School of Law
UNIVERSITY OF GEORGIA

Georgia Law Review

Volume 56 | Issue 1 Article 4

12-2021

Criticizing Judges: A Lawyer's Professional Responsibility

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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.

This article is available in Georgia Law Review: https://digitalcommons.law.uga.edu/glr/vol56/iss1/4

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

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[*] 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.

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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 bench[2] and outrage from members

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[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

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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

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[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,

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[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

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[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/zjWVMo8OW8TlTpvun3uCyN/ (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

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[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 POL'Y 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]

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[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

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(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,

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[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

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[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 cancelation.[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

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[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 justices[49] 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]

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[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/NZL4777nJu1tXMVEVAmoeI/; 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

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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-haste[58] 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 opinion[60] 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

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[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

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[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

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[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 cancelation 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"

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[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

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[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

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[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

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[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

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[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 States[99]—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

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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

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[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]

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[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

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[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* Ciraolo, 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 1983[118]:

> 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

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[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

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[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 standard[124] 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

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[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

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[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

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[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 POL'Y 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]

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[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]

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[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" concern[149] 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]

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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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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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

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[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

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[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 footnote[204] 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

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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,

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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 states[269]—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]

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[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*,

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[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

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[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 S*ullivan* 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

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[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.

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[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").