

Anthony M. Kennedy Inn of Court – Sacramento, CA 2024

Team 2 MCLE Research

“Courtroom Civility and its Importance in Restoring Confidence in the Justice System in a Time of Disrespect and Distrust?”

TEAM 2 MEMBERS

Alin Cintean	Bryce Fick
Renuka George	Matthew Gross
Jill Telfer	Jennifer Thompson
Lanny Winberry	Brittany Johnson
Jeremy Avila	Carrie Adams Hayes
Mark Teh	Sarah Bridges
LeeAnn Whitmore	ExCom Liaison: Wazhma Mojaddidi

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I. CALIFORNIA RULES OF PROFESSIONAL CONDUCT

3.6 Trial Publicity ([Rule of Professional Conduct 3.6 \(calbar.ca.gov\)](http://calbar.ca.gov))

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows* or reasonably should know* will (i) be disseminated by means of public communication and (ii) have a substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), but only to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6, lawyer may state:
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe* that there exists the likelihood of substantial* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - i. the identity, general area of residence, and occupation of the accused;
 - ii. if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - iii. the fact, time, and place of arrest; and
 - iv. the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable* lawyer would believe* is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

- The court further emphasized that Pavone’s appellate briefs contain many statements “that cannot be fairly characterized as acts of zealous advocacy” and that none of the charges Pavone alleged were “supported by any evidence.”

Matter of BB (2021) 5 Cal. State Bar Ct. Rptr. 835, 841 [LINK](#)

- State Bar of California’s review department affirmed an admonition as the appropriate disposition for respondent who violated his duty to maintain respect due to the courts when he made disrespectful statements to a superior court judge challenging a ruling, asserting “the court has a lack of backbone,” and repeatedly stating respondent did not respect the court or its decision.

U.S. Dist. Court for Eastern Dist. of Washington v. Sandlin (9th Cir. 1993) 12 F.3d 861 [LINK](#)

- Attorney made false statements about the trial judge in an effort to recuse the judge from a civil case, when the attorney witnessed the judge and opposing counsel were friends.
- The appellate court affirmed the district court’s conclusion that the attorney’s comments “were made without any basis in fact and with reckless disregard as to the truth thereof.
- The attorney was suspended from practicing law for six months.

IV. SECONDARY SOURCES (Attached as PDF’s)

JUDICATURE, Vol.106 No. 2 (2022) by David F. Levi, Raymond J. Lohier Jr., Diane P. Wood and Jeffrey S. Sutton, Bolch Judicial Institute Duke Law School – “*Losing Faith: Why Public Trust in the Judiciary Matters*”

Annenberg Research News dated Oct. 2022 by the Annenberg Public Policy Center, University of Pennsylvania – “*Over Half of Americans Disapprove of Supreme Court as Trust Plummets*”

Georgia Law Review dated Dec. 2021 by Lonnie T. Brown, University of Georgia School of Law – “*Criticizing Judges: A Lawyer’s Professional Responsibility*”

Strategic Plan for the Federal Judiciary dated Sept. 2020, by the Judicial Conference of the United States – “Issue 2: Preserving Public Trust, Confidence, and Understanding” [uscourts.gov](https://www.uscourts.gov)

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A photograph of the Supreme Court building in Washington, D.C. The image shows a row of tall, white, fluted columns and a wide set of steps leading up to the entrance. On the left, a large white marble statue of a seated woman, likely Lady Justice, stands on a high pedestal. In the foreground, a reflecting pool shows a clear reflection of the columns and the sky. The lighting is bright, suggesting a sunny day.

losing faith

**WHY PUBLIC DISTRUST IN THE JUDICIARY MATTERS
— AND WHAT JUDGES CAN DO ABOUT IT**

**BY RAYMOND J. LOHIER JR.,
JEFFREY S. SUTTON,
DIANE P. WOOD &
DAVID F. LEVI**

“The Court sometimes rightly does exactly what the public does not want.”
—JEFFREY S. SUTTON

In June, Gallup released its annual survey on public confidence in the United States Supreme Court. The Court’s rating hit a historic low, with just 25 percent of Americans reporting “quite a lot” or “a great deal” of confidence in the Court, down from 36 percent in 2021. Data show that the Court is not the only institution in which the American people are losing confidence. Faith in institutions across the board — from organized religion and public schools to news media and big business — sank in 2022. And the Court remains the most trusted of the three branches of government. But this year marked the largest one-year drop in the Court’s rating since the poll began in 1973 and the third decrease in a row. Of note: The poll was conducted before the Court issued its major rulings for the 2022 term.

Polls are just one imperfect measure of public sentiment. And judges must administer justice impartially, without favor or bias or concern for which way the winds of public opinion may blow. But the rule of law largely depends on the willingness of ordinary people, as well as political actors, to abide by court rulings. How does declining faith in the courts affect respect for the judiciary as a whole? And what can judges do to help reverse the trend?

DAVID F. LEVI, director of the Bolch Judicial Institute and president of The American Law Institute, asked three judges of the United States Courts of Appeals — Judge **RAYMOND J. LOHIER JR.** (Second Circuit), Chief Judge **JEFFREY S. SUTTON** (Sixth Circuit), and Judge **DIANE P. WOOD** (Seventh Circuit) — to consider these questions. Excerpts of their conversation, recorded in August 2022, follow. A podcast of the full discussion is available on The American Law Institute website at ali.org.

DAVID F. LEVI: I’ve known all of you for many years, some of us going way back in time. I asked you to have a conversation today about judging and the perception of the Supreme Court, because of the troubling poll numbers from the most recent Gallup poll about the loss of confidence by the American people in the Supreme Court.

I think it’s fair to say that the Court is in the middle of things right now. It’s received a lot of criticism from all sides of the political spectrum. From my point of view, the Court’s been under fairly continuous attack from conservatives at least since the 1970s, and it’s now under fairly continuous attack from progressives as well. Even well before the decisions of the last term, which were so consequential, there have been serious calls for court-packing, for jurisdiction stripping, for other kinds of devices that would either limit the Court or change its direction. From whatever vantage point these critical assessments are launched, the basic point that the critics seem to make is that the Court is a political — perhaps even partisan — institution, and that it is making decisions on a host of pressing issues facing the country that ought to be left to the political branches. And this characterization is intended as a challenge to the Court’s essential legitimacy: Why should nine people have that kind of authority to make political decisions? They presumably have that authority to make legal decisions, but the critics would say that many of these decisions aren’t legal.

So why don’t we start with why this is of concern. The reality is that there’s been a loss of confidence, as revealed by the Gallup polls. Should that concern us?

JEFFREY S. SUTTON: Perhaps a few caveats are in order about the poll

numbers. I’m skeptical about looking at one set of data points. I think to the extent that the Court should be concerned about public support, public credibility, one year doesn’t seem like a very good way to do it. In fact, one year of poll numbers seems much more likely to be used by the opponents of the Court’s decisions, as opposed to people trying to assess whether the Court is performing like a court.

Then we have another complication. The Court sometimes rightly does exactly what the public does not want. You could imagine a horrible murder in which the U.S. Supreme Court correctly reverses a conviction on legitimate constitutional grounds. In that setting, the public understandably would be agitated that the crime went unpunished. But I suspect the four of us would agree that that is a setting in which public disapproval would not legitimately undermine the Court’s credibility and reputation for principled decision-making. That’s why we have a Bill of Rights. Sometimes the federal courts are supposed to act in a counter-majoritarian way, which, no surprise, sometimes leaves the people frustrated by case outcomes.

If someone had told me 10 years ago the Court was going to overrule *Roe* and *Casey*, I would have expected a significant response — not because one side is right, but because Americans have long had strong feelings about the issue in both directions. No matter how you look at it, that decision is quite consequential and is likely to generate strong views.

LEVI: Ray, what’s your thought on this? I think Jeff is saying we should take these numbers with a note of caution. I don’t hear him to say that we shouldn’t be concerned about a loss of confidence in the Supreme Court. ►

“We have asked this institution of nine human beings to somehow cope with these extraordinarily eventful and

RAYMOND J. LOHIER: I don’t dispute at all the caveats that Jeff mentioned, about, for example, the counter-majoritarian role of the courts, and also about polls generally. But I do worry. One reason that I think we should all worry about a loss of confidence and support in the courts, or even a reported loss in confidence and support, is that — this is almost cliché — but we really have nothing other than public confidence to protect the branch.

I do think that we should pay attention when there’s any indication of flagging confidence or support in the judiciary. What’s important in my view is that there has to be at least the perception of some connection — and a judicial appreciation that there must be a connection — between the public and the Court, between what the public expects, broadly speaking, and how the Supreme Court and courts of appeals and the district courts rule, and how we justify or explain our rulings.

Any loss in confidence in what we do, or what the Supreme Court does, makes the rule of law somewhat more vulnerable and detracts from the legitimacy of what we do. What I mean by that, at least in part, is that a lack of confidence increases the risk that actors — it could be public actors, legislatures, certainly ordinary people — are just over time going to ignore our orders and mandates. And they’re going to do so as they perceive a lack of confidence or diminution or decrease in confidence and support in courts. They’re going to do so thinking that there will be no practical consequences. And that’s always the worry. It also increases the chances that the public — not only here but also abroad, which I think is an important point — is going to start to regard our judicial decisions not as a product of impartial deliberation based on the facts and the law in each particu-

lar case, but as in favor of or against a particular party, or a particular position, and as essentially pre-ordained, based entirely on the composition of the decision-making panel.

A few years ago, I had the good fortune of meeting a chief justice of what I would describe as a troubled democracy. He spoke to a few federal judges here in New York City and described this phenomenon in a very powerful and very sobering way. What he described is a series of repeated and un rebutted attacks [on the judiciary] from different sectors within the government in that country, especially the media and government actors in that country. Over time, this caused a significant reduction in public confidence in the supreme court of that country in particular, marginalized legal principles, and also marginalized the people within the country — at many levels, but certainly at the highest level — who believed in and were trying to foster a belief in the rule of law.

That’s a problem. And as we, the federal judges, were listening to this chief justice, we were thinking about the fact that it’s not an impossible future in the United States. And part of the problem is that when you have that loss of confidence in the court system, people resort to other means to resolve those matters that are properly or historically within the realm of the judiciary.

I think that there’s a bright side. I don’t think that the poll that you mentioned, David, or the polls that I’ve seen, have picked up on any decrease in confidence in the judiciary among members of the Bar, among the attorney class. And I think that’s pretty important. That was not true, by the way, in the troubled democracy that the chief justice of that country described. And I do think that if that ever begins to happen, that is, a decrease in confi-

dence among the members of the Bar in the pronouncements of the Supreme Court or of the lower courts, or in state court rulings, then we have a truly significant problem.

DIANE P. WOOD: I want to go back and ask why we find ourselves in this place, because I am troubled by these polls. I take Jeff’s point that one poll here, a poll there, could miss a lot of nuance. But the first question that I asked myself is: These are public polls, and so where is the public learning about the Court? We in this conversation are in rare air. We think of theories of interpretation, and we think of Court opinions, and we think of scholarly articles. That’s not where the public, as a whole, learns about the Supreme Court. I would say the primary place they learn about the Supreme Court is in the confirmation process. And the confirmation process is portrayed, in the press at least, as this grand fight between Camp A and Camp B, between liberals and conservatives, and who’s going to get this pre-ordained result.

Then you pile on something such as a decision by the Senate not to move forward on a vote with Merrick Garland, and then a decision by the Senate in a much tighter timeframe to move ahead aggressively with a vote on Amy Coney Barrett, my former colleague — both terrifically well-qualified to be on the Supreme Court, and I’m not complaining about anybody’s membership on the Court. But the public at large is told that this is a big partisan fight, and so somebody “wins” and somebody “loses” as a result of that. And that’s a shame.

But it seems to me that — and believe me, I have no idea how to do this — we could somehow dial down the temperature on the confirmation process, and begin to think that we really are

consequential cases. It's a little unfair of us then to turn around and say, 'Oh, now you're being partisan.'"
—DIANE P. WOOD

looking for people who are going to be what I'm going to define as a "good judge." These are people who are likely to sit on the Court for 30 years, 35 years, 40 years. Who among us has any idea what the hot issues of the day are going to be 20 years from now? I certainly don't claim that crystal ball.

We can all pick the 3 percent of cases that are the source of most differences in opinion. It's the abortion cases, it's guns; it's the tough ones. That used to include the death penalty. Many people have sincerely held, strong views on one side or the other of these issues. I'm not sure how you bridge those gaps, but truly you begin by respecting the fact that these are very difficult issues and that people of good faith are going to come out differently on them.

One other point I want to make is about the cert power. I think any of us, if given a pool of 6,000 cases and told, "pick out the 60 hardest cases, the most consequential that you can find, and give those your attention," we would end up with the tough ones. They will be the cases that have political overtones, that turn on policy, that have all sorts of dimensions. At the court of appeals level, where we have mandatory jurisdiction, you don't have that selection issue. But you do have it when you have the cert power. And the Supreme Court, for better or for worse, faces this challenge. We have asked this institution of nine human beings to somehow cope with these extraordinarily eventful and consequential cases. It's a little unfair of us then to turn around and say, "Oh, now you're being partisan," because we've asked them to do exactly that. We've asked them to take these extraordinarily difficult cases.

My only suggestion, or my wish, I suppose, would be that when opinions are being written, judges take

great care with their audience. Shorten them, make it clear what principles are being used. Don't stoop to name calling, probably don't even go into 20-page digressions into history. I'm not sure that's helping that much. I think clear rules of interpretation — where a judge can plausibly say, "This is the way I understand the law. This is how I got to where I need to be" — might be of some help in pulling back from the little 'p' politics view.

LEVI: I don't think the public really understands that the courts of appeals judges usually agree with one another, to the point where at least in some circuits it's not even deemed necessary to hold argument in many cases because these cases are so one-sided. It's also not fair to the parties, in a way, to impose more expense on them when the judges are quite convinced in how they're going to decide those cases. Even on the Supreme Court, out of those 60-odd cases, maybe each year there are 10 or so that will cause consternation. But in the majority of them, particularly in the technical areas, the judges are quite constrained and do tend to agree.

You're all on the court of appeals. Do you feel that you are affected when the Supreme Court is in the crosshairs, and the public has less confidence in the Court? Do you think that affects the stature of the lower courts?

LOHIER: The level of civic education about what we do is such that most people don't distinguish between different court systems. They just hear the term judge, or federal judge, and they have a general impression that applies to all judicial decision-making. I agree with Diane — a lot of what people see is the confirmation process and the top-line divided decisions of the Supreme Court, because that's what

the media picks up on. There very rarely are cases or media reports about circuit court decisions that don't make it up to the Supreme Court. And there's no news about unanimous decisions either, certainly not with respect to Supreme Court decisions, but definitely not with our courts and intermediate courts of appeals.

Diane and Jeff and I are each dealing with probably hundreds of decisions on the merits, and our courts are dealing with thousands at some point. With great respect for the individual litigants in each, decisions are like pebbles thrown into the ocean. By contrast, each one of the Supreme Court's decisions has the seismic — or is perceived to have — this seismic effect because there are so few decisions that come out. And again, the press and others don't focus on the unanimous decisions on more or less technical issues. They focus on the decisions that are sharply divided, or that show the Court as sharply divided. And that view trickles down to the rest of the judiciary.

I think that forms of civic education would help ameliorate that misperception. On the Seventh Circuit, there's a 97 percent unanimity rate. On the Second Circuit, it's something like 98 percent, a very high level of unanimity notwithstanding differences in terms of the appointing authority. And that is just not a story that's told.

LEVI: Jeff, you have been telling the story of the state constitutions incredibly well. I'm just in awe of what you've been able to accomplish here in the past few years. You've written two really wonderful books on state constitutions — *51 Imperfect Solutions: States and the Making of American Constitutional Law*, and *Who Decides? States as Laboratories of Constitutional Experimentation*. One of the points you've tried to make is ►

“There’s a growing disconnect, at least the perception of a disconnect, between the public and what the Supreme Court

that these constitutions, and the state supreme courts that are interpreting them, can take some of the pressure off of the U.S. Supreme Court to be the sole decision-maker on some of these very difficult issues. Can you talk to us about that in our current circumstance?

SUTTON: When we think of federalism, or “states’ rights,” lots of cautionary experiences come to mind, whether it’s slavery, Jim Crow, or other unfortunate chapters in American history. The last thing I want to do is forget those chapters. But I do wonder if, at this moment, federalism might offer some opportunities. I appreciate the risks of allowing 50 states to go their own way, as they might experiment in unsavory ways. But it is a very big country with 330 million perspectives. And it seems possible that many of the policy challenges we face do not submit to just one overarching answer.

It’s hard to find anything in law or policy these days about which Americans still agree. But we still seem to embrace Justice Louis Brandeis’s insight that, if you have a tricky policy problem, it’s dangerous to have the national government experiment with a one-size-fits-all solution when you have little information about how it’s going to play out. In making this point, Brandeis was referring to state legislatures as the laboratories of experimentation. But I wonder if the same insight applies equally to state courts — and state constitutions — as well. The key point Brandeis is making is that sometimes we should develop new ideas from the ground up. Why not do the same thing with innovative constitutional rights or structural ideas? Many of the biggest challenges in constitutional law — and many of the biggest divisions in the courts — arise from disputes about the meaning

of vague words (say, whether speech is “free”) or concepts that offer no guidance at all (say, substantive due process).

When the U.S. Supreme Court identifies a new substantive due process right, for example, it is at the outer edges of its power. Is that not a good time to wait for input from other sources?

I am skeptical that the current model, in which we Americans ask the U.S. Supreme Court to be the lead innovator, can last. There are three features of federal constitutional law that combine to put tremendous pressure on the current Court. One is that, over the last 75 years or so, the U.S. Supreme Court has exercised judicial review in a muscular way. It’s indeed hard to think of a country in world history that exercises judicial review with the same frequency and with respect to significant matters of public policy in the same way that the U.S. Supreme Court does.

The second point is that the federal courts are interpreting a document that requires three quarters of the states to amend. In other words, if the Court decision concerns anything remotely controversial, it can’t plausibly be corrected by a vote of the people. While I am prepared to be corrected, I doubt there is a democracy in the world that uses judicial review so frequently and makes it so difficult to correct a Court mistake by a constitutional amendment.

That brings us to the third leg of the stool: All federal judges have life tenure, making it difficult and highly unpredictable to alter the composition of the Court. It seems unlikely that the next 75 years of our history will see all three of these things taking place together.

Now let me contrast these features of the federal system with the state systems to show why state courts offer considerable promise as better vehi-

cles for constitutional experimentation. As a general rule, the state courts do not have a single one of these problems. They do not exercise judicial review in such consistently broad ways. Every one of their constitutions can be amended much more easily — in all but a few states just by a 51 percent vote. No state has a 75 percent threshold. The highest is New Hampshire, with a two-thirds requirement. Ninety percent of state court judges face the electorate at some points, and nearly all of the rest of them face age limits. Only Rhode Island gives its state court judges life tenure.

As I see it, the judges who ought to be in the vanguard of experimentation are the state court judges. The risks are smaller given the size of their jurisdictions. Any innovations provide useful information to the U.S. Supreme Court before it nationalizes an approach. The people can far more readily correct flawed decisions with constitutional amendments. And the people nearly always have the option of not reappointing or reelecting judges with whom they disagree.

It’s not lost on me that there are risks with relying exclusively on state courts, just as there are risks with relying exclusively on federal courts. That’s why I prefer two chances, not just one, to protect our liberties. And that’s why I prefer a system in which, generally speaking, constitutional experimentation starts in the states, it sometimes ends there, and it always permits a valuable dialogue between the state and federal court systems.

LEVI: I don’t know whether the last couple of cases challenge or illustrate your theory. In *Dobbs v. Jackson Women’s Health Organization*, you have the Court throwing the issue back to the states, and maybe to the state supreme courts, because as you point

does, sometimes a disconnect between what the courts of appeals do around the country and what the Supreme Court does.”
—RAYMOND J. LOHIER

out in one of your books, they have not been ruling on a constitutional right to abortion under their own state constitutions since *Roe* was decided. But now they will get cases. And, I don't suppose it's easy to predict how that's going to go, but it's going to become something significant, I would expect.

And then in *New York State Rifle & Pistol Association, Inc., v. Bruen*, you have, in a way, the reverse point, which is the Court's taken this off the table, something that involves guns in a country that is so different in different locations. The access to police resources and the environmental threats that you might have in a remote location in Wyoming are going to be very different than what you find in a highly urbanized area. And that might have been something where legislatures and even courts would say, "We come to different views on this because the circumstances are so different." But that's not going to happen now, at least for the foreseeable future.

SUTTON: It's clearly an educational moment for Americans to appreciate that they have at least two shots to protect a right to abortion. That's a valuable thing for people to know. It's possible we will find this is an area that also will lend itself to some compromises at the legislative level. Until now, I should add, no state has enacted a constitutional amendment to protect a right to abortion or a right to choose, however one wishes to phrase it. Now we have several on the ballot this fall.

In *Bruen*, I appreciate the perspective that it seems to be limiting state experimentation. But that story, it seems to me, has yet to be told. Based on the handgun-related holdings so far in *Bruen* and *District of Columbia v. Heller* and *McDonald v. Chicago*, there is still plenty of room for local experimentation with respect to all kinds of

weapons and ammunition. Time will tell. Whatever happens, I will be surprised if it ends with a country in which we have just one rule about gun regulation for rural Wyoming and urban New York. This is a big country, and I suspect all nine justices of the U.S. Supreme Court appreciate that the "right to bear arms," constitutional mandate though it is, still leaves room for local innovation and experimentation.

LEVI: So Jeff thinks that maybe the state supreme courts can take some of the pressure off of the U.S. Supreme Court. But can the circuit courts also take some of that pressure off the Court? Instead of being a way station en route to the decision, can they help to educate the public and maybe dissipate some of the division?

LOHIER: The federal courts of appeals were created in part to take pressure — another form of pressure — off of the Supreme Court, when the Supreme Court was overwhelmed after the Civil War by a very congested docket. We were created to significantly reduce its docket. And then, of course, as Diane mentioned earlier, in the 1920s that all-important cert power was introduced to take further pressure off. And prior to that, there had been a pretty active certification process whereby courts of appeals could certify specific questions. I think that if you had a certification process of the type that our state court counterparts in just about every state now have, that would be very helpful — if we could resume this tradition of certifying at least one or two questions that the active members, say, of the court of appeals in each region thought were not only very important, but particularly vexing for them. There's a growing disconnect, at least the perception of a discon-

nect, between the public and what the Supreme Court does, sometimes a disconnect between what the courts of appeals do around the country and what the Supreme Court does. In many areas, on technical issues, we see these circuit splits, and they're prolonged. They're not resolved by the Supreme Court. The Supreme Court takes other cases as is its prerogative. If we had a more formal procedure to tell the Supreme Court, "These are the issues that we're grappling with that are very vexing, that would be very helpful for you to resolve and to nationalize," that would be helpful.

LEVI: We're in a period where I think the lay public would be surprised — I'm surprised, too — that so much of the debate over the past 30 years or so has been in these competing camps of methodology of how to interpret the Constitution. Diane, you've offered in other venues an elegant defense of some form of living constitutionalism with some textualism thrown in — it may be even more subtle than that. But one of the concerns about living constitutionalism is that, if it's alive, it can go in a lot of different directions. And those directions may be determined by the judge's own predilection, and less by what the American people thought when they ratified the document. What are your thoughts about that?

WOOD: I start from the proposition that the people who wrote the Constitution — and I'll include those who've written the rather small number of amendments that we have to the Constitution — were intelligent people who knew what they were doing, and who meant what they were saying. So that's where I say, of course, you're going to start with the text. But if the text you're worried about says "in ►

“We don’t want to get to the point where the methodologies are so constraining that we all know how

order to be the president, you have to be 35 years old,” that’s easy. I have never in my life heard any big debate about what it means to be 35 years old.

But we have other provisions of the Constitution where, if you want to think in terms of rules versus standards, the people who wrote the document gave us very broad instruction — no cruel and unusual punishments, due process, equal protection. So if the constitutional text that we’re starting with happens to be one of those “standards,” one of those much broader-based things, then the people who wrote it themselves would’ve expected those standards to be applied in the contemporary world where the question arose. They would not have thought that you had to always excavate history in whatever year you want — 1787, 1791, 1868, and on. These are things that we build on experience. The common law judges themselves didn’t just pick solutions out of a hat. They looked very carefully to the other similar problems that had arisen, to analogies. Could they ground the rule that was going to govern this case in propositions that had been there before? And the difference for us is those propositions have to be rooted in the constitutional text.

I really think we can follow the constitutional text and still have flexibility where it’s needed, and not where the people who wrote the Constitution meant what they said. I don’t think you’ve got to be completely on one side or the other. You don’t have to read the Second Amendment to apply only to blunderbusses that were available in 1791. We should be sensible. There are a lot of provisions to the Constitution that I think give room for contemporary applications rooted in the law that’s developed around the clause.

