs outside the judge's presence or does not directly interfere with the proceeding).

99. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1031 (1991). Erwin Chemerinsky argues that lawyers' speech regarding pending cases must be protected because it is core political speech. Chemerinsky, *supra* note 5, at 861.

100. *Gentile*, 501 U.S. at 1034.

101. The Nevada rule was the same as Model Rule of Professional Conduct 3.6. Chemerinsky has criticized this case, arguing that the proper standard should be strict scrutiny, assessing whether the restriction is necessary to preserve the integrity of the proceedings. Chemerinsky, *supra* note 5, at 862–67.

102. *Gentile*, 501 U.S. at 1048–50. The Court in *Gentile* rejected the standard used for press commentary, which required a clear and present danger of harm to the judicial proceeding. The Court held that the rule was not an unconstitutional prior restraint on speech and that it was not invalid because

The opinion was delivered in two parts. Justice Kennedy issued the part of the opinion holding that the safe harbor in the state professional responsibility rule that allowed lawyers to put forward a defense was void for vagueness.<sup>103</sup> Justice Rehnquist's opinion rejected a broader facial challenge to the rule and commanded a majority in holding that the state can regulate speech in pending cases as long as there is a substantial likelihood that it will prejudice the proceeding.<sup>104</sup>

Writing for a minority, Justice Kennedy argued there was insufficient proof that Gentile's words affected the trial, Justice Kennedy cautioned that Gentile's speech, which was critical of state power, lies at the "very center of the First Amendment."<sup>105</sup> While noting that the administration of justice is a key government function, Justice Kennedy emphasized that public vigilance over that function is equally important and such oversight is even more critical when it involves allegations of public corruption.<sup>106</sup> Elevating the lawyer's role as fiduciary and watchdog along with the role as an officer of the court, Kennedy insisted that lawyers play a critical part in policing the state given their expertise and proximity to the process.<sup>107</sup>

Justice Kennedy also rejected the possibility that a lawyer's speech ought to be subject to greater regulation because the public tends to credit it, concluding that "The First Amendment does not permit suppression of speech because of its power to command assent."<sup>108</sup> Kennedy was skeptical that lawyers are given greater credit because of their access to confidential information, noting that Gentile rested his assertions on publicly available information. He added the mere fact that a lawyer agreed to abide by a broadly worded ethical rule does not itself end the inquiry. Those rules, he

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it was too vague to give lawyers sufficient notice of what speech was permitted at a press conference. We are not alone in critiquing the Court for failing to sufficiently protect the First Amendment rights of lawyers in *Gentile*. There is no evidence, for instance, that the out of court statements by attorneys do, in fact, prejudice jurors. Erwin Chemerinsky, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303, 1316, n.33 (1996).

103. *Gentile*, 501 U.S. at 1033, 1033–34.

104. *Id.* at 1062, 1077. It invalidated the application of the rule to *Gentile*, because a safe harbor allowing lawyers to state the defense was void for vagueness.

105. *Id.* at 1034.

106. *Id.* at 1035. Justice Kennedy noted that Model Rule 3.6 likely integrated the standard usually applied to prior restraints on core political speech, allowing limitations only when there was a "clear and present danger," or in this instance an imminent threat to the integrity of ongoing judicial proceedings. *Id.* at 1035–37.

107. *Id.* at 1057–58.

108. *Id.* at 1056.

explained, must be applied in a manner consistent with the First Amendment.<sup>109</sup>

In his opinion, Justice Rehnquist refused to adopt the petitioner's suggested requirement that a lawyer's words must pose a clear and present danger to the integrity of a proceeding to warrant discipline.<sup>110</sup> Instead, his opinion upheld Nevada's less stringent requirement that the speech could be punished if it was substantially likely to prejudice the proceeding. In favoring this less rigorous test, however, he too focused on the necessary connection between the lawyer's public speech and the proceeding at issue.<sup>111</sup> First, the lawyer must be participating in a pending case, and second, the speech must be substantially likely to negatively affect that case.<sup>112</sup>

It hardly seems a coincidence that many of the cases involving disbarment for extra-judicial speech involved lawyers who represented controversial defendants, particularly those charged with violating the Smith Act. In *In re Sacher*, the attorney was targeted for making arguments despite warnings and orders from the court and making "insolent, sarcastic, impertinent, and disrespectful remarks" during the court proceedings.<sup>113</sup> Sacher insisted that disbarment was inappropriate because his conduct was unlikely to recur, as it was unique to this high-profile case in which he represented unpopular clients who were the subject of a hostile political campaign. The court rejected this argument, concluding that attorney discipline was not a punishment but rather a means to preserve the integrity of the proceedings and that Sacher's repeated intransigence proved he lacked the proper character to practice law.

While the Court has not coalesced around a standard, in upholding speech restrictions for lawyers, all justices seek to require some connection between the attorney speech and a judicial function. The speech must be likely to harm a client or other party, undermine the right of a fair trial, obstruct justice, or reflect so poorly on a lawyer's ability to represent clients that he cannot practice law consistent with the demands of the profession. As Robert Post explains, "Within public discourse . . . traditional First

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109. *Id.* at 1054.

110. *Id.* at 1065–76.

111. *Id.* at 1074–77.

112. *Id.*

113. *In re Sacher*, 206 F.2d 358, 360 (2d Cir. 1953), *rev'd sub nom.*, *Sacher v. Ass'n of the Bar of City of N.Y.*, 347 U.S. 388 (1954).

Amendment doctrine transmutes claims of expert knowledge into assertions of opinion.”<sup>114</sup> In other words, even if a lawyer speaks as a part of a broader public discussion about the law, that speech is fully protected as it would be if spoken by a nonlawyer. Thus, a lawyer’s statements made while representing a client but not for the purpose of furthering the client’s interest would be considered fully protected speech.

As Justice Rehnquist’s opinion in *Gentile* suggests, limitations on lawyers representing clients in pending cases are more readily upheld because those interests are more likely at play.<sup>115</sup> As for the lawyers in our hypotheticals, only those involved in the Election Lie and the Vault Lie hypothetical are involved in a pending proceeding; the Environmental Lie involves a lawyer appearing as a commentator. The reasoning in both Justices Kennedy and Rehnquist’s opinions appear to caution against applying disciplinary rules in a way that would reach those who are not involved in an ongoing case.<sup>116</sup>

In *Gentile* Justice Rehnquist defended the rule at issue because the rule requiring that the targeted speech be substantially likely to interfere with proceedings created enough of a connection to a judicial function to justify the speech restriction.<sup>117</sup> What if the lawyer speaks on behalf of a client but the speech has very little to no relation to an ongoing proceeding, as in our first hypothetical? Drawing on the unconstitutional conditions line of cases, one might argue that a lawyer has no right to speak on behalf of a client independent of his status as a lawyer, so it can be regulated. But a lawyer does not need a license to speak in public, even when his speech is made on behalf of another person, and if his words do not relate to any ongoing proceeding or harm his client or a third party, it seems more like private speech that any individual could make on behalf of another than that of a government employee. As such, any regulation of speech in public on behalf of a client ought to pass the test in *Gentile*. There would still need to be some nexus with an ongoing proceeding to satisfy the First Amendment.

In sum, lawyers’ speech can be restricted more than the speech of others only when doing so would further an interest related to the

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114. POST, *supra* note 48, at 43.

115. *Gentile*, 501 U.S. at 1070.

116. Rebecca Roiphe & Bruce A. Green, *Impeaching Legal Ethics*, 49 FL. S.U.L. REV. (forthcoming) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3789957](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789957)); Chemerinsky, *supra* note 102, at 1316.

117. *Gentile*, 501 U.S. at 1079.

administration of justice. For instance, regulations tend to pass constitutional muster if the lawyer's speech would undermine a judicial proceeding, harm a client or third party to a proceeding, or when the words demonstrate that the lawyer is unfit to practice law.

## II. LAWYERS, RULES OF PROFESSIONAL CONDUCT, AND LYING

If asked whether lawyers may be punished for lying to the public about political events—for instance, for telling the lies for which Rudolph Giuliani was suspended<sup>118</sup>—the reflexive answer will be “of course.” It seems axiomatic that lawyers may not lie, whether in their professional or private lives, and that they may be sanctioned for doing so. However, the reflexive answer may be wrong depending on how one defines lying. There is no fixed definition, but rather than engaging in debate (for which there is ample room),<sup>119</sup> we employ a simple, nontechnical, conservative, and, we think, conventional definition—namely, that lying entails making statements that one knows to be false intending others to believe them. This would exclude making false statements in the honest but mistaken belief that they are true or with doubts about their veracity.<sup>120</sup> It would also exclude making literally true but misleading statements, making misleading omissions, deliberately failing to correct others' mistaken beliefs, and engaging in deceptive nonverbal conduct.

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118. *In re Giuliani*, 146 N.Y.S.3d 266, 268, 272, 274 (N.Y. App. Div. 2021) (interim suspension based on “uncontroverted evidence that respondent communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump and the Trump campaign in connection with Trump’s failed effort at reelection in 2020,” which included “repeatedly stat[ing] that in the Commonwealth of Pennsylvania more absentee ballots came in during the election than were sent out before the election” and that 30,000 “dead people ‘voted’ in Philadelphia”).

119. See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 13–14 (1978) (defining a lie as “any intentionally deceptive message which is *stated*,” but acknowledging that “the very choice of definition has often presented a moral dilemma all its own”) (emphasis in original).

120. By excluding these statements from our definition of lying, we do not mean to suggest they are either honest or non-sanctionable. In some contexts, lawyers can be sanctioned for failing to take adequate care to assure that their representations are true. Further, it may be deceptive to convey that one is certain about one’s representations when one has doubts. There is a wide range of words and conduct that one might regard as deceitful that may be sanctionable. Our focus is on lying, because it is assumed to be the most clearly improper and sanctionable.

Although professional conduct rules generally require lawyers to be truthful, the rules do not forbid *all* lying, even as that concept is modestly construed, and therefore it is not a foregone conclusion that the rules forbid lawyers from lying in the public square. This Part shows that the professional conduct rules and decisions interpreting them do not invariably subject lawyers to discipline for lying. Even when representing clients or otherwise conducting themselves as professionals, lawyers have some latitude to be untruthful.

Courts' role in adopting professional conduct rules with the help of bar associations, and in enforcing those rules with the help of bar counsel, is an exception to ordinary separation-of-powers principles that leave lawmaking to legislatures and law enforcement to executive officials and that largely confine judges to adjudication. The courts' role grows out of their inherent or constitutional authority to supervise lawyers who practice in the jurisdiction.<sup>121</sup> Given their limited lawmaking authority, courts may not regulate all aspects of lawyers' life. But courts have substantial authority to regulate lawyers' legal representations and other professional work as lawyers, which courts exercise by adopting professional conduct rules based on the ABA Model Rules of Professional Conduct and by enforcing these rules in disciplinary processes.

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121. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (“a federal court has the power to control admission to its bar and to discipline attorneys who appear before it”); see generally Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 374–77 (1998) (describing state courts' inherent authority to regulate the bar); Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003) (analyzing sources of federal courts' authority to regulate federal practitioners).

Courts employ their authority to promote truth-telling. Of course, participants' truthfulness is a paramount value in the adjudicative process, which functions to ascertain the truth. But even in proceedings, courts tend to assume that lawyers representing clients will shade the facts in favor of their client. This may not be lying, but it is not exactly truth-telling either. However, courts promote this value in all aspects of lawyers' work. Although the legal profession's efforts to gain the public trust invariably fall short,<sup>122</sup> judiciaries, along with attorney regulatory authorities and the organized bar, promote the ability to take lawyers at their word by insisting, as a general rule, that lawyers not lie, and by seeking to exclude or remove individuals whose conduct shows that they cannot be trusted to speak truthfully. Applicants for admission to the bar must demonstrate the requisite character to practice law,<sup>123</sup> including a character for integrity,<sup>124</sup> and once admitted, lawyers may be disciplined, including by suspension or disbarment, for violating court-adopted rules of professional conduct that put a premium on lawyers' truthfulness, candor, and honesty.<sup>125</sup>

Others have observed, however, that disciplinary authorities "recognize no norm against lying qua lying."<sup>126</sup> The same could be said about the lawyer regulatory process more broadly, including about professional conduct rules, even though the ABA Model Rules of Professional Conduct and corresponding state rules forbid a lawyer from engaging in "conduct

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122. Bruce P. Frohnen & Brian D. Eck, *Whom Do You Trust? Lying, Truth Telling, and the Question of Enforcement*, 27 QUINNIPIAC. L. REV. 425, 425–26 (2009) ("Lawyers have a reputation among the public for being particularly dishonest.").

123. See, e.g., *Bd. of Law Examiners v. Stevens*, 868 S.W.2d 773, 776, 778 (Tex. 1994) (Under Texas law, a bar applicant may be denied admission if there is "a clear and rational connection between a character trait of the applicant and the likelihood that the applicant would injure a client or obstruct the administration of justice if the applicant were licensed to practice law." In this case, the court upheld a finding that the applicant had two relevant "negative character traits," namely disrespect for the law and financial irresponsibility. *Id.*

124. See, e.g., *Heilberger v. Clark*, 169 A.2d 652, 657 (Conn. 1961) ("a very high degree of intelligence, knowledge, academic and legal training, judgment and, above all else, integrity is demanded" for admission to the bar); *In re Bitter*, 969 A.2d 71 (Vt. 2008) (denying admission to the bar because the applicant's lack of character raised doubts about whether he would be honest and trustworthy in law practice).

125. See, e.g., *In re Ivy*, 374 P.3d 374, 379 (Alaska 2016) (disbarring lawyer whose "false testimony [in violation of Rule 8.4(b)] constitutes a criminal act that reflects poorly on her integrity as an attorney"); see also *In re Platz*, 132 P. 390, 392 (Utah 1913) (disbarring lawyer where "the evidence . . . tended to show that [he] lacked the necessary honesty, integrity, and fidelity to make him a safe and proper person to be entrusted with the powers of an attorney at law").

126. Frohnen & Eck, *supra* note 122, at 426.



involving dishonesty, fraud, deceit or misrepresentation.”<sup>127</sup> Although most rules regulate only lawyers’ professional work, this “deceit rule” applies to lawyers’ conduct outside the professional setting as well. One might read the deceit rule broadly enough to cover all lying and assume that other rules are redundant—that they are simply special applications of the deceit rule intended to emphasize the importance of honesty in particular recurring contexts. But that would be a misunderstanding.

Part A looks at the expectations for lawyers in professional settings. That is where the imperative to be honest is strongest because the rules focus on lawyers’ professional conduct and purport to address lawyers’ nonprofessional conduct only if it casts doubt on lawyers’ fitness to practice law.<sup>128</sup> The professional conduct rules include a host of provisions targeting false statements and other false or deceitful conduct in the professional setting, but none of these tells lawyers emphatically and categorically, “thou shalt not lie.” While honesty and candor rules, as interpreted and applied, cover much ground, they do not add up to a comprehensive prohibition on lying in one’s professional work. On the contrary, rule drafters, courts, and other authorities have approved various conduct that one might otherwise regard as lying, often characterizing it differently and more benignly—for example, as allegations, argument, pretexting, or puffery.

Part B examines the regulation of lawyers outside the professional context. Although the rules, on their face, forbid lawyers from engaging in any “dishonesty” or “deceit” even in their private lives, courts and disciplinary authorities recognize, if only implicitly, that this proscription cannot be taken literally, because courts have limited authority to regulate lawyers’ private conduct. If courts demand greater candor from lawyers in their personal lives than society demands of members of the public generally, courts must have a justification relating to the qualifications for law practice or the distinctive role that lawyers serve even outside professional practice. To be sanctionable, lawyers’ lies must either reflect adversely on lawyers’ fitness to practice law or harm interests that lawyers, as distinguished from members of the public at large, are expected to protect given their societal role. Although no clear lines have been drawn in

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127. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS’N 1983).

128. *See id.* r. 8.4 cmt. 2 (“Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”).

published decisions, disciplinary authorities ordinarily ignore lawyers' lies that do not implicate their general character for honesty or their role as lawyers.

Finally, Part C looks at how the rules apply when lawyers lie in civic discourse, speaking for themselves, not for clients. We suggest that lies conventionally told in political speech will often be beyond the rules' reach because they can be characterized as opinion, as argument, or as allegations. But even the kinds of lies that would be sanctionable in law practice, and particularly in a court of law—namely, knowingly false statements purporting to be based on the lawyer's personal knowledge—may be beyond the rules' reach when the lies are told in the court of public opinion by lawyers functioning as politicians or political pundits. Given both historical and contemporary conventions of political speech, where misinformation and disinformation are common, lawyers might argue that when they lie in political speech, their conduct does not cast doubt on their fitness to practice law and are otherwise unrelated to their commitments as lawyers.

#### A. *Lying in the Practice of Law*

In law practice, honesty and integrity are not simply a matter of ordinary, garden-variety morality. They are deemed essential to lawyers' role because the effectiveness and efficiency of most aspects of law practice depend on others—for example, judges, clients, colleagues, and other lawyers—being able to trust lawyers and take them at their word. This understanding pervaded nineteenth-century writings on the legal profession,<sup>129</sup> and it was incorporated in the ABA's Canons of Professional Ethics, which in 1908 became the first national codification of lawyers' professional expectations.<sup>130</sup> It has been a consistent theme of ethics codes

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129. See, e.g., *State ex rel. Kilbourn v. Hand*, 9 Ohio 42, 42 (1839) (“The discharge of professional duties, demands great and unreserved confidence from the client, and the connection of the attorney with courts, and his access to papers, require unsuspected integrity. Hence *general honesty* and *fidelity to clients*, is not only necessary to his success, but even to the performance of his duties. Other good qualities may be wanting in his character, and some vices may be present, but *these* are the *essential virtues of his calling*, no more to be dispensed with than courage in a soldier, or modesty in a woman.”) (emphasis in original).

