The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation

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I: Introduction

Speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our ‘profound national commitment to the principle 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.’

-Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)

Shortly after handing down its watershed decision in New York Times v. Sullivan, the Supreme Court struck down Louisiana’s criminal libel statute as violating the First Amendment. In Garrison v. Louisiana, the Court overturned the conviction of a district attorney for criminal defamation after holding a press conference where he attributed “a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations” of particular judges and mused about possible “racketeer influences on our eight vacation-minded judges.”

Recalling the evils of seditious libel in England, and of the Sedition Act in the United States, the Court held that “only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.”

After Garrison, the American Bar Association (ABA) expressly adopted the Sullivan standard in Model Rule of Professional Conduct (MRPC) 8.2 for regulating lawyer speech regarding the judiciary. Thus the current regulatory regime for the vast majority of states merely prohibits lawyers from making statements “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.”

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1 Copyright 2008 by Margaret Tarkington, Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University.
3 Id. at 74.
Despite the ABA’s express recognition of the applicability of *Garrison* and *Sullivan,* the courts have not followed the ABA’s lead. Indeed, most state judiciaries have read the *Sullivan* standard out of the language of MRPC 8.2, interpreting it and other rules to punish speech that impugns the integrity of the judiciary without requiring a showing of knowledge of or reckless disregard as to falsity. Illustrative is the standard set by the Supreme Court of Kentucky, which requires that attorney allegations of judicial “corruption or unethical conduct” be “supported by substantial competent evidence.” As noted by the Supreme Court of Missouri, “[m]any courts disregard a claim of First Amendment protection in disciplinary proceedings, holding that free speech does not give a lawyer the right openly to denigrate the court in the eyes of the public.”

Not to be outdone—the Supreme Court of Florida has reaffirmed, post-*Garrison,* its “belief in the essentiality of the chastity of the goddess of justice” which “demands condemnation and the application of appropriate penalties” for attorney speech that brings the judiciary into disrepute.

Courts vary as to the appropriate sanctions for statements that impugn the integrity of the judiciary or bring it into disrepute. As one court noted, such conduct “invoke[s] punishment ranging from admonition to disbarment.” Indeed, attorneys have been admonished.

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4 The drafters of the Model Rules intentionally incorporated the *Sullivan* standard. In the proposed final draft, the drafters cited both *Sullivan* and *Garrison* and explained 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.’” See Proposed Final Draft: Model Rules of Professional Conduct, American Bar Association, May 30, 1981 (legal background explanation for Rule 8.2).

5 Courts rely on various sources of judicial authority to punish attorney speech impugning judicial integrity, including, most prominently, MRPC 8.2, but additionally regulations requiring attorneys to treat the judiciary with respect, rules forbidding attorneys from engaging in conduct prejudicial to the administration of justice, the contempt power, local court rules, civility codes, and even an attorney’s oath administered upon admission to the bar.

6 Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 168 (Kentucky 1980) (emphasis added).

7 In re Westfall, 808 S.W.2d 829, 833-34 (Missouri 1991) (citations omitted).

8 From a classical perspective, this would probably be Athena—who was indeed a virgin goddess.

9 In re Shimek, 284 So.2d 686, 690 (Sup. Ct. Fla. 1973) (emphasis added).

10 In re Frerichs, 238 N.W.2d 764, 769-70 (Sup. Ct. Iowa, 1976).

11 See id.
reprimanded,\textsuperscript{12} suspended from the practice of law,\textsuperscript{13} held in criminal contempt,\textsuperscript{14} and disbarred.\textsuperscript{15} In 2003, the Supreme Court of Ohio declared that “[u]nfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law.”\textsuperscript{16} And other courts have affirmed that they are duty bound to impose penalties for such statements.\textsuperscript{17}

In some contexts, the penalties for such speech have not fallen solely on attorneys. In 2007, the Utah Supreme Court in \textit{Peters v. Pine Meadow Ranch Home} struck the brief of the

\textsuperscript{12} See, e.g., In re Abbott, 925 A.2d 482 (Del. 2007); Fla. Bar v. Ray, 797 So.2d 556 (Fla. 2001); Idaho State Bar v. Topp, 129 Idaho 414 (1996); In re McCellan, 754 N.E.2d 500 (Ind. 2001); In re Reed, 716 N.E.2d 426 (Ind. 1999); Comm. on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Horak, 292 N.W.2d 129 (Iowa 1980); In re Arnold, 274 Kan. 761 (2002); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165 (Ky. 1980); In re Westfall, 808 S.W.2d 829 (Mo. 1991); In re Raggio, 87 Nev. 369 (1971); In re Holtzman, 78 N.Y.2d 184 (1991); In re Lacey, 283 N.W.2d 250 (S.D. 1979).