LEVI: How do you assess this sense that we have these different methodologies and judges just have to select one or the other? I think you’ve confused it a little bit by saying you can be eclectic depending on the nature of the text.

WOOD: So here’s the evil that I hope we can avoid, and that’s opportunistic behavior. If you think you want very literal interpretation, maybe you strike down the administrative state because Article II doesn’t say anything about it, or maybe you think that’s too much weight for the necessary and proper clause to carry. It’s just when you’re a textualist when that serves your end, and when you’re not a textualist when that doesn’t seem to lead to the result you want — I have trouble with that. It seems to me then you’re not really a textualist. You’re just doing sort of an ad hoc assessment of the provision in mind.

LEVI: That’s very helpful. I think what we want to avoid is we don’t want to get to the point where the methodologies are so constraining that we all know how a person is going to decide. That is kind of a form of judging that I’m sure none of us subscribes to, and yet it’s hard when you see these stable voting blocks on the controversial cases not to be, at least for me, not to be uneasy about it.

SUTTON: One premise of appellate courts is the possibility of disagreement. That’s why you have multiple members, who bring with them multiple perspectives. Take a case like *Bostock v. Clayton County*, where Diane [and her findings in a related case, *Hively v. Ivy Tech Community College*] was affirmed. There were three different opinions in the case, all written by textualists, and all in

disagreement. Even judges using the same methods of interpretation can come to different outcomes.

It might be helpful if we judges and the law schools could cut back on the “teams” approach to statutory and constitutional interpretation. It can be quite misleading in both directions. On one side, people should be happy to accept that all interpretation starts with the relevant words, and it usually starts with the assumption that they have a fixed meaning. There may be modest exceptions. If a constitutional provision turns on what is “unreasonable,” there may be more room for debate about evolution in that setting or others. And history is always relevant, even if it is not always dispositive. There is no such thing as legal interpretation without history. On the other side, judges should be humble about their ability to use history to discern clear answers. And they should be humble about whether dictionaries, context, and canons of interpretation supply clear answers. Otherwise, we are going to politicize interpretation, which is not good for law. A society that cannot agree how to interpret language is going to have difficulty preserving the rule of law.

LEVI: Two of you have been chief judges, so I think you’ve all been very aware of the collegiality of your courts. Maintaining collegiality is important for the very reasons that we’re talking about — so a court can do its job well. How is it to be a judge in a divisive time?

WOOD: As chief, I certainly tried hard to make sure that the rhetoric stayed cooled down. And when I write dissents, I try, godfather-like, to “keep it business.” Not personal. If I don’t agree, I need to have a reason, and I need to be able to put the reason down in some

a person is going to decide. That is kind of a form of judging that I'm sure none of us subscribes to."
—DAVID F. LEVI

way that a well-informed legal reader can understand what it is. If I can't do that, I shouldn't even write the dissent. The last thing in the world I want to do is write a dissent that's going to antagonize a colleague whom I might want to persuade to join me tomorrow. In fact, in over 27 years on the Seventh Circuit, there have been so many times when I have thought I knew exactly what Judge X was going to do. And Judge X would sometimes surprise me.

The other thing I'll just put in a huge plug for is at the Supreme Court level — just like at our level — if you can write opinions somewhat more narrowly, if you can do what the Supreme Court did during the term that it had only eight people while the vacancy was unfilled, they actually got a lot done and they narrowed things. They found ways of getting along together. They proved that they can do it if they need to.

SUTTON: Instead of *The Godfather*, I will invoke *The Sound of Music*, the nun's statement toward the end — "Father, I have sinned," after pulling out the spark plug in the police car. I'm sure I have written some dissents that are stronger than they needed to be. But I agree with Diane, it is usually unproductive in the case at hand, usually springs from vanity, and is not good for the courts in general.

LOHIER: I think that peer pressure helps. What I've noticed, particularly in the context of en bancs, has been when other colleagues, particularly senior colleagues, call and say, "You might want to take out a few words or sentences that you thought were superb sentences." There are so many new judges. This is a real opportunity to reinforce the message about collegiality.

LEVI: All of you do so much work in the civic education space. Do you have an elevator speech that you give when people say, "Gee, isn't this just politics by another name?"

LOHIER: I spoke to a number of high school students with very different backgrounds in New Mexico. It was fantastic, but I was stunned by the number of times that these 14- to 18-year old high school students expressed the view that judges were really nothing more than purely political actors whose decisions were entirely political. I was very surprised, and what I tried to do was to explain what I do, explain what my colleagues do, explain how I do my job every day. As Diane and Jeff both pointed out, I tell them how often we're unanimous in our decisions, despite very different viewpoints.

I also encourage people to go see an actual court proceeding. Go to court, federal court, state court, lower court, I don't care — just see how it operates. See, frankly, how, in many ways — with great respect for the litigants in each case — mundane it is, and then they'll appreciate really the majesty of what it is that we do and the fact that we've been able to do it so well in a way that has until now preserved the rule of law.

SUTTON: If we were blue-robed and red-robed judges, why would we agree in 90 percent to 97 percent of our cases? I can personalize the point in this way: In my two biggest cases, I ruled opposite my policy preferences, proving either that someone gave me the wrong-colored robe or that robes correctly come in neutral black after all.

I would add that increasing respect for law and courts is not our job alone. It's also the job of lawyers. Alexis De Tocqueville, in *Democracy in America*, makes the point that lawyers have a

prominent role in American government. Lawyers are in a great position to explain how the system works and what are legitimate points of debate about a decision and what are not.

WOOD: When I'm in that situation, as I was earlier this year with a rule of law program in Chicago that had quite a few high school students attending it, I try to keep it pretty specific. I try to say, "What are you worried about? Are you worried about the gun case? Are you worried about abortion?" Because the press tends to run these "sky is falling, world is coming to an end" headlines, and I'm very often able to say, "Let's be specific. What did the Court say here?" Well take *Dobbs*. They said, "This goes back to the legislatures and to the people." So I say, "If you want to feel empowered, the Court didn't shut you off, but you, as soon as you're able to do it, should register to vote, should make your voice heard." There are many, many court decisions that operate inside statutes where there's actually a pretty straight line between individual action and the ability to affect the system — not so for all constitutional things. But if you tell them, "Let's stop for a minute, take a deep breath and break it down," it becomes more manageable, and I think they wind up feeling empowered to do something about it.

LEVI: Thank you all so much. It renews my confidence in a system that attracts such talent and genuinely nice and thoughtful people. I cannot thank you enough, for what you do in your work and for being with us here today.

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RESEARCH 10 OCT 2022

Over Half of Americans Disapprove of Supreme Court as Trust Plummet

Trust that the U.S. Supreme Court is operating in the best interests of the American people has plummeted.

By the Annenberg Public Policy Center



Photo Credit: Fine Photographics / Unsplash

Trust that the U.S. Supreme Court is operating in the best interests of the American people has plummeted amid growing perceptions that the justices are partisans just like any other politicians, according to the latest [Annenberg Public Policy Center](#) survey, which includes questions tracking the court across more than a decade and a half.

The survey, which was conducted in August, two months after the Supreme Court overturned the 49-year-old *Roe v. Wade* ruling guaranteeing a constitutional right to abortion, finds that 53% of U.S. adults disapprove of how the court handles its job. The survey also reveals a chasm between the qualities the American people say they value most in judges, such as fairness and impartiality, and the traits they perceive in Supreme Court justices.

In most of the years the policy center has conducted this survey, differences in trust in the court by party affiliation have not been meaningful. That changed in 2022, with a wide gap separating Republicans from Democrats and independents on some attitudes toward the court.

“Whether the perceptions registered in our survey are justified or not, they are worrisome,” said Annenberg Public Policy Center Director Kathleen Hall Jamieson, who has directed the survey since its inception in 2005. “For the court to play its role in our system of government, it is important that it be perceived to be an independent branch that impartially and fairly bases its decisions on the Constitution, the law, and the facts of the case.”

The Supreme Court questions were part of the [Annenberg Constitution Day Civics Survey](#), a nationally representative survey conducted annually for Constitution Day (Sept. 17) by the [Annenberg Public Policy Center](#) (APPC) of the University of Pennsylvania. The 2022 survey of 1,113 U.S. adults was conducted by phone for APPC by independent research company [SSRS](#) on August 2-13, 2022. It has a margin of error of ± 3.6 percentage points at the 95% confidence level. The year-to-year changes reported here are statistically significant unless noted otherwise. Analyses were conducted by APPC research analyst Shawn Patterson Jr., Ph.D.

For the questions and additional data, see the [Appendix](#) and [Methodology](#) statement. Findings on [civics knowledge](#) were previously released for Constitution Day.

Supreme Court survey highlights

The survey found that:

Only 39% of U.S. adults approve of how the Supreme Court is handling its job, while 53% disapprove.

Over half (53%) have little or no trust in the Supreme Court to operate in the best interests of the American people, up 22 percentage points since 2019.

Trust is driven by party: 70% of Republicans but only 32% of Democrats have a great deal/fair amount of trust in the court.

If voting for a local or state judge, 90% of respondents say that having judges who rule based on the Constitution, the law, and the facts of the case is essential/very important.

But when the public is asked whether Supreme Court justices are more likely to set aside their personal and political beliefs to make rulings based on the Constitution, the law, and the facts, just 40% say they are likely to do so.

Half of Americans (50%) strongly disapprove of the Supreme Court's Dobbs ruling that the Constitution does not guarantee a right to abortion.

The findings come as the court begins its fall term amid growing concerns about trust in the court. In a speech last month in Colorado Springs, Colo., Chief Justice John G. Roberts Jr. defended the integrity of the court. "The court has always decided controversial cases and decisions always have been subject to intense criticism and that is entirely appropriate," Roberts told judges and lawyers. "You don't want the political branches telling you what the law is. And you don't want public opinion to be the guide of what the appropriate decision is. ... But simply because people disagree with an opinion is not a basis for criticizing the legitimacy of the court."

The findings are consistent with data in other recent surveys using similar questions. A Gallup poll in September found 47% of U.S. adults have a great deal or a fair amount of trust in the Supreme Court, while a Marquette Law School Poll found the court's approval rating at 40%.



Kathleen Hall Jamieson

Approval and trust

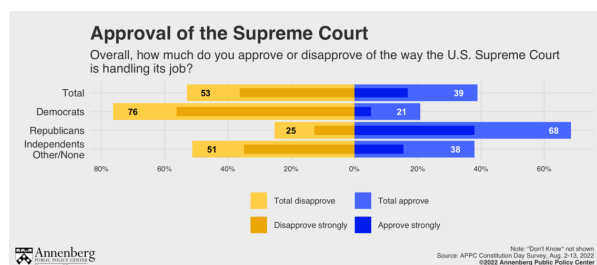
Approval: The APPC survey found that 53% of U.S. adults disapprove of how the Supreme Court is handling its job, more than a third of them disapproving (36%) strongly; 39% approve of the court, 7% of them approving strongly.

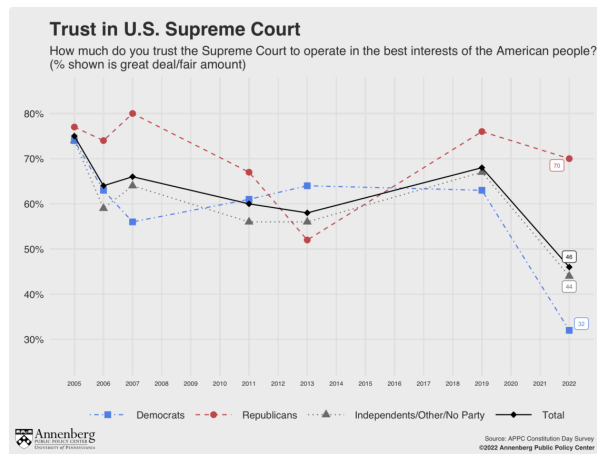
Trust: Only 46% of U.S. adults have a great deal/fair amount of trust in the Supreme Court to operate in the best interests of the American people, down from 68% in 2019, when we last asked this question. In APPC surveys since 2005, this is only the second time trust has dropped below 60%.

Other courts: The lack of trust extends to other parts of the judiciary as well. Asked about how much they trust the federal and state courts, 48% of U.S. adults have a great deal/fair amount of trust, while 51% trust the courts not too much/not at all.

Party and trust: In most years when the survey has asked about trust, party differences have not been significant. But in 2022, the survey found that 70% of self-described Republicans have a great deal/fair amount of trust in the Supreme Court, while a great deal/fair amount of trust is held by only 32% of self-described Democrats and 44% of independents and those with other or no party identification (independent/other/none).

Party and approval: Approval is likewise driven by party. While 68% of Republicans approve of how the court is handling its job, just 21% of Democrats approve. And while 76% of Democrats disapprove of the court, just 25% of Republicans disapprove.





Reining in the Supreme Court

In a series of questions, large numbers of Americans feel that the Supreme Court gets “too mixed up in politics” and favor limiting the Supreme Court’s jurisdiction or independence, nearly all on a par with prior years or increasing:

Justices are like other politicians: Half of U.S. adults (50%, up from 35% in 2019) feel that Supreme Court justices “are just like any other politicians” and “we cannot trust them to decide court cases in a way that is in the best interest of our country.”

More feel it is too “mixed up in politics”: Nearly 7 in 10 people (69%) feel the court gets too mixed up in politics, an increase of 12 percentage points since 2019.

Congress should limit the court: Nearly 4 in 10 people (38%) agree that when Congress disagrees with the Supreme Court’s decisions, Congress should pass legislation saying the Supreme Court can no longer rule on that issue or topic, the same as in 2021 and 10 percentage points higher than in 2018.

More seek to make the court less independent: Over half of those surveyed (56%) agree that the Supreme Court ought to be made less independent so that it listens a lot more to what the people want, up from 49% in 2019.

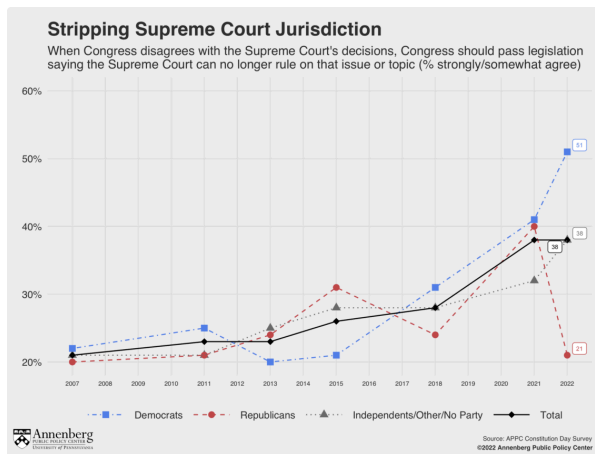
More seek to limit the court’s ability to decide some issues: Nearly half (48%) say the right of the Supreme Court to decide certain types of controversial issues should be reduced, up from 36% in 2019.

Many more feel it has too much power: Over 4 in 10 people (42%) feel that the Supreme Court has too much power, double the number (21%) who thought so in 2019.

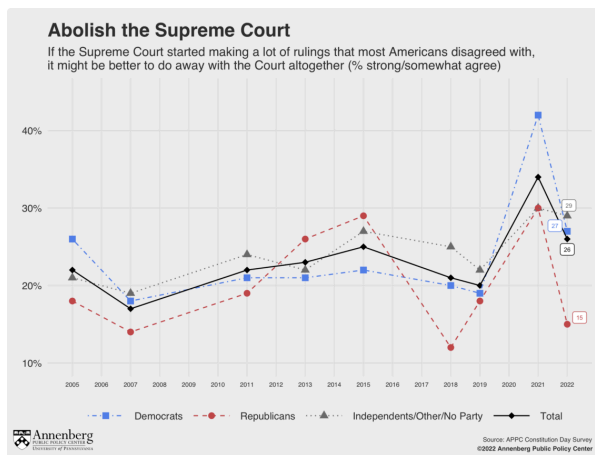
But fewer would abolish the court: A quarter of U.S. adults (26%) think “it might be better to do away with the court altogether” if the court “started making a lot of rulings that most Americans disagreed with” – a decline from last year (34%) but higher than our surveys prior to that.

Stripping jurisdiction from the Supreme Court

On questions of stripping the Supreme Court of jurisdiction or abolishing it altogether, responses by party in this survey have usually not differed significantly. Again, that changed in 2022, when 51% of Democrats but only 21% of Republicans agreed with the statement that Congress should pass legislation to limit the court’s jurisdiction if Congress disagrees with the court’s decisions.



Over 1 in 4 Democrats (27%) and independents/other/no party (29%) agreed that if the court started making a lot of rulings that most Americans disagreed with, it might be better to do away with the court altogether. Just 15% of Republicans agreed with this.



Partisanship, ideology and the court

Most think the Supreme Court majority was appointed by Republicans: Asked whether a majority of the Supreme Court justices were appointed by Democratic or Republican presidents, 68% say the majority were definitely or probably appointed by Republican presidents and 18% say definitely/probably by Democratic presidents.

More see the court as conservative: About half of those surveyed (49%) say the court is “sometimes liberal, sometimes conservative, depending on the law and facts of the case,” a decrease from nearly two-thirds (63%) in 2019. Over a third (36%) feel the court is generally conservative, up 17 points since 2019, and 8% say generally liberal. In 2020, Justice Amy Coney Barrett was confirmed to the Supreme Court, the last of three conservative justices added during President Donald Trump’s term, giving conservatives a 6-3 majority on the court.

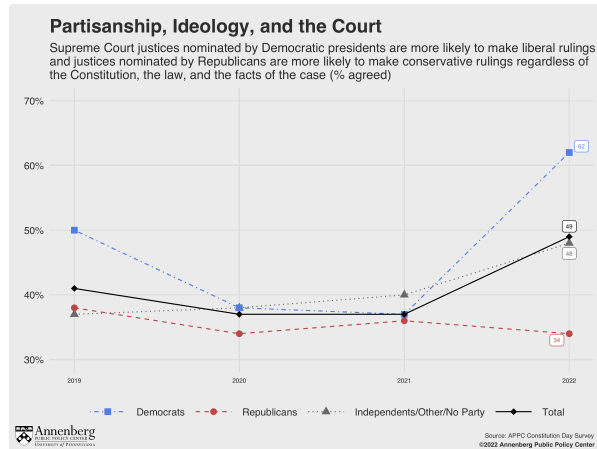
Most who see an ideological tilt think it’s bad: Among those who feel the court is generally liberal or conservative, the vast majority (75%) think it is bad for our system of government that the court is generally either of those.

What motivates Supreme Court justices

Setting aside personal and political views: Asked to consider the individual Supreme Court justices, less than half of U.S. adults (40%) think the justices “set aside their personal and political views and make rulings based on the Constitution, the law, and the facts of the case” – down 19 points from last year.

Following party leanings: Half of U.S. adults (49%, up from 37% in 2021) say Supreme Court justices nominated by Democratic presidents are more likely to make liberal rulings and justices nominated by Republican presidents are more likely to make conservative rulings, “regardless of the Constitution, the law, and the facts of the case.”

What's driving this: Responses are driven by party – 62% of Democrats, 48% of independents/other/no party but only 34% of Republicans say that party leanings influence justices more than the Constitution, the law, and the facts of the case. The survey finds a dramatic shift upward for Democrats from 2021 and 2020, when 37% and 38%, respectively, said party leanings had a greater influence.



What Americans value in judges

The survey noted that in some states, state and local judges are elected. Respondents were given a choice of different qualities and asked how important each would be in deciding whether to vote for a candidate for judge. Respondents said the most essential/very important qualities are that a judge:

- Is fair and impartial (91%)
- Will make rulings based on the facts of the case, the law and the Constitution (90%)
- Is highly recommended by the state bar association (45%)
- Shares your political beliefs (34%)
- Shares your religious beliefs (16%).

Those responses did not change significantly from 2019.

The abortion ruling – and increasing the size of the court

Abortion: On June 24, 2022, the Supreme Court ruled in *Dobbs v. Jackson Women’s Health Organization* that there was no constitutional guarantee of a right to abortion, overturning the *Roe v. Wade* decision recognizing such a right. The *Dobbs* ruling is widely unpopular among U.S. adults:

- Nearly 6 in 10 U.S. adults (58%) said they disapprove of that decision on abortion, 50% of whom were strongly disapproving
- Nearly 4 in 10 (39%) approve of the ruling, 27% strongly approving.

Increasing the size of the court: The survey also asked Americans what they thought of proposals to increase the number of justices on the Supreme Court – a proposal that some Democrats and left-leaning critics of the court have said would restore ideological balance to it. In the survey, a plurality of respondents opposed such a proposal:

- 38% opposed increasing the number of justices on the court, 29% strongly
 - 30% favored increasing the number of justices on the court, 18% strongly
- Full data for the survey is in the [Appendix](#).

Media Contact: Michael Rozansky, Annenberg Public Policy Center, (215) 746-0202, michael.rozansky@appc.upenn.edu.



**Kathleen Hall
Jamieson, Ph.D.**

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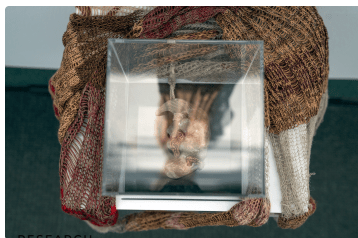
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Criticizing Judges: A Lawyer's Professional Responsibility

Lonnie T. Brown

University of Georgia, ltbrown@uga.edu

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Criticizing Judges: A Lawyer's Professional Responsibility

Cover Page Footnote

A. Gus Cleveland Distinguished Chair of Legal Ethics and Professionalism & Josiah Meigs Distinguished Teaching Professor, University of Georgia School of Law. I would first like to thank Professors Dan Coenen and Bruce Green for their very helpful insights, suggestions, and questions regarding earlier drafts of this article. In addition, I am greatly indebted to my amazing research assistants Kristen Bartlett and Sarah Nelson for their extensive research and substantive input throughout the article's evolution. Lastly, I thank my wife Kim for unfailingly making everything that I attempt better.

CRITICIZING JUDGES: A LAWYER'S PROFESSIONAL RESPONSIBILITY

*Lonnie T. Brown, Jr.**

Lawyers, as officers of the court, are expected to act with deference and respect toward judges. Speaking sharply to or publicly criticizing members of the bench is frowned upon and not infrequently met with punitive responses. The judiciary, however, is not above reproach. Judges are fallible and may possess personal biases, tainting self-interest, or even prejudice. As such, at times, they must disqualify themselves if their ability to dispense justice fairly and impartially can reasonably be questioned. Indeed, the very nature of a judge's role requires avoidance of even the "appearance of impropriety." When judges fail to adhere to this standard, decisional accuracy is called into question, and the perception of fairness, so important to the judicial process, is diminished.

Judges have broad discretion in deciding whether to disqualify themselves, and legal review of those decisions is limited, especially when made by a state's highest court. In Georgia, for example, if a supreme court justice declines to recuse, there is no avenue for appellate review and mandamus relief is unavailable. Hence, a lawyer's only meaningful recourse may be to publicly criticize the justice, making others aware of perceived wrongful conduct. Such a response, however, is substantially dissuaded in virtually every U.S. jurisdiction by Rule 8.2(a) of the Rules of Professional Conduct, which subjects lawyers to discipline for knowingly or recklessly making a false statement "concerning the qualifications or integrity of a judge." While facially narrow, the rule is widely

* A. Gus Cleveland Distinguished Chair of Legal Ethics and Professionalism & Josiah Meigs Distinguished Teaching Professor, University of Georgia School of Law. I would first like to thank Professors Dan Coenen and Bruce Green for their very helpful insights, suggestions, and questions regarding earlier drafts of this article. In addition, I am greatly indebted to my amazing research assistants Kristen Bartlett and Sarah Nelson for their extensive research and substantive input throughout the article's evolution. Lastly, I thank my wife Kim for unfailingly making everything that I attempt better.

interpreted to cover far more criticism than the text would suggest. Only Georgia and the District of Columbia have declined to adopt Rule 8.2(a), choosing instead to accord greater latitude to the free-speech rights of lawyers. In this article, I argue that such an approach is more consistent with and supportive of lawyers' ethical duties to their clients, the judicial system, and the public, and therefore should serve as the regulatory prototype.

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“The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.”¹

I. INTRODUCTION

In American society, judges have traditionally been viewed as wise and impartial arbiters of legal disputes, doling out justice from elevated benches while garbed in regal black robes. Judges’ status alone entitles them to respect and great deference. Citizens obediently acquiesce to their will and judgment in a manner similar to that of royal subjects to a king or queen. Lawyers, in particular, are expected to adhere to this hierarchical paradigm, reverently and submissively addressing judges as “your honor” and routinely prefacing in-court statements with “may it please the court.” Speaking sharply to or publicly criticizing a judge is anathema to our justice system, and lawyers who do so are not infrequently met with punitive responses from the bench² and outrage from members

¹ *Bridges v. California*, 314 U.S. 252, 270 (1941) (footnote omitted).