130. See, e.g., CODE OF PRO. ETHICS Canon 32 (AM. BAR ASS'N 1908) (“[A]bove all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.”).

and other professional writings since then.<sup>131</sup> Although our focus is on lying, the current rules address a range of professional conduct that one might regard as dishonest, deceitful, or lacking in candor, including, in various contexts, the failure to correct false statements,<sup>132</sup> and other nondisclosures,<sup>133</sup> recklessly false statements,<sup>134</sup> statements that are misleading though not necessarily literally false;<sup>135</sup> and misleading conduct.<sup>136</sup>

Lawyers' professional obligations are contextual.<sup>137</sup> With respect to lawyers' candor and truthfulness, the current rules distinguish between trial advocacy (or the equivalent) and lawyers' many other pursuits. But both in advocacy and in other legal work, certain statements that the public would regard as lies, and that would come within our conservative definition, are conceived as something other than lies or otherwise permitted. As matter of policy, courts make judgments distinguishing between lies that are bad and therefore sanctionable and those that are good or at least innocuous or ineffectual and therefore permissible.<sup>138</sup> That courts make both categorical and, at times, individual judgments about whether lawyers' lies are sanctionable will become important to our constitutional analysis of lawyers' false political speech because it means that courts will have to make judgments that constitutional doctrine might consider to be problematic for state actors, including the judiciary, regarding what is and is not acceptable as a matter of political convention or policy.

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131. See, e.g., MODEL CODE OF PRO. RESP. DR 1-102(A)(4) (AM. BAR ASS'N 1980) (subjecting a lawyer to professional discipline for "conduct involving dishonesty, fraud, deceit or misrepresentation"); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975).

132. MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 1983) ("A lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.").

133. *Id.* r. 3.3(a)(2) (duty to disclose certain adverse legal authority); *id.* r. 3.3(d) (duty to disclose material facts in an ex parte proceeding).

134. *Id.* r. 8.2(a) (forbidding making a false statement about a judge's integrity or qualifications either knowingly "or with reckless disregard as to its truth or falsity").

135. *Id.* r. 4.1 cmt. 1 (misrepresentations in violation of Rule 4.1(a) "can also occur by partially true but misleading statements").

136. *Id.* r. 8.4(c) (forbidding conduct involving dishonesty or deceit).

137. See, e.g., Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 379-85 (1998) (describing "the importance of context in resolving ethical dilemmas and in defining the lawyer's role and responsibilities").

138. See *supra* Part I.A.

The Model Rules make an especially strong statement regarding lawyers' honesty in the context of courtroom advocacy. Model Rule 3.3(a) states "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal."<sup>139</sup> Underscoring the importance of "candor toward the tribunal" (as Rule 3.3 is titled), the accompanying Comment interprets the phrase "false statement" broadly insofar as it recognizes that the rule may cover misleading silence as well as affirmative false statements.<sup>140</sup>

The Comment does not characterize Rule 3.3 as a particular application of a general duty to be truthful but explains that the rule arises out of advocates' special relationship to the courts, in that the rule expresses "the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process."<sup>141</sup> The implication is that lawyers' obligations in communications with the courts are especially stringent. Rule 4.1(a), which governs lawyers' communications with others during a legal representation, reinforces this understanding by incorporating a materiality requirement. It says that: "In the course of representing a client a lawyer shall not knowingly . . . make a false statement of *material* fact or law to a third person."<sup>142</sup> In other words, while lawyers may tell most people *immaterial* lies, lawyers may not tell judges *any* lies.

Other rules address dishonesty in particular professional interactions. The advertising and solicitation rules, which apply to the business side of lawyers' professional conduct outside the context of a lawyer-client relationship, forbid lawyers who are seeking to obtain clients from "mak[ing] false and misleading communication[s] about the lawyer or the lawyer's service." As interpreted and applied, these rules may be even more demanding than Rule 3.3, owing to the organized bar's traditional antipathy to lawyer advertising.<sup>143</sup> Other rules provide that in dealing with unrepresented individuals, lawyers acting on a client's behalf may "not state or imply that [they are] disinterested,"<sup>144</sup> since doing so would obviously be

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139. MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 1983).

140. See *id.* r. 3.3 cmt. 3 ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.").

141. *Id.* r. 3.3 cmt. 2.

142. *Id.* r. 4.1(a) (emphasis added).

143. Cf. Bruce A. Green & Carole Silver, *Technocapital@Biglaw.com*, 18 NW. J. TECH. & INTELL. PROP. 265, 280 (2021) (observing that "[b]ar-association ethics committees . . . are more sensitive to the possibility that statements may be misleading in the context of lawyer advertising than in other contexts").

144. MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 1983).

false and misleading. No rule specifically forbids lawyers from lying to their clients, although it is axiomatic that lawyers may not do so,<sup>145</sup> and perhaps it is implicit in the rules requiring reasonable communications between lawyers and their clients<sup>146</sup> and requiring lawyers to “render candid advice” to clients.<sup>147</sup>

Taken together, the professional conduct rules subject lawyers to discipline for much of what one would regard as lying in the course of their professional work. But, as the materiality limitation in Rule 4.1(a) illustrates, the rules do not reach *all* conduct that one might regard as deceptive or dishonest and that might fall within a definition of “lying.”<sup>148</sup> The authorities interpreting Rule 4.1 emphasize the materiality carve-out for lies to anyone other than judges. For example, the Comment accompanying that rule explains that “[u]nder generally accepted conventions in negotiations . . . [e]stimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim” are generally not “statements of material fact.”<sup>149</sup> The ABA’s ethics

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145. *United States v. Army*, 137 F. Supp. 3d 981, 987 (E.D. Ky. 2015) (“Lawyers have an ethical duty not to lie to their clients[.]”) (citing Lisa Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 661 & n.2 (1990)).

146. MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS’N 1983). Lawyers who lie to clients have been sanctioned under Rule 1.4, which establishes the duty to communicate with the client about the matter, and Rule 8.4(c), which forbids conduct involving dishonesty, fraud, deceit or misrepresentation. *See, e.g.*, *Disciplinary Counsel v. Burchinal*, 170 N.E.3d 855 (2021) (sanctioning a lawyer for various misconduct, including lying to clients about the status of matters).

147. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS’N 1983).

148. Some jurisdictions have rejected the materiality limitation. *See, e.g.*, N.Y. RULES OF PRO. CONDUCT r. 4.1 (2009) (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact.”). But immaterial false statements may still fall outside the rule. For example, the Comment accompanying New York’s version of Rule 4.1 explains, “Under generally accepted conventions in negotiation, certain types of statements are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement are ordinarily in this category.” *Id.* r. 4.1 cmt. 2.

149. MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS’N 1983). The secondary literature addressing falsehoods in transactional and settlement negotiations is voluminous. *See, e.g.*, James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U.L. REV. 255 (1999); Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1 (1992); Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713 (1997); Nathan M. Crystal, *The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055 (1998); Geoffrey C. Hazard, Jr., *The Lawyer’s Obligation to Be Trustworthy When Dealing With Opposing Parties*, 33 S.C.L. REV. 181 (1981); Rex R. Perschbacher, *Regulating Lawyers’ Negotiations*, 27 ARIZ. L. REV. 75 (1985); Geoffrey M. Peters, *The Use of Lies in*

committee has categorized certain false statements of immaterial fact, such as statements in negotiations that exaggerate strengths and minimize weaknesses, or that overstate the lawyer's "confidence in the availability of alternative sources of supply," as "'posturing' or 'puffing'" and has rationalized that these "are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely."<sup>150</sup>

The Comment to Rule 4.1 implies that lawyers are free to tell at least three types of lies: those that third parties would not ordinarily believe, those that third parties might believe but on which they are unlikely to act in reliance, and those on which third parties would not be justified in relying even if they might ordinarily do so.<sup>151</sup> One might argue that lawyers' lies about public events in certain media would fall into one or more of these categories, since the public would not be justified in believing, and acting in reliance on, what commentators, including lawyer-commentators, say in these media.<sup>152</sup>

There are additional categories of permissible falsehoods, developed particularly in courtroom advocacy. Although Rule 3.3(a) conveys that candor is at a premium when lawyers speak to judges, it turns out that several categories of speech are, or may be, excluded.

At least in courtroom advocacy, *arguments* appear to drop off the list of false factual representations—i.e., lies—that are captured by the candor rules. A lawyer's closing arguments to a jury, for example, do not purport to be based on the lawyer's personal knowledge but are based on evidence

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*Negotiation*, 48 OHIO ST. L.J. 1 (1987); Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83 (2002); Alvin B. Rubin, *A Causerie on Lawyer's Ethics in Negotiation*, 35 LA. L. REV. 577 (1975); Deborah Schmedemann, *Navigating the Murky Waters of Untruth in Negotiation: Lessons for Ethical Lawyers*, 12 CARDOZO J. CONFLICT RESOL. 83, 86 (2010); Alan Strudler, *Incommensurable Good, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529(1998); Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219 (1990); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926 (1980).

150. ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-439 (2006).

151. MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 1983).

152. *Cf. McDougal v. Fox News Network*, 489 F. Supp. 3d 174, 183–84 (S.D.N.Y. 2000) (holding that Tucker Carlson's televised assertion that the plaintiff engaged in extortion was not actionable slander because it was rhetorical hyperbole: "[G]iven Mr. Carlson's reputation, any reasonable viewer 'arrive[s] with an appropriate amount of skepticism' about the statements he makes. . . . Whether the Court frames Mr. Carlson's statements as 'exaggeration,' 'non-literal commentary,' or simply bloviating for his audience, the conclusion remains the same—the statements are not actionable.").

introduced at trial. Likewise, a lawyer's arguments to the judge on a motion are ordinarily based on other evidence, not based on a lawyer's first-hand knowledge. A lawyer may not knowingly make a false "assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court,"<sup>153</sup> but the rules do not forbid a lawyer from knowingly making false *arguments*—i.e., false factual assertions premised on others' false statements, false evidence, or erroneous inferences. For example, a lawyer may "argue" that an event occurred, based on inferences from evidence, even though the lawyer knows that the event never happened. Commentators have debated whether lawyers *should* make false arguments,<sup>154</sup> but the disciplinary rules do not necessarily foreclose this possibility.

For essentially the same reason, Rule 3.3(a) does not apply to the lawyer's false *allegations* in adjudicative proceedings, including in pleadings that the lawyer prepares and files in court regarding matters about which the lawyer does not purport to have personal knowledge.<sup>155</sup> The rules restrict frivolous pleadings,<sup>156</sup> as do civil procedure rules,<sup>157</sup> but they do not expressly forbid lawyers from conveying false allegations, as distinguished from false representations. Allegations on behalf of a client are essentially previews of arguments that are expected to be made based on the evidence in the future proceeding. They are not regarded as "statements of fact" under the rule, and, unless the context or the submission otherwise indicates, they

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153. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 3 (AM. BAR ASS'N 1983). *See, e.g.*, *Pearson v. First NH Mortg. Corp.*, 200 F.3d 30, 38 (1st Cir. 1999).

154. *See* Joshua A. Liebman, Note, *Dishonest Ethical Advocacy?: False Defenses in Criminal Court*, 85 *Fordham L. Rev.* 1319 (2016) (reviewing scholarly and professional literature on whether defense lawyers may use a false defense).

155. The Comment to Rule 3.3 explains that a lawyer is accountable only for statements "purporting to be on the lawyer's own knowledge." MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 3 (AM. BAR ASS'N 1983). Knowledge is a defined term in the rules. *See id.* r. 1.0. A lawyer can have knowledge of a fact, and of its truth or falsity, that is not based on direct observation. *See id.* ("A person's knowledge may be inferred from circumstances."). Therefore, a lawyer can conceivably make a knowingly false statement regarding a fact about which the lawyer lacks first-hand knowledge, if the lawyer knows from other sources that the statement is false. But if the lawyer does not purport to have personal knowledge, direct or inferential, the lawyer's statements would presumably fall outside the rule. Guesses, predictions, and expressions of faith are among the kinds of statements that presumably do not qualify as statements of fact because they are not expressions of the lawyer's personal knowledge. *See id.*

156. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 1983); *id.* r. 3.3 cmt. 3 (citing r. 3.1).

157. *See, e.g.*, FED. R. CIV. P. 11.

are not expressions of the lawyer's personal knowledge or belief.<sup>158</sup> Consequently, lawyers are not expected to believe their own allegations, and the rules suggest that lawyers may therefore make allegations believing and perhaps even knowing them to be false if the allegations are not predicated on perjury or false evidence. In the Vault Theft hypothetical, for example, the lawyer's knowingly false assertion in a press conference that the client passed a lie detector test would likely come within Rule 4.1, since it seems to concern a matter within the lawyer's personal knowledge. In contrast, the lawyer's knowingly false assertion that crooked cops stole the money and drugs concern a matter outside the lawyer's personal knowledge and therefore would likely be viewed as an allegation, not as a false statement of fact under the rule. Perhaps procedural rules or extralegal professional understandings restrain advocates from making false allegations supported by circumstantial evidence, but false allegations fall outside the rules against knowingly false statements of fact.

Advocates' leeway in courtroom advocacy to make knowingly false allegations and arguments presumably extends to some extent to advocates' extrajudicial speech. For example, it is inconceivable that a criminal defense lawyer like the one in the Vault Theft scenario would be disciplined for lying for saying at a press conference following a client's arrest, "My client is innocent," even if the lawyer knows the client to be guilty in fact, if presumed innocent in the eyes of the law.<sup>159</sup> One might argue that these acceptable forms of lying are not meaningfully less harmful than others. Under defamation law, for example, publishers can be held civilly liable for knowingly conveying others' falsehoods, because doing so can be just as harmful as originating the falsehoods.<sup>160</sup> Likewise, couching falsehoods as allegations or arguments may still lead others to believe them, since lawyers are conveying them. To compound the problem, although advocates may not expressly vouch for false allegations and arguments, advocates may

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158. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 3 (AM. BAR ASS'N 1983) (stating that a lawyer is not required to have personal knowledge of the allegations in a complaint).

159. A criminal defense lawyer might defend a false claim of innocence on the ground that it is a truthful legal claim, given the presumption of innocence. One can, of course, envision factually detailed innocence claims that could not be defended on this basis, however, such as a knowingly false statement that "my client never removed cash or drugs from the police department's safety deposit vaults."

160. *See, e.g.,* *Martin v. Wilson Pub. Co.*, 497 A.2d 322, 327 (R.I. 1985) ("It has long been recognized in respect to the law of defamation that one who republishes libelous or slanderous material is subject to liability just as if he had published it originally.").



make them with feigned conviction, leading listeners to infer or assume that lawyers believe what they are saying.

The reference to “false statement[s] of fact or law” in Rule 3.3(a) and 4.1(a) implies other carve-outs for rhetoric that is not a “statement” or that states something other than “fact or law.” The rules could be read to exclude statements that merely *imply* false facts, since implications are not statements, although courts tend to read the rules more broadly. The rules could also be read to exclude lawyers’ false statements of their opinion,<sup>161</sup> intent regarding future conduct,<sup>162</sup> or general state of mind, since these are not necessarily what is meant by *facts*. But, as the Comment to Rule 3.3 indicates, authorities can read the language liberally if they want to reach impermissibly deceitful statements or silence that they consider offensive.<sup>163</sup> Further, the vague language of Rule 8.4(c) has sometimes been used to fill in gaps when, in the authorities’ judgment, lawyers employ dishonesty or deceit that cannot be characterized as a “false statement of fact.”<sup>164</sup>

Just as authorities may interpret candor rules expansively when, in their judgment, lawyers deserve punishment, they may for policy reasons exclude lies that are innocuous or that, as in the case of what has been called

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161. Under defamation law, one may be liable for expressing opinions that imply false defamatory facts. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990) (“If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, ‘In my opinion Jones is a liar,’ can cause as much damage to reputation as the statement, ‘Jones is a liar.’”). False ideas, however, are constitutionally protected. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”).

162. In some contexts, false statements of intent regarding future conduct are not regarded as false statements of fact. *See, e.g., Matsumura v. Benihana Nat’l Corp.*, 542 F. Supp. 2d 245, 253 (S.D.N.Y. 2008) (“Though misrepresentations of present or past fact have the potential to create liability for the speaker, [m]ere unfulfilled promissory statements as to what will be done in the future are not actionable.”) (quoting *Brown v. Lockwood*, 432 N.Y.S.2d 186, 194 (N.Y. App. Div. 1980)); *but see In re Hong-Min Jun*, 78 N.E.3d 1100, 1100 (Ind. 2017) (observing that it is a federal crime for a visa applicant to make a false statement of intent to leave the country upon expiration of a visa, and sanctioning a lawyer under Rule 1.2(d) for assisting the client’s wife in making a false application).

163. *See* MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. (AM. BAR ASS’N 1983).

164. *See* Peter R. Jarvis & Bradley F. Tellam, *The Dishonesty Rule—A Rule with a Future*, 74 OR. L. REV. 665, 668–70 (1995) (discussing application of rule to secret tape recording and other deceitful nondisclosures).