\textsuperscript{13} See, e.g., U.S. Dist. Ct. for E.D. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993) (six month suspension for accusing judge of having edited transcript—judge had edited transcript, just not substantively); In re Pyle, 283 Kan. 807, 156 P.3d 1231 (2007) (3 month suspension for statements made in letters to clients, friends, and family); Stilley v. Sup. Ct. Comm. on Prof’l Conduct, 370 Ark. 294 (2007) (explaining that normally use of disrespectful language is not serious misconduct warranting suspension, but in this case the court struck the attorney’s brief, which in turn prejudiced a client, which is serious misconduct); In re Glenn, 256 Iowa 1233 (1964) (one year suspension for circulating leaflet questioning suspicious series of events regarding criminal convictions); In re Wilkins, 777 N.E.2d 714 (Ind. 2002) (30 day suspension for statement in footnote of brief, which was later reduced to a reprimand); In re Antanga, 636 N.E.2d 1253 (Ind. 1994) (30 day suspension for calling judge racist after judge humiliated attorney by arresting attorney and having him represent client in prison garb); Peters v. State Bar of Cal., 219 Cal. 218 (1993) (3 month suspension); Ramirez v. State Bar of Cal., 28 Cal.3d 402 (1980) (one year suspension); In re Shimek, 284 So.2d 686 (Fla. 1973) (suspended unless apologized); In re Garringer, 626 N.E.2d 809 (Ind. 1994) (60 day suspension); In re Becker, 620 N.E.2d 691 (Ind. 1993) (30 day suspension); Ky. Bar Ass’n v. Waller, 929 S.W.2d 181 (Ky. 1996) (suspended for 6 months); In re Simon, 913 So.2d 816 (La. 2005); La. State Bar Ass’n v. Kerst, 428 So.2d 406 (La. 1983); In re Graham, 453 N.W.2d 313 (Minn. 1990) (sixty day suspension); In re Glauberman, 107 N. J. Eq. 384, 152 Atl. 650 (N.J. 1930) (1 year suspension); Office of Disciplinary Counsel v. Gardner, 99 Ohio St.3d 416, 793 N.E.2d 425 (2003) (6 month suspension); Farmer v. Board of Prof’l Responsibility of the Sup. Ct. of Tenn., 660 S.W.2d 490 (Tenn. 1983) (60 day suspension); State Board of Law Exam’rs v. Spriggs, 155 P.2d 285 (Wyo. 1945) (6 month suspension).

\textsuperscript{14} See, e.g., Ky. Bar Ass’n v. Waller, 929 S.W.2d 181 (Ky. 1996) (fined $499, sentenced to 30 days in jail for contempt and additionally disciplined and suspended for six months); see also In re Friday, 138 Cal. App. 660, 32 P.2d 1117 (1934); In re Pryor, 18 Kan. 72 (1877).

\textsuperscript{15} See, e.g., In re Palmisano, 70 F.3d 483 (7th Cir. 1995); In re Evans, 801 F.2d 703 (4th Cir. 1986) (disbarred from USDC for district of Maryland); Iowa Sup. Ct. Board of Prof’l Ethics and Conduct v. Ronwin, 557 N.W.2d 515 (Iowa 1996); In re Meeker, 76 N.M. 354, 414 P.2d 862 (1966); see also In re Cobb, 445 Mass. 452 (2005) (involving many ethical violations in addition to impugning judicial integrity); In re Lacey, 283 N.W.2d 250 (S.D. 1979) (court said disbarment was warranted, but did not disbar because attorney was receiving award for 50 years of active practice at annual bar conference and was on deathbed).

\textsuperscript{16} Gardner, 793 N.E.2d 2d at 427.

\textsuperscript{17} Rameriz, 28 Cal.3d at 414 (Cal. 1980) (“Appropriate discipline must be imposed, if for no other reason than the protection of the public and the preservation of respect for the courts and the legal profession.” (emphasis added)); In re McCellan, 754 N.E.2d 500 (Ind. 2001); Reed, 716 N.E. 2d at 428 (court says had “constitutional duty” to preserve adjudicatory system and punish); Antanga, 636 N.E.2d at 1258 (stating that it “must preserve integrity of the process and impose discipline” despite outrageous conduct of the judge).
party represented by the offending attorney and summarily affirmed a lower court decision that the Court acknowledged was both legally and factually erroneous. The lower court’s decision was erroneous in precisely the manner argued by the offending attorney, but the attorney made the fatal mistake of attributing nefarious motives to the lower court. In a subsequent decision where an attorney argued that a criminal defendant had been denied due process because of a biased judge, the Utah Supreme Court cited Peters and “remind[ed] attorneys of the pitfalls that may accompany” such an argument. The Court elaborated: “Any allegation that a trial judge became biased against a defendant should be supported by copious facts and record evidence” and “should be made in a reserved, respectful tone, shunning hyperbole and name-calling.”