² See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 601–02 (1986) (“[A] current that runs through some judicial opinions is that all lawyer criticism of judges creates public disrespect for the law or the judiciary and thus should be sanctioned without careful regard for its truth or falsity, possibly because the tone of criticism rather than its factual content is considered objectionable.” (footnotes omitted)); Dara Kam, *‘Grim Reaper’ Attorney Daniel Uhlfelder in Hot Water over Comments*, TALLAHASSEE DEMOCRAT (Feb. 12, 2021, 3:03 PM), <https://www.tallahassee.com/story/news/2021/02/12/grim-reaper-attorney-daniel-uhlfelder-hot-water-over-comments/6742127002/> (describing a Florida appeals court’s finding that a lawyer potentially committed criminal contempt and violated Florida ethics rules when he suggested in a public statement that the court’s decision in his appeal was politically motivated); see also *In re Snyder*, 472 U.S. 634, 641 (1985) (“[Petitioner’s] refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly ‘harsh’ statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts.” (alteration in original) (quoting *In re Snyder*, 734 F.2d 334, 337 (8th Cir. 1984), *rev’d* 472 U.S. 634 (1985))); *In re Mahoney*, 280 Cal. Rptr. 3d 2, 5–6 (Cal. Ct. App. 2021) (holding an attorney in contempt for implying in an appellate brief that the lower court’s decision was politically influenced and for impugning the lower court’s integrity through a seeming comparison of it to Attorney Thomas Girardi, who had been accused of various high-profile ethical transgressions); *Howard v. Offshore Liftboats, LLC*, No. 13-4811, 2016 WL 2865889, at *9 (E.D. La. May 17, 2016) (sanctioning a lawyer \$1,000 for statements questioning the court’s integrity that were found to run afoul of Rules

of the bar.³ In addition, such behavior may subject lawyers to professional discipline if their statements falsely or recklessly impugn a judge's qualifications or integrity.⁴

Notwithstanding the traditional judge-lawyer dynamic and the established regulatory limitations, the judiciary is not, and should not be, above reproach.⁵ Judges are as fallible as anyone else and may possess personal biases, tainting self-interest, or even prejudice. As such, at times, they must disqualify themselves if their ability to dispense justice fairly and impartially can reasonably be questioned.⁶ Indeed, the very nature of a judge's role

8.2 and 3.5 of Louisiana's Rules of Professional Conduct); *In re Palmisano*, 70 F.3d 483, 485–88 (7th Cir. 1995) (affirming the reciprocal disbarment by the Northern District of Illinois of an attorney who accused judges of numerous criminal and other wrongful acts).

³ See, e.g., *infra* notes 82–86 and accompanying text; Julie Hilden, *Should Lawyers Be Allowed to Blog Critically About Judges?*, FINDLAW (Sept. 21, 2009), <https://supreme.findlaw.com/legal-commentary/should-lawyers-be-allowed-to-blog-critically-about-judges.html> (“Attorney bloggers who cross the line when it comes to wording [critical of judges] should face backlash, but from their more decorous colleagues and fellow bloggers — not from a quasi-governmental entity such as the bar . . .”); Debra Cassens Weiss, *Accused of ‘Outrageous and Unfounded Attacks’ on SCOTUS Chief Justice, Pro-Trump Lawyer Stands by Claims*, A.B.A. J. (Feb. 11, 2021, 2:16 PM), <https://www.abajournal.com/news/article/pro-trump-lawyer-l-lin-wood-stands-by-wild-claims-about-chief-justice> (discussing how an attorney asked a judge to revoke attorney L. Lin Wood's pro hac vice admission in a New York case because, among other things, he had made “outrageous and unfounded attacks” on Chief Justice Roberts).

⁴ See MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS'N 2020) (“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . .”).

⁵ See WOLFRAM, *supra* note 2, at 601 (“[T]he law gives ‘[j]udges as persons or courts as institutions . . . no greater immunity from criticism than other persons or institutions.’” (second and third alterations in original) (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978))); see also *Palmisano*, 70 F.3d at 487 (“Judges should hesitate to insulate themselves from the slings and arrows that they insist other public officials face . . .” (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964))).

⁶ See MODEL CODE OF JUD. CONDUCT r. 2.11 (AM. BAR ASS'N 2020) (“A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . . The judge has a personal bias or prejudice concerning a party or a party's lawyer . . .”); see also 28 U.S.C. § 455(a) (“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”); *id.* § 455(b) (providing for disqualification when a judge “has a personal bias or prejudice concerning a party”); *U.S. Dist. Ct. for the E. Dist. of Wash. v. Sandlin*, 12 F.3d 861, 868 (9th Cir. 1993) (Trott, J., concurring and dissenting) (“Anything less than this antiseptic approach to judging undermines public confidence in our system of justice, and without public confidence in the basic fairness of our system, it would soon crumble.”).

requires the avoidance of even the “appearance of impropriety.”⁷ When judges fail to adhere to this standard, the legitimacy of a given decision is subject to skepticism, and the perception of fairness, so important to our legal process, is diminished.

In Georgia and elsewhere, judges have broad discretion in making recusal decisions, especially at the supreme court level.⁸ Georgia justices decide recusal motions themselves,⁹ and there is no requirement that they supply any explanation for their recusal or non-recusal.¹⁰ Furthermore, when a justice declines to recuse, there is no avenue for appellate review,¹¹ nor is the extraordinary remedy of mandamus available to force recusal.¹² Does this mean that a Georgia justice is completely immune from professional scrutiny regarding matters of this nature? In terms of obtaining a judicial

⁷ See MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS’N 2020) (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and *shall avoid impropriety and the appearance of impropriety.*” (emphasis added)).

⁸ See, e.g., *infra* note 76 and accompanying text; see also GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 1009 (2018) (“When a party files a motion to disqualify, the most common approach is for the subject judge to review the motion on the merits.”).

⁹ See GA. SUP. CT. R. 26 (“A Justice whose impartiality is questioned will determine, alone or in consultation with the other Justices, whether to grant or deny the motion to disqualify or to disqualify himself or herself from or not participate in the case voluntarily, rendering the motion moot. The criteria for disqualification are set forth in statutory law, case law, and the Code of Judicial Conduct.”); O.C.G.A. § 15-1-8 (2021) (providing baseline rules for disqualification); GA. CODE OF JUD. CONDUCT r. 2.11(A) (2021) (delineating circumstances that require a judge’s disqualification).

¹⁰ Although there is no express requirement that judges explain the basis for recusal or non-recusal, Rule 2.11(C) permits judges disqualified under Rule 2.11(A) to disclose the basis for their disqualification and ask the parties and lawyers to consider waiving the disqualification, provided the basis of the disqualification is not “personal bias or prejudice concerning a party.” GA. CODE OF JUD. CONDUCT r. 2.11(C) (2021); see also GA. CODE OF JUD. CONDUCT r. 2.11 cmt. 2 (2021) (“Judges should disclose on the record, or in open court, information that the court believes the parties or their lawyers might consider relevant to the question of disqualification, even if they believe there is no legal basis for disqualification.”); Patrick Emery Longan, *Legal Ethics*, 62 MERCER L. REV. 215, 231–32 (2010) (describing “the unusual step” Justice Nahmias took by “explaining why he chose to recuse himself from all cases in which the firm of King & Spalding” was counsel: because familial ties created the potential that his “impartiality might reasonably be questioned”).

¹¹ See *infra* notes 93–94 and accompanying text.

¹² See *Clark v. Hunstein*, 733 S.E.2d 259, 262 (Ga. 2012) (finding that “[n]othing in [Georgia’s] Constitution suggests that this Court can mandamus itself or its Justices” and holding that “mandamus does not lie against this Court or its Justices”).

remedy, the answer appears to be “yes.” However, there are two potential extrajudicial options available.

First, if the refusal to recuse is egregious enough, a lawyer may file a disciplinary complaint against the justice with the Judicial Qualifications Commission based on an arguable violation of Rule 2.11(A) of Georgia’s Code of Judicial Conduct,¹³ which mandates the disqualification of judges under specific circumstances.¹⁴ The other possibility, contrary to the tradition of deference and respect, is for a lawyer to criticize a justice openly in order to bring any perceived impropriety to the public’s attention.¹⁵ The latter approach was taken by the lawyers in *Barrow v. Raffensperger*.¹⁶

In *Raffensperger*, three of nine justices ultimately refused to recuse themselves in an appeal involving the procedure for replacing a resigning, but still sitting, justice.¹⁷ The specific issue presented was whether Justice Keith Blackwell’s announced resignation, to take effect eight months later, allowed for his position to be filled by gubernatorial appointment, rather than the expected general nonpartisan election.¹⁸ The lawyers for the lead appellant John Barrow responded to the recusal decision by sharply criticizing the non-recusing justices in the media.¹⁹ Barrow, also a lawyer and one of the would-be candidates for the court seat at issue, was even more condemnatory in rebuking the justices,

¹³ See *Functions & Procedures*, GA. JUD. QUALIFICATIONS COMM’N, <https://gajqc.gov/functions-and-procedures> (last visited Nov. 23, 2021) (describing the procedure for filing an ethical complaint against a judge in Georgia).

¹⁴ See GA. CODE OF JUD. CONDUCT r. 2.11(A)(1) (2021) (requiring disqualification “in any proceeding in which [a judge’s] impartiality might reasonably be questioned, or in which . . . [t]he judge has a personal bias or prejudice”). While filing such a disciplinary complaint is possible, “reporting [a judge] is not a remedy likely to bring effective reaction in many jurisdictions.” WOLFRAM, *supra* note 2, at 601.

¹⁵ See WOLFRAM, *supra* note 2, at 601 (noting that because of the absence of other effective remedies, “lawyers may feel strong motivation to resort to the scourge of publicity to expose perceived judicial corruption, autocracy, or incompetence”).

¹⁶ 842 S.E.2d 884 (Ga. 2020); see *infra* Part III.

¹⁷ See Robin McDonald, *State Supreme Court Splits in Recusing on Fight over Justice Blackwell’s Seat*, DAILY REP. (Mar. 23, 2020, 10:03 AM) [hereinafter, McDonald, *Court Splits in Recusing*], <https://www.law.com/dailyreportonline/2020/03/23/state-supreme-court-splits-on-recusing-in-fight-over-justice-blackwells-seat/> (“Justices John Ellington, Nels Peterson, Michael Boggs and Charles Bethel have recused, in addition to Blackwell himself. There is also one unfilled vacancy on the court. Chief Justice Harold Melton, Presiding Justice David Nahmias and Justice Sarah Warren did not recuse . . .”).

¹⁸ See *infra* Part II.

¹⁹ See *infra* Part III.

especially Presiding Justice David Nahmias.²⁰ In addition to questioning the appropriateness of Nahmias's refusal to recuse, Barrow also took the opportunity to denounce Nahmias generally for his alleged domineering style on the bench and suggested that the Presiding Justice was using his authority improperly to obtain a desired result in Barrow's appeal.²¹

In this article, I examine whether the judicial criticism lodged by Barrow and other lawyers was ethically proper, and I address the broader question of whether lawyers criticizing judges is a systemic necessity warranting a sweeping expansion of their ability to engage in this form of speech. Currently, the applicable ethical rule in every U.S. jurisdiction, except Georgia and the District of Columbia, is consistent with Rule 8.2(a) of the ABA Model Rules of Professional Conduct,²² which generally prohibits a lawyer from knowingly or recklessly making a false statement "concerning the qualifications or integrity of a judge."²³ Georgia expressly declined to include this provision in its version of the rules of professional

²⁰ See Jim Galloway, Opinion, *John Barrow and the Brewing Fight over A Vanished Supreme Court Race*, ATLANTA J.-CONST. (May 5, 2020), <https://www.ajc.com/blog/politics/opinion-john-barrow-and-the-brewing-fight-over-vanished-supreme-court-race/zjWVMo8OW8TITpvun3uCyN/> (expounding on Barrow's criticisms of the justices and explaining that "[i]nside and outside the courtroom, Barrow has alleged collusion and manipulation").

²¹ Barrow publicly stated that "Nahmias is notorious for his attempts to dominate the Court. His refusal to step aside in this case is a violation of the Code of Judicial Conduct. . . . I'm concerned that Justice Nahmias may be trying to manipulate the substitute justices for the same reason Justice Blackwell and the Governor have manipulated the timing of Justice Blackwell's 'retirement' — to control the Georgia Supreme Court." Jim Galloway, Tia Mitchell & Greg Bluestein, *The Jolt: Georgia GOP Cancels State Convention, Rewrites Delegate Selection Process*, ATLANTA J.-CONST. (Apr. 14, 2020), <https://www.ajc.com/blog/politics/the-jolt-georgia-gop-cancels-state-convention-rewrites-delegate-selection-process/xpdTVXwrtb00RBSRtf6IwK/>; see also R. Robin McDonald, *John Barrow Accuses Ga. Supreme Court of 'Slow Walking' Ruling on Justice Blackwell's Seat*, DAILY REP. (Apr. 13, 2020, 6:36 PM) [hereinafter McDonald, *Slow Walking*], <https://www.law.com/dailyreportonline/2020/04/13/john-barrow-accuses-ga-supreme-court-of-slow-walking-ruling-on-justice-blackwells-seat/> (expounding on Barrow's statements about Justice Nahmias); *infra* notes 75–76 and accompanying text.

²² See AM. BAR ASS'N CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 8.2 (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8.2.pdf (listing each state's version of Model Rule 8.2).

²³ MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS'N 2020).

conduct adopted in 2001,²⁴ even though its version is principally fashioned after the ABA's Model Rules.²⁵ Given this departure from the Model Rules, are Georgia lawyers freer to criticize the judiciary than lawyers licensed in other states? In my view, the answer is a qualified "yes." Members of the bar in Georgia do have more ethical room to criticize judges, but that room is not without limits. Even in the absence of Rule 8.2(a), there are ethical restrictions and practical considerations that appropriately constrain the form and manner of judicial criticism by lawyers.

Part II introduces this subject by discussing the background of *Barrow v. Raffensperger*, which supplies essential context for assessing the propriety of lawyers' criticism of judges. Part III then details the actual statements made by the lawyers in that case along with the public responses to their critiques by other members of the bar. In addition, Part III addresses the efficacy and potential factual accuracy of these lawyers' statements. Part IV explores the historical development and current state of the Model Rules in relation to judicial criticism by contrast to the seemingly more

²⁴ See GA. RULES OF PRO. CONDUCT r. 8.2 (2021) (leaving Rule 8.2(a) as "[r]eserved"); see also GA. RULES OF PRO. CONDUCT r. 8.2 cmt. 1 (2021) ("Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice."). As noted, the District of Columbia likewise declined to adopt Rule 8.2(a) and, in fact, declined to adopt Rule 8.2 in its entirety. See COMMENTS OF THE SECTION ON COURTS, LAWYERS, AND THE ADMINISTRATION OF JUSTICE OF THE D.C. BAR REGARDING PROPOSED RULES OF PROFESSIONAL CONDUCT 17 (1988) (copy on file with the author) (stating that a minority of the Section agreed with the omission of Rule 8.2(a) and that "[l]awyers are no less citizens than are nonlawyers, and should be no less entitled to criticize judges — indeed, they are often the only citizens with the knowledge and ability effectively to do so."); see also AM. BAR ASS'N CPR POLY IMPLEMENTATION COMM., *supra* note 22 (noting that D.C. did not adopt Rule 8.2). This article, however, will focus solely on Georgia, with the understanding that much of the analysis, by extension, should apply to D.C. lawyers as well, but because D.C. judges are appointed, rather than elected, some considerations related to Rule 8.2 will necessarily differ.

²⁵ At present, all states have adopted rules of professional conduct based, in varying degrees, on the ABA Model Rules. See Jaliz Maldonado, *California Aligns New Rules with ABA Rules of Professional Conduct*, NAT'L L. REV. (Aug. 29, 2018), <https://www.natlawreview.com/article/california-aligns-new-rules-aba-rules-professional-conduct> (indicating that in 2018 California joined the other 49 states in adopting a version of rules of professional conduct closely following or modeled after the ABA Model Rules of Professional Conduct).

lenient standards applicable in Georgia. In Part V, I assess the ethical propriety of the lawyers' statements in *Raffensperger* under Georgia's unique, free-speech-friendly regulatory regime, which includes various rules of professional conduct that legitimately restrict certain types of judicial criticism—for example, criticism that “would serve merely to harass or maliciously injure” a judge.²⁶ This analysis reveals that the lawyers in *Raffensperger* were on solid ethical ground in issuing their criticism, at least from the standpoint of the blackletter ethical rules.

Indeed, *Raffensperger* presents a paradigmatic example of a situation in which lawyers should not only be rather liberally permitted to publicly criticize members of the judiciary but actually *must* do so in order to effectively represent their clients and serve the broader public interest.²⁷ To the latter point, most judges in Georgia, although often initially appointed by the governor to fill mid-term vacancies, eventually endure a nonpartisan election.²⁸ In such a system, it is essential that judges be held publicly accountable for their decisions and their actions, and lawyers are best equipped to assess those matters in a well-informed and thoughtful manner.²⁹

²⁶ GA. RULES OF PRO. CONDUCT r. 3.1(a) (2021).

²⁷ See, e.g., Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 871 (1998) (observing that “attorney speech often serves to advance the interests of the client and the interests of society”).

²⁸ See *Barrow v. Raffensperger*, 842 S.E.2d 884, 892–94 (Ga. 2020) (discussing Georgia's selection process for supreme court justices); *id.* at 896 (noting that “the appointment mechanism for initial service of Justices provided in Paragraphs III and IV [of the 1983 Georgia Constitution] has been the norm, not the exception, in the more than 35 years that we have lived under this Constitution: of the 18 Justices who first took office during that time, all but one — Justice John J. Ellington — was initially appointed by a Governor to fill a vacancy”); *Judicial Selection in the States: Georgia*, NAT'L CTR. FOR STATE CTS. http://www.judicialselection.us/judicial_selection/index.cfm?state=GA (last visited Nov. 23, 2021) (providing a succinct overview of Georgia's judicial selection procedure). It should be noted that the judge of Georgia's recently-created State-wide Business Court is appointed to a five-year term by the governor with the approval of a majority of the judiciary committees of both the Georgia House and Senate. O.C.G.A. § 15-5A-7 (2021).

²⁹ See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1056–57 (1991) (“To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar.”); WOLFRAM, *supra* note 2, at 601 (“Lawyers possess special knowledge and legal training that gives [sic] them a unique ability to assess the performance of judges.”); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1601

Without such professional scrutiny and commentary, clients would be ill-served and the electorate underinformed about factors bearing on a judge's suitability for office.³⁰ While judicial criticism by lawyers is important in jurisdictions like Georgia in which judges are primarily elected, it may actually be even more necessary in appointment-only systems, such as at the federal level or in the District of Columbia,³¹ because such criticism may be the most consequential way for a lawyer to ensure meaningful public and

(2009) (“Because lawyers have the education and training to recognize, understand, and articulate problems with the judiciary, and are regularly exposed to and experiencing those problems as they bring their clients’ cases before judges, they have more expertise and are better able to comment on the judiciary and judicial qualifications.”); *see also id.* at 1575 (noting that “speech regarding the qualifications and integrity of members of the judiciary is essential for democracy to function properly and cannot be suppressed merely to protect judicial reputation”); Sandra M. Molley, Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 NOTRE DAME LAW. 489, 489 (1981) (arguing that “attorneys are particularly suited to serve as a check on the judiciary” given that they “operate within the legal system, understand the judicial process, and are familiar with individual judges”). *But see* Hal R. Lieberman, *Should Lawyers Be Free to Publicly Excoriate Judges?*, 25 HOFSTRA L. REV. 785, 796 (1997) (maintaining that “[i]f lawyers’ statements are accorded greater attention and credence than comments by others, then lawyers can also do far more damage to a judge’s professional reputation by making unwarranted attacks”).

³⁰ *See* WOLFRAM, *supra* note 2, at 601 (“If lawyers were reluctant to call public attention to judicial shortcomings, most incompetent or corrupt judges would probably remain unchastened on the bench.”); *see also* State *ex rel.* Oklahoma Bar Ass’n v. Porter, 766 P.2d 958, 967 (Okla. 1988) (“Without question, foreclosing the public’s receipt of speech concerning the governmental function of the courts forestalls the public’s access to the thoughts of the very class of people in daily contact with the judicial system.”); Tarkington, *supra* note 29, at 1577 (“In order to vote with informed judgment, citizens should be free to make and obtain opinions and information regarding . . . candidates [for judicial office].”); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 337 (2001) (contending that “the location of the judiciary within a democratic political order counsels against processes of mystification, by which the workings of the court system are obscured from public view and criticism”); *cf.* Landmark Commc’ns, Inc. v. Virginia, 435 U.S. 829, 842 (1978) (noting that “speech cannot be punished when the purpose is simply ‘to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed’” (quoting *Bridges v. California*, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting))).

³¹ *See* D.C. Code § 1-204.33 (2013) (describing the nomination and appointment procedure for D.C. courts); *FAQs: Federal Judges*, U.S. CTS., <https://www.uscourts.gov/faqs-federal-judges> (last visited Nov. 23, 2021) (describing the process for federal judicial appointments).

regulatory oversight of otherwise insulated problematic judicial behavior.³²

The article concludes by making the case for widespread relaxation of regulation of lawyers' criticism of judges, thereby freeing them to fulfill in a better way their professional responsibility to their clients and the public. To be sure, such criticism should not be wholly unbridled because lawyers can go too far. First, there are, and appropriately so, limits to the protection afforded under the First Amendment. For example, it is well settled that lawyers may be held legally accountable for making statements about a judge that are known to be false or uttered with reckless disregard for the truth or falsity of the statements.³³ The same is true with regard to public criticism that a "lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding."³⁴ In addition, if the criticism does not relate to pending litigation or is made by a lawyer not involved in the case, it can be limited to the extent that it "pose[s] a clear and present danger to the administration of justice."³⁵

Furthermore, lawyers can appropriately be called upon to issue their judicial criticism in a professional and respectful manner,

³² See Tarkington, *supra* note 29, at 1636 ("Where the judiciary is appointed, the judiciary must remain in the scrutiny of the public so that abuses and incompetence can be checked and, where necessary, steps can be taken to remove judges.").

³³ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282–83 (1964) (holding that for a public official to prove they were defamed, the statement must have been made with "actual malice"); see also *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (extending *Sullivan's* holding to criminal sanctions for criticisms of the official conduct of public officials).

³⁴ GA. RULES OF PRO. CONDUCT r. 3.6(a) (2021); see also *Gentile*, 501 U.S. at 1036–37 (noting that the restriction on lawyer speech contained Rule 3.6 is not inherently unconstitutional if "[i]nterpreted in a proper and narrow manner"). For an example of various other ethical rules, consistent with constitutional protections, that appropriately curtail the nature of a lawyer's criticism, see GA. RULES OF PRO. CONDUCT r. 3.1(a), r. 4.1(a), r. 8.4(a)(4) (2021). For a discussion of the potential application of these rules to judicial criticism, see *infra* Part V.

³⁵ See, e.g., *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1443 (9th Cir. 1995) ("[L]awyers' statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice."); *Garland v. State*, 325 S.E.2d 131, 133 (Ga. 1985) (finding that contemptuous statements are not protected by the U.S. Constitution, nor by the Georgia Constitution, and that "[t]he test applied to determine whether a statement is contemptuous is whether there is a clear and present danger to orderly administration of justice").

whenever possible.³⁶ Firm, reasoned commentary is proper and constructive; caustic, vitriolic, or petty personal attacks are not. The latter not only unjustly impugn the character of the judge criticized but also reflect poorly on the lawyer who issues the criticism, thus casting a negative light on both the judicial system and the profession as a whole.³⁷

Finally, lawyers can, should, and do publicly come to the defense of judges believed to have been wrongfully criticized. In fact, the ethical rules encourage such responses, especially in light of judges' inability to speak out in their own defense.³⁸ Lawyers who forthrightly counter judicial criticism that they view as unjust or inaccurate aptly provide citizens with a more balanced view of the judicial conduct at issue, which then enables citizens to reach their own conclusions.

Hence, constitutional parameters, sound rule-based restrictions, and practical considerations rooted in a desire for professional integrity and the quest for well-informed self-government combine to ensure that proper, constructive judicial criticism will be the norm rather than the exception.

II. *BARROW V. RAFFENSPERGER*

On February 26, 2020, Georgia Supreme Court Justice Keith Blackwell submitted a letter to Governor Brian Kemp communicating his resignation from the Court, effective November

³⁶ See, e.g., *In re Snyder*, 472 U.S. 634, 647 (1985) (observing that “[t]he necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone”).