*pretexting*, promote positive ends in a representation.<sup>165</sup> In a leading case, Apples Corps' lawyers sought proof that the opposing party was violating an injunction against the sale of copyright-infringing stamps with pictures of the Beatles.<sup>166</sup> The lawyers' support staff and investigators, as well as two lawyers themselves, telephoned the stamp producer's representatives pretending to be collectors.<sup>167</sup> The company's in-house lawyer, posing as a consumer, falsely said that "she wished to order certain stamps for her husband who was a John Lennon fan who had seen the stamps."<sup>168</sup> Although the lawyers and nonlawyer surrogates lied, the District Court found that they did not violate the rules.<sup>169</sup> It observed that courts had previously countenanced lawyers' use of deceit in criminal and civil-rights investigations.<sup>170</sup> Further, Rule 4.1(a) did not reach all lies (given its materiality limitation), and as a matter of statutory construction, it would not make sense for Rule 8.4(c) to extend to all lies, since that would make Rule 4.1(a) redundant.<sup>171</sup> The court endorsed the narrower construction of Rule 8.4(c), advocated in an article co-authored by the ABA ethics committee's former chair, which asserted that the rule applied "only to misrepresentations that manifest a degree of wrongdoing on a par with dishonesty, fraud, and deceit. In other words, it should apply only to grave

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165. See Steven C. Bennett, *Ethics of "Pretexting" in a Cyber World*, 41 MCGEORGE L. REV. 271 (2010); David J. Dance, Note, *Pretexting: A Necessary Means to a Necessary End?*, 56 DRAKE L. REV. 791 (2008); see also William H. Fortune, *Lawyers, Covert Activity, and Choice of Evils*, 32 J. LEGAL PROF. 99, 101 (2008); Barry R. Temkin, *Deception in Undercover Investigations: Conducted-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE L. REV. 123 (2008). For an argument that investigative deception, and similar deceit used to ferret out the truth, is entitled to greater First Amendment protection than other falsehoods, see Chen & Marceau, *supra* note 13, at 1435; see also Komal S. Patel, Note, *Testing the Limits of the First Amendment: How Online Civil Rights Testing is Protected Speech Activity*, 118 COLUM. L. REV. 1473 (2018). For an argument that the First Amendment protection should apply equally to lawyers who engage in investigative deception, see Rebecca Aviel & Alan K. Chen, *Lawyer Speech, Investigative Deception, and the First Amendment*, 2021 U. ILL. L. REV. 1267 (2021).

166. *Apple Corps v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998). See also *Ariz. Formal Op.* 99-11. Although Rule 8.4(a) forbids a lawyer from violating a rule "through the acts of another," some authorities interpret Rule 8.4(c) to forbid a lawyer's personal use of pretexting in gathering evidence but to allow a lawyer's retention of an investigator to gather evidence through the same deceitful means. See, e.g., *Colo. Op.* 137 (2019); see also MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 1983).

167. *Apple Corps*, 15 F. Supp. 2d at 462-64.

168. *Id.* at 462.

169. *Id.*

170. *Id.* at 475.

171. *Id.* at 475-76.

misconduct that would not only be generally reprov'd if committed by anyone, whether lawyer or nonlawyer, but would be considered of such gravity as to raise questions as to a person's fitness to be a lawyer."<sup>172</sup>

In sum, there is no outright, comprehensive prohibition against lying in the practice of law. While there is little tolerance for some lies, such as lawyers' lies to judges about matters of personal knowledge, bar associations and courts that draft and interpret the rules, and bar counsel who decide which cases to pursue, recognize that lawyers need some leeway to lie even in their professional work as lawyers. Some knowingly false statements violate the professional conduct rules because they cause harms against which the rules protect or because they cast doubt on the lawyer's fitness to practice law. But some are excluded, whether because they are deemed "immaterial," because they are not regarded as statements of personal knowledge but as allegations or argument, or for other reasons. At the margins, the question of whether lawyers can be punished for making assertions in their professional work that they know to be false depends on context, convention, and policy judgments.

### *B. Lying Outside the Professional Setting*

Given the limited scope of courts' supervisory authority to regulate lawyers, any judicial rules regulating lawyers must be tied somehow to the practice of law.<sup>173</sup> Two types of rules reach into lawyers' private lives. The

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172. *Id.* at 476 (quoting David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791, 817 (1995)). Courts take varying approaches to whether, and when, lawyers or their agents may lie about their identities or motivations, or tell other lies, in order to gather information, and the decisions tend to be highly contextual. *Compare, e.g.,* *Gidatex, S.r.L v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (permitting investigators to pose as customers in investigation of trademark infringement), *with* *Leysock v. Forest Lab'y, Inc.*, No. 12-11354, 2017 U.S. Dist. LEXIS 65048 (D. Mass. Apr. 28, 2017) (dismissing complaint as sanction where lawyers' investigators lied to obtain information from physicians about their prescribing practices, including confidential patient information). *See generally* Aviel & Chen, *supra* note 165, at 1273-79 (summarizing decisions addressing investigative deceit by lawyers and their agents).

173. For example, Model Rule 8.4(g), a recent rule addressing harassment or discrimination, applies only if the forbidden conduct is "related to the practice of law." MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 1983). But the limiting principle is not universally respected in states' rules or in the application of their rules. For example, New York has a rule forbidding "other conduct that adversely reflects on the lawyer's fitness as a lawyer," which has been applied to harassing conduct

first protects interests such as the justicial and the lawyer regulatory processes to which lawyers are expected to be committed given their role in society.<sup>174</sup> The second addresses misconduct that reflects adversely on lawyers' character or qualifications to practice law.<sup>175</sup> Unsurprisingly, only a handful of rules extend to misconduct outside one's professional practice, since most of what lawyers do outside law practice does not set them apart from nonlawyers and has no special significance for their professional commitments or for how they practice law.

To the extent that rules target lawyers' false statements or other dishonesty in their private lives, one might assume that limits apply like those applicable to Rules 3.3(a) and/or Rule 4.1(a), since it would be anomalous for lawyers to have more leeway to lie in law practice than in their private lives. Assuming lawyers are complying with the law that applies to the public generally (such as criminal and tort law), lawyers in private discourse presumably may tell immaterial lies or make false arguments and allegations. Moreover, given courts' limited authority to regulate lawyers' nonprofessional conduct, and given disciplinary authorities' considerable charging discretion, one might expect disciplinary authorities to refrain from initiating proceedings when lawyers' nonprofessional lies have no bearing on their professional role or work. That might explain the dearth of decisions testing the boundaries of courts' disciplinary authority when lawyers are dishonest outside law practice. The overwhelming number of cases involve lies that are criminal, fraudulent, or defamatory, thereby threatening or causing legally cognizable harms, or that are otherwise contrary to conventional societal, if not legal, norms.

One set of rules governing lawyers' extra-professional conduct is meant to prevent harms to the judicial process or other harms for which lawyers, given their role in society, may be held accountable.<sup>176</sup> Rule 8.1(a) forbids

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entirely unrelated to the practice of law. *See* N.Y. RULES OF PRO. CONDUCT r. 8.4(h) (N.Y. STATE BAR ASS'N 2009); *see, e.g., In re Schlossberg*, 137 N.Y.S.3d 44 (N.Y. App. Div. 2020) (censuring lawyer for tirade against Spanish-speaking delicatessen employee).

174. *See, e.g.,* MODEL RULES OF PRO. CONDUCT r. 8.4(d) & (f) (AM. BAR ASS'N 1983) (forbidding "conduct prejudicial to the administration of justice" and knowingly assisting a judge in violating a rule of judicial conduct).

175. *See, e.g., id.* r. 8.4(c) (forbidding certain criminal conduct).

176. For example, the rule forbidding "conduct that is prejudicial to the administration of justice" has been applied to personal as well as professional misconduct. *See id.* r. 8.4(d); *see, e.g., Att'y Grievance Comm'n of Md. v. Sheinbein*, 812 A.2d 981, 996–99 (Md. App. 2002) (attorney sanctioned for helping son flee country to escape criminal prosecution).

lawyers' knowingly false statements in connection with a bar application or disciplinary matter,<sup>177</sup> but more relevant to political lies is Rule 8.2(a), which forbids knowingly and recklessly false statements about judges and judicial candidates or about public legal officers and candidates for legal office.<sup>178</sup> The rule essentially makes libeling judges sanctionable, but it has been applied more broadly than libel law.<sup>179</sup> Courts interpreting the rule distinguish knowingly false factual statements impugning judges, which are sanctionable, from pure opinions and hyperbole, which are not.<sup>180</sup>

The other set of rules extending beyond lawyers' professional work addresses misconduct that reflects adversely on the lawyer's character or qualifications to practice law.<sup>181</sup> Rule 8.4(b), which subjects lawyers to discipline for criminal conduct, explicitly conveys that committing a crime is professional misconduct for which lawyers may be disbarred, suspended, or otherwise sanctioned only if the criminal conduct "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<sup>182</sup> Although Rule 8.4(c), forbidding "conduct involving dishonesty, fraud, deceit or misrepresentation,"<sup>183</sup> does not expressly incorporate this limitation, judicial opinions have recognized that the rule covers falsehoods and deceptions outside lawyers' professional work only if the conduct indicates a generally dishonest or untrustworthy character.<sup>184</sup>

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177. MODEL RULES OF PRO. CONDUCT r. 8.1(a) (AM. BAR ASS'N 1983).

178. *Id.* r. 8.2(a).

179. *See, e.g.,* Cleveland Metro. Bar Ass'n v. Morton, No. 2020-1520, 2021 Ohio LEXIS 2321 (Nov. 23, 2021) (sanctioning lawyer for asserting in a court filing that judges had a political agenda).

180. *See, e.g.,* Iowa Sup. Ct. Att'y Disciplinary Bd. v. Att'y Doe No. 792, 878 N.W.2d 189, 195 (Iowa 2016) (finding that statements to a judge were not hyperbolic); *In re Callaghan*, 796 S.E.2d 604, 625-26 (W. Va. 2017) (rejecting the assertion that false statements in campaign material were rhetorical hyperbole).

181. *See, e.g., In re Serritella*, 125 N.E.2d 531, 534 (Ill. 1955) ("We are charged with the responsibility of supervising the professional conduct of attorneys practicing in this State, and we are interested in their private conduct only in so far as such relates to their professional competence or affects the dignity of the legal profession.").

182. MODEL RULES OF PRO. CONDUCT r. 8.4(b) (AM. BAR ASS'N 1983); *see id.* r. 8.4 cmt. 2 ("Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice" such as "[o]ffenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice.").

183. *Id.* r. 8.4(c).

184. *See, e.g., In re Complaint as to Conduct of Carpenter*, 95 P.3d 203, 232 (Or. 2004) ("[T]here must be a rational connection between the conduct that gives rise to an allegation of a rule violation and the purpose of the lawyer discipline system. That is, the accused lawyer's conduct must demonstrate that

The rules targeting criminal and deceitful conduct assume that lawyers have a character for honesty or dishonesty that dictates both their private and their professional conduct; therefore, dishonesty in one's private life generally predicts dishonesty as a professional. The attorney admissions process presupposes this as well. The concept that lawyers and others have a defining character has a long pedigree, and, although scholars have questioned the premise,<sup>185</sup> courts continue to rely on it. To a lesser extent, the rule also recognizes that lawyers' deceit reflects poorly on the legal profession, eroding public trust and respect.<sup>186</sup> Rule 8.4(c) may initially have been meant to refer to tortious conduct and equivalent conduct that is legally or universally regarded as improper, if not legally actionable, for anyone, not just lawyers.<sup>187</sup> This would make the rule function largely like Rule 8.4(b) and other rules which allow lawyers to be punished for conduct that violates other law.<sup>188</sup> But courts have applied the rule more liberally. It might be argued, at the other extreme, that all lying and comparable dishonesty should be covered because dishonesty is universally regarded as morally, if not legally, wrong, but opinions concede that not every lie told

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the lawyer lacks those characteristics that are essential to the practice of law."); *see also In re Serritella*, 125 N.E.2d 531, 534 (Ill. 1955) ("Any act which evidences want of professional or personal honesty, such as renders him unworthy of public confidence, affords sufficient grounds for disbarment. . . . But before any discipline is warranted for acts done outside of an attorney's professional capacity, it should be demonstrated that they are such as tend to show him an unfit person to discharge the obligations of an attorney and tend to bring the legal profession into disrepute.").

185. *See, e.g.,* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 587 (1985) ("Abuses in a lawyer-client relationship are more likely to predict future conduct in that capacity than many of the personal offenses for which attorneys have been sanctioned."); *see also infra* note 232. While finding the concept of "good moral character" to be useful, the Supreme Court acknowledged that the concept invites arbitrariness. *See, e.g.,* *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262-63 (1957) ("The term 'good moral character' . . . by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.")

186. *See* MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 2 (AM. BAR ASS'N 1983).

187. *Jarvis & Tellam, supra* note 164, at 671 (stating that the drafters of the predecessor to Rule 8.4(c) "believed that the references to fraud, deceit and misrepresentation in the common law of torts would be sufficient to give a good basis for interpretation of those words" and that dishonesty was meant "to be read in a more or less similar manner").

188. For example, Rule 1.2(c) forbids lawyers from assisting clients' "criminal or fraudulent" conduct, and Rule 3.4(a) forbids lawyers from "unlawfully" obstructing others' access to evidence. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(c), 3.4(a) (AM. BAR ASS'N 1983). These and various other rules defer to existing law to define impermissible conduct and reinforce the other law by adding the possibility of professional discipline.

by a lawyer “jeopardizes the public’s interest in the integrity and trustworthiness of lawyers.”<sup>189</sup>

That said, it is hard to know which lies are permissible. Courts’ examples tend to be obvious and extreme, such as “telling the story of Santa Claus to children.”<sup>190</sup> Commentators assume that lawyers are exempt from punishment in other situations where it is socially or commercially acceptable for people to make certain false statements, such as by giving a false excuse to decline an invitation or lying about one’s bottom line.<sup>191</sup> There is no public record of lawyers being disciplined for these sorts of lies, but because the disciplinary process in many states is confidential unless a lawyer is publicly sanctioned,<sup>192</sup> one cannot be certain whether disciplinary authorities are even aware of cases where lawyers tell commonplace lies in their private lives. Nor do disciplinary authorities appear to be proactive by, for example, monitoring dating websites. If disciplinary authorities are aware of examples, which may abound, of lawyers making false claims in social settings, the authorities evidently defer to convention.

Bar associations’ ethics committees have not gone out of their way to catalogue socially acceptable and unacceptable lies, but they have occasionally answered lawyers’ questions about whether lawyers’ lies

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189. *In re Complaint as to Conduct of Carpenter*, 95 P.3d 203, 208 (Or. 2004).

190. *See, e.g., In re Conduct of Carpenter*, 95 P.3d at 208 (“[T]his court examines lawyer conduct that occurs outside the scope of professional relationships, such as that of attorney and client, to determine whether the conduct jeopardizes the public’s interest in the integrity and trustworthiness of lawyers. Not every lawyer misstatement poses that risk: telling the story of Santa Claus to children is an example.”); *see also* Tory L. Lucas, *To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Conduct*, 89 NEB. L. REV. 219, 260 n.262 (2010) (“[P]arents are routinely challenged by their children on whether lying can be justified—is there a Santa Claus, a Tooth Fairy, or an Easter Bunny? . . . If an attorney lied in response to these questions, those lies would not impact an attorney’s fitness to practice law. This is not the essence of the attorney deception issue.”).

191. *See, e.g.,* Jeffrey Krivis, *The Truth About Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 251, 252–55 (2004); *see also* W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C.L. REV. 527, 545 (2002) (“[W]hen a lawyer is not under the formal strictures of rules of court, it perhaps ought to be left to social mores rather than professional ethics to decide what to do about lawyers who lie about whether they are available to take a phone call, whether an opposing client is having a bad hair day, or whether the Easter Bunny really exists.”). On the likelihood that, for the public in general, the First Amendment protects social lies and lies in intimate personal relationships, *see* David S. Han, *Categorizing Lies*, 89 U. COLO. L. REV. 613, 629, 632–33 (2018).

192. *See* Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007).

outside the professional setting are sanctionable. An easy case is where lawyers employed as public investigators lie to suspects about their identity and motivations to gather evidence of crimes. Authorities agree that investigators who happen to be lawyers but do not hold themselves out as lawyers may gather evidence through deception.<sup>193</sup> In this context, nonlawyers' use of deception is so socially and legally acceptable, and indeed such a necessary part of their law enforcement job, that one cannot plausibly argue that lying in an undercover investigative capacity shows lawyer-investigators' dishonest character and predicts their untruthful behavior in law practice. Lawyers' use of pseudonyms in conventional contexts unrelated to their role or status as lawyers has also been approved. For example, the Washington state bar's ethics committee implied that lawyers may use pseudonyms in their work for a state social service agency unless they were "engaged in the practice of law,"<sup>194</sup> and, in a similar vein, the ABA's ethics committee said that a lawyer may publish under a pseudonym, though it adds that if the publication identifies the author as a lawyer, it must disclose that the name is pseudonymous.<sup>195</sup>

### *C. Do Political Lies Fall Through the Cracks?*

Although our focus is on a constitutional question, it is worth noting that when lawyers tell political lies in the public square, outside the practice of law, the conduct is not necessarily subject to discipline. Notably, this issue was not addressed by the appellate court in the much-discussed

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193. D.C. Bar, Legal Ethics Committee, Op. 323 (2004) ("Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties."); Va. State Bar, Standing Comm. on Legal Ethics, Op. 1765 (2003) ("[W]hen an attorney employed by the federal government uses lawful methods, such as the use of 'alias identities' and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c).").

194. Wash. State Bar Ass'n, Informal Op. 1660 (1996). With respect to using pseudonyms in law practice, see also Tex. Sup. Ct. Professionalism Comm., Op. 434 (1986) (lawyer previously known on television under assumed name must use legal name in law practice).