The speech being sanctioned runs the gamut of criticism and derogation. In some cases, the statements have been as mild as accusing the judiciary of being result-oriented or politically motivated. At the other end of the spectrum are accusations of wide-spread judicial corruption and conspiracy. Rarely do attorneys resort to crude language or expletives. Rather, the best descriptor for the typical verbal excess by attorneys in these cases is rhetorical hyperbole.

Nor does the forum in which the speech is made appear to make much difference in terms of the standard applied or punishment imposed. Attorneys are punished for allegations in briefs

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18 151 P.3d 962 (Utah 2007).
19 See id. at ¶¶ 5-6 (explaining the factual and legal arguments that were raised on appeal and gave rise to the attorney’s accusations, and stating as to each that “[t]he court of appeals did err” as to the law and facts).
21 Id.
22 For example, in Idaho State Bar v. Topp, 129 Idaho 414, 416 (1996), an attorney who attended a hearing (and who was not involved in the case) was reprimanded for opining to the press that the ultimate decision differed from a similar case because the judge in the first decision “wasn’t worried about the political ramifications.” Thus, his statement “necessarily implied that Judge Michaud based his decision on completely irrelevant and improper considerations” and thus “impugned his integrity.” See id. at 418; see also In re Reed, 716 N.E.2d 426 (Ind. 1999); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165 (Ky. 1980); In re Westfall, 808 S.W.2d 829 (Mo. 1991); In re Raggio, 87 Nev. 369 (1971).
23 In Committee on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274 (W. Va. 1991), the attorney accused a judge of being part of a secret Masonic plot to cover up the arson of a local establishment.
24 But see Grievance Administrator v. Fieger, 719 N.W.2d 123 (Mich. 2006) (making crude remarks on radio show about judges after verdict for client was reversed on appeal).
and filings with courts, statements to the press, letters to the judiciary, communications with an authority to complain about a judge, pamphlets or campaign literature, and even correspondence with friends, family, and clients. Attorneys have been punished when the statements made could not have prejudiced or affected a pending proceeding and when the


Attorneys have been punished for statements about the judiciary in briefs to the court even when the suit is filed against judges, and the question at issue is whether an exception to judicial immunity exists. See Ramirez v. State Bar of Cal., 28 Cal.3d 402 (1980).

26 Westfall, 808 S.W.2d 829 (statements to press criticizing appellate decision that had been released); Raggio, 87 Nev. 369 (statements made in television interview criticizing decision of Nevada Supreme Court to have death penalty case reheard); Heleringer, 602 S.W.2d 165 (statement to press criticizing judge for holding restraining order hearing ex parte); Topp, 129 Idaho 414 (statements to press that implied judge’s decision was politically motivated); Reed, 716 N.E.2d 426 (statements in interview with press); In re Antanga, 636 N.E.2d 1253 (Ind. 1994) (statements in interview for ACLU local newsletter); Kentucky Bar Ass’n v. Nall, 599 S.W.2d 899 (Ky. 1980) (statements in radio interview); In re Holtzman, 78 N.Y.2d 184 (1991) (letter sent to press criticizing judge’s treatment of sexual assault victim); Fieger, 719 N.W.2d 123 (statements on radio show); In re Lacey, 283 N.W.2d 250 (S.D. 1979) (statements to press criticizing state courts’ handling of the case after appellate decision received); Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee, 771 S.W.2d 116 (Tenn. 1989) (statements to the press complaining about a judge and then the disciplinary process).

27 In re Arnold, 274 Kan. 761 (2002) (letter sent to judge by attorney who had been disqualified); In re Guy, 756 A.2d 875 (Del. 2000) (letter sent to judge); Fla. Bar v. Ray, 797 So.2d 556 (Fla. 2001) (three letters sent to Chief Immigration Judge complaining about another immigration judge); In re Evans, 801 F.2d 703 (4th Cir. 1986) (in letter sent to magistrate after case was on appeal and no longer before the magistrate or the district court).