³⁷ See, e.g., *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995) (“Indiscriminate accusations of dishonesty . . . do not help cleanse the judicial system of miscreants yet do impair its functioning”); Lieberman, *supra* note 29, at 796 (noting that lawyers’ “[i]rresponsible attacks [on judges] have a very real likelihood of subverting the dignity and authority of the courts”).

³⁸ See GA. RULES OF PRO. CONDUCT r. 8.2 cmt. 3 (2021) (“To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.”); see also *In re Tri-State Ethanol Co.*, No. 06-1043, 06-1040, 2007 WL 30337, at *4 (D.S.D. Jan. 3, 2007) (“Judges have virtually no protection from politicians or lawyers. Unlike an opposing party, judges are not permitted to respond, to testify, or file a brief or affidavit.”); Lieberman, *supra* note 29, at 796 (observing that judges’ inability to defend themselves is likely the reason for inclusion of the “duty of lawyers to speak out *against* improper personal attacks on judges”).

18, 2020.³⁹ Governor Kemp accepted the resignation the same day.⁴⁰ Prior to this development, the expectation was that Justice Blackwell would run for re-election in a nonpartisan general election scheduled for May 19, 2020, as his six-year term was to expire on December 31, 2020.⁴¹

On March 1, the governor notified Secretary of State Brad Raffensperger of his intention to appoint Justice Blackwell's replacement, and the secretary accordingly canceled "candidate qualifying for the May 19 election for Justice Blackwell's office and directed his staff . . . not to accept qualifying documents and fees for the election."⁴² Former Georgia Congressman John Barrow and attorney Beth A. Beskin subsequently sought to qualify for the election but were denied the right to do so in light of the secretary of state's cancellation.⁴³ As a result, they each filed a petition in Fulton County Superior Court seeking a writ of mandamus ordering Raffensperger to reopen the qualification process and to conduct the election for Justice Blackwell's seat.⁴⁴

On March 16, the trial court denied the petitions, finding that

under the express language of the Georgia Constitution and OCGA § 45-5-1, a vacancy existed for Justice Blackwell's seat as of February 26, 2020[,] and once Governor Kemp notified the Secretary of State of [his] decision to fill the seat via appointment, [the] Secretary . . . no longer was under a statutory legal duty to hold qualifications for Justice Blackwell's seat.⁴⁵

Barrow then sought expedited appellate review of this decision by the Georgia Court of Appeals.⁴⁶ On March 19, however, the court of appeals transferred Barrow's emergency motion to the Georgia Supreme Court because the case involved an election contest, which

³⁹ Barrow v. Raffensperger, 842 S.E.2d 884, 888 (Ga. 2020).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 888–89.

⁴⁵ *Id.* at 889.

⁴⁶ *Id.*

is within that Court's exclusive jurisdiction.⁴⁷ Beskin filed a similar emergency motion, and the two cases were consolidated for the Georgia Supreme Court's consideration.⁴⁸

Barrow also filed a "Motion to Disqualify or Recuse" all eight sitting supreme court justices⁴⁹ contending that their impartiality might reasonably be questioned in light of Justice Blackwell's involvement in the substance of the case, including as a witness.⁵⁰ One of Barrow's attorneys, Michael Moore, pointedly contended that the maneuvering undertaken to ensure that Justice Blackwell's replacement was appointed rather than elected "already [gave] the appearance that a group of insiders [had] determined that hand-selecting a justice and protecting a judicial pension [were] more important than protecting the people of Georgia's right to vote."⁵¹

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ At the time of the motion, there were only eight justices, rather than nine, because Justice Robert Benham's vacant seat had not yet been filled by the governor. It was later filled through the appointment of Court of Appeals Judge Carla Wong McMillian. Bill Rankin, *Barrow, Suing for High Court Vote, Tells 8 Justices: Recuse Yourselves*, ATLANTA J.-CONST. (Mar. 20, 2020), <https://www.ajc.com/news/local/barrow-suing-for-high-court-vote-tells-justices-recuse-selves/NZL477nJu1tXMVEVAmoeI/>; Bill Rankin, *Kemp Appoints First Asian-American Woman to Georgia Supreme Court*, ATLANTA J.-CONST. (Mar. 27, 2020), <https://www.ajc.com/news/local/kemp-appoints-mcmillan-georgia-supreme-court/jzOqqOxk2cRqdfZqRDvyjP/>. Once Justice McMillian took her seat on the Supreme Court, she too recused herself. R. Robin McDonald, *Another One: 6 Judges Have Stepped Down from This Case by Candidates Suing to Run for Georgia's High Court*, DAILY REP. (Apr. 17, 2020, 5:35 PM) [hereinafter McDonald, *Another One*], <https://www.law.com/dailyreportonline/2020/04/17/another-one-6-judges-have-stepped-down-from-this-case-by-candidates-suing-to-run-for-georgias-high-court/>.

⁵⁰ Although Justice Blackwell did not testify live in the trial court proceeding, his testimony was presented by stipulation. See *Raffensperger*, 842 S.E.2d at 888 n.2 ("We note that Justice Blackwell is not a party in either of these cases, and while he was subpoenaed as a witness in the trial court, his testimony (like that of all the witnesses) was presented by stipulation. Thus, all of the evidentiary facts that the parties deemed pertinent are undisputed."); R. Robin McDonald & Greg Land, *Fight for Justice Blackwell's Seat Heads to Ga. Supreme Court, Teeing Up Potential Conflict of Interest*, DAILY REP. (Mar. 19, 2020, 1:19 PM) [hereinafter McDonald & Land, *Teeing Up Potential Conflict*], <https://www.law.com/dailyreportonline/2020/03/19/fight-for-justice-blackwells-seat-heads-to-ga-supreme-court-teeing-up-potential-conflict-of-interest/> (explaining that Justice Blackwell was "subpoenaed as a witness and submitted stipulated testimony in a Fulton County Superior Court hearing on Barrow's mandamus petition").

⁵¹ McDonald & Land, *Teeing Up Potential Conflict*, *supra* note 50. The pension reference apparently relates to the argument that if Justice Blackwell's resignation was effective as of

He further described allowing the sitting justices to decide the case as akin to “asking the chickens in the henhouse to vote on whether one of them can keep its golden egg.”⁵²

Justice Blackwell readily recused himself from the case, as did Justices Charles Bethel, Michael Boggs, John Ellington, and Nels Peterson.⁵³ Court of Appeals Judge Carla Wong McMillian was later appointed to fill Justice Robert Benham’s vacant seat on the supreme court, and she too promptly recused herself.⁵⁴ However, Chief Justice Harold Melton, Presiding Justice David Nahmias, and

February 26, 2020, when he announced his intention to retire, he would not have completed the necessary ten years of appellate court service required to receive his full pension. See O.C.G.A. § 47-2-244(f) (2021) (“After ten years of service as an appellate court judge, such judge shall be entitled to receive during life a retirement benefit payable monthly equivalent to 75 percent of the salary of an appellate court judge then serving in the office from which such judge retired.”); see also R. Robin McDonald, *Unwilling to Wait on State Supreme Court, Voters Seek Injunction over Blackwell Seat*, DAILY REP. (Apr. 28, 2020, 4:14 PM) [hereinafter McDonald, *Unwilling to Wait*], <https://www.law.com/dailyreportonline/2020/04/28/unwilling-to-wait-on-state-supreme-court-voters-seek-injunction-over-blackwell-seat/?slreturn=20210619153601> (quoting the plaintiffs’ attorney’s argument that “[i]f, as a matter of law, Justice Blackwell’s resignation is effective in February 2020, then Justice Blackwell has no right to receive the compensation and benefits he is receiving until November 18, 2020”). Justice Blackwell was appointed to the court of appeals on November 1, 2010. *Keith R. Blackwell 2010–2012*, GA. CT. APPEALS, <https://www.gaappeals.us/history/judges.php?id=73>.

The supreme court’s opinion in *Raffensperger* seems to counter Moore’s pension-related criticism. Specifically, Justice Nahmias explained that Justice Blackwell’s resignation was technically effective when accepted by the governor, at least for purposes of creating a prospective right to appoint his successor. *Raffensperger*, 842 S.E.2d at 887–88. However, from the standpoint of creating a “vacancy” on the court, which actually triggers the governor’s appointment power, that would not occur until November 18, 2020. *Id.* at 888. Indeed, as noted by the court, Justice Blackwell “continue[d] to serve as a full-fledged Justice of [the] Court” until that date. *Id.* at 887. *But see* McDonald, *Unwilling to Wait*, *supra* (explaining that plaintiffs’ counsel argued that the state “cannot keep Justice Blackwell on the bench and pay him, but treat him as retired for purposes of enabling Governor Kemp to appoint his successor”).

⁵² McDonald & Land, *Teeing Up Potential Conflict*, *supra* note 50.

⁵³ McDonald, *Court Splits in Recusing*, *supra* note 17. The Court dismissed Barrow’s Motion to Disqualify or Recuse All Justices as moot with regard to these five justices, given their voluntary decision to recuse. Order on Emergency Motions, *Barrow v. Raffensperger*, No. S20M1012, S20M1020, 842 S.E.2d 844 (Ga. Mar. 23, 2020) [hereinafter *Raffensperger*, March 23 Order], <https://www.courthousenews.com/wp-content/uploads/2020/03/barrow-raffensperger.pdf>.

⁵⁴ See McDonald, *Another One*, *supra* note 49 (“The Supreme Court of Georgia’s newest justice has decided to recuse rather than sit on a pending appeal over who will fill Justice Keith Blackwell’s seat.”).

Justice Sarah Warren opted to remain on the case.⁵⁵ Specifically, the supreme court issued an order stating that these three justices, “having each carefully considered the motion to recuse him or her, deny the motion.”⁵⁶ In keeping with Georgia law, five superior court judges were then appointed to replace the recused justices.⁵⁷

The three remaining justices and the five superior court judges partially granted emergency motions to hear the matter post-haste⁵⁸ but later found that an immediate decision in the case, as requested by Barrow and Beskin, was unnecessary; instead, they held that “an opinion would be issued as soon as practicable.”⁵⁹

On May 14, 2020, in a 6–2 opinion⁶⁰ authored by Presiding Justice Nahmias, the court held that although the trial court’s reasoning was erroneous,⁶¹ it was correct in refusing to grant the requested writ of mandamus because there was nothing to compel

⁵⁵ McDonald, *Court Splits in Recusing*, *supra* note 17.

⁵⁶ *Raffensperger*, March 23 Order, *supra* note 53.

⁵⁷ *Id.* The superior court judges appointed to hear the case were “Scott Ballard of the Griffin Judicial Circuit, Brenda Holbert Trammell of the Ocmulgee Judicial Circuit, the Southern Circuit’s Richard Cowart, Oconee Circuit Chief Judge Sarah Wall, and Timothy Walmsley of the Eastern Circuit in Savannah.” McDonald, *Court Splits in Recusing*, *supra* note 17. Rule 57 of the Supreme Court of Georgia’s Rules provides that “[a] disqualified or nonparticipating Justice shall be replaced by a senior appellate justice or judge, a judge of the Court of Appeals, or a judge of a superior court whenever necessary to achieve a quorum and on any other occasion that the participating Justices by majority vote deem such replacement necessary.” GA. SUP. CT. R. 57. The Court’s March 23, 2020 order described the replacement process as follows: “Pursuant to this Court’s rules and policies, by unanimous vote of the participating Justices, substitute judges have been selected by the Clerk of this Court at random from a pre-existing list and have been designated to hear and decide these cases in the place of the nonparticipating Justices.” *Raffensperger*, March 23 Order, *supra* note 53.

⁵⁸ *Raffensperger*, March 23 Order, *supra* note 53.

⁵⁹ *Barrow v. Raffensperger*, 842 S.E.2d 884, 889 n.3 (Ga. 2020).

⁶⁰ Judges Brenda Holbert Trammell and Scott L. Ballard dissented. *Id.* at 908–15 (Trammell, J., dissenting). In her dissent, Judge Trammell noted that she is not opposed to gubernatorial appointments. *Id.* at 915. “However, in this instance, when the resignation will not result in a vacancy in the office until (originally) almost six months after the election, I cannot in good conscience agree that the election should be cancelled and the will of the people thrust aside as ‘fruitless and nugatory.’” *Id.*

Chief Justice Melton wrote a concurring opinion, joined by Justice Warren and Judges Cowart, Wall, and Walmsley, emphasizing that the case was “not about this Court’s choice between election and appointments” but rather what the constitution and pertinent law dictate. *Id.* at 907–08 (Melton, C.J., concurring).

⁶¹ *See id.* at 900–01 n.18 (plurality opinion) (finding that the trial court’s “conclusion was poorly reasoned” and inconsistent with relevant precedent).

the secretary of state to do.⁶² In particular, once the governor accepted Justice Blackwell's tendered resignation, a vacancy was created, effective November 18, 2020.⁶³ That vacancy extinguished Justice Blackwell's existing term and thereby "eliminate[d] the need under the Constitution and statutes for an election for [his] next term."⁶⁴

III. LAWYERS' JUDICIAL CRITICISM IN *BARROW V. RAFFENSPERGER*

Throughout the pendency of the *Raffensperger* litigation, the lawyers for John Barrow and Beth Beskin were critical of various members of the Georgia Supreme Court. Justice Blackwell, for one, was criticized for what the lawyers perceived to be the motivation behind the timing of his retirement.⁶⁵ As already noted, Barrow's attorney Michael Moore suggested that the circumstances left the impression that insiders had decided that it was more important to hand-pick a replacement justice and protect a judicial pension than to safeguard Georgia citizens' right to vote.⁶⁶ After the Court's decision in the case, Moore stated that Justice Blackwell's seat had been "sold for the price of a judicial pension and barely 40 days."⁶⁷ Furthermore, in criticizing Justice Nahmias, Barrow personally

⁶² See *id.* at 898–900 ("The Secretary of State generally may be compelled by mandamus to conduct a legally required election, but not when the election will be legally nugatory." (emphasis omitted)). Although the supreme court affirmed the trial court's decision denying the writ of mandamus, it found that court's reasoning to be erroneous. See *id.* at 887 ("[W]e hold that while the trial court's reasoning was mistaken, its conclusion that the Secretary of State could not be compelled by mandamus to hold the May 19 election for Justice Blackwell's office was correct.").

⁶³ *Id.* at 887–88.

⁶⁴ *Id.* at 898; see also *id.* ("[I]f an incumbent Justice's office becomes vacant before his or her existing term ends, that term and any future term associated with that Justice is eliminated, so an election to fill such a term will, in legal effect, be nugatory.").

⁶⁵ McDonald, *Slow Walking*, *supra* note 21.

⁶⁶ See *supra* notes 51–52 and accompanying text. Along the same lines, Moore later stated, "Whether it's about protecting Justice Blackwell's pension or packing the court with members of the Federalist Society, it's important that the voters and courts have access to those reasons and discussions . . ." Galloway, *supra* note 20.

⁶⁷ R. Robin McDonald, *GA Supreme Court Refuses to Compel Election for Justice Blackwell's Seat*, DAILY REP. (May 14, 2020, 5:19 PM) [hereinafter McDonald, *Court Refuses to Compel Election*], <https://law.com/dailyreportonline/2020/05/14/ga-supreme-court-refuses-to-compel-election-for-justice-blackwells-seat/>; see also *supra* note 51 and accompanying text.

stated that he was concerned that Justice Nahmias may be “trying to manipulate the substitute justices’ appointed to replace his five recused colleagues ‘for the same reason Justice Blackwell and the governor have manipulated the timing of Justice Blackwell’s “retirement”—to control the Georgia Supreme Court.”⁶⁸

The lawyers reserved their most forceful criticism for the three non-recusing Justices—Melton, Nahmias, and Warren. One of Barrow’s lawyers, Lester Tate, who previously served as chair of Georgia’s Judicial Qualifications Commission, stated he was “shocked that with a majority of the justices recusing that any justice—particularly Presiding Justice Nahmias—would attempt to continue to participate and give the public no facts or law whatsoever to justify that decision.”⁶⁹ Tate further maintained that the justices’ refusal to recuse was “‘inconsistent with principles of openness and impartiality’ and ‘violate[d] the rules that Justice Nahmias, himself, ha[d] set down for other judges to abide by.’”⁷⁰

Michael Moore’s criticism of the justices was even sharper, suggesting that the justices were flouting their obligation to avoid the appearance of impropriety.⁷¹ Specifically, he contended that “[i]f their conduct is to become the accepted norm, Georgia judges will no longer be expected to act without the appearance of impropriety,” and “[i]nstead, it’ll be ok as long as they choose the ethical course of conduct some of the time.”⁷² He also condemned what he viewed as an obvious improper refusal to recuse by Justices Melton, Nahmias, and Warren, contending that they had “individually gone to great lengths to hang onto a case about their friend’s seat — one in which the rules for every other judge in the state would have unquestionably required recusal or disqualification.”⁷³

The most severe criticism of the justices, however, came from Barrow himself. He was particularly disconcerted over what he believed to be an unnecessary delay by the court in the issuance of

⁶⁸ McDonald, *Slow Walking*, *supra* note 21.

⁶⁹ McDonald, *Court Splits in Recusing*, *supra* note 17.

⁷⁰ *Id.*; see also McDonald, *Court Refuses to Compel Election*, *supra* note 67 (quoting Tate’s declaration that “[i]f Justice Warren, Justice Nahmias, and Justice Melton had recused like every other judge in the state would have been required to do if they had been sitting in judgment of a colleague’s conduct, there easily could have and would have been a different result”).

⁷¹ McDonald, *Court Splits in Recusing*, *supra* note 17.

⁷² *Id.*

⁷³ Galloway, *supra* note 20.

a ruling in the case.⁷⁴ He speculated that the prolonged wait was an intentional maneuver by the three non-recusing justices, led by Justice Nahmias, and emphasized his view that Nahmias's remaining in the case was ethically improper—a perspective that other lawyers shared, at least according to Barrow:

A lot of lawyers are concerned that our case is being “slow walked” by the three justices who’ve refused to step aside, especially Presiding Justice Nahmias. Nahmias is notorious for his attempts to dominate the Court. His refusal to step aside in this case is a violation of the Code of Judicial Conduct. He can’t be the judge of a case involving a close colleague, and he can’t be the judge of his own case. But that’s just what he’s doing.⁷⁵

Barrow then converted his criticism into a campaign advertisement of sorts, proclaiming that all citizens could rest assured that nothing like this would happen if he were on the Georgia Supreme Court: “No one should have to worry about something like that. When I’m on the Supreme Court, nobody—no Democrat, Republican, Independent, man, woman, or child—will have to fear that their case is being manipulated or ‘slow walked’ for political ends.”⁷⁶

Cary Ichter, counsel for Beskin, was more restrained in his assessment of the court and resisted criticizing any justices individually. Even so, he opined on the potential negative effect of a decision upholding the secretary of state’s cancellation of the election: “If the Supreme Court says Justice Blackwell’s seat is vacant as Justice Blackwell continues to work with the other justices each and every day, the credibility of the court will be a distant memory.”⁷⁷ He was somewhat more critical after the court handed down its decision in the case, but even then, his comments focused on the possible impact of the ruling without directly criticizing any individual justice. In particular, Ichter stated that “[i]t is frightening to think the court has issued a decision so shortsighted with respect to its potential unintended consequences”

⁷⁴ *McDonald, Slow Walking*, *supra* note 21.

⁷⁵ Galloway et al., *supra* note 21.

⁷⁶ *Id.*

⁷⁷ *McDonald, Unwilling to Wait*, *supra* note 51.

and further noted that the “entire scheme . . . is likely subject to serious constitutional challenge.”⁷⁸

Others who were not directly associated with the case also added their voices to the discussion.⁷⁹ Senior Fulton County Superior Court Judge Melvin Westmoreland expressed concern that the public might question the justices’ ability to decide the case impartially,⁸⁰ which in his view, counseled in favor of letting other judges hear the appeal: “In an abundance of caution, it may be in the Supreme Court’s best interest to consider a process which allows judges from outside their bench to hear and decide this case.”⁸¹

Interestingly, one attorney, Richard Robbins, came to the defense of the non-recusing justices and directly attacked Barrow and his lawyers for their negative commentary. While Robbins acknowledged that “[r]easonable attorneys can disagree with how the case should have been decided,” he took issue with “experienced attorneys [demonstrating] such a flagrant disrespect for the Supreme Court and mak[ing] inflammatory and personal attacks on the justices with whom they disagree.”⁸² He characterized the criticism as “appalling” and detrimental to the administration of justice:

These attacks only serve to harm the judiciary, which is called upon to make important and controversial decisions. One can disagree with rulings, but to attack the judges personally damages our system of justice and the respect we all should want citizens to have for the judiciary. I understand the strong feelings about this

⁷⁸ McDonald, *Court Refuses to Compel Election*, *supra* note 67 (alteration in original).

⁷⁹ See, e.g., McDonald & Land, *Teeing up Potential Conflict*, *supra* note 50 (detailing statements about the case from Fulton County Senior Judge Melvin Westmoreland and former Georgia Supreme Court Justice Leah Sears, among others).

⁸⁰ See *id.* (referencing Judge Westmoreland’s statement that “[w]hether the public perceives the other justices as being able to impartially decide the matter so important to one of their companions is difficult to gauge”).

⁸¹ *Id.*

⁸² Richard Robbins, Letter to the Editor, *Lawyer Decries ‘Appalling’ Comments About High Court Justices*, DAILY REP. (May 15, 2020, 2:40 PM), <https://www.law.com/dailyreportonline/2020/05/15/lawyer-decries-appalling-comments-about-high-court-justices-letter/>.

particular case. But the public disrespect shown the justices is inexcusable.⁸³

Although Robbins acknowledged that the non-recusal decision of the three justices was a “close call,” he respected their right to “act as they felt was appropriate” and characterized them as “very well-regarded and very ethical.”⁸⁴ He objected to their being castigated for not recusing themselves and was especially animated over the harsh criticism leveled at Justice Nahmias, calling Barrow’s comments “untrue” and “offensive,” amounting to nothing more than “petty name-calling.”⁸⁵ Robbins concluded by generally condemning the practice of lawyers criticizing judges in any manner that could “diminish the authority and respect for the judiciary.”⁸⁶ Seemingly, in his view, proper criticism would be solely limited to apolitical expressions of disagreement with specific rulings.⁸⁷

Notably, another attorney, Tom Stubbs, felt compelled to respond to Robbins’s commentary by emphasizing the systemically damaging effect of the court’s decision, which he viewed as indisputably partisan in nature, and by defending the propriety of the criticism advanced by Barrow and his lawyers.⁸⁸ Specifically, according to Stubbs, “[t]he most logical reading of [the court’s] ruling is that the majority put personal partisan priorities and favoritism for a colleague ahead of the law,” and “[t]hat kind of ruling, to borrow a phrase, opens the door to the attendant response.”⁸⁹ He further asserted that “[t]urning logic and language on its head as the majority must do to reach its conclusion makes it difficult to view their ruling as anything other than one in which their partisan slip shows.”⁹⁰ Stubbs also questioned the propriety of

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Tom Stubbs, Letter to the Editor, *Election Decision ‘Will Tarnish’ State High Court’s Reputation*, DAILY REP. (May 18, 2020, 2:39 PM), <https://www.law.com/dailyreportonline/2020/05/18/election-decision-will-tarnish-state-high-courts-reputation-letter/> (“[T]he partisan shadow this ruling casts over our judiciary means we cannot take their reasoning at face value.”).

⁸⁹ *Id.*

⁹⁰ *Id.*

Justices Melton, Nahmias, and Warren remaining in the case and compared the court's decision to *Bush v. Gore*⁹¹:

[T]his ruling, led as it was by three justices who, by every applicable standard, should have recused, will be viewed as most observers view the U.S. Supreme Court's overtly partisan, outcome-driven ruling in *Bush v. Gore*: it will tarnish the reputation of the court. . . . The majority who birthed this ruling, sadly, earned their day in infamy.⁹²

Many will view the criticism of the court, individual justices, and the lawyers themselves as severe, both in content and tone. But, with regard to the three justices' refusal to recuse, it is important to emphasize that the lawyers had no legal recourse for challenging the propriety of their non-recusal. Although at an earlier time Rule 26 of the Georgia Supreme Court Rules required an independent review of recusal motions by the remaining justices when one justice declined to recuse,⁹³ that rule has since been abandoned. The current version of Rule 26 permits a justice to consult with colleagues on the bench about a recusal motion but ultimately leaves that decision to the justice's unilateral discretion.⁹⁴

Conceivably, the lawyers in *Raffensperger* could have petitioned for a writ of certiorari from the U.S. Supreme Court if a federal question could properly be stated, but securing the grant of such a

⁹¹ 531 U.S. 98 (2000).

⁹² Stubbs, *supra* note 88.