195. ABA Comm. on Pro. Ethics, Informal Op. 84-1507 (1984). The opinion explained that otherwise the publication would "leave the reader under a misapprehension of fact, and could, if the reader sought to contact the author, cause unnecessary inconvenience and possible embarrassment to the reader." *Id.* The opinion did not suggest that this misapprehension or inconvenience reflected adversely on the lawyer's character but simply regarded this as a harm that lawyers should not cause when they were acknowledging themselves to be publishing as lawyers. *Id.*



decision suspending Rudolph Giuliani from law practice on an interim basis, because he conceded that his statements questioning the legitimacy of the 2020 presidential election were made in the context of representing President Trump or the Trump campaign.<sup>196</sup> But it is raised by the many allegedly false statements of federal and state officials and campaign functionaries relating to what Democrats have called “the Big Lie”—namely, a false statement that Trump won the 2020 presidential election or that the election was “stolen” from him.<sup>197</sup>

Except for lies about judges and other public officials which may be covered by Rule 8.2(a), political lies in press conferences, in speeches on the floor of Congress, in podcasts, on talk radio, and in other public settings will present the question whether the lawyer’s conduct involved “dishonesty, deceit, fraud or misrepresentation.” Assuming the lawyer-speakers knew their statements were false, those who were speaking on clients’ behalf would be able to argue that their statements fell outside the rule. Following the election, those discrediting the announced results did not purport to have first-hand knowledge or to have personally amassed and reviewed all the supposed evidence. “Trump won,” can be characterized as opinion, especially if preceded by “IMHO” (in my humble opinion), or as an argument based on whatever “evidence” was circulating or known. If the assertion was purportedly based on the size and enthusiasm of Trump’s crowds during the campaign, it would be a frivolous argument, but it would not be sanctionable, because no rule forbids frivolous arguments in the court of public opinion. The same might be said of more specific claims, such as that thousands of convicts or dead people voted in swing states, insofar as these can be characterized as, at worst, frivolous allegations or arguments.

Lawyers running for office who lie about their own credentials are obviously purporting to speak based on personal knowledge and, if the lie is a material one, might be subject to discipline. Likewise, those who tell lies bordering on defamation about opposing candidates or others would likely fall within the rule.<sup>198</sup> But the 2020 post-election lies were mostly not

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

197. See, e.g., *Why is the ‘Big Lie’ Proving So Hard to Dispel?*, NPR (Jan. 4, 2022, 4:24 PM), <https://www.npr.org/2022/01/04/1070337968/why-is-the-big-lie-proving-so-hard-to-dispel> [<https://perma.cc/64PJ-DBJD>].

198. See, e.g., *State v. Russell*, 610 P.2d 1122 (Kan. 1980); see also *In re Thatcher*, 89 N.E. 39 (Ohio 1909). In *In re Evans*, 78 S.E. 227 (S. Car. 1913), the court suspended a lawyer who publicly

of this kind, but about the election process. Perhaps one might argue that lies about the election are a species of political lie that are sanctionable because lawyers' commitment to "the administration of justice" must go beyond the administration of the judicial system and encompass the operation of democratic processes more broadly.

In that event, the question becomes which political lies threaten democracy, and whether some or all that do not relate to the democratic process are nevertheless covered because they reflect adversely on the lawyer's character. Suppose, for example, a lawyer lies about what scientists regard as established fact about the environment (e.g., "burning coal does not contribute to climate change"). Leaving aside whether the false statements are permissible opinions, allegations, or arguments, do they demonstrate a generally dishonest character and therefore reflect adversely on the lawyer-speaker's character or fitness as a lawyer?

These questions may call for a serious exploration of the conventions of public political discourse. As we have shown, socially and commercially permissible lies may be exempt from the professional conduct rules, since engaging in generally acceptable conduct does not ordinarily reflect a dishonest character. Lawyers who tell political lies might argue that they are engaged in conventional political discourse—the political equivalent of professing that there is a Santa Claus (though the consequences may be less benign).

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slandered two other lawyers and a sheriff and who also misappropriated clients' funds. The court was doubtful whether, generally speaking, false public speech would itself be a disciplinable offense. The court stated: "It is not for this Court to animadvert upon the prevalent exaggeration and excess in public speech so discreditable and misleading. Allowance must be made for weak men who drift with the current into untrue statements, and who assume one character in private life and another in public speech. A charge of falsehood against an attorney so weak as to meet expletive with expletive and excess with excess in the heat of a political campaign would rarely be considered by the Courts in disbarment proceedings." *Id.* at 230. However, in this instance, the court found that serious falsehoods, amounting to an accusation of criminal conduct, "must be weighed by the Court, especially when coupled with other offenses showing a reckless disregard of professional duty." *Id.*

### III. Assessing Lawyers' Political Lies

#### A. *What Level of Scrutiny Should Be Applied to Lawyers' Political Lies in Public?*

Courts apply strict scrutiny to most regulations targeting the content of speech.<sup>199</sup> State regulation of speech rarely survives this analysis, which requires the government to show that the regulation at issue is necessary to further a compelling state interest. The First Amendment, however, requires a less stringent showing in a few isolated instances in which the speech has been historically subject to regulation.<sup>200</sup> Fraud, defamation, lies to government officials, and obscenity, for example, are not subject to strict scrutiny.<sup>201</sup> This subsection assesses the appropriate level of scrutiny to apply if state courts were to punish a lawyer for the hypothetical statements above.

Courts would apply the same level of scrutiny to the regulation of the lawyers' speech involved in our hypotheticals as they would if the words were spoken by nonlawyers. It is the government interest, which we discuss in section B, that may differ. As the Court suggested in *NIFLA v. Becerra*, content-based restrictions are often subject to strict scrutiny, even if they target professional speech.<sup>202</sup> Overturning a law that required pregnancy centers to provide information about their services, including about abortion, the Court explained that strict scrutiny applies because there is no separate category of professional speech: "Speech is not unprotected merely because it is uttered by 'professionals.'"<sup>203</sup>

There are two circumstances when courts apply a less stringent form of scrutiny to lawyer speech than that of laypeople. The first occurs when the state requires certain disclosures in commercial professional speech and the second when targeting speech is incidental to the regulation of professional

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199. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

200. *See supra* note 40 and accompanying text.

201. *United States v. Stevens*, 559 U.S. 460, 469 (2010) (refusing to treat depictions of animal cruelty as worthless speech undeserving of full First Amendment protection).

202. *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct 2361, 2374 (2018).

203. *Id.* at 2371–72.

conduct.<sup>204</sup> Neither of these two exceptions apply here. All three of our hypotheticals involve the regulation of the content of speech. They do not concern commercial speech, nor do they regulate professional conduct that incidentally touches on speech.<sup>205</sup>

The status of the speaker does not change the nature of the scrutiny, but the content of the speech may still mandate a less exacting analysis. One might analogize the lawyer's lies in our first hypothetical to impersonating a government official, which enjoys no First Amendment protection. The latter form of speech is considered useless in part because it undermines faith in a government function.<sup>206</sup> The lies in the Election Fraud hypothetical similarly undermine democratic processes. Like libel, however, false representations about government functions require a different analysis if they are made during public debate. Libel is not protected speech unless it is made against a government official, because in the context of heated public debate, people often exaggerate and even tell falsehoods. As the Court explained in *New York Times v. Sullivan*, speech that would otherwise be considered useless must be protected in the political context and given "breathing space" for this sort of debate.<sup>207</sup>

The question remains whether to apply strict scrutiny or a less stringent form of review to regulation of political lies, like the Election Lie example. The split decision in *Alvarez*, makes it difficult to answer this question. Justice Kennedy applied the highest level of scrutiny to the Stolen Valor Act, while Breyer recommended intermediate scrutiny and Alito's dissent viewed the lies about medals of honors as worthless speech.<sup>208</sup> Because the lies in our hypotheticals, unlike those in *Alvarez*, however, involve political speech, the reasoning in all three opinions in *Alvarez* would mandate strict scrutiny. While Justices Kennedy, Breyer, and Alito disagree about whether lies ever have intrinsic value as speech, they all acknowledge that laws concerning lies in some contexts, like politics, in which the government cannot be trusted to separate truth from falsehood, are the most

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204. On commercial speech see *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–456 (1978); and on regulation of conduct see *Ohralik*, 436 U.S. at 456.

205. *Id.* at 2371.

206. *U.S. v. Alvarez*, 567 U.S. 709, 721 (2012); Norton, *supra* note 27, at 198.

207. *N.Y. Times v. Sullivan*, 376 U.S. 254, 271–72 (1964).

208. *Alvarez*, 567 U.S. 709.

dangerous.<sup>209</sup> Justice Kennedy's opinion and Alito's dissent, which represent seven justices, would clearly apply the most exacting analysis in this context. While Breyer's opinion is ambiguous on this point, he too might subject such laws to strict scrutiny. The government's own inevitable interest in political speech means that bias would necessarily affect its assessment and truthful speech would be caught in the dragnet. As such, strict scrutiny ought to apply to court discipline of a lawyer for our hypothetical statements above.

As we explain in Part II, some falsehoods are subject to a lower level of scrutiny. Lies to government officials, perjury, and lies to further fraudulent ends fall into this category because they are conventionally regulated lies that involve concrete injury. The question is whether lies about the government that do not fall into one of these historically regulated categories ought to be added to the list. In his opinion in *Alvarez*, Justice Kennedy applies strict scrutiny to the law prohibiting false statements about military honors and determines that lower levels of scrutiny are reserved for a select few historically regulated lies that result in legally cognizable harm.<sup>210</sup> Our hypothetical enforcement of the rules of professional conduct in the three examples above would not qualify for less strict review under Kennedy's standard because none of the lies involved falls into that category.

Justice Breyer's concurring opinion in *Alvarez*, on the other hand, suggests a less stringent analysis to assess the validity of the Stolen Valor Act.<sup>211</sup> Breyer argues that in analyzing the constitutionality of the statute, courts should balance the nature of the government interest with the speech-related harm that comes from the regulation.<sup>212</sup> But Justice Breyer reserves this lesser form of scrutiny for regulations of false speech that do not run a high risk of chilling or penalizing truthful speech. Breyer lists false speech about "philosophy, religion, history, the social sciences, the arts, and the like" as the kind of speech that must be afforded the highest protection due to the likelihood of government bias and the potential for deterring truthful discourse.<sup>213</sup> Speech concerning the government like that involved in our

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209. *Id.*

210. *Id.* at 719–20.

211. *Id.* at 730 (Breyer, J., concurring).

212. *Id.*

213. *Id.* at 731.

hypotheticals runs just this sort of risk. If anything, it is less likely that the government could assess truth in an even-handed, unbiased way when the speech at issue concerns political or partisan ideology than the topics Justice Breyer lists. While Breyer favors the balancing approach of intermediate scrutiny and is a bit vague about when a more exacting analysis is needed, he does acknowledge that at a certain point the risk of biased regulation is so great that it warrants strict scrutiny. It seems reasonable to conclude that lies about government like the ones involved in our examples would qualify.

While objecting to Kennedy's application of strict scrutiny to the Stolen Valor Act, Justice Alito similarly argues that strict scrutiny must be applied to the regulation of some sorts of lies. The most exacting analysis would be necessary if the lies are in the context of "philosophy, religion, history, the arts, social sciences, and other matters of public concern," because in this context, regulation would present "an unacceptable danger of suppressing truthful speech."<sup>214</sup> Alito explains: "The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth."<sup>215</sup> The political lies involved in our hypotheticals pose just this sort of danger.

### B. *Government Interests in Regulating Lawyers' Political Lies*

As discussed in Part I, the First Amendment would ordinarily forbid a state from enacting a law subjecting the general public to punishment for lying in the media or elsewhere in the public square about government operations and other political events. There are exceptions if the false public speech defames identifiable public officials, furthers a financial fraud, or falls within another category of falsehoods that the government traditionally may proscribe.<sup>216</sup> But we take from *New York Times v. Sullivan*<sup>217</sup> and *United States v. Alvarez*<sup>218</sup> that the state cannot punish political lies unless

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214. *Id.* at 751 (Alito, J., dissenting).

215. *Id.*

216. The historic and traditional categories of speech that the government may restrict based on content were identified in *Alvarez* as: "advocacy intended, and likely, to incite imminent lawless action," obscenity, defamation, "speech integral to criminal conduct," "so-called 'fighting words,'" child pornography, fraud, "true threats" and "speech presenting some grave and imminent threat the government has the power to prevent." *Id.* at 717 (plurality opinion of Kennedy, J.).

217. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

218. *Alvarez*, 567 U.S. at 709.

they threaten some “legally cognizable harm”<sup>219</sup> or concern easily verifiable facts on subjects other than those of public concern.<sup>220</sup> The Court’s discussion of the Sedition Act suggests that a ban on political lying cannot be justified simply by the need to protect citizens from the distortion of their political viewpoint or of their preference among candidates for public office.<sup>221</sup>

Consequently, we take as a starting point that some of the lies in our opening hypotheticals, while worthy of condemnation, would not be generally sanctionable if told by nonlawyers. For example, despite the destructiveness of misinformation in the political sphere, a state law could not sanction members of the public for falsely claiming on social media that a candidate’s unidentified supporters stuffed ballot boxes with dead voters’ ballots, that a construction project will release cancer-causing pollutants, or that an indicted defendant is innocent and the prosecution overreached.<sup>222</sup> Whether told by a nonlawyer or a lawyer, these lies would not constitute legally actionable frauds, even if one might loosely claim that the public is being defrauded.<sup>223</sup> Likewise, these lies would not be legally actionable as defamatory speech, even if false assertions are made about a potential construction site, election officials, or law enforcement authorities. Banning these sorts of lies would chill legitimate political speech and threaten government bias and overreach.

As we conclude in Part I.B, the state can, at times, sanction lawyers’ political speech in the public square, even when it is prohibited from punishing the identical speech of the general public. It can only do so, however, if the prohibition is necessary to promote a compelling state interest related to the administration of justice. This Section explores whether disciplining lawyers for political lies would closely serve a sufficiently compelling justification.

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219. *Id.* at 719.

220. *Id.* at 730–32 (Breyer, J., concurring); *id.* at 743–44 (Alito, J., dissenting). *See supra* Part I.A.

221. *Sullivan*, 376 U.S. at 273–76.

222. For a recent account of misinformation’s political influence, see Reid J. Epstein, *Falsehoods Meddle in Humble Bid to Honor Past*, N.Y. TIMES, Oct. 25, 2021, at A1.

223. We recognize that the state has traditionally restricted speech that furthers a fraud, and that, in our hypotheticals, and in other cases of political lying, one might loosely assert that the public is being defrauded. But the public is not being defrauded in a legal sense in our hypotheticals any more than in *Alvarez*, where listeners may have been fooled into believing that the speaker won a medal of honor but would not have parted with money or otherwise relied on the lie to their detriment.

We begin by addressing political lying by lawyers in the context where the First Amendment claim would be strongest, namely, when lawyers speak in their personal capacity, not on behalf of a client or otherwise in the context of law practice. A federal judge in Michigan recognized the constitutional importance of this distinction when she sanctioned lawyers representing Republican voters and would-be electors for filing a legally and factually baseless challenge to the 2020 presidential election results in her state. “Although the First Amendment may allow Plaintiffs’ counsel to say what they desire on social media, in press conferences, or on television,” she observed, “federal courts are reserved for hearing genuine legal issues which are well-grounded in fact and law.”<sup>224</sup>

We conclude that punishing lawyers who tell political lies in their private lives will sometimes serve a compelling government interest but that no interest would justify a categorical ban on lawyers’ political lies. We then consider briefly whether, assuming we are right about this, one can justify a categorical ban on political lies told by lawyers extra-judicially but in the context of their legal practices. We express skepticism that courts can punish all political lies that lawyers might tell on clients’ behalf in the public square.

### 1. Regulating Lawyers’ Political Lies Outside Law Practice

One can envision lawyers telling political lies in various contexts outside their law practices: in holding or campaigning for public office, in serving as commentators or pundits as in our first hypothetical, or simply on social media or in other discourse with friends, neighbors, or the broader community. Suppose that a disciplinary authority asserts that the political lies in question would violate a professional conduct rule such as Rule 8.4(c), which bars all conduct involving “dishonesty, fraud, deceit, or

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224. *King v. Whitmer*, No. 20-13134, slip op. at 91 (E.D. Mich. Aug. 25, 2021); *id.* at 3 (“While there are many arenas—including print, television, and social media—where protestations, conjecture, and speculation may be advanced, such expressions are neither permitted nor welcomed in a court of law.”); *id.* at 101 (“Plaintiffs’ counsel’s politically motivated accusations, allegations, and gamesmanship may be protected by the First Amendment when posted on Twitter, shared on Telegram, or repeated on television. The nation’s courts, however, are reserved for hearing legitimate causes of action.”). In striking down a professional conduct rule concerning bias and harassment, a Pennsylvania federal court similarly noted this difference. *Greenberg v. Haggarty*, 491 F. Supp. 3d 12, 26–28 (E.D. Pa. 2020).



misrepresentation,”<sup>225</sup> and that the disciplinary authority seeks to enforce the rule by asking the court to suspend the lawyer’s license or otherwise punish the lawyer for lying. If the court agrees that the professional conduct rule otherwise applies, the question becomes whether the First Amendment bars enforcing the rule in this manner. This is not an overbreadth question, asking whether the rule sweeps in so much constitutionally protected speech that the rule itself is unconstitutional on its face; rather, the question is whether applying the rule to punish some particular false speech by a lawyer violates the First Amendment.<sup>226</sup>

It bears emphasizing that the mere fact that a professional conduct rule forbids the lawyer’s conduct does not resolve the constitutional question. Professional conduct rules do not escape constitutional scrutiny. As we have discussed, law practice is not a “privilege” on which courts may impose any conditions they see fit.<sup>227</sup> Courts’ restrictions on lawyers’ speech must serve a legitimate state purpose.<sup>228</sup> This is true even when lawyers, acting in their professional capacity, engage in speech relating to judicial proceedings, as in *Gentile v. State Bar of Nevada*<sup>229</sup> and *Legal Servs. Corp. v. Velazquez*,<sup>230</sup> as well as when lawyers engage in commercial speech while practicing law such as when they advertise to attract paying clients.<sup>231</sup> How compelling the purpose served by a restriction on lawyers’ speech must be, and how close a fit there must be between the restriction and the purpose it ostensibly serves, will depend on the level of scrutiny that the First Amendment requires. As we explain above, this in turn rests on the nature of the regulated speech. Core political speech deserves the greatest degree of

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225. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS’N 1983).