⁹³ See ADAM SKAGGS & ANDREW SILVER, BRENNAN CTR. FOR JUST., PROMOTING FAIR AND IMPARTIAL COURTS THROUGH RECUSAL REFORM 5 (2011), <https://www.brennancenter.org/our-work/research-reports/promoting-fair-and-impartial-courts-through-recusal-reform> (noting that in 2010, Georgia Supreme Court Rule 26 provided that "if a justice subject to a disqualification request declines to recuse, the remaining Justices decide the motion to disqualify").

⁹⁴ GA. SUP. CT. R. 26; *see also* Order Amending Supreme Court Rule 26 (Ga. Sept. 1, 2016), https://www.gasupreme.us/wp-content/uploads/2015/05/Order_Rule26_September-2016_FINAL.pdf ("A Justice whose impartiality is questioned will determine, alone or in consultation with the other Justices, whether to grant or deny the motion to disqualify or to disqualify himself or herself from or not participate in the case voluntarily, rendering the motion moot. The criteria for disqualification are set forth in statutory law, case law, and the Code of Judicial Conduct.").

petition would have been a longshot at best.⁹⁵ Alternatively, the lawyers could have filed a disciplinary complaint against the non-recusing justices with the Judicial Qualifications Commission.⁹⁶ This, however, would not have been an attractive option because the complaint was unlikely to succeed, and even if it was successful, the resulting findings would not have changed the outcome in the underlying litigation.⁹⁷

Under these circumstances, what else could Barrow and his lawyers have done besides publicly criticize the justices? Of course, they could have chosen the path of least resistance and simply remained silent and respectful, moving forward with the case on the merits and then pursuing any viable post-judgment relief that might have been obtainable. Had they proceeded in this fashion, however, the recusal issue would have likely faded away without the justices' conduct receiving any sort of meaningful public scrutiny or consideration. Whether or not the justices were correct in their refusals to recuse, it is difficult to maintain that their decisions should have escaped any consequential form of outside examination. Furthermore, one could argue that had the lawyers refrained from publicly voicing their concerns, they would have breached their ethical duty to provide competent and diligent representation, as well as their obligation to the public to safeguard the administration of justice.⁹⁸ On this view, it may have actually

⁹⁵ See MATTHEW MENENDEZ & DOROTHY SAMUELS, BRENNAN CTR. FOR JUST., JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION 1 (2016), <https://www.brennancenter.org/our-work/research-reports/judicial-recusal-reform-toward-independent-consideration-disqualification> (noting that the U.S. Supreme Court “hears very few cases” involving state supreme court justices’ decisions on recusal motions).

⁹⁶ See GA. CODE OF JUD. CONDUCT r. 2.11(A)(1) (2021) (requiring disqualification in any proceeding in which a judge’s impartiality might reasonably be questioned or in which the judge has a personal bias or prejudice); *Functions & Procedures*, *supra* note 13 (explaining the procedure in Georgia for lawyers to file official disciplinary complaints).

⁹⁷ See WOLFRAM, *supra* note 2, at 601 (“[R]eporting [a judge] is not a remedy likely to bring effective reaction in many jurisdictions.”); *Raffensperger*, March 23 Order, *supra* note 53 (dismissing the motion to recuse in *Raffensperger* in part as moot). Moreover, any potential efforts at obtaining outside review of the justices’ non-recusal would have been complicated by the fact that they provided no explanation for their decision. McDonald, *Court Splits in Recusing*, *supra* note 17.

⁹⁸ See GA. RULES OF PRO. CONDUCT r. 1.3 (2021) (outlining a lawyer’s responsibility to “act with reasonable diligence and promptness in representing a client”); GA. RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (2021) (“A lawyer should pursue a matter on behalf of a client despite

been the lawyers' professional responsibility to engage in judicial criticism, just as they did. Even assuming there was a professional obligation to speak out, though, the question remains whether these lawyers did so in an appropriate manner, particularly in light of the longstanding norms that have traditionally restrained when and how lawyers can criticize judges.

IV. PROFESSIONAL REGULATION OF JUDICIAL CRITICISM

A. THE EVOLUTION OF THE ABA'S APPROACH

Judicial criticism by lawyers has traditionally been subject to some level of professional regulation by the bar. The ABA's 1908 Canons of Professional Ethics—the first national, uniformly-adopted code of ethics in the United States⁹⁹—emphasized the necessity of lawyers exhibiting respect for the judiciary and protecting judges against unjust criticism:

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not

opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”)

⁹⁹ See James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2395 (2003) (stating that the 1908 Canons of Ethics were the “first national code of legal ethics in this country”); see also WOLFRAM, *supra* note 2, at 50 (noting that “[a] semblance of uniformity did exist for several decades because of the virtually unchallenged universality of the 1908 ABA Canons of Ethics”).

It should be noted that even before the adoption of any formal regulatory provision by the ABA, and indeed, before the organization's founding, the U.S. Supreme Court laid the foundation for regulating judicial criticism by denouncing speech or conduct of lawyers that reflects poorly on the administration of justice or regarding the qualifications and integrity of a judge. See *Bradley v. Fisher*, 80 U.S. 335, 356 (1871) (“A greater indignity could hardly be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause.”). In *Bradley*, an attorney sought damages against a judge who had barred him from practicing before the court because of the attorney's criticism of the judge during trial. See *id.* at 344–45. In ultimately affirming the denial of the attorney's claim, the Court emphasized that attorneys are obligated to refrain from using insulting language or engaging in offensive conduct directed towards “judges personally for their judicial acts.” *Id.* at 355.

being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor.¹⁰⁰

This text suggests that, rather than criticizing judges, lawyers should take care to defend jurists who are unjustly attacked. While this declaration seemed to counsel against criticizing judges, the Canons did recognize that, under certain circumstances, lawyers had a professional obligation to criticize judges for serious lapses, albeit through the formalized manner of submitting “grievances to the proper authorities.”¹⁰¹ Along the same lines, in the context of judicial selection, the Canons acknowledged the need for lawyers to ensure that only suitable candidates for the bench were seated, suggesting that appropriate, constructive criticism was not only proper but encouraged in this context. As the Canons put it, lawyers “should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench.”¹⁰²

It is important to note that the Canons were largely aspirational, rather than legally-binding disciplinary standards.¹⁰³ That changed in 1969 with the ABA’s adoption of the Model Code of Professional Responsibility, which was subsequently adopted in some form by every U.S. jurisdiction.¹⁰⁴ The Code consisted of blackletter Disciplinary Rules (DRs) and aspirational Ethical Considerations (ECs) designed to highlight and reinforce aspects of the DRs and

¹⁰⁰ CANONS OF PRO. ETHICS Canon 1 (AM. BAR ASS’N 1908).

¹⁰¹ *Id.* (“Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, *but not otherwise*, such charges should be encouraged and the person making them should be protected.” (emphasis added)).

¹⁰² CANONS OF PRO. ETHICS Canon 2 (AM. BAR ASS’N 1908).

¹⁰³ *See* WOLFRAM, *supra* note 2, at 55 (“The Canons were probably not intended to have any direct legal effect, but it is clear that the ABA leadership contemplated that they would be influential in lawyer discipline proceedings in courts.” (footnote omitted)).

¹⁰⁴ *See id.* at 56–57 (noting that every state, except California adopted some version of the Model Code, and it had a “strong influence” even in California). At present, all states have adopted rules of professional conduct based, in varying degrees, on the ABA Model Rules. *See* Maldonado, *supra* note 25 (describing California’s adoption of new ethics rules that “closely follow the ABA Model Rules of Professional Conduct”).

also to inspire lawyers to go above what the rules required in the interest of professionalism.¹⁰⁵

With regard to judicial criticism, the Model Code declared that “[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.”¹⁰⁶ Thus, any statement by a lawyer about a judge, known to be false, would have subjected a lawyer to discipline. The accompanying Ethical Consideration, EC 8-6, acknowledged a lawyer’s right to criticize judges publicly, principally in the context of judicial selection, given the uniquely informed perspective of members of the bar.¹⁰⁷ However, EC 8-6 also emphasized that the substance of any such criticism had to be meritorious and its delivery appropriately restrained and decorous:

Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. . . . Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. . . . While a lawyer as a citizen has a right to criticize such officials publicly, *he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.*¹⁰⁸

¹⁰⁵ As noted in the Preliminary Statement to the Model Code, the ECs were “aspirational in character and represent[ed] the objectives toward which every member of the profession should strive.” MODEL CODE OF PRO. RESP. Preliminary Statement (AM. BAR ASS’N 1980).

¹⁰⁶ MODEL CODE OF PRO. RESP. DR 8-102(B) (AM. BAR ASS’N 1980).

¹⁰⁷ MODEL CODE OF PRO. RESP. EC 8-6 (AM. BAR ASS’N 1980).

¹⁰⁸ MODEL CODE OF PRO. RESP. EC 8-6 (AM. BAR ASS’N 1980) (emphasis added) (footnotes omitted).

In addition, as in the Canons of Professional Ethics, EC 8-6 highlighted the importance of lawyers defending judges “against unjust criticism” because of restrictions on judges being able to do so themselves.¹⁰⁹ Moreover, and most significantly, EC 8-6 suggested that judicial criticism was only appropriate when motivated by a desire to improve the legal system: “Criticisms motivated by reasons other than a desire to improve the legal system are not justified.”¹¹⁰

Thus, while the blackletter DR, on its face, seems to have simply prohibited knowingly false statements about judges, in reality, the expectation under the Model Code was much more circumscribed in terms of the type of judicial criticism deemed acceptable, even if true.

Besides being truthful, a lawyer’s judicial critique ideally would not include such things as “intemperate statements,” “petty criticisms,” or statements of any kind not issued for the purpose of improving the legal system.¹¹¹ As a result, even if a lawyer determined that the most effective way to advocate on behalf of a client was to publicly expose a judge’s perceived bias or prejudice, the Model Code would have at least discouraged, and perhaps wholly foreclosed, such a strategy. This state of affairs created particular difficulties for the lawyer who concluded that only strong language would suffice to convey the severity of a jurist’s improper conduct.¹¹² EC 8-6, after all, counseled lawyers to use “appropriate language” when critiquing judges, limited to temperate, constructive utterances.¹¹³ The idea, so it seemed, was to outlaw

¹⁰⁹ *Id.* (“Adjudicatory officials, not being wholly freed to defend themselves, are entitled to receive the support of the bar against unjust criticism.”); *see also supra* note 100 and accompanying text. *But see In re Mahoney*, 280 Cal. Rptr. 3d 2, 4 (Cal. Ct. App. 2021) (“The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.” (quoting *In re Ciralo*, 450 P.2d 241, 244 (Cal. 1969))).

¹¹⁰ MODEL CODE OF PRO. RESP. EC 8-6 (AM. BAR ASS’N 1980).

¹¹¹ *Id.*

¹¹² *Cf.* Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 542 (2009) (“Conduct that might fairly be characterized as discourteous in the abstract can be reasonable in the context of proceedings in which a judge is provoked or is otherwise seeking to maintain order.”). *But see* Lieberman, *supra* note 29, at 796 (arguing that “lawyers should be limited to criticism that is offered in a courteous and professional manner for the purpose of improving the administration of justice”).

¹¹³ MODEL CODE OF PRO. RESP. EC 8-6 (Am. Bar Ass’n 1980).

speech by lawyers that might undermine “public confidence in our legal system,”¹¹⁴ apparently even when that confidence may have been undeserved as a matter of fact.

In 1983, primarily because of concerns about overall format and content, the ABA replaced the Model Code with the Model Rules of Professional Conduct.¹¹⁵ Unlike the Model Code, with its numerous ECs that arguably modified or enlarged the reach of the DRs, the Model Rules utilized a Restatement-style format with blackletter text followed by explanatory comments.¹¹⁶ Rule 8.2(a), dealing with judicial criticism, was included in the original set of rules.¹¹⁷ It was seemingly adopted without any controversy, and the rule’s language is the same now as it was in 1983¹¹⁸:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal

¹¹⁴ *Id.*; see *supra* note 108 and accompanying text. Rule 8.2(a) of the Model Rules of Professional Conduct also adheres to this central purpose of ensuring public confidence in the system. See, e.g., *In re Wilkins*, 777 N.E.2d 714, 717 (Ind. 2002) (per curiam) (“The prohibitions in [Rule] 8.2(a) are concerned with preserving the public’s confidence in the administration of justice.”); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1437 (9th Cir. 1995) (“Ethical rules that prohibit false statements impugning the integrity of judges . . . are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice.”); *In re Westfall*, 808 S.W.2d 829, 836 (Mo. 1991) (en banc) (noting that “the state has a substantial interest in maintaining public confidence in the administration of justice” in its discussion regarding Rule 8.2(a)).

¹¹⁵ See AM. BAR ASS’N CTR. FOR PRO. RESP., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 xiv–xvi (Art Garwin ed., 2013) [hereinafter A LEGISLATIVE HISTORY] (illustrating that the inconvenient “tripartite format of the Model Code,” which invited confusion regarding application and enforceability of the rules, was a primary impetus behind the need for a new format of professional ethical rules); see also WOLFRAM, *supra* note 2, at 60–61 (discussing various criticisms of and concerns regarding the Model Code, including potential antitrust challenges).

¹¹⁶ See A LEGISLATIVE HISTORY, *supra* note 115, at xiv (noting an observation made during the debate by the ABA House Delegates concerning the reformatting of the rules that “the unique tripartite format of the Model Code had led to confusion about the interrelationship among the Canons, Ethical Considerations, and Disciplinary Rules, and inconsistent application by courts and disciplinary agencies”).

¹¹⁷ See *id.* at 835 (stating that Rule 8.2 and its comments “were adopted at the August 1983 ABA Annual Meeting”).

¹¹⁸ See *id.* at 835–37 (chronicling Rule 8.2(a) from its unchallenged adoption to its modern-day iteration).

officer, or of a candidate for election or appointment to judicial or legal office.¹¹⁹

The text of Rule 8.2(a) mirrors the standard for defamation claims made by public figures, which the U.S. Supreme Court established in *New York Times Co. v. Sullivan*.¹²⁰ Indeed, the 1981 proposed draft of the rule cited *Sullivan*, noting that “[t]he Supreme Court has held that false statements about public officials may be punished only if the speaker acts with knowledge that the statement is ‘false or with reckless disregard of whether it is false or not’ and that ‘Rule 8.2 is consistent with that limitation.’”¹²¹

Textually, Rule 8.2(a) both broadened and narrowed the scope of prohibited judicial criticism. The language of the rule seems broader than previous regulatory iterations insofar as it is not solely limited to statements *known* to be false; instead, it also disallows commentary about judges made with reckless disregard as to truth or falsity.¹²² A reasonable interpretation of the rule’s standard for a

¹¹⁹ MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS’N 2020).

¹²⁰ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that a public official may only recover for defamation upon a showing that the allegedly offending statement was made with “actual malice,” meaning “with knowledge that it was false or with reckless disregard of whether it was false or not”); *Garrison v. Louisiana*, 379 U.S. 64, 65–67 (1964) (utilizing the same standard in reversing the conviction of a prosecutor for criminal defamation stemming from his media comments criticizing local judges for a backlog of cases, which he attributed to their “inefficiency, laziness, and excessive vacations,” among other things); see also *In re Westfall*, 808 S.W.2d 829, 837 (Mo. 1991) (en banc) (noting that “the rule’s language itself is consistent with the constitutional limitations placed on defamation actions by the United States Supreme Court cases of [*Sullivan*] and *Garrison*”); Tarkington, *supra* note 29, at 1569 (observing that the ABA “expressly adopted the *Sullivan* standard in Model Rule of Professional Conduct (MRPC) 8.2”).

¹²¹ Tarkington, *supra* note 29, at 1587 (alteration in original) (quoting ABA COMM’N ON EVALUATION OF PRO. STANDARDS, PROPOSED FINAL DRAFT: MODEL RULES OF PROFESSIONAL CONDUCT 206 (1981)); see also AM. BAR. ASS’N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 344–345 (1984) (explaining that Rule 8.2(a) is consistent with the standard established in *Sullivan* and *Garrison v. Louisiana*, which dealt with the constitutionality of a criminal defamation statute); AM. BAR ASS’N CTR. FOR PRO. RESP., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 688 (Ellen J. Bennett & Helen W. Gunnarsson eds., 9th ed. 2019) (observing that “Rule 8.2(a) adopts the same standard for professional responsibility purposes” as *Sullivan* and *Garrison*); David L. Hudson Jr., *How Far Can Criticism of Judges Go Under Ethics Rules?*, A.B.A. J. (Dec. 1, 2016, 2:30 AM), https://www.abajournal.com/magazine/article/criticism_judges_ethics_rules (noting that Rule 8.2(a) “echoes the standard in libel law articulated by the U.S. Supreme Court in *New York Times Co. v. Sullivan*”).

¹²² MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS’N 2020).

violation would be that, unless recklessly made, a lawyer must *subjectively* know that the criticism is false.¹²³ Such a construction is consistent with the *Sullivan* defamation standard¹²⁴ and is arguably what the ABA intended.¹²⁵ Thus, the scope of the rule, outside of the “recklessness” context, seems quite narrow, capturing only intentionally false criticism. Nevertheless, most courts applying states’ versions of Rule 8.2(a) have opted for a standard of “objective reasonableness,”¹²⁶ thereby significantly broadening the rule’s reach and affording less First Amendment protection to lawyers’ speech concerning judges.¹²⁷ For example, in *In re Westfall*, the Missouri Supreme Court held that despite the wording of Rule 8.2(a) being identical to the subjective standard announced in *Sullivan*, in the disciplinary context, an objective standard had to be applied. In the court’s view, the state’s “interest in protecting the

¹²³ Cf. Tarkington, *supra* note 29, at 1588 (emphasizing that the *Sullivan* standard is determined by “the speaker’s subjective intent”).

¹²⁴ See *supra* note 120.

¹²⁵ See *supra* notes 120–121 and accompanying text.

¹²⁶ See, e.g., Tarkington, *supra* note 29, at 1587 (observing that “[o]ne of the most jarring aspects of the cases on attorney speech impugning judicial integrity is the near universal rejection by state courts of the *Sullivan* [subjective] standard,” replacing it with an “objective reasonableness standard”); see also Att’y Grievance Comm’n v. Frost, 85 A.3d 264, 277 (Md. 2014) (applying the objective standard because “[e]ven outside the courtroom, the speech of a lawyer may be curtailed to an extent greater than an ordinary citizen’s” (alteration in original) (quoting Att’y Grievance Comm’n v. Gansler, 835 A.2d 548, 560 (Md. 2003))); Bd. of Pro. Resp. v. Davidson, 205 P.3d 1008, 1016 (Wyo. 2009) (holding that “[b]ecause of the interest in protecting the public, the administration of justice and the profession, a purely subjective standard is inappropriate”); Iowa Sup. Ct. Att’y Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 80 (Iowa 2008) (finding that “a majority of jurisdictions addressing this issue has concluded the interests protected by the disciplinary system call for a test less stringent than the *New York Times* standard”).

¹²⁷ However, it is important to note that, even with this broadened objective reasonableness standard, the current version of Model Rule 8.2(a) remains narrower than its predecessor regulations, as it focuses only on criticism that relates to a judge’s “qualifications or integrity.” MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS’N 2020). While this limitation could be interpreted liberally to cover a wide swath of speech, it nevertheless suggests that there are certain areas that are beyond the rule’s reach. For example, criticizing judges for their courtroom style or manner of speaking would not necessarily call into question a judge’s qualifications or integrity and should be permissible—though perhaps unwise, as a practical matter—under Rule 8.2(a).

public, the administration of justice, and the profession, [made use of] a purely subjective standard . . . inappropriate.”¹²⁸

State courts typically justify the more restrictive curtailment of attorney speech critical of the judiciary by relying on lofty ideals related to the sacred nature of the legal profession.¹²⁹ In other words, by accepting membership in the bar, one necessarily must sacrifice certain rights, including the right to criticize judges in a manner that would impugn a judge’s integrity or call the judge’s qualifications into question.¹³⁰ Indeed, the Missouri Supreme Court in *Westfall* stated as much explicitly: “Other courts reject first amendment arguments in holding that an attorney’s voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary.”¹³¹

Clearly, there is a dramatic difference between *Sullivan*’s subjective standard and the objective standard widely applied in

¹²⁸ *In re Westfall*, 808 S.W.2d 829, 837 (Mo. 1991) (en banc) (relying on *In re Graham*, 453 N.W.2d 313 (Minn. 1990); see also *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1437 (9th Cir. 1995) (opting for an objective standard in assessing propriety of judicial criticism by lawyers, i.e., “what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances” (quoting U.S. Dist. Ct. for the E. Dist. Wash. v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993))).

¹²⁹ See, e.g., *In re Sawyer*, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring) (“A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.”).

¹³⁰ See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1081–82 (1991) (O’Connor, J., concurring) (“Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech.”); *In re Snyder*, 472 U.S. 634, 644–45 (1985) (“The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.”); *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995) (observing that U.S. Supreme Court cases like *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), and *Gentile* demonstrate that courts “may require attorneys to speak with greater care and civility than is the norm in political campaigns”); Tarkington, *supra* note 29, at 1622–29 (explaining the constitutional limitations on speech within the privilege of practicing law); see also Chemerinsky, *supra* note 27, at 873 (arguing that to apply less than strict scrutiny in analyzing restrictions on speech by lawyers because of their status as lawyers is “an unconstitutional condition on bar membership”).

¹³¹ *In re Westfall*, 808 S.W.2d at 834; see also *In re Madison*, 282 S.W.3d 350, 354 (Mo. 2009) (noting that a lawyer’s constitutional rights may be restricted by the state to protect the integrity of the judiciary); *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990) (stating that attorneys who make reckless critical statements regarding judges or other legal officers exhibit a flaw in judgment that conflicts with their role of officer of the court).

assessing whether a lawyer has violated Rule 8.2(a). As Professor Margaret Tarkington has suggested, some courts seem to be of the view “that a reasonable attorney would never impugn the dignity of a court without significant evidence of misconduct.”¹³² Such an approach undoubtedly has the effect of diminishing a lawyer’s willingness to criticize a judge, even when there might be a valid subjective basis for doing so.

Furthermore, consistent with the former Model Code approach, Comment 1 to Rule 8.2 indicates that the central purpose of the provision is to protect the sanctity of our legal system. As it states, “false statements by a lawyer can unfairly undermine public confidence in the administration of justice.”¹³³ Yet, as in the Model Code and the Canons, the Comment stresses the importance of constructive, truthful statements by lawyers about judges in the selection process: “Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office Expressing honest and candid opinions on such matters contributes to improving the administration of justice.”¹³⁴ Moreover, there is the continued emphasis on the necessity of lawyers coming to the defense of judges who are wrongfully criticized, given restrictions on judges’ ability to do so personally: “To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.”¹³⁵

Conspicuously, every U.S. jurisdiction, with the exceptions of Georgia and the District of Columbia, has adopted Rule 8.2(a) and its comments.¹³⁶ Therefore, in virtually every corner of the country, a lawyer’s freedom to criticize judges is more constrained than that of nonlawyers. For example, then-presidential candidate Donald Trump—a nonlawyer—could publicly question the impartiality of federal district court Judge Gonzalo Curiel, based solely on the

¹³² Tarkington, *supra* note 29, at 1590.

¹³³ MODEL RULES OF PRO. CONDUCT r. 8.2 cmt. 1 (AM. BAR ASS’N 2020).

¹³⁴ *Id.*

¹³⁵ MODEL RULES OF PRO. CONDUCT r. 8.2 cmt. 3 (AM. BAR ASS’N 2020); *see also* WOLFRAM, *supra* note 2, at 601 (observing that lawyer codes express the common wish that “lawyers might come to the defense of judges unfairly accused”).

¹³⁶ AM. BAR ASS’N CPR POLY IMPLEMENTATION COMM., *supra* note 22.

judge's Mexican heritage,¹³⁷ but a lawyer offering a similar critique would almost certainly have been viewed as violating Rule 8.2(a). To be sure, serious concerns were raised by the eventual President's comments in terms of their potential effect on the public's perception of the justice system, among other things, and many deemed them to be highly inappropriate coming from the nation's chief executive.¹³⁸ Yet, Trump had the freedom to criticize Judge Curiel in this manner, no matter how ill-advised or unsavory, because only "false" or "reckless" statements of "fact"—as those terms have been interpreted by the courts—could have supported a successful slander or libel action under the *Sullivan* standard.¹³⁹ Lawyers, on the other hand, must be much more cautious and circumscribed when criticizing judges, at least everywhere except (perhaps) in Georgia and the District of Columbia.¹⁴⁰

¹³⁷ See Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict'*, WALL ST. J. (June 3, 2016, 10:03 AM), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442> (describing Trump's contentions that federal district court Judge Gonzalo Curiel could not be impartial in a lawsuit related to Trump University because the judge was of Mexican heritage).

¹³⁸ See, e.g., Jose A. Del Real & Katie Zezima, *Trump's Personal, Racially Tinged Attacks on Federal Judge Alarm Legal Experts*, WASH. POST (June 1, 2016), https://www.washingtonpost.com/politics/2016/06/01/437ccae6-280b-11e6-a3c4-0724e8e24f3f_story.html ("Trump's strikingly personal attacks on Curiel are highly unusual and have prompted questions about how he would react to adverse judicial decisions should he become president."); Siobhan Hughes, *Paul Ryan: Donald Trump's Judge Comments 'Out of Left Field'*, WALL ST. J.: WASHWIRE BLOG (June 3, 2016, 2:29 PM), <https://www.wsj.com/articles/BL-WB-63595> (describing Paul Ryan and Mitch McConnell's criticisms of Trump's comments); Jose A. Del Real & Mike DeBonis, *Trump Increasingly Alone in Defending His Racial Attacks on Latino Federal Judge*, WASH. POST (June 6, 2016), https://www.washingtonpost.com/politics/trump-increasingly-alone-in-defending-his-racial-attacks-on-latino-federal-judge/2016/06/06/be2cee3e-2c15-11e6-9b37-42985f6a265c_story.html ("One of the strongest criticisms came from Sen. Susan Collins of Maine, who has said that she plans to support the presumptive GOP nominee. 'His statement that Judge Curiel could not rule fairly because of his Mexican heritage does not represent our American values,' Collins said in a statement. 'Mr. Trump's comments demonstrate both a lack of respect for the judicial system and the principle of separation of powers.'"); Dan Carden, *Pence Deems Trump Criticism of E.C.-Born Judge 'Inappropriate'*, NWI TIMES (Feb. 28, 2018), https://www.nwitimes.com/news/local/govt-and-politics/pence-deems-trump-criticism-of-e-c-born-judge-inappropriate/article_f1cc25bb-7f71-5f03-9ebb-97c66f3e4f3b.html ("Of course I think those comments were inappropriate,' Pence told reporters Tuesday. 'I don't think it's ever appropriate to question the partiality of a judge based on their ethnic background.'").

¹³⁹ See *supra* notes 120–121 and accompanying text.

¹⁴⁰ See AM. BAR ASS'N CPR POL'Y IMPLEMENTATION COMM., *supra* note 22.

B. GEORGIA'S APPROACH TO JUDICIAL CRITICISM BY LAWYERS

Until 2001, lawyers' criticism of judges in Georgia was governed by DR 8-102 and EC 8-6 because the state had adopted the Model Code provisions verbatim.¹⁴¹ In 2001, Georgia switched to the Model Rules with various notable deviations, seemingly intent on retaining certain vestiges of the earlier version of its rules or else opting to go in its own independent direction.¹⁴² One significant area in which Georgia chose an idiosyncratic path was the regulation of judicial criticism. Rather than adhering to the traditional Model Code approach that it had followed for years or adopting Model Rule 8.2(a), like almost every other jurisdiction, Georgia simply declined to adopt any blackletter rule on this point. Specifically, it enacted Rule 8.2(b), which requires that lawyers seeking judicial office adhere to the Code of Judicial Conduct, but expressly "reserved" adoption of Rule 8.2(a).¹⁴³ Yet Georgia, somewhat inexplicably, adopted all of the comments to Model Rule 8.2, including those that clearly relate only to Rule 8.2(a).¹⁴⁴ Hence, while there is no blackletter prohibition, the comments imply otherwise, stressing the importance of lawyers commenting on the qualifications of those being considered for judicial office and indicating that false statements about judges undermine public confidence in the legal system.¹⁴⁵

¹⁴¹ See GA. RULES OF PRO. RESP. DR 8-102, EC 8-6 (2000) (prohibiting knowing "false statements of fact concerning the qualifications of a candidate for election or appointment to judicial office" and "false accusations against a judge or other adjudicatory officer" and circumscribing the ability of lawyers to criticize judges and protest judicial elections or appointments).

¹⁴² Compare GA. RULES OF PRO. CONDUCT r. 8.4(a)(4) (2021) ("It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to . . . engage in *professional* conduct involving dishonesty, fraud, deceit or misrepresentation . . .") (emphasis added), with MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2020) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .").

¹⁴³ GA. RULES OF PRO. CONDUCT r. 8.2 (2021).

¹⁴⁴ See GA. RULES OF PRO. CONDUCT r. 8.2 cmts. 1–3 (2021) (retaining the same language as the comments to the ABA's Model Rule 8.2).

¹⁴⁵ See GA. RULES OF PRO. CONDUCT r. 8.2 cmt. 1 (2021) ("Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general,

Why Georgia chose this approach is not clear. There is no documented legislative history, only anecdotal evidence and speculation. The anecdotal evidence suggests that Georgia's Disciplinary Rules and Procedures Committee may have been concerned that Rule 8.2(a) could run afoul of the First Amendment.¹⁴⁶ In particular, there seems to have been a concern "that an errant judge might misuse the rule" to unduly curtail a lawyer's speech.¹⁴⁷ In addition, some viewed the rule as unfairly singling out one group of lawyers—judges—for protection but not affording similar safeguards for other members of the bar.¹⁴⁸

The "errant judge" concern¹⁴⁹ seems dubious because one could argue that there is always a risk that a judge may abuse or misapply a rule of professional conduct. For example, a judge might errantly restrict a lawyer's First Amendment rights under Rule 3.6, which limits counsel's ability to comment publicly about litigation.¹⁵⁰

prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.").

¹⁴⁶ See E-mail from Bill NeSmith, Deputy Gen. Couns. of the State Bar of Georgia, to Lonnie Brown Jr., Professor of L., Univ. of Georgia (July 1, 2020, 14:33 EST) (on file with the author) (citing "First Amendment concerns" recalled by members of the Disciplinary Rules and Procedures Committee).

¹⁴⁷ *Id.*

¹⁴⁸ See *id.* (relaying the recollection of two committee members about a concern "that the rule singles out a particular group for protection not extended to all lawyers"). It is important to note that Deputy General Counsel NeSmith emphasized that these were recollections from 20 years ago. *Id.*

¹⁴⁹ See *supra* note 147 and accompanying text.

¹⁵⁰ See GA. RULES OF PRO. CONDUCT r. 3.6(a) (2021) ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a person would reasonably believe to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."); GA. RULES OF PRO. CONDUCT r. 3.6(b) (2021) ("Reserved."); GA. RULES OF PRO. CONDUCT r. 3.6(c) (2021) ("Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity."); GA. RULES OF PRO. CONDUCT r. 3.6(d) (2021) ("No lawyer associated in a firm or government entity with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).").

Nevertheless, Georgia has adopted that provision, principally styled after the corresponding Model Rule.¹⁵¹

The adoption of Rule 3.6, however, may add some legitimacy to the second proffered rationale for not adopting Rule 8.2(a)—avoiding unequal First Amendment treatment of lawyers and judges.¹⁵² In particular, Rule 2.10 of Georgia’s Code of Judicial Conduct constrains a judge’s ability to comment publicly on pending or impending litigation in a fashion similar to Rule 3.6’s limitation on lawyers.¹⁵³ With regard to Rule 8.2(a), there is no directly parallel counterpart in the Georgia Judicial Code.¹⁵⁴ Thus, if Georgia had adopted Rule 8.2(a), there would be a standard restricting a lawyer’s right to criticize judges without any corresponding restriction on a judge’s ability to criticize lawyers.

While superficially logical, equating ethical standards applicable to lawyers with those applicable to judges seems to be an apples-to-oranges comparison. Judges and lawyers, though both admitted to the practice of law, have very different roles within the system, and

¹⁵¹ Compare GA. RULES OF PRO. CONDUCT r. 3.6 (2021), with MODEL RULES OF PRO. CONDUCT r. 3.6 (AM. BAR ASS’N 2020).

¹⁵² See *supra* note 148 and accompanying text.

¹⁵³ See GA. CODE OF JUD. CONDUCT r. 2.10(A) (2021) (“Judges shall not make, on any pending proceeding or impending matter in any court, any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing.”); GA. CODE OF JUD. CONDUCT r. 2.10(B) (2021) (“Judges shall not, in connection with cases, controversies, or issues that are likely to come before the court, make promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”); GA. CODE OF JUD. CONDUCT r. 2.10(C) (2021) (“Judges shall require court staff, court officials, and others subject to the judge’s direction and control to refrain from making statements that the judge would be prohibited from making by Rule 2.10.”); GA. CODE OF JUD. CONDUCT r. 2.10(D) (2021) (“Notwithstanding the restrictions in Rule 2.10, a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.”). For the text of Rule 3.6 regarding attorneys, see *supra* note 150.

¹⁵⁴ Notably, Georgia has not adopted Rule 4.1(A)(11) of the Model Code of Judicial Conduct, which precludes a “judge or a judicial candidate” from “knowingly, or with reckless disregard for the truth, mak[ing] any false or misleading statement.” MODEL CODE OF JUD. CONDUCT r. 4.1(A)(11) (AM. BAR ASS’N 2020) (emphasis added). The closest provision in Georgia’s Code of Judicial Conduct is Rule 4.2(A)(3), which prohibits “judicial candidates” from “us[ing] or participat[ing] in the publication of a false statement of fact, or mak[ing] any misleading statement concerning themselves or their candidacies, or concerning any opposing judicial candidate or candidacy, with knowledge of the statement’s falsity or with reckless disregard for the statement’s truth or falsity.” GA. CODE OF JUD. CONDUCT r. 4.2(A)(3) (2021) (emphases added).

those differences rightly inform the content of the regulations that govern each group's conduct. Consequently, although there are a few parallel obligations,¹⁵⁵ the vast majority of the ethics rules are specifically tailored to the differing functions of judges and lawyers within the justice system. For example, a judge may be disqualified from a case whenever his or her impartiality may reasonably be questioned,¹⁵⁶ while the standard for lawyer disqualification for a conflict of interest requires a significant risk that the conflict will materially and adversely affect a representation.¹⁵⁷

Thus, in light of the less-than-persuasive anecdotal explanations for Georgia's omission of Rule 8.2(a), one is left to engage in rational speculation that may coincide with those proffered reasons. The most plausible theory seems to be that Georgia simply wanted to protect lawyers' ability to criticize judges more broadly than Rule 8.2(a) would allow, while still putting some restraints on the range of permissible criticism. This theory would explain the omission of the blackletter text of Rule 8.2(a) but the inclusion of the related comments.¹⁵⁸ Specifically, Comment 1 encourages lawyers to candidly express opinions about judges, recognizing that this can "contribute[] to improving the administration of justice."¹⁵⁹ On the other hand, the comment discourages false statements, noting that they "can unfairly undermine public confidence in the administration of justice."¹⁶⁰ Furthermore, Comment 3 embraces the traditional concept that lawyers should speak out to "defend

¹⁵⁵ Compare, e.g., GA. CODE OF JUD. CONDUCT r. 2.15(B) (2021) (outlining a judge's duty to report to the appropriate authority known violations of the rules of professional conduct by lawyers that raise "a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects"), with GA. RULES OF PRO. CONDUCT r. 8.3 (2021) (providing that lawyers should report to the appropriate professional authority known violations of the rules of professional conduct that raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects").

¹⁵⁶ See GA. CODE OF JUD. CONDUCT r. 2.11(A) (2021) (providing that "[j]udges shall disqualify themselves in any proceeding in which their *impartiality* might reasonably be questioned").

¹⁵⁷ GA. RULES OF PRO. CONDUCT r. 1.7(a) (2021). In the context of a current representation adverse to a former client, the current and former matters must be the same or substantially related to create a disqualifying conflict for a lawyer. GA. RULES OF PRO. CONDUCT r. 1.9(A) (2021).

¹⁵⁸ See *supra* notes 143–145 and accompanying text.

¹⁵⁹ GA. RULES OF PRO. CONDUCT r. 8.2 cmt. 1 (2021).

¹⁶⁰ *Id.*

judges and courts unjustly criticized.”¹⁶¹ The chosen formulation points to an underlying intent to enable lawyers to speak freely in critiquing judges—but lawyers must do so in a responsible manner and for a proper purpose—and simultaneously be willing to come to the defense of judges when they are wrongfully criticized.

While there appear to be no Georgia disciplinary cases involving lawyers’ criticism of judges,¹⁶² there are judicial opinions that seem consistent with the notion that robust First Amendment protection for lawyers may be the impetus underlying the state’s rejection of Rule 8.2(a). For example, in *Garland v. State*, an attorney representing a defendant charged with drug trafficking was essentially accused by the trial judge during a pretrial hearing of involvement in the defendant’s escape from the jail where he was being held.¹⁶³ The attorney, who was not given an opportunity to respond to the judge’s accusation, subsequently vented his anger and frustration to a newspaper reporter.¹⁶⁴ In the attorney’s published remarks, he described the pretrial hearing as “a sham proceeding” that was “unlawful and improper,” as well as “a political effort to turn a tragedy into political hay for’ the trial judge,” and concluded that “the trial court’s actions had ‘violated the canons of judicial ethics [and] constitute[d] slander of the rankest order.”¹⁶⁵ After the attorney’s remarks were published, a different judge held the attorney in criminal contempt based on the content of those statements.¹⁶⁶ On appeal, the Georgia Court of Appeals affirmed the contempt order, finding that the attorney’s comments

¹⁶¹ GA. RULES OF PRO. CONDUCT r. 8.2 cmt. 3 (2021).

¹⁶² See *Recent Attorney Discipline*, STATE BAR GA., <https://www.gabar.org/forthepublic/recent-discipline.cfm> (last visited Nov. 23, 2021) (listing instances of attorney discipline, with no cases involving judicial criticism). It should be noted, however, that one Georgia lawyer has had a disciplinary complaint filed against him, in part, for inflammatory remarks that he made about Chief Justice of the United States John Roberts. See David Cohen, *Georgia State Bar Seeking to Discipline Lin Wood*, POLITICO (Feb. 14, 2021, 10:30 AM), <https://www.politico.com/news/2021/02/14/lin-wood-georgia-469015> (describing the State Bar of Georgia’s effort to discipline Lin Wood for various comments, including his allegation “that Chief Justice John Roberts [was] involved in a sex-trafficking ring and that he plotted to kill Justice Antonin Scalia”).

¹⁶³ 325 S.E.2d 131, 132–33 (Ga. 1985).

¹⁶⁴ *Id.* at 133.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* The original trial judge who was the subject of the attorney’s statements recused himself from the case following the pretrial hearing, which is why a different judge issued the contempt order. *Id.*

were beyond the protection of the First Amendment because they represented a “contumacious interference with or an obstruction of the administration of justice.”¹⁶⁷

The Georgia Supreme Court reversed, holding that the attorney’s statements did not “present a clear and present danger to the administration of justice” and therefore were protected by the First Amendment.¹⁶⁸ Significantly, the court borrowed liberally from Justice Hugo Black’s opinion in *Bridges v. California*¹⁶⁹ to highlight the importance of the First Amendment in the context of judicial criticism:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.¹⁷⁰

The court went on to indicate, however, that it did not condone the type of statements made by the attorney and emphasized that “[c]ivility and courtesy should be hallmarks of the legal profession.”¹⁷¹ Nevertheless, in the context of assessing the

¹⁶⁷ *Id.* (quoting *Garland v. State*, 320 S.E.2d 548, 551 (Ga. Ct. App. 1984), *rev’d* 325 S.E.2d 131 (Ga. 1985)). It should be noted that when a lawyer’s public statements relate to pending litigation in which the lawyer is involved, the U.S. Supreme Court in *Gentile v. State Bar of Nevada* held that they may be regulated under a standard less demanding than “clear and present danger.” 501 U.S. 1030, 1036, 1075 (1991); *id.* at 1063 (holding “the ‘substantial likelihood of material prejudice’ standard . . . satisfies the First Amendment”). The applicable standard is now embodied in Georgia Rule 3.6(a). For the text of this provision, see *supra* note 150.

¹⁶⁸ *Garland*, 325 S.E.2d at 134.

¹⁶⁹ 314 U.S. 252 (1941).

¹⁷⁰ *Garland*, 325 S.E.2d at 134 (quoting *Bridges*, 314 U.S. at 270–71); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

¹⁷¹ *Garland*, 325 S.E.2d at 134.

propriety of the imposition of criminal contempt, those aspirational elements of professionalism were not deemed pertinent.¹⁷²

More recently, in *Baskin v. Hale*,¹⁷³ the Georgia Court of Appeals echoed the supreme court's deference to the First Amendment in the area of judicial criticism.¹⁷⁴ In this custody case, the trial court issued a permanent injunction that prohibited the parties and their counsel from commenting on the matter or making any disparaging or derogatory remarks about the opposing party to the media or on social media.¹⁷⁵ The injunction would have lasted for ten years and apparently included within its proscription criticism of the court.¹⁷⁶ In holding that the injunction violated the First Amendment, the court of appeals acknowledged the authority of "trial courts to restrict a parent's communications and postings on social media during the pendency of a divorce or custody proceeding."¹⁷⁷ However, it could not "condone the superior court's attempt in this case to restrict the parties' and lawyers' right to publicly criticize the court and the litigation for the next ten years."¹⁷⁸ The court of appeals found lacking any evidence of the necessary "imminent danger" or "compelling interest" that might warrant the imposition of such a prior restraint on speech.¹⁷⁹

Both *Garland* and *Baskin* support the view that lawyers in Georgia have ample constitutional room to criticize judges, even

¹⁷² *See id.* ("Viewing this case in the context of the restraints by which we are bound, we cannot find the statements present a clear and present danger to the administration of justice."). The supreme court appeared to intimate that the attorney's comments might have constituted slander and could be the subject of a disciplinary proceeding but did not reach any conclusions in this regard. *See id.* ("We are not dealing with the broader areas of civil actions for libel or slander or disciplinary proceedings against an attorney.").

¹⁷³ 787 S.E.2d 785 (Ga. Ct. App. 2016).

¹⁷⁴ *Id.* at 792 ("[T]he law gives judges as persons, or courts as institutions no greater immunity from criticism than other persons or institutions." (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978))).

¹⁷⁵ *See id.* at 788 ("[Baskin, Hale], their attorneys, and the [GAL] are hereby restrained and enjoined from putting, placing[,] or causing to be placed any information concerning this custody case upon or in any social media, website, or other public medium. The parties are restrained and enjoined from, directly or indirectly, putting, placing, or causing to be placed any disparaging or derogatory comments about the opposite party upon or in any social media, website, or other public medium." (alterations in original)).

¹⁷⁶ *Id.* at 791–92.

¹⁷⁷ *Id.* at 792.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (quoting *Cruz v. Jackson Cnty. Dep't of Hum. Servs. (In re Interest of R.J.M.B.)*, 133 So. 3d 335, 346 (Miss. 2013)).

when that criticism may be caustic and in bad taste. Nonetheless, Georgia still could have opted to afford lawyers less protection from the standpoint of professional discipline, following the lead of most states, by adopting Rule 8.2(a).¹⁸⁰ The fact that it did not, choosing instead to cherry-pick from the Model Rules' comments,¹⁸¹ strongly implies that Georgia intended to permit judicial criticism to the full extent allowed by the Constitution for nonlawyers.

Although there is no way to know for sure what may have been in the collective minds of the Disciplinary Rules and Procedures Committee, the Board of Governors of the State Bar, and the justices of the Georgia Supreme Court (the ultimate approver of rules of professional conduct),¹⁸² the decision to reject Rule 8.2(a) makes eminent sense from the standpoint of the First Amendment and the public's interest. Specifically, given their education and training, lawyers are best equipped to accurately assess the overall performance of judges, especially as to whether they are adhering to required ethical standards.¹⁸³ It is important for lawyers to responsibly share their views and opinions about judges, thus enabling members of the public to be informed voters and participants in the judicial process.¹⁸⁴ Rule 8.2(a) and the objective manner in which it is typically applied almost certainly deter some lawyers from speaking out, even when what they have to say is

¹⁸⁰ See *supra* note 22 and accompanying text (describing the jurisdictional breakdown of states that adopted Rule 8.2(a)).

¹⁸¹ See *supra* notes 143–145 and accompanying text.

¹⁸² Rules governing the legal profession are typically given the power of law through adoption by a state's highest court. See WOLFRAM, *supra* note 2, at 24 (noting that American courts have generally “asserted the affirmative power to regulate the legal profession” from bar admission to professional disciplinary regulation); *Nelson & Hill, P.A. v. Wood*, 537 S.E.2d 670, 676 (Ga. Ct. App. 2000) (“The Supreme Court of Georgia has the duty to regulate the legal profession in the public's interest.” (citing *AFLAC, Inc. v. Williams*, 444 S.E.2d 314, 316 (Ga. 1994))); *Jud. Qualifications Comm'n v. Lowenstein*, 314 S.E.2d 107, 108 (Ga. 1984) (“Courts have inherent authority to regulate the conduct of attorneys as officers of the court and to control and supervise the practice of law generally” (citing *Wallace v. Wallace*, 166 S.E.2d 718, 723 (Ga. 1969))).

¹⁸³ See *supra* note 29; see also GA. RULES OF PRO. CONDUCT r. 8.3(b) (2021) (“A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.”).

¹⁸⁴ See Tarkington, *supra* note 29, at 1577 (discussing the importance of citizens being able “to vote with informed judgment,” which supports the argument for greater free-speech rights for lawyers).

truthful and relevant to the fair administration of justice. The rule likely curtails improper criticism as well, which is a good thing, but is that benefit worth the cost of potentially restraining proper, necessary speech? Presumably, Georgia thought not.

Whatever the rationale for Georgia's approach to lawyers' critiques of judges, its chosen course is the right one. From a professional responsibility perspective, there are times when judicial criticism is not only appropriate, but necessary. Unduly hamstringing those best situated to comment harms the system, rather than protects its sanctity. The prospect of criticism may deter judicial misconduct. And reverence for judges is not always warranted. Circumstances may dictate that the only available recourse for fulfilling a lawyer's professional obligations to a client, and to the public at large, is to shine a spotlight on a judge's actions through extrajudicial criticism.¹⁸⁵ This is the position in which the plaintiffs' lawyers found themselves in *Barrow v. Raffensperger*.

V. ANALYSIS OF THE LAWYERS' CRITICISM IN *BARROW V. RAFFENSPERGER*

A. THE ETHICAL PROPRIETY OF THE LAWYERS' JUDICIAL CRITICISM

Although Georgia's attorney regulatory regime seems to accord great deference to the free-speech rights of lawyers, particularly as evidenced by its refusal to adopt Rule 8.2(a),¹⁸⁶ at least three other rules of professional conduct may be implicated by the lawyers' criticism in *Raffensperger*—namely, Rules 3.1(a), 4.1(a), and 8.4(a)(4).¹⁸⁷ Rule 3.1(a) provides that “[i]n the representation of a

¹⁸⁵ Cf. *supra* note 15.

¹⁸⁶ See *supra* notes 142–148 and accompanying text.

¹⁸⁷ GA. RULES OF PRO. CONDUCT r. 3.1(a), r. 4.1(a), r. 8.4(a)(4) (2021). It should be noted that Rule 3.6 could also come into play regarding judicial criticism, but given that rule's requirement that a lawyer must “know[] or reasonably should know that [the lawyer's statements] will have a substantial likelihood of materially prejudicing an adjudicative proceeding,” it is difficult to see how the lawyers' comments in *Raffensperger* would fall within the rule's scope. GA. RULES OF PRO. CONDUCT r. 3.6 (2021). The *Raffensperger* lawyers were criticizing the actual decisionmakers for remaining on the case, which does not seem capable of materially prejudicing the proceeding by affecting its fairness to the parties. Rule 3.6(a) is

client, a lawyer shall not . . . file a suit, *assert a position*, conduct a defense, delay a trial, or *take other action on behalf of the client* when the lawyer knows or when it is obvious that such action *would serve merely to harass or maliciously injure another*.¹⁸⁸ This provision seems to cover harassing or malicious statements by a lawyer about a judge made in the context of a representation. Criticizing a judge's decision certainly appears to fall within "action [taken] on behalf of the client,"¹⁸⁹ but the intent of the lawyer and nature of the remarks will determine whether there has been a violation.

Rules 4.1(a) and 8.4(a)(4) both impose a duty of honesty and therefore can be violated only if judicial criticism is false.¹⁹⁰ In representing a client, a lawyer is prohibited under Rule 4.1(a) from making "a false statement of material fact or law to a third person."¹⁹¹ It is important to emphasize that the false statement must be *material* for there to be a violation,¹⁹² a limitation that may often place a lawyer's judicial criticism beyond the rule's intended proscription. Rule 8.4(a)(4), on the other hand, can be violated even by a lawyer who is not representing a client in a matter, but he or she must be acting in a professional capacity.¹⁹³ As the rule states: "It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to . . . engage in *professional conduct* involving dishonesty, fraud, deceit or misrepresentation."¹⁹⁴ Untruthful statements by lawyers critical of judges, whether made to the media or some other third party, at least create the possibility that a lawyer could be subject to discipline for such commentary, depending upon whether or not the act of criticizing is viewed as "professional conduct." Moreover, the State Bar's premium on First

designed more to address such things as a lawyer discussing publicly evidence that he or she knows will be inadmissible at trial or a lawyer commenting on the criminal record of a party. See GA. RULES OF PRO. CONDUCT R. 3.6(a) cmt. 5A (2021) ("There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration.").