226. For discussions of the distinction between facial and “as applied” constitutional challenges to laws, see, e.g., Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005).

227. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054 (1991) (“[O]ur cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law.”); *Ex parte Garland*, 71 U.S. 333, 379 (1866) (“The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. . . . It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.”).

228. See, e.g., *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2366–71 (2018).

229. *Gentile*, 501 U.S. at 1030.

230. *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

231. See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995).

protection, while other forms of speech like commercial speech may warrant a more lenient analysis. Presumably, a stronger justification, and a closer fit between the restriction and the court's justification, are needed when lawyers acting in their personal capacity engage in political speech in the public square, because of the high value placed on political speech.

We can envision two types of justifications for sanctioning lawyers for telling political lies in their private capacity. One is that the conduct reflects adversely on the lawyer's fitness to practice because it reflects a dishonest character. The other is that the lawyer's political lies cause some identifiable harm—whether to the legal profession or to the general polity—which the court may prevent by restricting lawyers' speech. We consider these theories in turn.

- a. Whether lawyers' political lies outside law practice are a sign of dishonest character

One might argue that regardless of the context, any form of lying is a sign of unfitness to practice law because it shows that the lawyer has a dishonest character. As courts and bar authorities recognize, this is untrue. That is the lesson of our discussion in Part II. Courts carve out certain lies that do not reflect adversely on character by redefining the lies as forms of permissible advocacy. Disciplinary authorities carve out others, simply by looking the other way rather than initiating disciplinary charges when lawyers tell social and other benign lies.

One might argue that Rule 8.4(c) should not survive even a facial challenge, either because lawyers' lying has no bearing at all on their character and fitness to practice or because so many lies have no bearing on character that the rule is vastly overbroad. Drawing on contemporary social-science teachings, Deborah Rhode and others have questioned the basic premise that people have a character for honesty or deceit—i.e., that those who are caught lying outside the professional setting are more likely than others to lie in their role as lawyers.<sup>232</sup> Commentators also urge that the

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232. Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement*, 2014 BYU L. REV. 775, 775 (2014) ("The bar's character and fitness requirement is based on the largely untested premise that an applicant's past history helps predict whether that individual possesses the moral character needed to be a trustworthy lawyer."); Rhode, *supra* note 185, at 559

assumption is untenable because almost everyone sometimes lies, at least in their personal capacity, so that if the rule were taken literally, virtually no one would be qualified to practice law.<sup>233</sup> The skeptics are a long way from persuading the courts that the ability to assess character is entirely mythical, however. Both the admissions and the disciplinary process accept that certain criminal and dishonest conduct by bar applicants and lawyers reflects a character that makes them unfit to practice law because the conduct portends future professional wrongdoing.

Even so, courts do not assume that *all* lies reflect adversely on the character of a lawyer or bar applicant. For example, in *Schware v. Board of Bar Examiners of New Mexico*,<sup>234</sup> the Supreme Court held that an applicant denied admission to the bar, based ostensibly on bad moral character, was denied due process because the conduct in question, which occurred many years earlier, did not support the admissions authority's finding.<sup>235</sup> Among the cited conduct was Schware's use of aliases "to forestall anti-Semitism in securing employment [and] organizing his fellow workers."<sup>236</sup> The Court observed that "it is wrong to use an alias when it is done to cheat or defraud another but it can hardly be said that Schware's [use of aliases] was wrong."<sup>237</sup> In the disciplinary setting, too, courts recognize, at least implicitly, that lawyers' lies are not necessarily evidence of an immutably deceitful character but are often aberrational or contextual. Were it otherwise, lawyers' lies would warrant permanent disbarment and not, as is often the case, suspension or another lesser sanction.<sup>238</sup>

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("Even trained psychiatrists, psychologists, and mental health workers have been notably unsuccessful in projecting future deviance, dishonesty, or other misconduct on the basis of similar prior acts.") In the disciplinary context, when lawyers violate rules relating to the practice of law, discipline serves purposes other than protecting the public from lawyers who, based on past misdeeds, can be expected to engage in future transgressions. See generally Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 494-95 (2014) (summarizing the goals of discipline).

233. Bruce Green & Jane Campbell Moriarty, *Rehabilitating Lawyers: Perceptions of Deviance and its Cures in the Lawyer Reinstatement Process*, 40 FORDHAM URB. L.J. 139, 145 (2012) ("Although only a small percentage of people are consistently and dangerously dishonest, most people are dishonest to some degree.")

234. *Schware v. Bd. of Bar Exam of State of N.M.*, 353 U.S. 232 (1957).

235. *Id.* at 147.

236. *Id.* at 240-41.

237. *Id.*

238. See, e.g., Green & Campbell, *supra* note 233, at 147 ("If one were to accept the significance of 'character' as a consistent state, a rational approach to discipline would be permanently to disbar

Although Rule 8.4(c) might be justified on the ground that dishonesty reflects adversely on lawyers' character for truthfulness, in most cases where disciplinary authorities punish lawyers for lying, the lies are illegal or otherwise cause concrete harm about which courts are legitimately concerned. In these cases, courts could sanction lawyers without regard to whether the lawyer's conduct indicated that the lawyer had a dishonest character. Like most other rules, Rule 8.4(c) largely identifies conduct that causes harm that the judiciary has an interest in preventing, and disciplinary authorities may punish lawyers for causing this harm. To the extent the lawyer's character is implicated, the relevant character trait is indifference to the law. Conversely, when lawyers tell lies in the belief that the lies are lawful, professionally permissible, and beneficial to their clients, there is often no basis to infer that the lawyer's character is deficient. Consider, for example, situations where lawyers employed as undercover criminal investigators, or engaged in civil investigations, lie about their identity and motivation to gather evidence of wrongdoing. The lies say nothing about the lawyers' character. If courts permit this sort of deception, as in *Apple Corps*,<sup>239</sup> then they are at least implicitly suggesting that the lies are beneficial or at least harmless.<sup>240</sup> Deceiving others with the courts' blessing would not reveal a lawyer's dishonest character. If courts forbid this deception, its employment will reflect bad character only insofar as the lawyer knowingly violated a judicial norm,<sup>241</sup> and even then, the conduct principally implies a propensity toward rule breaking.<sup>242</sup>

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every lawyer who is found to have engaged in serious misconduct, on the theory that the lawyer probably lacks the requisite character to practice law and the lawyer's character is unlikely to change. Most courts have not adopted this approach.”).

239. *Apple Corps v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998).

240. In some contexts, these sorts of investigative lies are not only beneficial but closely akin to political speech. See Aviel & Chen, *supra* note 165, at 1291–95; see also *Apple Corps v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998).

241. One can debate whether blind obedience to the law is a necessary character trait for lawyers. William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421 (2001) (demonstrating that the popular portrayal of good lawyers often involves transgression in the service of informal values).

242. A case in point is *Miss. Bar v. Att'y ST*, 621 So. 2d 229 (1993), a disciplinary proceeding against a criminal defense lawyer who recorded a conversation with the apparently corrupt sheriff who framed the lawyer's client. When the sheriff asked whether the lawyer was recording the call, the lawyer falsely said he was not. The disciplinary tribunal found that recording the conversation, although deceitful, was a permissible means of establishing the sheriff's wrongdoing, and the state supreme court agreed. The disciplinary tribunal also concluded that it was permissible for the lawyer to falsely deny

Accepting that some lies told in a lawyer's private life indicate a dishonest character that reflects poorly on the lawyer's ability to practice law, but that others do not, one might ask whether political lies necessarily show a general character for dishonesty that can be expected to affect the lawyer's practice. In general, political lies such as those in our hypotheticals do not cause legally cognizable harms. The lying lawyer does not necessarily aim to cheat or defraud others. The lawyer's motivation may simply be to gain popularity in certain political circles, to persuade the audience to take a certain position on a public policy question, or to influence the audience's attitude toward public officials or government operations. Dishonesty toward these ends does not violate criminal or civil law. It may not even violate conventional societal norms. Even if it does, dishonesty towards these ends does not necessarily reflect a propensity toward dishonesty in situations that lawfully demand honesty. It is just as likely that lawyers moving between private and professional roles will conform their conduct to the expectations or obligations of their role. Lawyers who fail to keep secrets in their private lives are not assumed to have a general character for indiscretion that will carry over to the representation of clients. There is no reason to assume that lawyers, acting as private citizens, who tell political lies in public settings will disregard the candor rules in law practice.

The objectives behind political lying are not obviously benign or beneficial; they differ from Schwere's use of aliases to circumvent religious

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recording the conversation to elicit the sheriff's admissions, and the state supreme court initially agreed, *Miss. Bar v. Att'y ST*, No. 90-BA-552, 1992 Miss. LEXIS 415 (Miss. July 1, 1992), before withdrawing its opinion and issuing another one privately reprimanding the lawyer as a sanction for lying. *Miss. Bar*, 621 So. 2d 229. The court's decisions regarding whether a lawyer in this situation may secretly record a conversation or may lie were not predicated on the view that the conduct in question reflected a dishonest character or propensity; rather, the court made a policy judgment. The court's ultimate decision to forbid lying even for a good cause could be justified on any of several policy rationales—e.g., because any lying by lawyers erodes public trust, or because lawyers cannot be trusted to distinguish good lies from bad ones. But if the court had adhered to its initial ruling, one could not conclude that future lawyers who permissibly lied in identical situations had a propensity for dishonesty, any more than one could conclude that lawyers who secretly record conversations in the same circumstances have a dishonest character. In circumstances where rules forbid lying, a lawyer who breaks the rule may have a propensity to break rules, including those governing truth-telling. But the rule categorically forbidding lying itself cannot be justified on the ground that any time lawyers lie, they demonstrate a character for dishonesty. Lying when legally and socially permitted is not a reflection of dishonest character or propensity. To the extent that Rule 8.4(c) expands on civil law and other conventional norms against lying, it cannot be justified as a character rule but can only be justified on some other ground, such as that it looks bad for the profession for lawyers to lie.

discrimination and from lies told by lawyers in their work as undercover FBI agents. But lying does not have to be beneficial to be irrelevant to one's character to practice law. It must merely be nonpredictive of how one would behave in law practice where professional norms and rules generally forbid dishonesty. The bar recognizes, for example, that lies that accord with social or commercial convention—for example, social lies to deflect unwanted party invitations or puffery in business negotiations—do not show a propensity for dishonesty.<sup>243</sup>

In certain circles, if not encouraged, political lies are socially, culturally, or politically acceptable. Lying is a form of political discourse in which a significant number of public officials, political figures, and others openly and publicly engage in social media and elsewhere.<sup>244</sup> Telling political lies is more likely to reflect a controversial political choice or rhetorical style than evidence of a character trait. Even if it is evidence of a character trait, it is unlikely to be one that would affect law practice. There is no reason to presume, for example, that public officials who told “The Big Lie” are more likely than others to be dishonest in contexts, such as law practice, where honesty is required.

Rudolph Giuliani's claim that one may “‘throw a fake’ during a political campaign” has been criticized.<sup>245</sup> However, lying recurs even at the highest levels of government: historians acknowledge that all presidents lie to the American public, at times for self-serving or corrupt reasons, but at other times for strategic and beneficial reasons, such as to conceal military strategy.<sup>246</sup> Venerated lawyer-presidents such as Abraham Lincoln and Franklin Roosevelt number among those guilty of lying.<sup>247</sup> Lawyers in public life who lie to the public to promote political or governmental

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243. See MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 1983).

244. See, e.g., Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S MAG. (Nov. 1964), <https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics/> [<https://perma.cc/LFB4-YF2Q>]. This is not to say that lying in this context is not dangerous. ANNE APPLEBAUM, *TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM* (2020) (arguing that politicians and their spokespeople promote “medium-sized lies” that help garner support for authoritarian leaders); Arendt, *supra* note 2. The harm, however, is not unique when lawyers promote the lie.

245. Hilary Gerzhoy, *Despite Giuliani's Assertion, Lawyers Cannot 'Throw a Fake'*, LAW360 (Aug. 12, 2021, 7:35 PM), <https://www.law360.com/articles/1412492>.

246. Waldron, *supra* note 27, at 7–8.

247. ERIC ALTERMAN, *LYING IN STATE: WHY PRESIDENTS LIE – AND WHY TRUMP IS WORSE* (2020); BENJAMIN GINSBERG, *THE AMERICAN LIE: GOVERNMENT BY THE PEOPLE AND OTHER POLITICAL FABLES* (2007).

objectives may be misjudging the necessity or utility of the lies, but that relates to their competence, objectivity, or disinterestedness—not to their character for truthfulness.

If it were applied to political lies in lawyers' private lives, Rule 8.4(c) would not predictably punish lawyers with dishonest character. If disciplinary authorities were to begin pursuing all lawyers who lie in the media about public and political controversies, courts would have to decide which political lies reflect adversely on one's character and which do not. It is unclear how that distinction should be made. Perhaps courts would look at the lawyer's motivation, on the theory that political lies told for a laudable purpose do not show bad character. Perhaps courts would decide whether the lies were consistent with a broadly (if not universally) accepted convention. Until now, published decisions suggest disciplinary authorities have exercised discretion to protect courts from having to engage in these sorts of inquiries, which seem difficult if not impossible to conduct fairly.

This is not to say that lawyers' "benign" or "conventional" political lying in their personal capacity should be regarded as professionally acceptable. Other members of the bar may legitimately condemn the conduct and impose informal sanctions—public condemnation or shunning, for example—to encourage lawyers to become social and political exemplars.<sup>248</sup> But if lawyers acting in their private capacity are to be punished for telling lies in the context of political propaganda campaigns, when nonlawyers have a First Amendment right to tell precisely the same lies, courts will have difficulty justifying the punishment on the ground that the lies show deceitful character.

b. Whether lawyers' political lies outside law practice are uniquely harmful

Other possible justifications for punishing lawyers, but not other members of the public, for political mendacity focus on the harms this conduct causes. Lawyers' speech may be regulated, in ways that others' speech may not, either because lawyers' speech may be uniquely harmful

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248. For a discussion on the difference between breaking rules of professional conduct that can result in disbarment or other sanction and violating norms of the profession that result in informal professional consequences, see W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession*, 54 VAND. L. REV. 1953 (2001).

in ways with which judiciaries are legitimately concerned, because lawyers may have a greater obligation than others to avoid causing certain harms, or both. *Gentile* provides an example. Although the Court struck down Nevada's version of Rule 3.6, which restricts advocates' extrajudicial speech, the Court made clear that the First Amendment allows states to adopt better-tailored rules forbidding lawyers from publicly discussing pending cases if their statements are substantially likely to undermine the impartiality of the adjudicative proceeding.<sup>249</sup> In other words, the state rules must be specific enough to avoid chilling protected speech and resulting in discriminatory enforcement.<sup>250</sup> Courts have assumed that state rules based on the current Model Rule 3.6 are a close enough fit. This regulation of advocates' extrajudicial speech is permissible even though it leads to "punishment of pure speech in the political forum,"<sup>251</sup> given the importance of the state interest in protecting the integrity of trials and the close fit between a narrow rule's restriction on speech and this state interest.

The legitimacy of the state interest may not fully explain Rule 3.6. The state could not restrict the defendant or other nonlawyers from making similar statements to the press or restrict the press from publishing stories that might prejudice the jury. One reason for allowing regulation to single out lawyers might be that lawyers' extrajudicial statements, rightly or wrongly, are assumed to be more persuasive to prospective jurors than others' statements. This may be so both because lawyers are assumed to have greater access to nonpublic information about their cases and because lawyers are deemed to be more credible than others. But lawyers' presumptively greater impact on potential jurors also cannot be a complete explanation, because pretrial and trial publicity, regardless of the source, can potentially prejudice a jury.<sup>252</sup> The explanation must also be, at least in part, that serving as a trial advocate, if not as a lawyer generally, implies a commitment to preserving the proper functioning of the adjudicative system, at least in cases where one represents a client. Although lawyers do

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249. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1036–38 (plurality opinion of Kennedy, J.).

250. *See Gentile*, 501 U.S. at 1046–48 (opinion for the Court).

251. *Id.* at 1034 (plurality opinion of Kennedy, J.).

252. This is implicitly recognized by Rule 3.6 itself. Rule 3.6(c), which was added to the rule after the *Gentile* decision, allows lawyers to make otherwise prejudicial public statements to redress "the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." *See* MODEL RULES OF PRO. CONDUCT r. 3.6(c) (AM. BAR ASS'N 1983). The prejudicial publicity need not originate with opposing counsel but may come from any source.



not wholly surrender their First Amendment rights when they engage in advocacy, they are subject to limitations on speech that are designed to promote fair and impartial trials.<sup>253</sup> In other words, lawyers' speech can be restricted insofar as the restrictions are integral to their role as lawyers, just as any government employee's speech could be limited to ensure that the employee can properly carry out his job.

One might argue that lawyers' lies about government operations or other civic controversies may threaten harms of comparable significance to the interest in fair trials. In its opinion suspending Rudolph Giuliani, the New York state appellate court said that his lies about the 2020 presidential election, including in radio shows and podcasts, eroded public trust both in government<sup>254</sup> and in the legal profession.<sup>255</sup> Giuliani acknowledged that he had been speaking as a lawyer on behalf of President Trump or the Trump campaign,<sup>256</sup> and the court found his lies more harmful because he was identifiably a lawyer.<sup>257</sup> For now, we put aside whether, to prevent public mistrust of government and the bar, courts may punish lawyers such as Giuliani who falsely advocate for clients in the court of public opinion. We consider first whether to prevent these harms, courts may punish lawyers who tell political lies when speaking outside the practice of law. As we discuss, this may be a bridge too far.

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253. See *Gentile*, 501 U.S. at 1071 (“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”); *Mezibov v. Allen*, 411 F.3d 712, 717–18 (6th Cir. 2005) (“An attorney’s speech in court and in motion papers has always been tightly cabined by various procedural and evidentiary rules, along with the heavy hand of judicial discretion. . . . [Any First Amendment] challenge is almost always grounded in the rights of the client, rather than any independent rights of the attorney.”); but cf. *Neuberger v. Gordon*, 567 F. Supp. 2d 622, 634 (D. Del. 2008) (distinguishing *Mezibov* as a case involving courtroom advocacy and finding that the lawyer in question “engaged in protected activity while speaking to the media and the public.”).

254. *In re Giuliani*, 146 N.Y.S.3d 266, 283 (N.Y. App. Div. 2021) (“False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of a free society. . . . the broad dissemination of false statements, casting doubt on the legitimacy of thousands of validly cast votes, is corrosive to the public’s trust in our most important democratic institutions.”).

255. *Id.* (“When those false statements are made by an attorney, it also erodes the public’s confidence in the integrity of attorneys admitted to our bar and damages the profession’s role as a crucial source of reliable information . . . . It tarnishes the reputation of the entire legal profession and its mandate to act as a trusted and essential part of the machinery of justice.”) (citations omitted).

256. *Id.* at 270.

257. *Id.* at 283 (“Where, as here, the false statements are being made by respondent, acting with the authority of being an attorney, and using his large megaphone, the harm is magnified.”).

i. Preventing harm to public trust in government.

Courts assume that lawyers' First Amendment right to freedom of speech may be restricted to some extent to prevent the erosion of public confidence in government. That is the objective of Rule 8.2(a), which subjects lawyers to discipline for making "statement[s] that the lawyer knows to be false . . . concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."<sup>258</sup> Although the rule is close to an anti-defamation rule, its ostensible purpose is not to prevent reputational harm to the particular judge or legal officer. Rather, the accompanying Comment explains, the theory is that lawyers' false statements about judges' integrity "can unfairly undermine public confidence in the administration of justice."<sup>259</sup>

Rule 8.2(a) takes a side on a debate predating the adoption of professional conduct rules and going back to the nineteenth century. Although some early courts sanctioned lawyers for making any false statements about judges' integrity, recognizing that doing so undermines public respect for the judiciary,<sup>260</sup> others held that lawyers should not be punished for falsely impugning a judge or court once a case ended, lest legitimate criticism be chilled.<sup>261</sup> For example, a 1934 decision observed:

[B]oth under statutes and the common law the great weight of authority now is to the effect that, in so far as proceedings to punish for contempt are concerned, comment upon the behavior of the court in cases fully determined in the particular court criticized is unrestricted under our constitutional guaranty of liberty of the press and free speech . . . especially in the absence of a statute of

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258. MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS'N 1983). The rule also extends to a statement made "with reckless disregard as to its truth or falsity." *Id.*

259. *Id.* r. 8.2(a) cmt. 1.

260. See, e.g., *In re Humphrey*, 163 P. 60 (Cal. 1917); *In re Ades*, 6 F. Supp. 467, 481 (D. Md. 1934) ("false and malicious assault upon the integrity of the courts, . . . whether during the course of litigation or thereafter, is not only a gross violation of the duty of respect to the courts, but, if permitted to go unrebuked, would tend inevitably to bring the courts and our whole system of administering justice into public disrepute"); *In re Thatcher*, 89 N.E. 39 (Ohio 1909).

261. See, e.g., *State Bd. of Examiners v. Hart*, 116 N.W. 212, 215, 217 (Minn. 1908); *Ex parte Steinman*, 95 Pa. 220 (1880) (Sharswood, J.).

direct application to the contrary. This view, in brief, is based upon the theory that, keeping our constitutional guaranties in mind, libelous publications which bear upon the proceedings of a court while they are pending may in some way affect their correct determination, and are properly the subject of contempt proceedings. On the other hand, such publications or oral utterances of entirely retrospective bearing come within the sphere of authorized comment unless they affect a judge personally, when he has his remedy in an action of libel or slander as does any other individual thus offended against.<sup>262</sup>

Rule 8.2(a) rejects the view that lawyers' lies about judges are a proper subject of professional regulation only when they occur in the context of a pending proceeding in which the lawyer is an advocate.

In practice, however, despite the rule's breadth, Rule 8.2(a) has mostly been applied to lawyers who falsely impugn judges' integrity during advocacy in their pleadings or in other judicial submissions or arguments. In that context, courts have rejected First Amendment challenges even when Rule 8.2(a) is applied broadly,<sup>263</sup> and commentators agree the First Amendment poses no obstacle.<sup>264</sup> But that is in part because courts have broad authority to regulate advocacy to protect the integrity of judicial proceedings and to preserve their decorum.<sup>265</sup> For similar reasons, Rule 3.3(a), forbidding lying to judges, does not impede lawyers' free speech, and courts can sanction other forms of impermissible advocacy as well.<sup>266</sup>

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262. *People v. Albertson*, 275 N.Y.S. 361, 363–64 (N.Y. App. Div. 1934).

263. See Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 330–44 (2004) (discussing cases rejecting First Amendment challenges to sanctions imposed on appellate advocates under Rule 8.2(a)).

264. Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 163 (2008) (“There is little controversy regarding the power of judges to control and to restrict lawyers’ speech in the courtroom. In furtherance of the proper administration of justice and fair judicial processes for litigants, judges’ ability to conduct non-disruptive court proceedings trump attorneys’ First Amendment rights to speak in court.”); Richmond, *supra* note 263, at 328 (“The First Amendment generally does not exempt a lawyer from discipline for intemperate speech in court or for inappropriate statements in pleadings or briefs.”).

265. See *Miss. Bar v. Att’y ST*, 621 So. 2d 229 (Miss. 1993); see also *supra* text accompanying note 199.

266. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.5(d) (AM. BAR ASS’N 1983) (forbidding “conduct intended to disrupt a tribunal”).

Of course, *New York Times v. Sullivan* settles the constitutionality of lawyers' defamatory statements regardless of whether they occur in or outside a legal representation. But Rule 8.2(a) raises a harder constitutional question when applied to lawyers' false but nondefamatory statements outside judicial proceedings, and especially outside law practice. Because the rule's objective is to "preserve public confidence in the fairness and impartiality of our system of justice," not merely to protect individuals' reputations, it may be read to apply even to false statements about judicial operations that do not focus on individual judges or to other false statements impugning judicial integrity.<sup>267</sup> Some commentators have assumed, however, that the First Amendment would foreclose courts from applying the rule broadly to lawyers who falsely disparage judges in law review articles or in other settings outside law practice.<sup>268</sup>

In a post-*Alvarez* decision, *Myers v. Cotter*,<sup>269</sup> a federal district court rejected a judicial candidate's First Amendment challenge to both Rule 8.2(a) and a judicial conduct rule forbidding judges and judicial candidates from making knowingly or recklessly false or misleading statements.<sup>270</sup> With respect to the candidate's facial challenge, the court applied strict scrutiny, asking whether the rules were narrowly tailored to serve a compelling interest,<sup>271</sup> namely, "the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'"<sup>272</sup> It found that although the rules applied to lawyers' speech outside legal representations, the rules were narrowly tailored to serve this interest. The court further found that the rules were constitutional as applied to the false statements by a trial lawyer who had appeared before the judge and then announced his candidacy to oppose the judge.<sup>273</sup> The decision illustrates courts' view that, to preserve public trust in the judiciary, lawyers

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267. Wendel, *supra* note 53, at 429.

268. See Lawrence A. Dubin, *Fieger, Civility, and the First Amendment: Should the Mouth that Roared Be Silenced?*, 82 U. DET. MERCY L. REV. 377 (2005) (discussing decision holding that the First Amendment barred disciplining a lawyer for comments on a radio show disparaging appellate judges who overturned a substantial verdict in the lawyer's case); Richmond, *supra* note 263, at 345 (quoting from treatise).

269. *Myers v. Cotter*, No. CV 16-45, 2017 U.S. Dist. LEXIS 151140 (D. Mont. 2017).

270. *Id.* at \*4 (citing Montana Code of Judicial Conduct, Canon 4.1(A)(10), "[A] judge or judicial candidate shall not . . . knowingly or with reckless disregard for the truth, make any false or misleading statement.").

271. *Id.* at \*8.

272. *Id.* at \*9 (quoting *Williams Yulee v. Fla. Bar*, 573 U.S. 433, 445 (2015)).

273. *Id.* at \*18-25.

engaged in political speech may be restricted from making false statements about judges of the sort that would be constitutionally protected if made by others.<sup>274</sup>

Rule 8.2(a) might seem like strong precedent for a rule forbidding lawyers from lying about political or public controversies, or for the application of a broader rule, such as Rule 8.4(c), to lawyers' political lies. Certainly, the objective of preserving public trust in government is a legitimate one. But one might ask both whether lawyers, more than others, can be expected to advance this interest as a matter of professional obligation, and whether courts may promote this interest by employing their supervisory authority over the bar to impose a restriction uniquely on lawyers.

It is easy to see why lawyers can and should be required to assume responsibility for the proper functioning of the courts. Lawyers' traditional role was principally as advocates, and many still serve in that role; lawyers are collectively identified with adjudication; and the legal profession nearly has a monopoly over practice in the courts. Lawyers have a unique collective stake in the proper functioning of the courts and their training gives them special, if not unique, expertise to promote improvements to court processes and avoid subverting them. Thus, few have questioned the rule forbidding lawyers from engaging in "conduct prejudicial to the administration of justice,"<sup>275</sup> and one can understand a rule forbidding lawyers' falsehoods about judges' integrity as an application of that general principle.

It is harder, however, to see why lawyers, individually or collectively, should be required to assume unique responsibility for the proper functioning of government in general and, thus be obligated to refrain from conduct prejudicial to government administration, including false speech that impedes government operations or undermines public confidence in government. This is a civic obligation that all citizens should equally assume and that all citizens should be equally able to undertake. Although

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274. For a discussion of the constitutional protection afforded to nonlawyers' false statements on the campaign trail, see Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367 (2017); see also Note, *Victory Through Deceit: The Constitutional Collision Between Free Speech and Political Lies*, 50 SUFFOLK U.L. REV. 717 (2017). For a discussion of the exception for judicial candidates, see Nat Stern, *Judicial Candidates' Right to Lie*, 77 MD. L. REV. 774 (2018).

275. See MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 1983).

individual lawyers have often engaged in civic leadership, perhaps in disproportionate number, lawyers individually and collectively have no special role in the running of government aside from the adjudicative processes. Correspondingly, courts have no authority over the operation of government beyond the judicial processes; separation of powers principles suggest that they should not attempt to assume such authority.

Even if courts could promote public trust in government by restricting lawyers' private speech about government, there still may not be a close enough fit between a restriction on lawyers' lying and the courts' objective. When lawyers lie about judges, particularly, as in *Myers v. Cotter*, regarding cases in which the lawyers participated, it is plausible to assume that the public is more likely to credit lawyers' lies than others' lies. Lawyers, particularly those who appear before the judge, have greater access to knowledge about the judge's conduct. By virtue of their legal training, lawyers may be better able to measure the judge's conduct against judicial conduct rules and expectations. Further, at least in speech related to law practice, the public may assume that lawyers are professionally obligated to be truthful. It is not at all clear, however, that when lawyers speak about ordinary political controversies unrelated to their law practices, the public will assume they have credibility, expertise, and special access to facts.

Consider the lawyer in our earlier Environmental Lie hypothetical who lies about the potential impact of a construction project. When that lawyer, speaking in the lawyer's personal capacity—for example, as a local resident opposing a neighborhood development—publicly states that the project will cause cancer-causing pollution, the public has no reason to assume the lawyer has greater access to information about the construction site than others or a greater ability to evaluate the health risks than others. On the contrary, the public might infer the lawyer, motivated by opposition to the project and speaking as a private citizen, is no more credible than others.<sup>276</sup> Likewise, in our second hypothetical, where the lawyer lies about election fraud, there is no reason to conclude that the lawyer's lies will have greater weight than anyone else's. The lawyer claims no first-hand knowledge that

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276. A further obstacle to regulating these statements is the contestable nature of scientific facts. See Jane R. Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73 (2018) (addressing the application of the First Amendment to false and contested scientific claims). In contrast, in the Environmental Lie hypothetical, there would be a stronger basis for regulating the lawyer's false and potentially defamatory assertion that the members of the City Council are "obviously taking money from real estate developers to do their bidding." See *supra* p. 39.

dead citizens' votes were recorded and does not claim to have investigated for a lawsuit. No legal expertise is needed to know that dead people's votes may not be recorded. And the lawyer, as a political partisan, is unlikely to be regarded as more credible than others.

Part of the reason why lawyers' lies about judges are likely to have a greater impact than their lies about other government operations, or about public or civic events generally, is that lawyers have a special relationship with the judiciary, and, at some level, the public understands that. Lawyers' professional codes tell them that they are "officer[s] of the legal system,"<sup>277</sup> that they "should demonstrate respect for the legal system and for those who serve it, including judges,"<sup>278</sup> and that "[t]o maintain the fair and independent administration of justice," they should "defend judges and courts unjustly criticized."<sup>279</sup> While the professional codes also encourage lawyers, as public citizens, to seek to improve the law and the administration of justice generally,<sup>280</sup> the legal profession has no general obligation to the government more broadly. It is not as closely tied to other branches of government as to the judiciary or as responsible collectively for the other branches' wellbeing. And the further one gets from the administration of government to other public policy concerns, the less lawyers are likely to be viewed as speaking with professional authority. Lawyers' assertions about the electoral process are likely to be less authoritative than their assertions about judges' integrity, and their assertions about public health are likely to be less authoritative still.

This is not to say that lawyers' political lies never uniquely undermine public trust in government. It is possible, though in our opinion not proven, that they might. In Giuliani's case, the state appellate court assumed that his law license gave him a "megaphone," amplifying his lies about the 2020 presidential election, and thereby giving them greater impact.<sup>281</sup> Either with the benefit of hindsight, or under the influence of hindsight bias, the New York court assumed that Giuliani's lies led to Trump supporters' forcible entry of the Capitol on January 6,<sup>282</sup> and the federal court in Michigan likewise assumed that the frivolous election lawsuits were a contributing

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277. MODEL RULES OF PRO. CONDUCT Preamble para. 1 (AM. BAR ASS'N 1983).

278. *Id.* para. 5.

279. *Id.* r. 8.2 cmt. 3.

280. *Id.* Preamble para. 6.

281. *In re Giuliani*, 146 N.Y.S.3d 266, 283 (N.Y. App. Div. 2021).

282. *Id.*

cause.<sup>283</sup> Perhaps similar lies told by lawyers outside their law practice—for example, in their role as elected officials—could also be blamed for creating mistrust in the election that spurred a violent response. But so far lawyers have not been sanctioned for lying about the 2020 election in their nonlawyer capacities. Both in Giuliani’s case and in the case of lawyers in public office, there is good cause for skepticism about whether it was their law licenses that gave them credence or influence. In any event, our point is that lawyers’ political lies in general, unlike lawyers’ lies about judges’ integrity in particular, do not presumptively distort public understanding.

Nor is this to suggest that lawyers’ political lies outside the context of law practice are harmless, much less that they serve a useful function. Our point is simply that lawyers’ lies about government or about political and civic events are often, and perhaps ordinarily, no more harmful to public discourse and public understanding than other peoples’ political lies. Therefore, we are skeptical that, to protect public trust in government, lawyers can be punished for telling political lies as private citizens when the First Amendment forbids punishing other private citizens for the same lies. That the speaker is a lawyer does not create a closer fit between the restriction on speech and the worthy aim to protect public confidence in government.

ii. Protecting harm to public trust in the legal profession.

One might also argue that a lawyer’s political lies undermine public confidence in the bar’s integrity.<sup>284</sup> In other words, even if a lawyer’s political lies do not in fact reflect deceitful character, the public will believe that the lies do. When the public catches lawyers telling political lies, the result may be to undermine future clients’ and others’ confidence in lawyers and, generally, for the public to mistrust members of the legal profession. This theory might justify disciplinary authorities in punishing political lies told in public while exempting or ignoring lies told to friends and family.

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283. *King v. Whitmer*, No. 20-13134, slip op. at 100–01 (E.D. Mich. Aug. 25, 2021).

284. *Cf. Att’y Grievance Comm’n v. Basinger*, 109 A.3d 1165, 1170 (Md. 2015) (“Generally, a lawyer violates MLRPC 8.4(d) [forbidding conduct prejudicial to the administration of justice] where the lawyer’s conduct negatively impacts the public’s perception of the legal profession.’ In other words, a lawyer violates MLRPC 8.4(d) where the lawyer’s conduct ‘tends to bring the legal profession into disrepute.’”) (internal citations omitted).