¹⁸⁸ GA. RULES OF PRO. CONDUCT r. 3.1(a) (2021) (emphasis added).

¹⁸⁹ *Id.*

¹⁹⁰ GA. RULES OF PRO. CONDUCT r. 4.1(a) & r. 8.4(a)(4) (2021).

¹⁹¹ GA. RULES OF PRO. CONDUCT r. 4.1(a) (2021).

¹⁹² *Id.*

¹⁹³ GA. RULES OF PRO. CONDUCT r. 8.4(a)(4) (2021).

¹⁹⁴ *Id.* (emphasis added).

Amendment protection of lawyers must be kept in mind in assessing the potential for discipline under any of these rules.

In considering the ethical propriety of the statements made by the lawyers in *Raffensperger*, it is instructive to categorize their remarks by nature and content. The pertinent judicial criticism can be separated into four distinct groups: (1) criticism of a judge's decision, (2) criticism that calls into question the legitimacy of a judge's motivation for a decision, (3) criticism of the manner in which a judge carries out his or her judicial responsibilities, and (4) personal attacks on a judge.

Generally, as to the first category—criticism of a judicial decision—the U.S. Supreme Court has indicated that this type of commentary does not necessarily impugn judicial integrity.¹⁹⁵ Specifically, in *In re Sawyer*, writing for a plurality, Justice Brennan maintained that if the judge who was the alleged target of the criticism in the case “was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. . . . The public attribution of honest error to the judiciary is no cause for professional discipline.”¹⁹⁶ Under this reasoning, one could argue that even if Rule 8.2(a) had been adopted in Georgia, it would not be violated when lawyers merely question the correctness of a judicial decision. Furthermore, this type of criticism would not run afoul of Rule 3.1(a), 4.1(a), or 8.4(a)(4), especially to the extent it was delivered in a measured fashion.

A number of the statements made by the lawyers in *Raffensperger* appear to fall within this first category of judicial criticism and therefore were ethically proper, whether or not practically well-advised. For example, Lester Tate's critique of the three non-recusing justices was essentially aimed at the perceived incorrectness of their decision and their failure to provide any explanation therefor.¹⁹⁷ Michael Moore likewise made some statements that were largely directed at the alleged erroneous

¹⁹⁵ See *In re Sawyer*, 360 U.S. 622, 634–35 (1959) (plurality opinion) (distinguishing between comments that impugn judicial integrity and those that criticize the law and disfavored judicial outcomes).

¹⁹⁶ *Id.* at 635; see also Wendel, *supra* note 30, at 331–32 (observing that “attribution of honest error to judges does not impute disgrace — after all, appellate courts and academic commentators accuse judges of error on a daily basis”).

¹⁹⁷ See *supra* notes 69–70 and accompanying text.

nature of the justices' decision, although his remarks were definitely of a more pointed variety and highlighted the potential negative effects of the precedent the justices were setting.¹⁹⁸ Specifically, Moore expressed concern that, going forward, Georgia judges may “no longer be expected to act without the appearance of impropriety.”¹⁹⁹ That statement, however, is hard to question under the governing rules because—in law-review fashion—it simply sets forth the basis for the overarching critique. The comments made by Cary Ichter, Beth Beskin's attorney, also fell well within the range of acceptable criticism according to any plausible standard.²⁰⁰ His statements focused on the merits of the litigation itself, rather than the non-recusal decision, and did no more than question the correctness of the court's ruling, together with the future impact it might have, without focusing, caustically or otherwise, on any individual justice.²⁰¹

The second and third categories—criticism of decisional motivation and the manner in which a judge fulfills official duties—seem to overlap. In particular, when a lawyer criticizes a judge for the alleged motivation behind a decision, that statement will typically carry with it at least an implication that a judge is not executing professional responsibilities in an appropriate manner. *In re Wilkins*, an Indiana Supreme Court case with parallels to *Raffensperger*, illustrates the point.²⁰² This disciplinary case arose

¹⁹⁸ See *supra* note 72 and accompanying text.

¹⁹⁹ McDonald, *Court Splits in Recusing*, *supra* note 17.

²⁰⁰ See *supra* notes 77–78 and accompanying text.

²⁰¹ See *supra* notes 77–78 and accompanying text; see also *In re Sawyer*, 360 U.S. at 634 (noting that a factor militating against the suspension of a lawyer for judicial criticism was that the individual judge was not mentioned by name and that none of the lawyer's complaints was phrased as implicating the judge individually); Lieberman, *supra* note 29, at 791 (observing that “while statements that gratuitously demean the judicial system should be avoided, attacks are far more harmful and cause far more disrespect when directed at individual judges, who do not have the means to defend themselves”).

²⁰² *In re Wilkins*, 782 N.E.2d 985 (Ind. 2003). It should be noted that the Indiana Supreme Court issued two opinions in this disciplinary matter. In the first, it determined that Wilkins had violated Rule 8.2(a) and imposed a thirty-day suspension. See *In re Wilkins*, 777 N.E.2d 714, 717, 719 (Ind. 2002) (per curiam) (“We find that his comments . . . violated [Rule] 8.2(a) because they were made with reckless disregard as to the truth or falsity concerning the integrity of a three-judge panel of the Court of Appeals.”). The case came before the court a second time on Wilkins's motion for rehearing regarding the finding of a violation, as well as the level of discipline imposed. *In re Wilkins*, 782 N.E.2d at 986–87. The court partially

out of an effort to transfer to the Indiana Supreme Court an appeal that had been decided by the Indiana Court of Appeals on the ground that the lower court's decision "erroneously and materially misstate[d] the record."²⁰³ In a brief submitted to the supreme court in support of transfer, Wilkins included a footnote²⁰⁴ that directly called into question the motivation behind the lower court's decision in the matter, which stated,

Indeed, the [Court of Appeals] Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).²⁰⁵

Clearly, both the motivation for the appeals court's decision and the manner in which that court fulfilled its duties were the targets of Wilkins's criticism. The Indiana Supreme Court found that these comments violated Rule 8.2(a) "because they were made with reckless disregard as to the truth or falsity concerning the integrity of a three-judge panel of the Court of Appeals."²⁰⁶ Notably, the supreme court was sharply condemnatory of Wilkins's conduct, observing that the offending footnote

ascribes bias and favoritism to the [Court of Appeals] judges[,] . . . and it implies that these judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome. These aspersions

granted the rehearing and reduced Wilkins's discipline to a public reprimand but let its previous finding of a violation stand. *Id.*

²⁰³ *In re Wilkins*, 777 N.E.2d at 715.

²⁰⁴ Interestingly, Wilkins was apparently only local counsel in the case. The brief and the offending footnote were drafted by primary out-of-state counsel. However, Wilkins worked on and signed the brief and therefore was equally responsible for its content, and as an Indiana-licensed attorney, was subject to the rules and disciplinary authority of the Indiana Bar. *See id.* ("Even though the respondent did not necessarily author the words at issue here (a task admittedly performed by Michigan counsel), the respondent signed the brief pursuant to Ind. Admission and Discipline Rule 3(2)(d), and was thus 'jointly responsible therefore.'")

²⁰⁵ *In re Wilkins*, 782 N.E.2d at 986 (alteration in original) (quoting *In re Wilkins*, 777 N.E.2d at 716).

²⁰⁶ *In re Wilkins*, 777 N.E.2d at 717.

transgress the wide latitude given appellate argument, and they clearly impugn the integrity of a judge in violation of . . . Rule 8.2(a).²⁰⁷

For his criticism, Wilkins was initially suspended from practice for thirty days,²⁰⁸ but the discipline was later reduced to a public reprimand.²⁰⁹

Though the Indiana Supreme Court's ability to render an impartial decision in this disciplinary matter was apparently not questioned by Wilkins, it is difficult to ignore the possibility that the court's ultimate determination may have been affected by the fact that judicial colleagues were the targets of the criticism.²¹⁰ This latter point was the principal basis for the lawyers' comments about the justices' motivation in *Raffensperger*, and like in *Wilkins*, such remarks carried with them, either directly or by implication, the additional accusation that the justices were not fulfilling their judicial responsibilities.²¹¹ Specifically, the lawyers, to varying degrees, questioned the motivation of Justices Blackwell, Melton, Nahmias, and Warren with regard to their conduct related to the case.²¹²

The criticism of Justice Blackwell arose from the manner in which he chose to resign, an approach that precipitated the very legal dispute at issue in *Raffensperger*—i.e., whether the secretary of state should have been required to hold an election notwithstanding Justice Blackwell's carefully timed, prospective resignation. As noted previously, Barrow's attorney, Michael Moore,

²⁰⁷ *In re Wilkins*, 782 N.E.2d at 986.

²⁰⁸ *See In re Wilkins*, 777 N.E.2d at 719 (finding that a thirty-day suspension was justified because of Wilkins's "failure to express remorse").

²⁰⁹ *See In re Wilkins*, 782 N.E.2d at 987 (finding that Wilkins's "exemplary record for honesty, integrity, and truthfulness" warranted a reduction of his sanction).

²¹⁰ *See In re Wilkins*, 777 N.E.2d at 720 (Boehm, J., dissenting) ("This Court acts as judge, jury, and appellate reviewer in a disciplinary proceeding. . . . Where the offense consists of criticism of the judiciary, we become the victim as well.").

²¹¹ *See, e.g., McDonald, Slow Walking, supra* note 21 ("[Justice Nahmias] can't be the judge of a case involving a close colleague, and he can't be the judge of his own case But that's just what he's doing.").

²¹² *Compare McDonald & Land, Teeing Up Potential Conflict, supra* note 50 (reporting Moore's claim that the justices wished to "protect[] a judicial pension"), *with McDonald, Slow Walking, supra* note 21 (reporting Barrow's claim that the justices were trying to "suppress the vote").

asserted that Justice Blackwell’s resignation strategy “[gave] the appearance that a group of insiders [had] determined that hand-selecting a justice and protecting a judicial pension [were] more important than protecting the people of Georgia’s right to vote.”²¹³ Similarly, appellant Barrow himself suggested that Justice Blackwell and the governor manipulated the system to ensure that the governor would fill the vacant seat by appointment: “[Justice Nahmias was] trying to manipulate the substitute justices . . . for the same reason Justice Blackwell and the governor ha[d] manipulated the timing of Justice Blackwell’s ‘retirement’—to control the Georgia Supreme Court.”²¹⁴

To be sure, both of these statements convey the belief that Justice Blackwell’s motivation for resigning was influenced by a desire to empower the Republican governor to appoint his successor and that this was a manipulative scheme intended to deprive Georgia citizens of their right to elect justices.²¹⁵ While strongly worded, the essence of the accusation—that Justice Blackwell timed his resignation so as to enable Governor Brian Kemp to appoint his replacement—is likely accurate, and the fact that he may have done this should come as no surprise. It is commonplace throughout the United States for judges to time their retirements with consideration of their likely successors in mind.²¹⁶ Accordingly, a resigning justice who had been appointed by a Democratic governor could be expected to plan resignation, if possible, to allow a Democratic governor to appoint the next justice.²¹⁷ Hence, the real potential issue with Moore and Barrow’s statements is their accusatory tone and the suggestion that Justice Blackwell was doing something, from a motivational standpoint, that was out of the ordinary or inherently wrong.²¹⁸ Though disparaging and

²¹³ McDonald & Land, *Teeing Up Potential Conflict*, *supra* note 50.

²¹⁴ McDonald, *Slow Walking*, *supra* note 21.

²¹⁵ McDonald & Land, *Teeing Up Potential Conflict*, *supra* note 50; McDonald, *Slow Walking*, *supra* note 21.

²¹⁶ See, e.g., David C. Nixon & J. David Haskin, *Judicial Retirement Strategies: The Judge’s Role in Influencing Party Control of the Appellate Courts*, 28 AM. POL. Q. 458, 458 (2000) (“If judges are politically strategic, they may try to retire at times that maximize the chances that an ideologically compatible successor will be appointed.”).

²¹⁷ See *id.* at 461 (“Perhaps the best way to continue one’s own policy legacy is to ensure an ideologically similar replacement.”).

²¹⁸ McDonald & Land, *Teeing Up Potential Conflict*, *supra* note 50; McDonald, *Slow Walking*, *supra* note 21.

perhaps even hypocritical, this line of criticism seems to not only fall outside of Georgia's ethics rules but also to be protected by the First Amendment.

Consider *Garrison v. Louisiana*, a case finding unconstitutional a criminal contempt statute under which a prosecutor was charged for publicly criticizing state court judges.²¹⁹ In *Garrison*, the prosecutor attributed a significant backlog of criminal cases and his inability to obtain funds for undercover vice investigations to the laziness, inefficiency, and, perhaps, corrupt motives of eight judges.²²⁰ In particular, he stated,

The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints. . . . This raises interesting questions about the racketeer influences on our eight vacation-minded judges.²²¹

In finding that it was unconstitutional to subject the prosecutor to criminal contempt for his remarks, the U.S. Supreme Court observed, "Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or *improper motivation*."²²² Along the same lines, in *New York Times Co. v. Sullivan*, the Court emphasized that in making statements of this nature factual errors are likely.²²³ As the Court put it, "Errors of fact, particularly in

²¹⁹ 379 U.S. 64, 77 (1964) (finding that the statute "incorporate[d] constitutionally invalid standards in the context of criticism of the official conduct of public officials").

²²⁰ *See id.* at 65–66 ("The principal charges alleged to be defamatory were his attribution of a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges . . .").

²²¹ *Id.* at 66.

²²² *Id.* at 77 (emphasis added); *see also In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995) ("Some judges are dishonest; their identification and removal is a matter of high priority in order to promote a justified public confidence in the judicial system."); Tarkington, *supra* note 29, at 1605 (observing that "[g]enerally, people do not really know what motivates others, but improper motivation is an important factor in measuring the fitness of government officials").

²²³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

regard to a man's mental states and processes, are inevitable."²²⁴ Hence, from a constitutional perspective, it seems clear that Moore and Barrow were on solid ground.

Moreover, on their face, the lawyers' statements do not appear to fall within Rule 3.1(a), 4.1(a), or 8.4(a)(4).²²⁵ First, even if Moore and Barrow's speculation about Justice Blackwell's motivation was wrong, it cannot reasonably be characterized as knowingly false, nor were their statements made with the intent "merely to harass or maliciously injure."²²⁶ They were clearly reactions to the circumstances presented, albeit strongly-worded and denigrating. Second, Barrow was a party in the action, not counsel, and on that basis alone, his comments were not covered by Rule 3.1(a) or 4.1(a), which only apply to lawyers when representing clients.²²⁷ In addition, his statements were most likely beyond the reach of Rule 8.4(a)(4) as well because they were made outside of the context of what would typically be characterized as "professional conduct."²²⁸

The foregoing analysis is equally applicable to the criticism lodged at the three non-recusing justices, which not only challenged the justices' motivation for their failure to recuse but also suggested that this decision reflected adversely on their abilities to carry out their judicial responsibilities.²²⁹ Lester Tate, one of Barrow's lawyers, indicated that he was "shocked" that the three justices would not recuse themselves given that the majority of their

²²⁴ *Id.*; see also *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995) ("Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.").

²²⁵ See *supra* notes 188–194 and accompanying text.

²²⁶ See *supra* notes 188–189 and accompanying text.

²²⁷ See *supra* notes 188–191 and accompanying text.

²²⁸ See *supra* note 194 and accompanying text; see also *In re Palazzola*, 853 S.E.2d 99, 108 (Ga. 2020) (observing that the "phrase ['professional conduct'] is not so capacious as to encompass *everything* a lawyer does in the management of a law office (or for that matter, in life)"). Although in *Palazzola* the Georgia Supreme Court declined to interpret the meaning of "professional conduct" in the context of the types of deceptive conduct related to law practice management that would be prohibited, the opinion nevertheless supports the view that the phrase connotes a requirement that the conduct in question be associated in some way with the actual practice of law. *Id.* at 101, 108–10.

It should be noted, however, that one can argue that Barrow was holding himself out as a lawyer or judicial candidate in making his remarks, thus qualifying as "professional conduct." Nevertheless, even if that is correct, Barrow still did not violate Rule 8.4(a)(4) for the other reasons discussed.

²²⁹ See *supra* notes 69–76 and accompanying text.

colleagues had done so.²³⁰ He also expressed concern over the justices' failure to provide any explanation to the public for their non-recusal and maintained that this omission, coupled with their remaining on the case, was "inconsistent with principles of openness and impartiality" and the very rules regarding recusal that "Justice Nahmias, himself, has set down for other judges to abide by."²³¹ Barrow's other attorney, Michael Moore, was more direct in terms of questioning the justices' motivation for non-recusal, stating that they had "gone to great lengths to hang onto a case about their friend's seat" and maintaining that, under the same circumstances, "every other judge in the state would have unquestionably" been disqualified.²³² Moore went on to predict the troubling effect of the justices' decision for the future of the Georgia judiciary and asserted that, as a result of their example, "Georgia judges will no longer be expected to act without the appearance of impropriety."²³³

The criticism by Moore and Tate of Justices Melton, Nahmias, and Warren is unquestionably more biting and accusatory than that directed toward Justice Blackwell. Nevertheless, the criticisms appear to have been safely within the lawyers' First Amendment rights as recognized in Georgia, and there is nothing about the remarks that goes beyond what seems acceptable under Rules 3.1(a), 4.1(a), and 8.4(a)(4). Indeed, their comments actually appear to have been expressions of opinion and thus not sanctionable for embodying false statements of fact.²³⁴ It is true that they could not know for sure what was in the minds of the three justices in deciding to remain on the case, but that is not constitutionally relevant;²³⁵ and so long as their statements were not knowingly false or

²³⁰ McDonald, *Court Splits in Recusing*, *supra* note 17.

²³¹ *Id.*

²³² Galloway, *supra* note 20.

²³³ McDonald, *Court Splits in Recusing*, *supra* note 17.

²³⁴ *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995) (noting that "statements of opinion are protected by the First Amendment unless they 'imply a false assertion of fact'" (quoting *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 19 (1990))); *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995) ("Even a statement cast in the form of an opinion . . . implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty.").

²³⁵ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting the need to protect speech to foster "uninhibited" public debate).

intended merely to harass or maliciously injure the justices, the ethics rules do not come into play either.²³⁶

John Barrow's criticism of the three non-recusing justices was the harshest and therefore the most likely to be ethically improper.²³⁷ His statements were not only critical of the justices' motivation and ability to fulfill their responsibilities; they also involved what could be viewed as a personal attack on Justice Nahmias. First, in terms of motivation, Barrow maintained that the delay in issuing a decision in the case was an intentional ploy by the three justices inspired by politics, i.e., a deliberate effort to allow the governor to appoint a Republican justice.²³⁸ In addition, although he questioned the propriety of all three justices remaining on the case, he was especially critical of Justice Nahmias, asserting that Nahmias "is notorious for his attempts to dominate the Court" and arguing that his non-recusal violated the code of judicial conduct because he was judging "a case involving a close colleague."²³⁹

The latter point regarding the propriety of non-recusal was equally applicable to the other two justices, but Barrow did not direct this criticism at them, underscoring the personal nature of his critique of Justice Nahmias.²⁴⁰ Although this choice surely suggests that Barrow had stronger feelings about Justice Nahmias's conduct, the individualized nature of his remarks does not make them any more likely to violate the ethics rules. Besides being mostly opinion-based, the statements generally did not seem to facially violate the applicable rules in terms of the type of conduct required: they were not solely intended to harass or maliciously injure, and the falseness and materiality of the statements was, at most, debatable.²⁴¹ More importantly, Barrow was not acting in a

²³⁶ See GA. RULES OF PRO. CONDUCT r. 3.1(a) (2021) (prohibiting behavior that "harass[es] or maliciously injure[s]"); GA. RULES OF PRO. CONDUCT r. 4.1(a) (2021) (prohibiting knowingly making false statements of material fact); GA. RULES OF PRO. CONDUCT r. 8.4(a)(4) (2021) (prohibiting "professional conduct involving dishonesty, fraud, deceit or misrepresentation").

²³⁷ See *supra* notes 74–76 and accompanying text.

²³⁸ See McDonald, *Slow Walking*, *supra* note 21; see also *supra* notes 75–76 and accompanying text.

²³⁹ McDonald, *Slow Walking*, *supra* note 21.

²⁴⁰ See *id.* (naming Justice Nahmias specifically as "the high court's liaison to the state judicial watchdog agency, [who] is violating the state Code of Judicial Conduct by failing to recuse").

²⁴¹ See *supra* notes 239–240 and accompanying text.

representational capacity when he uttered his judicial criticism and thus was not subject to the reach of the pertinent rules of professional conduct. For this same reason, the biting appraisal of the justices offered by attorney Thomas Stubbs, who simply commented as an outside observer, did not subject him to potential professional discipline either.²⁴²

It is important to note, though, that as a judicial candidate,²⁴³ Barrow was not subject only to the rules of professional conduct; he was also subject to Georgia's Code of Judicial Conduct.²⁴⁴ Could it be that his statements violated some provision of that Code?

B. THE ETHICAL PROPRIETY OF JOHN BARROW'S CRITICISM UNDER THE CODE OF JUDICIAL CONDUCT

While, as a lawyer, John Barrow is always governed by the rules of professional conduct, when he announced his intention to run for Justice Blackwell's soon-to-be-vacated seat, he became a "judicial candidate," and thereby also subjected himself to regulation under the code of judicial conduct.²⁴⁵ Indeed, some of Barrow's comments criticizing the justices were plainly in the nature of campaigning, made to emphasize why he was personally better qualified to be a justice and deserved to be elected: "When I'm on the Supreme Court, nobody—no Democrat, Republican, Independent, man, woman, or child—will have to fear that their case is being manipulated or 'slow walked' for political ends."²⁴⁶

Interestingly, Georgia's Code of Judicial Conduct includes a rule that not only encompasses the substance of Model Rule 8.2(a) but

²⁴² See *supra* notes 89–90 and accompanying text.

²⁴³ See GA. CODE OF JUD. CONDUCT Terminology (2021) (defining "judicial candidate" as "a person, including an incumbent judge, seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she: (1) appoints or forms a *campaign committee*, (2) makes a public announcement of candidacy, (3) declares, files or qualifies as a candidate with the election or appointment authority, or (4) authorizes solicitation or acceptance of *contributions or support*.").

²⁴⁴ See GA. RULES OF PRO. CONDUCT r. 8.2(b) (2021) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct."); GA. CODE OF JUD. CONDUCT Preamble ¶ 3 (2021) ("The Code of Judicial Conduct establishes standards for ethical conduct of judges and *judicial candidates*.").

²⁴⁵ See GA. RULES OF PRO. CONDUCT r. 8.2(b) (2021) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.").

²⁴⁶ Galloway et al., *supra* note 21.

actually goes further, at least in constraining campaign-related speech—specifically, Rule 4.2(A)(3) provides that

[j]udicial candidates . . . shall not use or participate in the publication of a false statement of fact, or make any misleading statement *concerning themselves* or their candidacies, or *concerning any opposing judicial candidate or candidacy, with knowledge of the statement's falsity or with reckless disregard for the statement's truth or falsity.*²⁴⁷

Hence, like Model Rule 8.2(a), Georgia Judicial Code Rule 4.2(A)(3) prohibits a candidate for judicial office from making statements known to be false or with reckless disregard for the statements' truth or falsity.²⁴⁸ Unlike Rule 8.2(a), however, Rule 4.2(A)(3) is not limited to statements concerning a judge's "qualifications or integrity."²⁴⁹ In addition, it reaches further beyond the scope of Rule 8.2(a) insofar as it applies to false or reckless statements that candidates make about themselves, not just statements about others. Given the emphasis in Georgia on the importance of the First Amendment for lawyers, it seems somewhat odd that the state's code of judicial conduct includes such a provision, especially in light of the ostensibly conscious decision to omit a parallel rule for lawyers generally in the rules of professional conduct.²⁵⁰ After all, one might think that free-speech interests are at their highest importance in the context of intense and open efforts to contend for public office.²⁵¹ Moreover, it is noteworthy that Georgia's Rule 4.2(A)(3) departs from its closest counterpart in the

²⁴⁷ GA. CODE OF JUD. CONDUCT r. 4.2(A)(3) (2021) (emphasis added).

²⁴⁸ *Id.*

²⁴⁹ Compare MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS'N 2020) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . ."), with GA. CODE OF JUD. CONDUCT r. 4.2(A)(3) (2021) (providing that judicial candidates "shall not use or participate in the publication of a false statement of fact, or make any misleading statement concerning themselves or their candidacies, or concerning any opposing *judicial candidate* or candidacy, with *knowledge* of the statement's falsity or with reckless disregard for the statement's truth or falsity" (emphases added)).