Maintaining public confidence in the legal profession is a legitimate state interest that courts can and do promote through professional conduct rules. For example, a Comment accompanying Rule 8.4(g),<sup>285</sup> a relatively new rule forbidding lawyers from engaging in harassment or discrimination in their law practices, explains that this conduct “undermine[s] confidence in the legal profession and the legal system.”<sup>286</sup> A recent ABA ethics opinion discussing this rule quotes from decisions offering this rationale to justify sanctioning lawyers for harassing or discriminatory conduct in law practice.<sup>287</sup> Courts might promote public confidence in the legal profession by punishing certain conduct outside law practice as well. This is a rationale courts once offered for disciplining lawyers for crimes of “moral turpitude” that do not necessarily reflect adversely on the lawyer’s fitness for the practice of law.<sup>288</sup>

In the case of criminal conduct, however, it is already established that the state can punish members of the general public for the conduct in question. No special rationale is needed to forbid lawyers from engaging in the conduct. The same is somewhat true of certain discriminatory and harassing conduct in the practice of law; indeed, a Comment to Rule 8.4 directs courts to seek guidance in the substantive law.<sup>289</sup> With respect to

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285. MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 1983). The constitutionality of state versions of this rule has been challenged. *Compare* Greenberg v. Haggarty, 491 F. Supp. 3d 12, 26–33 (2020) (striking down Pennsylvania’s version of the anti-discrimination rule), with *In re Abrams*, 488 P.3d 1043, 1050–54 (Colo. 2021) (upholding Colorado’s version of the same rule). In upholding the anti-discrimination rule, the Colorado court did not rely on a general need to protect the reputation of the profession and instead concluded that the rule was necessary to achieve the state’s legitimate interest in “regulating the conduct of attorneys during the representation of their clients, protecting clients and other participants in the legal process from harassment and discrimination, and eliminating expressions of bias from the legal process.” *In re Abrams*, 488 P.3d at 8.

286. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 1983).

287. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020) (citations omitted).

288. *See, e.g., In re Lesansky*, 17 P.3d 764, 767 (Cal. 2001) (“Criminal conduct not committed in the practice of law or against a client reveals moral turpitude if it shows a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney’s conduct would be likely to undermine public confidence in and respect for the legal profession.”).

289. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 1983) (“The substantive law of antidiscrimination and antiharassment statutes and case law may guide application of [Rule 8.4(g)]”). To the extent that the rule imposes restrictions on lawyers’ speech beyond those established by existing law, First Amendment questions might be, and have been, raised. *See, e.g.,* Bruce A. Green & Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, HOFSTRA

political lies, in contrast, the question is whether courts may adopt rules forbidding lawyers from engaging in a class of speech in which nonlawyers may lawfully engage to protect public confidence in the legal profession—that is, whether this objective is sufficiently compelling, and whether there is a close enough fit between the objective and the restriction on speech.

It is not enough just to posit that a restriction on speech promotes public confidence in the bar. More than four decades ago, in *Bates v. State Bar of Arizona*,<sup>290</sup> the Supreme Court concluded that various proffered interests, including the interest in preserving public confidence in the legal profession, could not justify a categorical ban on lawyer advertising.<sup>291</sup> The bar argued that advertising would “erode the client’s trust in his attorney” by revealing the attorney’s financial motivation, and that it would “tarnish the dignified public image of the profession.”<sup>292</sup> The Court found it implausible that clients were unaware of lawyers’ financial motivation, given that few worked for free, and it questioned the connection between advertising and public respect for professions, noting that the public was just as likely to be cynical about the legal profession’s prohibition of overt advertising while lawyers drummed up business through social connections.<sup>293</sup>

In general, noncommercial expression receives greater protection than commercial speech, and so the need to restrict noncommercial speech to protect the bar’s reputation must be even more compelling. It is conceivable that, once revealed, lawyers’ political lies, even outside law practice, erode public trust in the bar. The effectiveness of the legal profession depends on public confidence that, when lawyers are practicing law, they are not lying to their clients, the court, opposing counsel and parties, and others. It is plausible that when a lawyer serving as a public official, a commentator, or simply a member of the public tells political lies in the public media,

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L. REV. (forthcoming 2022); Margaret Tarkington, *Throwing Out the Baby: The ABA’s Subversion of Lawyer First Amendment Rights*, 24 TEX. REV. L. & POL. 41 (2019); see also Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018). For a defense of Model Rule 8.4(g), see Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017).

290. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

291. *Id.* at 385.

292. *Id.* at 368.

293. *Id.* at 369–70.

members of the public will identify that person as a lawyer and think less of the legal profession as a result.

But restrictions on political speech require more than a plausible link to a legitimate objective. In *Florida Bar v. Went for It*,<sup>294</sup> a divided Supreme Court upheld a blackout on lawyers' advertising targeted to victims within thirty days of an accident, finding that "[t]he Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered."<sup>295</sup> But the restriction was preceded, and justified, by a two-year study, which developed an "anecdotal record" that the Court found to be "noteworthy for its breadth and detail."<sup>296</sup>

One might question whether the abstract interest in maintaining public confidence in the legal profession should ever justify a restriction on lawyers' political speech,<sup>297</sup> but if so, the restriction must rest on more than mere conjecture; there must be persuasive evidence that the speech in question significantly erodes public trust. Perhaps the bar can develop a record to show that, when lawyers acting in their personal capacity lie about political matters, and then go unpunished, public trust in the legal profession is significantly eroded. But it has not done so yet, and there are reasons to doubt it can. When lawyers speak outside law practice, the public does not necessarily identify them as lawyers, and if it does, the public does not necessarily assume that the lawyers' political lying (if the public recognizes the speech as knowingly false) reflects on how these lawyers will behave in their law practices. Nor does the public necessarily assume that lawyers who lie in the public square are representative of the profession.

And, of course, it is not a foregone conclusion that the public's confidence in the legal profession's honesty is at risk of being eroded.

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294. Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995).

295. *Id.* at 635.

296. *Id.* at 627.

297. Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 971 (2014) ("The difficult First Amendment problems are triggered when government regulations are grounded not in palpably functional rationales, but in more ethereal values such as promoting respect for the rule of law, maintaining professionalism and public confidence in the legal system, and safeguarding the dignity of the profession."). For a criticism of the compelling nature of the government interest in protecting the reputation of the profession, see *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 465 (2015) (Scalia, J., dissenting) (arguing that this sort of abstract malleable government interest does not lend itself to strict scrutiny, but rather to a "sleight of hand").

Surveys—and lawyer jokes—suggest that the legal profession is not universally trusted. One might posit that part of the problem is practices that courts permit—for example, legitimate advocacy that includes making false allegations, making factual arguments to the jury that lawyers know to be false, and presenting evidence and testimony that the lawyer suspects are false. Given the mistrust cultivated by conventional, professionally proper practices, it is uncertain that lawyers' public lies as private citizens will meaningfully influence the public perception of lawyers.

## 2. Political Lies in the Context of Law Practice

As discussed above, we are skeptical that courts exercising their authority to regulate the bar may generally forbid lawyers from lying about politics in the public square, at least when lawyers are speaking for themselves, not for clients. The First Amendment precludes laws, like the Sedition Act, subjecting private citizens to punishment for lying about the government, and we are unpersuaded that lawyers, when acting as private citizens, are on different constitutional footing. Suppose, however, that lawyers are engaged in the practice of law, making identical false statements in the public square but doing so on clients' behalf. Some might assume the First Amendment now gives way to courts' regulatory power, because the justifications for proscribing lawyers' political falsehoods are now more compelling or because the proscription better serves the relevant objectives.<sup>298</sup>

We are not so sure. Courts can sanction lawyers for *some* political lies to the public on clients' behalf, in addition to the lies, such as those about a judge's integrity or qualifications or those that impact an ongoing proceeding, for which lawyers may be sanctioned even when speaking in their private capacity. But we think in many or most cases, the rationale for punishing lawyers' political lies to the public is no more persuasive when lawyers act on clients' behalf than when lawyers act in precisely the same way on their own behalf. For example, for reasons discussed earlier, we assume that the First Amendment forbids punishing a lawyer who in his private role as a political partisan, rallies his party's supporters by making

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298. See, e.g., Andrew M. Perlman, *The Legal Ethics of Lying About American Democracy*, in BEYOND IMAGINATION? THE JANUARY 6 INSURRECTION 3–10 (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3933872](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3933872).

a false claim of voter fraud on public media. If that is correct, then we doubt that courts may sanction the lawyer in our second hypothetical who makes precisely the same false claims in the same public fora but does so as a candidate's lawyer.

To be clear, our focus is on political lies to the public, not on lawyers' lies on other subjects, such as commercial matters that merit less constitutional protection, and not on lies that lawyers might tell courts or identifiable individuals in their professional interactions in a legal matter. We see no First Amendment problem with rules generally forbidding lawyers from lying to judges, clients, opposing counsel and parties, and other identifiable individuals to whom lawyers make representations in a legal matter and who might rely to their detriment on the lawyers' false statements.<sup>299</sup> In large measure, professional conduct rules forbidding lawyers from lying in the course of representing clients cover the same ground as obstruction of justice law, tort law, agency law, and other laws,<sup>300</sup> but even when professional conduct rules that affect speech are more demanding, they generally serve a compelling objective and there is a close fit.

Even if other law is silent, courts can forbid lawyers' prevarication to protect the integrity of the court process and to protect clients and others from harmful reliance on false representations, and courts can mostly justify rules against lying in law practice on these grounds. There are other possible

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299. See generally Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 660–74 (2018) (addressing when lies may be constitutionally regulated because they harm others or benefit the speaker). The fact that someone's lies concern a "political" subject should not necessarily take it outside the conventional categories of sanctionable lies. See, e.g., *In re Clinesmith*, Report and Recommendation (D.C. App. Aug. 11, 2021), [https://dcbbar.org/ServeFile/GetDisciplinaryActionFile?fileName=HCKevin\\_EClinesmith21ND004.pdf](https://dcbbar.org/ServeFile/GetDisciplinaryActionFile?fileName=HCKevin_EClinesmith21ND004.pdf) [<https://perma.cc/EZ79-E34X>] (suspending FBI associate general counsel who pled guilty to making a false statement in connection with investigating the Trump campaign). Moreover, public statements that might be acceptable in the media may be sanctionable when made to an individual, such as a client. For example, in *In re Sitton*, 618 S.W.3d 288 (Tenn. 2021), the lawyer advised a woman on Facebook how to kill her abusive husband to make it look like she was acting in self-defense. Although the lawyer argued unsuccessfully that he did not mean to be taken seriously, he conceded that he was giving legal advice in his professional capacity. We assume that, in contrast, if a lawyer wrote a blog, not directed at a client or any other particular person, on how to get away with murder, the writing might be in bad taste but would be constitutionally protected speech.

300. See MODEL RULES OF PRO. CONDUCT r. 3.3(a), 4.1(a) (AM. BAR ASS'N 1983). Some rules expressly incorporate other law, such as the rules forbidding assistance in a crime or fraud, or the rules forbidding other unlawful conduct. See *id.* r. 1.2(d), 3.4(a), 4.1(b). For a discussion of how the rules of professional conduct integrate aspects of agency law and overlap with other law, see W. Bradley Wendel, *Moral Judgment and Professional Legitimation*, 51 ST. LOUIS U.L.J. 1071, 1073 n.1 (2007).

justifications as well, although they may not all suffice standing on their own. A categorical rule against lying to clients can be justified (although there is no such explicit rule at present) because, even if the client disbelieved and disregarded the lawyer's false statements, the lawyer's lie would likely erode the client's trust to the detriment of the lawyer-client relationship. Likewise, rules can forbid lawyers from lying to third parties, even when there is no risk of detrimental reliance, to the extent it can be shown that the lies will undermine public confidence in lawyers' integrity. Arguably, even when lawyers tell innocuous lies to third parties on clients' behalf, the public will lose confidence in the legal profession, with the result that people will mistrust lawyers with whom they interact even when the lawyers are trustworthy. Further, it is arguable that a rule against lying in law practice may generally forbid even harmless or salutary lies out of concern that lawyers cannot be trusted to distinguish the harmless or salutary lies, which may be rare, from those that matter.<sup>301</sup>

All that said, however, it is not a foregone conclusion that courts can apply a flat-out prohibition on lawyers' political lies in the context of law practice. The First Amendment limits courts' ability to restrict lawyers' speech in the context of law practice,<sup>302</sup> and political speech on a client's behalf is entitled to heightened protection. As Renee Knake Jefferson recently observed in an article on lawyers' political speech, although courts can undoubtedly punish lawyers for making false claims of election fraud "in the courtroom," it does not follow inescapably that courts can punish lawyers for making the same claims "in the court of public opinion."<sup>303</sup> Professor Jefferson suggests that the First Amendment would preclude "a wholesale ban on public facing lawyer lies in political life" but that in order to preserve "the public's confidence in the administration of justice and the legal profession," the First Amendment would permit "[a] narrow ban on lawyer lies that undermine valid elections in the court of public opinion."<sup>304</sup> Significantly, she does not distinguish whether the lawyer is lying about the

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301. See, e.g., *Mississippi Bar v. Att'y ST*, 621 So. 2d 229 (Miss. 1993) (finding that criminal defense lawyer violated Rule 4.1 by falsely denying that he was recording his conversation with a corrupt city police chief who was about to make statements exonerating the wrongly convicted client, notwithstanding that the lawyer ethically recorded the conversation "to protect his client's interests" and that the lawyer's false denial was "intended to protect his client and uncover the truth").

302. See generally Smolla, *supra* note 297.

303. Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J.F. 114, 133 (2021).

304. *Id.* at 136-37.

election in the lawyer's personal capacity or on a client's behalf. She apparently assumes that whether the restriction on political speech closely serves a compelling objective will be about the same either way. We agree, but that leads us to the opposite conclusion, namely, that courts cannot ordinarily punish lawyers for lying to the public about an election.

The argument for regulating lawyers' political speech is not necessarily greater when lawyers speak for clients than when lawyers speak for themselves. Consider the "Stop the Steal" rally at the National Mall on January 6, 2021, where two lawyers, Rudolph Giuliani and constitutional law professor John Eastman, asserted that President Trump won the election.<sup>305</sup> It is questionable whether the public perceived that Giuliani and Eastman were representing Trump as a client. Even if so, their representative role probably would not alter how Trump supporters would have perceived the lawyers' false statements at the time or how the public would perceive the legal profession in retrospect; nor would it make much difference in assessing the lawyers' character to practice law.

Of course, if Trump were violating criminal law by intentionally obstructing justice or inciting a riot, his lawyers could not knowingly assist him.<sup>306</sup> Nor could they lie if doing so was assisting in a fraud. But suppose that the aim was not to incite Trump's supporters to storm the Capitol, but simply to influence them and others to politically pressure Vice President Pence, members of Congress, and state officials who they believed had lawful authority to determine the outcome of the presidential election. We assume that Congress could not prohibit nonlawyer candidates such as Trump, nonlawyer officials, and nonlawyer supporters such as Trump's daughter and son-in-law from engaging in false political speech on occasions such as this one. In that case, it is questionable that, to serve some public interest within the judiciary's concern, courts may adopt professional conduct rules subjecting lawyers to professional punishment for engaging in similar false political speech as advocates on candidates' behalf.

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305. Thomas Coleson, *Rudy Giuliani Called for 'Trial by Combat' Before Trump Supporters Stormed the Capitol*, BUSINESS INSIDER (Jan. 7, 2021), <https://www.businessinsider.com/rudy-giuliani-called-on-trump-supporters-for-trial-by-combat-2021-1> [<https://perma.cc/6BJD-E5CJ>]; Andrea Salcedo, *Law Professor John Eastman Spoke at Rally Before Capitol Riots. Facing Outrage, He Won't Return to His University*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/nation/2021/01/14/john-eastman-chapman-university-departure/>.

306. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983).

To give another example, consider a lawyer like the one in our Environmental Lie hypothetical who seeks to persuade the public to pressure the local government to abandon a development project. The lawyer might represent a client as a lawyer, might serve a client outside the context of a lawyer-client relationship, might act in her own capacity as a member of a civic group opposing the development, or might act entirely on her own as a public commentator (as in the hypothetical) or as a concerned citizen. If the lawyer makes false statements to the public in the media or elsewhere, it seems unlikely that the resulting harm to civic discourse, government functioning, or the public perception of the legal profession will be affected by the lawyer's particular role, assuming one can discern it, or that the falsehoods reflect differently on the lawyer's character depending on her role.

We have already expressed doubt that a lawyer's professional status amplifies the impact of lawyers' political lies,<sup>307</sup> and even if so, it is questionable whether lawyers can be sanctioned for political lying to the public, when others may not be, on the ground that lawyers are more persuasive.<sup>308</sup> Similarly, we doubt whether the public is more likely to accept false political speech when lawyers speak on clients' behalf rather than on their own behalf. When lawyers talk about politics in the media or in other fora, the public may not recognize that they do so as a client's legal representative. If the public realizes that the lawyer is speaking as a client's advocate, not as a matter of personal belief, the public should give the lawyer's statements less credence, not more.<sup>309</sup> The falsehoods themselves will not be more artful or persuasive when the lawyer represents a client; the lawyer will bring the same skills to bear either way.

Further, the lawyer's role in these examples has little significance for the lawyer's character relating to the practice of law. Presumably, the

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307. See Chen & Marceau, *supra* note 299, at 655.

308. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1057 (plurality opinion of Kennedy, J.) ("If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent."); see generally David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991) ("The Government may not suppress speech on the ground that it is too persuasive.").

309. That is why lawyers appearing before legislatures must disclose when they are representing a client, not speaking on their own behalf. See MODEL RULES OF PRO. CONDUCT r. 3.9 (AM. BAR ASS'N 1983).



lawyer understands that lying is a permissible tool in political advocacy—indeed, that the First Amendment gives clients leeway to be dishonest. In that event, the lawyer’s use of this tool is not an expression of the lawyer’s general propensity to prevaricate any more than a civil rights lawyer’s use of testers to gather evidence of intentional discrimination reflects on those lawyers’ character. Political lying is not a moral decision but an instrumental one—a choice among tools of advocacy—whether on the lawyer’s own behalf, on a client’s behalf, or on a non-client’s behalf. Our Vault Theft Lie hypothetical illustrates the point. Professional conduct rules allow lawyers, as a matter of zealous advocacy, to respond to unduly prejudicial pretrial publicity to mitigate reputational harm and promote an unbiased jury.<sup>310</sup> The criminal defense lawyer’s press conference promotes those legitimate objectives to the same degree whether assertions regarding his client’s innocence are true or false. As long as the lies are not substantially likely to interfere with a proceeding, and as in our example, might make the proceeding fairer or at least correct an unfairness, it is hard to imagine a government interest that would justify punishing the lawyer’s lie.

Finally, to the extent the public sees through the lawyer’s lies, its perception of the legal profession will not necessarily erode more significantly when the lawyer has a client. One might speculate that the public will think worse of the legal profession when the lawyer lies in lobbying for a client than when the lawyer lies on her own behalf, insofar as it perceives the lies to be reprehensible and that the legal profession tolerates them as a tool of advocacy. As we have discussed, however, mere conjecture about the public perception cannot justify restrictions on political speech.<sup>311</sup> Moreover, there is no reason to assume the public, which already regards courtroom advocacy as troubling, will think even less of the profession if one more questionable weapon is included in lawyers’ arsenal.

This is not to say that courts must let lawyers get away with all false statements in the court of public opinion. We think, for example, that courts have a stronger basis to forbid lawyers who represent parties in pending proceedings from lying in the media about the proceedings or about the evidence or issues in the proceedings. As discussed, lawyers have a more obvious obligation to protect public confidence in the adjudicative process

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310. *Id.* r. 3.6(c).

311. *See supra* Part III.B.1.

than in the democratic process in general. To the extent that lawyers' false public statements about a judge's ruling, or about the evidence or proceedings, distort the public understanding of the proceedings and undermine public confidence in the adjudicative process, the argument seems stronger for holding lawyers accountable. Making contradictory assertions about the evidence—truthful ones in court, and false ones in public media—may compound the problem. Even if so, a professional conduct rule should not be applied to categorically forbid lawyers from telling political lies in the court of public opinion. Rather, courts should have to distinguish between political lies that do and do not significantly undermine the compelling judicial interest in preserving public confidence in the administration of justice. As we discuss below, a rule asking courts to make this kind of distinction would raise further problems.

### *C. The Problem in Regulating Political Lies*

At first glance, it might seem that regulating political lies like the ones in our hypotheticals would further the purpose and values of the First Amendment. The First Amendment is designed to promote democracy, social stability, the advancement of truth, and the preservation of individual autonomy.<sup>312</sup> It is supposed to foster the process by which public opinion is formed.<sup>313</sup> The lawyer's lies about the election involved in our second hypothetical seem to undermine these values. They threaten the integrity and legitimacy of a core democratic function. They sow misinformation and falsehoods that might lead some to resort to extra-legal action. And they undermine the autonomy of the listeners who are duped into believing the lie.

But the relevant question is not whether the lies in the abstract undermine free speech values but rather whether allowing those lies to go unpunished is preferable to the alternative. In other words, does the greater risk arise from the lies themselves or government regulation of those lies?<sup>314</sup> Tasking the government with regulating these sorts of untruths may pose an

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312. See generally Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–54 (1989).

313. POST, *supra* note 48, at 14; see also *supra* note 270.

314. Greenawalt, *supra* note 312, at 135 (“The critical question is not how well truth will advance absolutely in conditions of freedom but how well it will advance in conditions of freedom as compared with some alternative set of conditions.”).

even greater threat to free speech values than the speech itself. John Stuart Mill famously asserted that truth is much more likely to emerge from a free exchange of views than when the government puts its thumb on the scale.<sup>315</sup> This is an empirical claim, and it is certainly possible that Mill is not always correct. But when it comes to politics, the government, which reflects the dominant view and inevitably has its own interest in maintaining power and promoting its preferred policies, is especially unlikely to promote truth, and even if it correctly targets a false statement, removing that statement from public discourse undermines a process by which truth is at least potentially reaffirmed. So, the question is really, in the context of political discourse, which does more damage: the lie or the regulation of that lie?<sup>316</sup>

When disciplining lawyers for speech, it is worth noting not only the general concern about government bias and chilling of truthful speech, but also particular concerns about the institutions involved. Disciplinary agencies may have their own ideological biases that affect not only enforcement decisions but also determine which cases they choose to investigate. Biases can operate on an unconscious level, leading regulators to ignore lies that advance their political interests while identifying and pursuing those that advance an ideological opponent's objectives.<sup>317</sup>

Transparency, trust, and truth are the cornerstone of modern democracies in general, and American democracy in particular.<sup>318</sup> So too is the notion that no one institution has a monopoly on truth. The open-ended pursuit of knowledge and an evolving understanding of truth are equally important to the democratic system.<sup>319</sup> In the democratic form of government, truth itself is a product of human agreement. This is part of what makes courts wary to give the government unchecked power in this regard.

Even if there is a compelling state interest involved, it would be difficult to devise a regulation to address our hypotheticals that did not threaten significant harm. The First Amendment law concerning lies is fact-specific, developing, and not entirely coherent. As the fractured opinion in *Alvarez*

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315. See generally JOHN STUART MILL, ON LIBERTY (1859).

316. David S. Han, *Categorizing Lies*, 89 COLO. L. REV. 613, 622 (2018) ("Whenever the government seeks to regulate lies regarding the highest-value speech, it creates substantial risks of chilling effects and potential government abuse.").

317. Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151, 190 (2022).

318. SOPHIA ROSENFELD, DEMOCRACY AND TRUTH: A SHORT HISTORY 24 (2019).

319. *Id.* at 26.

demonstrates, Supreme Court justices are not in agreement on how to approach these questions, let alone how to resolve them. That said, there are a few emerging themes that bear on the analysis of the First Amendment, political lies, and lawyers.

Some justices believe lies can have inherent value. That value derives, in part, from their ability to generate discussion that will lead to both truth and a greater widespread acceptance of that truth.<sup>320</sup> As Hannah Arendt put it, “the lie did not creep into politics by some accident of human sinfulness; moral outrage, for this reason alone, is not likely to make it disappear.”<sup>321</sup> In place of moral outrage, Arendt suggests reliable witnesses. This may seem like weak medicine,<sup>322</sup> but she argues that powerful people have only a limited ability to persuade groups to believe things that are clearly untrue. At a certain point, if remaining in power depends on disinformation, authoritarians will have to resort to force and coercion. If the government has not yet reached that point, then the best way out of attempted mass manipulation is by resorting to trusted individuals and institutions designed to uncover truth.<sup>323</sup>

Banishing lies like the ones in our hypotheticals might make their proponents more stubbornly committed to the untruth.<sup>324</sup> Or, as Robert Post suggests, “insofar as the state intervenes definitively to settle these disputes, it alienates persons from participation in public discourse.”<sup>325</sup> This is especially so if one political party is in control of the mechanism of enforcement and the members of the other party embrace the untruth.

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320. Lies about one’s identity to ferret out wrongdoing, like those used by civil rights testers, fall into this category. Chen & Marceau, *supra* note 13, at 1454–71.

321. Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers*, NYRB (Nov. 18, 1971), <https://www.themarginalian.org/2016/06/15/lying-in-politics-hannah-arendt/> [https://perma.cc/33HE-B959].

322. This argument is flawed. If words that are used to counter lies are relatively powerless, then why aren’t the lies themselves powerless? Words can be powerful or weak depending on the speaker. See generally NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH MORE SPEECH, NOT CENSORSHIP (2018) (arguing that counter-speech is the most effective way to address harmful speech).

323. For a similar argument about the lawsuits concerning alleged election fraud, see Bruce A. Green & Rebecca Roiphe, *Trump’s Lawsuits Are Good for American Democracy*, THE HILL (Nov. 9, 2020, 9:30 AM), <https://thehill.com/opinion/white-house/525008-trumps-lawsuits-are-good-for-american-democracy> [https://perma.cc/997S-7DRV].

324. Robert Post argues that when the law prohibits lies it suppresses political dialog by excluding those whose thought stems from different premises. Even if those premises are false, it is better to increase exposure to the truth in the political realm than banish these individuals to their own echo chamber. POST, *supra* note 48, at 119.

325. POST, *supra* note 48, at 30.

Inviting debate can expose some to a process that is far more likely to convince than the excommunication of their prior beliefs. Thus, ironically, deliberate lies can be valuable because they are more likely to lead to uncovering and disseminating the truth than their suppression would.<sup>326</sup>

All the opinions in *Alvarez* share the concern that even if lies are entirely worthless, speech regulations in certain contexts run the risk of punishing and deterring truthful speech because government actors either cannot or will not be neutral in discerning falsehood. Regulation of the lies in our hypotheticals raises this concern; that government officials acting either consciously or not would target the speech of political opponents. Lies in this context are fairly rampant,<sup>327</sup> which leaves a great deal of discretion to regulators, who would be drawn to punish the lies of their opponents and not their allies. In a context like this, where people tend to turn a blind eye to lies that play into their own ideology and disbelieve assertions that do not, it is too grave a danger to allow regulation.<sup>328</sup>

Another purpose of free speech is to maintain social stability by accommodating different interests and views.<sup>329</sup> Once again, the question is not whether the lies are good for stability. Clearly, they are not. The question is whether, given the fact that the lies have already been uttered, the regulation of the lie or the lie itself is worse. If the belief in election fraud, for instance, is widespread, suppressing the lie might lead a larger group of citizens to abandon traditional democratic means of dispute resolution and turn to extra-legal or undemocratic mechanisms instead. But which is more likely to create instability? If enough people believe the lie, then government suppression is unlikely to lead people to recognize their error and will instead cause them to feel further disaffected and to distrust government even more.

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326. With the internet, there are a multitude of small communities where members can adhere to their own truths, making it more important that the shared institutions remain open to all, even those who seek to spread untruths. There is at least some empirical support for the proposition that banning speech empowers rather than weakens it. Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2053 (2017).

327. Waldron, *supra* note 27.

328. Media critics have noted this tendency with regard to current events. For an example, see Bari Weiss, *The Media's Verdict on Kyle Rittenhouse*, SUBSTACK (Nov. 17, 2021), <https://bariweiss.substack.com/p/the-medias-verdict-on-kyle-rittenhouse> [<https://perma.cc/DU7K-FXT5>].

329. Greenawalt, *supra* note 312, at 142–43,

None of these conclusions suggest that lies should never be sanctioned. Of course, if the lies fall into one of the historically unprotected categories like defamation or fraud that result in legally cognizable harm, the court or regulators could punish the speaker. Justices Breyer and Alito's opinions in *Alvarez* suggest a broader category of lies that might also be regulated for all citizens, not just lawyers. According to their analysis, lies concerning things other than religion, politics, the social sciences, or similarly charged subjects might be regulated if they result in concrete measurable harm to the listeners.

As we argue above, some political lies told by lawyers would, at least theoretically, be subject to sanction, particularly those that affect an ongoing proceeding or otherwise betray the lawyers' fiduciary duties to the client or other third party.<sup>330</sup> There is, however, a First Amendment problem with punishing lawyers for engaging in these sorts of falsehoods in the public sphere as well. Doing so requires courts to distinguish lies that would affect an ongoing proceeding or harm to the client from those that would not. This is a difficult task that involves a significant amount of discretion. Discretion in a politically charged context invites concern that courts will be ideologically driven in singling out which lies to pursue. Even if the court is not biased, there are still two concerns. First, the fear that courts may be inaccurate or biased in their determination may well chill lawyers from engaging in protected political speech. Second, it would be hard to convince the public that the courts were doing anything other than choosing political sides. Thus, even if courts undertake only to sanction those lies that affect an ongoing proceeding or undermine the lawyer's fiduciary obligations, there is a danger that the public will lose faith in the courts as an unbiased arbiter. This is why historical precedent matters for pursuing lies. If courts have historically engaged in this sort of disciplinary action, then they would be less likely to invite criticism that they are acting out of political bias, which in turn can undermine faith in the judicial system. Given that courts tend not to punish lawyers in other contexts for lying outside of a court proceeding, there is a real danger that doing so here will invite such allegations and undermine, rather than promote, faith in government in general, and courts in particular.

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330. See *supra* note 87 and accompanying text.

History cautions that disciplinary determinations made in the context of political debate are not always (or even often) made in a disinterested way. As Nadine Strossen points out, before the Supreme Court reined in defamation law, it was regularly used to pursue civil rights activists.<sup>331</sup> In the McCarthy era, courts and bar associations targeted lawyers who challenged the status quo.<sup>332</sup> While the regulatory apparatus may currently be used against unsympathetic lawyers, the precedent remains and will invariably be invoked against others, who may be pushing for unpopular but just reforms, in the future.

This is not to say that Model Rule 8.4(c) or any other rule addressing lawyers' lies is unconstitutionally overbroad. Instead, we argue that there are significant problems in their application, particularly to political lies. It would be hard if not impossible to draft a rule that perfectly tracked our analysis, though narrow rules might be preferable. In the meantime, disciplinary agencies in different states have a good deal of discretion, which they ought to exercise in light of the First Amendment principles we highlight. The inherent uncertainty in these rules will no doubt chill lawyers' speech. If state regulatory authorities aggressively discipline lawyers for lying outside of their professional role, they will inevitably chill truthful speech as lawyers veer even further from the line. Thus, the wiser course would be to tread lightly, stay far away from the constitutional line we draw, and only punish lawyers for lying when doing so is necessary to preserve the administration of justice or to achieve some other valid government interest.

### CONCLUSION

Lies and misinformation about government are serious and chronic problems, ones that have grown increasingly menacing. It is galling to those of us who hold the profession to high ideals when lawyers amplify these lies. While regulating lies in the public realm may seem like an easy answer, it is not. The First Amendment reminds us how dangerous it is to give power to the government to determine which voices get to shape public opinion.

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331. STROSSEN, *supra* note 322.

332. See JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN AMERICA* 231–63 (1977).

The rules of professional conduct have been applied for the most part in a way that respects constitutional limits, but after the Big Lie, there are an increasing number of critics calling for disbarment of attorneys for the things they say not in their professional capacity, but in public.<sup>333</sup> The benefit of disciplining these lawyers is speculative, at best, and the harm may be significant. If we give courts the power to regulate lies about government, we invite them to make discretionary judgments in a politically charged context and risk chilling valuable political speech.

As a general matter, lawyers should not be treated differently than others for telling political lies in their private capacity in the public square. The bar has various justifications for treating lawyers differently, as Rule 8.4(c) would seem to allow. But these rationales must be strictly scrutinized because political speech is at issue. And most of the time, we doubt the rationales hold up. Even if the goals are worthwhile, sanctioning lawyers for political lies is not a necessary or well-tailored way to pursue them. The traditional rationale for sanctioning lawyers' lies in their private lives is based on an assumption about character—namely, that all lying shows a character for dishonesty that will be expressed equally in law practice, where truthfulness is at a premium. But the social science underpinnings of this assumption are dubious, and particularly so when lawyers lie in private political speech, given that lying is woven into our political culture. Likewise, the assumptions that lawyers' political lies will impair public trust in our democratic institutions and in the legal profession are unproven and unlikely. Depending on the content of the false speech, lawyers' political speech may sometimes threaten cognizable harm to the judicial process or to clients, but these will be the rare cases, and giving courts responsibility

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333. See, e.g., Letter from twenty-seven members of the Washington, D.C. bar to Office of Disciplinary Counsel, re: Professional Responsibility Investigation of William P. Barr, (July 22, 2020), at 4–16 (<https://www.justsecurity.org/wp-content/uploads/2020/07/Professional-Responsibility-Investigation-of-William-P.-Barr-Complaint-DC-Bar-Association-July-22-2020.pdf> [<https://perma.cc/GL5W-M5YS>]) (asserting that Attorney General Barr should be sanctioned for making false statements regarding the Mueller report); Letter from Scott Harshbarger, Chairman, Laws. Defending Am. Democracy, Inc., to Att'y Grievance Comm., Sup. Ct. of the State of N.Y., App. Div., First Jud. Dep't (Jan. 20, 2021), (<https://ldad.org/wp-content/uploads/2021/05/LDAD-Attorney-Grievance-Committee-Complaint.pdf> [<https://perma.cc/7YJ2-AJ86>]) (requesting that the Attorney Grievance Committee suspend Giuliani's license to practice law while investigating his conduct); Letter from Ronald C. Minkoff, Frankfurt Kurmit Klein & Selz PC, to Jorge Dopico, Chief Counsel, Att'y Grievance Comm., First Jud. Dep't (Jan. 21, 2021) (<https://images.law.com/contrib/content/uploads/documents/389/125082/Rudy-Complaint-Past-Presidents.pdf> [<https://perma.cc/9FZB-X4ZA>]) (requesting that Giuliani be disciplined).



for winnowing out these cases would create further problems. When it comes to political speech, lawyer exceptionalism should be the exception, not the rule.