²⁵⁰ See *supra* notes 145–148 and accompanying text.

²⁵¹ See Tarkington, *supra* note 29, at 1576, 1576 n.48 (citing theories regarding the central nature of political speech in First Amendment jurisprudence).

ABA Model Code of Judicial Conduct, Rule 4.1(A)(11).²⁵² That rule states, in pertinent part, that “a judge or a judicial candidate shall not . . . knowingly, or with reckless disregard for the truth, make any false or misleading statement.”²⁵³ Thus, the Model Code is textually broader insofar as it applies not simply to “judicial candidates” but also to judges who are not necessarily running for re-election.²⁵⁴

The dichotomy between Georgia’s treatment of a lawyer’s criticism of a judge and a judicial candidate’s criticism of an opponent is difficult to reconcile; though, perhaps one could argue that candidates for office have greater incentive to twist the truth, thus making campaign speech more worrisome as a general matter and less worthy of protection. While plausible, this argument is hardly compelling. A more likely explanation for the lack of parallelism between the rules may be that it resulted from simple oversight. But, whatever the reason, the fact of the matter is that there is a rule in Georgia that expressly applied to John Barrow’s statements about the justices, and the question is: Did he violate it? I think the answer is that he clearly did not.

First, none of Barrow’s criticism of the three non-recusing justices was even covered by Rule 4.2(A)(3). In particular, the rule only applies to statements “concerning [candidates] or their candidacies” or “concerning any *opposing judicial candidate or candidacy*.”²⁵⁵ Barrow was running for the seat that Justice Blackwell was vacating, and as such, he was not running against Justice Melton, Justice Nahmias, or Justice Warren.²⁵⁶ Therefore, anything that he said about them that might otherwise have run afoul of Rule 4.2(A)(3)’s proscription would still not be a violation.²⁵⁷ Furthermore, for the reasons discussed in the previous section,²⁵⁸ it

²⁵² See *supra* note 154.

²⁵³ MODEL CODE OF JUD. CONDUCT r. 4.1(A)(11) (AM. BAR ASS’N 2020).

²⁵⁴ *Id.* Notably, the Model Code definition of “judicial candidate” includes a “*sitting* judge, who is seeking selection for or retention in judicial office by election or appointment.” MODEL CODE OF JUD. CONDUCT Terminology (AM. BAR ASS’N 2020).

²⁵⁵ GA. CODE OF JUD. CONDUCT r. 4.2(A)(3) (2021) (emphasis added).

²⁵⁶ See *Barrow v. Raffensperger*, 842 S.E.2d 884, 887 (2020) (identifying John Barrow and Elizabeth A. Beskin as the candidates running for Justice Blackwell’s seat).

²⁵⁷ See GA. CODE OF JUD. CONDUCT r. 4.2(A)(3) (2021) (prohibiting intentionally or recklessly misleading or false statements about judicial candidates).

²⁵⁸ See *supra* Section V.A.

seems difficult, if not impossible, to conclude that the statements would rise to the level of a facial violation, even if the rule applied.²⁵⁹

The same conclusion applies to Barrow's statements about Justice Blackwell. Like the three non-recusing justices, Justice Blackwell was also not an "opposing judicial candidate."²⁶⁰ In addition, the comments that Barrow made about him, though harsh, were not demonstrably false or even objectively so.²⁶¹ Finally, it seems clear that to the extent Barrow was making statements about himself in criticizing the justices, those statements too, whether or not "misleading," were not knowingly false or made with reckless disregard for their truth or falsity, even when judged by an objective standard. For example, Barrow's campaign promise that he would not "slow walk" cases for political reasons cannot be proven false, nor can it rationally be characterized as reckless. At worst, it was mere campaign hyperbole and certainly not something that should subject any candidate to professional censure.

Hence, none of the judicial criticism related to *Raffensperger* should expose the lawyers involved to any potential professional discipline under the rules of professional conduct, nor the code of judicial conduct, and that is as it should be, especially in the context of judicial decisions concerning recusal. In fact, not only should lawyers be permitted to criticize judges in such matters, but they also often have a professional responsibility to do so in the interest of their clients and, perhaps more importantly, the public.

VI. CONCLUSION: A LAWYER'S PROFESSIONAL RESPONSIBILITY TO CRITICIZE JUDGES

While judges are entitled to respect, they are rightly subject to public scrutiny and should be no more immune from criticism than

²⁵⁹ See *supra* notes 238–241 and accompanying text.

²⁶⁰ GA. CODE OF JUD. CONDUCT r. 4.2(A)(3) (2021).

²⁶¹ Surprisingly, the comments to Rule 4.2 expressly state that, notwithstanding the subjective tone of the blackletter text, an objective standard should be utilized in determining whether the rule has been violated. See GA. CODE OF JUD. CONDUCT r. 4.2 cmt. 4 (2021) ("The determination of whether a judicial candidate knows of falsity or recklessly disregards the truth or falsity of his or her public communication is an objective one.").

any other individual holding a government position.²⁶² Indeed, because judges in most states are elected in some fashion,²⁶³ citizens need to be informed about the qualifications of candidates in order to decide how to cast their votes.²⁶⁴ Furthermore, because of the indispensable role that the judiciary plays in the administration of our justice system and the necessity of fairness within that system, both in fact and perception, it is appropriate to carefully scrutinize judges' performances and to publicly share information bearing on their fitness to serve.

Rule 8.2(a) and its predecessors have been utilized to restrain lawyers from actively participating in the public debate regarding the qualifications and integrity of judges,²⁶⁵ reputedly for the purpose of preserving “public confidence in the administration of justice.”²⁶⁶ The rule, on its face, prohibits only knowingly false statements and those made with reckless disregard for their truth or falsity.²⁶⁷ In reality, however, the rule's application of an objective reasonableness standard, rather than a subjective one, encompasses far more in terms of judicial criticism.²⁶⁸ Instead of preserving public confidence, such an approach operates to undermine that purported goal. Those best suited to critique judicial performance are essentially silenced, thus depriving the electorate of valuable information to guide its voting choices. In jurisdictions where judges are appointed—at the federal level and

²⁶² See *In re Sawyer*, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting) (“Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism.”); see also *Bridges v. California*, 314 U.S. 252, 270–71 (1941) (observing that shielding judges from criticism is not the proper approach and would likely create greater contempt for the judicial process).

²⁶³ See BRENNAN CTR. FOR JUST., JUDICIAL SELECTION: SIGNIFICANT FIGURES (2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> (discussing the fact that 39 states use “some form of election at some level of court”).

²⁶⁴ See Tarkington, *supra* note 29, at 1577 (“Speech regarding members of the judiciary or their decisions is patently relevant to self-governance.”).

²⁶⁵ See *id.* at 1569 n.6 (describing the propensity of courts to rely on Rule 8.2 to “punish attorney speech impugning judicial integrity”).

²⁶⁶ MODEL RULES OF PRO. CONDUCT r. 8.2 cmt. 1 (AM. BAR ASS'N 2020).

²⁶⁷ MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS'N 2020).

²⁶⁸ See Tarkington, *supra* note 29, at 1588–89 (noting that “state courts have almost universally disciplined attorneys under a reasonableness standard”); see also *supra* notes 126–128 and accompanying text.

in a number of states²⁶⁹—there is still a need for an informed public to hold accountable those elected officials responsible for judicial appointments.²⁷⁰

In rejecting Rule 8.2(a) and its overly-restrictive application to lawyers, both Georgia and the District of Columbia have appropriately accorded primacy to lawyers' free-speech rights in the interest of enhancing judicial accountability, thus helping to foster public confidence in the judiciary.²⁷¹ Without this form of freedom, lawyers cannot effectively fulfill their ethical obligations to advocate competently, diligently, and zealously on behalf of their clients, nor can they satisfy their broader duty to the public to ensure fairness and impartiality in the judicial system.²⁷² *Barrow v. Raffensperger* exemplifies the importance of having a free-speech-centered philosophy with regard to criticism of judges by lawyers. The lawyers in that case, in a very literal sense, had no judicial recourse to advocate on behalf of their clients once the three justices declined to recuse themselves. As discussed, non-recusal decisions by justices of the Georgia Supreme Court are not generally subject to appellate review, and resort to extraordinary relief, such as mandamus, is not possible either.²⁷³ Accordingly, the objecting lawyers' only alternative consistent with their professional responsibility to their clients was to engage in extrajudicial criticism of the justices. By speaking out in this fashion, these lawyers were also able to satisfy their critical obligation as public citizens, embodied in the Preamble to the Georgia Rules of Professional Conduct, to "seek improvement of the law, . . . the administration of justice and the quality of service rendered by the legal profession."²⁷⁴

²⁶⁹ See BRENNAN CTR. FOR JUST., *supra* note 263 (noting that "[a]ppointments are also a common aspect of judicial selection" and discussing various ways states appoint judges).

²⁷⁰ See Tarkington, *supra* note 29, at 1577 ("Even as to appointed judges, the citizenry perform[s] self-governance in selecting representatives responsible for appointing judges and can call upon those representatives to use their power to address concerns.").

²⁷¹ See *supra* notes 146–147 and accompanying text.

²⁷² See *supra* note 98 and accompanying text.

²⁷³ See *supra* notes 11–12, 93–94 and accompanying text.

²⁷⁴ GA. RULES OF PRO. CONDUCT Preamble ¶ 5 (2021); see also Wendel, *supra* note 30, at 333 ("Silencing lawyers' criticism of the law and those who administer it interferes with the long-established 'rebellious' dimension of the lawyer's social function. Lawyers are supposed to give voice to dissenters, outsiders, and unpopular clients and challenge the exercise of state power.").

Other jurisdictions should follow the lead of Georgia and the District of Columbia by eliminating Rule 8.2(a) in its entirety. Taking this step will not give lawyers the unfettered ability to say whatever they want about members of the judiciary because other rules of professional conduct impose reasonable limitations; for example, Rule 4.1(a) prohibits lawyers from making materially false statements of fact or law to third persons.²⁷⁵ In addition, when the statements relate to ongoing judicial proceedings in which lawyers are involved, Rule 3.6 proscribes extrajudicial commentary that has “a substantial likelihood of materially prejudicing” the proceeding.²⁷⁶

Apart from the ethics rules, the flipside of the First Amendment will create opportunities to sanction wrongful lawyer speech. Specifically, not all speech is protected.²⁷⁷ For example, statements that create a “clear and present danger to the administration of justice” may subject a lawyer to censure.²⁷⁸ Furthermore, as established in *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*, false statements about judges, or those made with reckless disregard for their truth or falsity, are likewise not protected.²⁷⁹ Lawyers who make such statements may properly be penalized and/or otherwise subject to civil liability. Indeed, in keeping with the principles established in *Sullivan* and *Garrison*,

²⁷⁵ MODEL RULES OF PRO. CONDUCT r. 4.1(a) (AM. BAR ASS’N 2020); *see also* MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS’N 2020) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .”).

²⁷⁶ MODEL RULES OF PRO. CONDUCT r. 3.6(a) (AM. BAR ASS’N 2020). Most states have versions similar to Model Rule 3.6. *See* AM. BAR ASS’N CPR POL’Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 3.6 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-6.pdf (noting that twenty-one states have identical rules to Model Rule 3.6, twenty-eight states have variations of Model Rule 3.6, and one state did not adopt Model Rule 3.6).

²⁷⁷ *See, e.g., Garland v. State*, 325 S.E.2d 131, 133–34 (Ga. 1985) (finding that contemptuous statements are not constitutionally protected at the federal or state level).

²⁷⁸ *See Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1443 (9th Cir. 1995) (“[L]awyers’ statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice.”); *see also Garland*, 325 S.E.2d at 133 (“[T]he test applied to determine whether a statement is contemptuous is whether there is a clear and present danger to orderly administration of justice . . .”).

²⁷⁹ *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that public officials can recover for defamation if they establish “actual malice” by the speaker); *Garrison v. Louisiana*, 379 U.S. 64, 65–67 (1964) (applying the “actual malice” standard to criminal libel).

states that are unwilling to discard Rule 8.2(a) could still accord lawyers greater freedom to criticize judges by simply honoring the rule's textual requirement of knowing or reckless falsity, rather than reading into the provision an "objective reasonableness" standard.²⁸⁰

Even when lawyers are accorded significant freedom to criticize judges, as in Georgia and the District of Columbia, they should typically do so in a professional, respectful manner.²⁸¹ Professionalism within the bar is usually promoted through aspirational rules, oaths, continuing education programs, reputational concerns, and professional lore. Georgia has an aspirational "Lawyer's Creed," under which, among other things, a lawyer pledges to courts and tribunals "respect, candor, and courtesy."²⁸² In conjunction with this Creed, there is also an "Aspirational Statement on Professionalism," part of which focuses on a lawyer's conduct directed toward the judiciary.²⁸³ Specifically, the Statement exhorts lawyers to strive "[t]o model for others the respect due to our courts" by "[a]void[ing] unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary."²⁸⁴ Clearly, lawyers should endeavor to adhere to these noble principles. Yet, it is important to emphasize that these are not blackletter mandates. Nor should they be. There may be times when lawyers need to condemn judicial action in strong terms, depending upon the nature of the act being criticized, and they should be able to do so without running the risk of facing formal sanctions.

Nevertheless, the aspirational goals will have some impact on lawyers in terms of whether and how they choose to criticize judges, as will various practical considerations.²⁸⁵ For example, a lawyer

²⁸⁰ See *In re Westfall*, 808 S.W.2d 829, 847 (Mo. 1991) (en banc) (Blackmar, C.J., dissenting) (noting that the principles established in *Sullivan* and *Garrison* "amply protect the public from defamatory statements by lawyers about judges"); see also Chemerinsky, *supra* note 27, at 861, 885–87 (arguing for application of *Sullivan* standard to statements by lawyers in assessing when they can be proscribed).

²⁸¹ See, e.g., *In re Snyder*, 472 U.S. 634, 647 (1985) (explaining the need for "a professional and civil tone" when lawyers criticize the justice system).

²⁸² *Lawyer's Creed*, STATE BAR GA., <https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm> (last visited Nov. 23, 2021).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ See *supra* note 29.

must always be mindful that the judge to be criticized may be the ultimate decision maker in a case. This is particularly true in the context of recusal. If one goes overboard in arguing for a judge's recusal, and that effort fails, the lawyer will be forced to move forward in the case with that very judge, who (in light of human nature) may well become—whether consciously or unconsciously—disinclined to give the benefit of the doubt to the character-questioning movant. Moreover, even when criticizing lower court judges on appeal, as in *Wilkins*, a lawyer would be wise to temper that criticism to the extent reasonably possible to avoid eliciting a reaction from the reviewing court that may be understandably protective or deferential to fellow members of the bench who are being criticized.²⁸⁶

Finally, the ultimate and most appropriate checks on lawyer criticism of judges are responses to such criticism by other lawyers in defense of the judge in question. As Justice Louis Brandeis famously noted in *Whitney v. California*, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, *the remedy to be applied is more speech, not enforced silence.*”²⁸⁷ This truism aptly captures what happened in *Raffensperger*. In response to the harsh criticism leveled at Justices Blackwell, Melton, Nahmias, and Warren, attorney Richard Robbins authored an editorial defending those justices and condemning both the content and tone of the lawyers' criticism.²⁸⁸ Robbins's efforts—whether or not one agrees with him—were wholly consistent with the regulation of judicial criticism in Georgia, which has historically included an exaltation for lawyers to defend judges against “unjust criticism,” largely because of restrictions on judges' ability to defend themselves.²⁸⁹ In fact, even though Georgia has declined to adopt Rule 8.2(a), it did include a comment to its version of Rule 8.2 that reaffirms the importance of

²⁸⁶ See *In re Wilkins*, 777 N.E.2d 714, 720 (Ind. 2002) (per curiam) (Boehm, J., dissenting) (observing that the “intemperate language” used by Wilkins “is very poor advocacy, distracting as it does from the points that are sought to be made”).

²⁸⁷ 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (emphasis added), *overruled in part* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also Wendel, *supra* note 30, at 338 (observing that the remedy for the public's lack of information about judging and its tendency to be “swayed by single-issue campaigns against particular judges” is “more speech, not suppression of wrongheaded criticism of judges”).

²⁸⁸ See *supra* notes 82–87 and accompanying text.

²⁸⁹ See *supra* note 38 and accompanying text.

lawyers defending judges: “To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.”²⁹⁰

Barrow v. Raffensperger illustrates well how Georgia’s judicial-criticism regulatory regime strikes a sound balance, permitting all lawyers involved to effectively fulfill their professional responsibility to their clients and the public. Open criticism of judicial officials could and did take place, and so did responsive counter-criticism directed at the complaining lawyers.²⁹¹ Voters were properly left to weigh these opposing accounts in assessing the performance of key public officers. And that is how it should be in regulating the work of lawyers distinctly duty bound to safeguard the sanctity of the judicial process.

²⁹⁰ GA. RULES OF PRO. CONDUCT r. 8.2 cmt. 3 (2021).

²⁹¹ *Cf. Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1058 (1991) (observing that “constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases”).

Issue 2: Preserving Public Trust, Confidence, and Understanding

How should the judiciary promote public trust and confidence in the federal courts in a manner consistent with its role within the federal government?

Issue Description

The ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the judiciary. In large part, the judiciary earns that trust and confidence by faithfully performing its duties; adhering to ethical standards; and effectively carrying out internal oversight, review, and governance responsibilities. These responsibilities include accountability for a failure to observe scrupulous adherence to ethical standards. The surest way to lose trust and confidence is failure to live up to established ethical standards and failure to hold judges and judiciary personnel accountable for misconduct. Transparency in efforts to ensure accountability for misconduct, where possible and appropriate, helps foster public trust and confidence.

Public perceptions of the judiciary are often colored by misunderstandings about the institutional role of the federal courts and the limitations of their jurisdiction, as well as attitudes toward federal court decisions on matters of public interest and debate. Changes in social media and communication will continue to play a key role in how the judiciary is portrayed to and viewed by members of the public. These changes provide the judicial branch an opportunity to communicate broadly with greater ease and at far less cost. However, they also present the challenge of ensuring that judiciary information is complete, accurate, and timely. This challenge is especially difficult because judges are constrained in their ability to participate in public discourse. This plan includes four strategies to enhance public trust and confidence in, and understanding of, the judiciary:

- Assure high standards of conduct and integrity for judges and employees. (Strategy 2.1)
- Hold accountable judges and judiciary personnel who engage in misconduct, and be transparent, in furtherance of statutory and other requirements and consistent with confidentiality and privacy requirements, about accountability for misconduct. (Strategy 2.2)
- Improve the sharing and delivery of information about the judiciary. (Strategy 2.3)
- Encourage involvement in civics education activities by judges and judiciary employees. (Strategy 2.4)

Strategy 2.1

Assure high standards of conduct and integrity for judges and employees.

Background and Commentary. Judges and judiciary employees are guided by codes of conduct, internal policies, and robust accountability mechanisms within the judiciary that work together to uphold standards relating to conduct and the management of public resources. These mechanisms include disciplinary action, as well as formal complaint procedures for impacted employees to seek redress, such as dispute resolution processes, audits, program reviews of judiciary operations, internal control and information technology self-assessments, and workplace conduct oversight and response processes. The judiciary has adopted several measures, described in Issue 4 of this plan, to ensure an exemplary workplace in which all employees are treated with dignity and respect, and on a non-discriminatory basis.

Accountability mechanisms must address critical risks, keep pace with changes in regulations and business practices, and respond to public and government interest in detailed and accessible information about the judiciary. The regular review and update of policies, along with efforts to ensure that they are accessible to judges and employees, will help to improve judiciary compliance and controls. In addition, guidance relating to conduct that reflects current uses of social media and other technologies can help to avoid the inappropriate conveyance of sensitive information.

This strategy emphasizes up-to-date policies, timely education, and relevant guidance about ethics, integrity, and accountability. The strategy also relies upon the effective performance of critical integrated internal controls; governance of judiciary financial information; audit, investigation, and discipline functions; risk management practices; and self-assessment programs.

Goal 2.1a: Enhance education and training for judges and judiciary employees on ethical conduct, integrity, accountability, and workplace conduct.

Goal 2.1b: Ensure the integrity of funds, information, operations, and programs through strengthened internal controls and audit programs.

Strategy 2.2

Hold accountable judges and judiciary personnel who engage in misconduct, and be transparent, in furtherance of statutory and other requirements and consistent with confidentiality and privacy requirements, about accountability for misconduct.

Background and Commentary. The judiciary seeks to ensure accountability by openly receiving information about potential misconduct and following existing procedures to address misconduct. Credible allegations of misconduct will be examined, investigated, and subject to appropriate action in accordance with existing statutory, policy, and other procedures. Individuals who experience or witness possible misconduct should be able to seek redress or satisfy their obligation to take appropriate action by bringing these issues to the attention of an appropriate official without fear of retaliation or adverse consequences. The judiciary's codes of conduct, Rules for Judicial Conduct and Judicial Disability Proceedings, and Model Employment Dispute Resolution Plan were updated in 2019 to reinforce these principles.

Transparency, to the extent permissible and possible, demonstrates the judiciary's fidelity to accountability for misconduct. Law and policy related to confidentiality and the legitimate privacy interests of victims, witnesses, and others may limit what information can be made public. The judiciary strives to make public information about misconduct procedures and related actions, where permissible and appropriate.

Goal 2.2a: Ensure avenues for seeking advice, obtaining assistance as to potential misconduct, obtaining redress, where appropriate, and filing a complaint are easily accessible.

Goal 2.2b: Ensure timely action is taken on credible allegations of misconduct according to established procedures, and when the evidence supports it, ensure action is taken with regard to misconduct.

Goal 2.2c: Ensure each circuit's website prominently displays actions taken under the Judicial Conduct and Disability Act and Rules for Judicial Conduct and Judicial Disability Proceedings, in accordance with the requirements of the Act and the Rules, and summaries of other records or reports of workplace conduct issues, where permissible and appropriate.

Goal 2.2d: Consider conducting reviews of systemic issues, when appropriate.

Strategy 2.3

Improve the sharing and delivery of information about the judiciary generally.

Background and Commentary. Sources of news, analysis, and information about the federal judiciary continue to change, as do communication tools used by the public. These changes can present challenges to the accurate portrayal of the judiciary and the justice system. Enhanced communication between the judiciary and the media is one way to help increase the accuracy of stories about the justice system and public understanding of the courts. Since the media is a significant way in which the public learns about the judiciary, helping reporters understand court processes is one way to improve the public understanding of the justice system. Judges can undertake these efforts within the parameters of the Code of Conduct and while avoiding discussion of any specific cases.

It is now easier to communicate directly with the public, which can help to improve the public's understanding of the federal judiciary's role and functions. The judiciary must keep pace with ongoing changes in how people access news and information when formulating its own communications practices.

The federal judiciary also serves as a model to other countries for its excellence, judicial independence, and the delivery of equal justice under the law. The judiciary should continue to work with the executive branch when called on to communicate with representatives of other countries about the mission, core values, and work of the federal judiciary.

Goal 2.3a: Develop a communications strategy that considers the impact of changes in journalism and electronic communications and the ability of federal judges and employees to communicate directly with the public.

Goal 2.3b: Develop or increase communications and relationships between judges and journalists, consistent with the Code of Conduct and not specific to any case, to foster increased understanding of the judiciary.

Goal 2.3c: Communicate with judges in other countries to share information about the federal judiciary in our system of justice and to support rule-of-law programs around the world.

Strategy 2.4

Encourage involvement in civics education activities by judges and judiciary employees.

Background and Commentary. The federal judiciary relies on public respect, understanding, and acceptance. The lack of civics knowledge can have an adverse effect on the branch. A civically informed public will also be better inoculated against attempts to undermine trust in the justice system. As noted by the Chief Justice of the United States in his 2019 Year End Report on the Federal Judiciary, “[t]he judiciary has an important role to play in civic education...” Reinforcing the perspective of the Chief Justice, at its March 2020 session, the Judicial Conference of the United States “affirmed that civics education is a core component of judicial service; endorsed regularly-held conferences to share and promote best practices of civics education; and encouraged circuits to coordinate and promote education programs.”

Public outreach and civics education efforts by judges and judiciary employees take place inside courthouses and in the community. These efforts could be facilitated through greater coordination and collaboration with civics education organizations. Resources to help judges and judiciary employees participate in educational outreach efforts are available from the Administrative Office, the Federal Judicial Center, and private court administration and judges’ associations.

Goal 2.4a: Communicate and collaborate with organizations outside the judicial branch to improve the public’s understanding of the role and functions of the federal judiciary and its accountability and oversight mechanisms and external financial reporting.

Goal 2.4b: Facilitate participation by judges and court employees in public outreach and civics education programs.

Goal 2.4c: Support education about the defense function and the critical role it plays in ensuring fair trials and proceedings, as well as in maintaining public confidence in the justice system.