28 Ray, 797 So.2d at 560 & n.2 (letter sent to Chief Immigration Judge, complaining about another immigration judge, a method which had been local practice for “seek[ing] redress when an attorney is having difficulties with an immigration judge”); U.S. Dist. Ct. for E.D. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993) (statements made to FBI and appropriate authorities at United States Attorney’s office regarding judge’s editing of transcripts); In re Graham, 453 N.W.2d 313, 315 (Minn. 1990) (in letter to the U.S. Attorney, in a judicial misconduct complaint, and in an affidavit in support of a motion to recuse, although court indicates that also released to public).

29 See e.g., In re Charges of Unprofessional Conduct involving File No. 17139, 720 N.W.2d 807 (Minn. 2006) (statements made in campaign literature by judicial candidate about incumbent judge); In re Glenn, 256 Iowa 1233 (1964) (leaflet circulated in community).

30 See, e.g., In re Pyle, 283 Kan. 807, 808-10 (2007) (letter sent to family, friends, and clients); In re Shay, 160 Cal 399 (Cal. 1911) (letter sent to client, and Shay is still relied on as authority, see Rameriz).

31 See, e.g., Pyle, 283 Kan. 807 (“explanatory” letter regarding discipline sent to family, friends, and clients); Glenn (leaflet after cases decided with no appeal pending). There are several cases where statements are made to the press after an appellate decision has been handed down. See, e.g. In re Westfall, 808 S.W.2d 829 (Mo. 1991); In re Raggio, 87 Nev. 369 (1971); In re Lacey, 283 N.W.2d 250 (S.D. 1979); Fieger, 719 N.W.2d 123; see also In re Evans (attorney disbarred from USDC after sending letter accusing magistrate of incompetence or pro-Jewish bias, where attorney waited to send letter until after district court had adopted magistrate’s ruling and Fourth Circuit had rejected summary reversal, although full disposition at the Fourth Circuit was still pending).

Nevertheless, some courts have verbally recognized a right of an attorney to criticize the judiciary after a case is no longer pending. See In re Cobb, 445 Mass. 452, 467 (Mass 2005) (limiting its holding to “the power of the State to regulate the speech of an attorney representing clients in pending cases”); In re Graham, 453 N.W.2d 313, 321 (Minn. 1990) (stating that First Amendment protects ability to “criticize rulings of the court once litigation was complete or to criticize judicial conduct or even integrity” (emphasis added)).
statements are made by attorneys who are not engaged in a representative capacity before the criticized court.\(^{32}\)

The widespread decision of judiciaries to carve out an exception to \textit{Sullivan} and \textit{Garrison} for statements regarding themselves is nothing less than shocking. In the context of attorney discipline, courts act as judge and jury, and, where the speech regards the judiciary, the courts are also the victim.\(^{33}\) Yet, courts abuse this position and impose extreme punishment on attorneys and their clients to preserve their own reputation and suppress further disparagement. Some courts even deny attorneys the defense of truth.\(^{34}\) In the 21\textsuperscript{st} Century, courts cite, as authoritative, cases decided before \textit{Sullivan} and even cases predating the incorporation of the Bill of Rights.\(^{35}\) Ironically, the punishment and suppression of attorney speech is done in the name of preserving the public \textit{perception} of judicial integrity—an interest that the Supreme Court has never recognized as valid despite its being proffered in other cases.\(^{36}\) Rather than address problems and improve integrity itself, courts have downplayed judicial abuses while punishing attorney speech aimed at exposing them.\(^{37}\) As shown, the cases are numerous\(^{38}\) and have enjoyed a recent resurgence.\(^{39}\) Yet the problem has not previously been examined adequately by academia.

\footnotesize{\begin{itemize}
  \item \(^{33}\) See infra note 214 and accompanying text.
  \item \(^{34}\) See infra Part II.C.2.
  \item \(^{35}\) See infra Part IV.A.1.
  \item \(^{36}\) See infra notes 153–59 and accompanying text.
  \item \(^{37}\) See infra notes 215–23 and accompanying text.
  \item \(^{38}\) See supra notes 10–15.
  \item \(^{39}\) See, e.g., Stilley v. Sup. Ct. Comm. on Prof’l Conduct, 370 Ark. 294 (2007); Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962 (Utah 2007); In re Abbott, 925 A.2d 482 (Del. 2007); In re Pyle, 283 Kan. 807 (2007); Grievance Administrator v. Fieger, 719 N.W.2d 123 (Mich. 2006); In re Charges of Unprofessional Conduct involving File No. 17139, 720 N.W.2d 807 (Minn. 2006); In re Cobb, 445 Mass. 452, 467 (2005); In re Simon, 913 So.2d 816, 824 (La. 2005); Office of Disciplinary Counsel v. Gardner, 99 Ohio St.3d 416 (2003); In re Wilkins, 777 N.E.2d 714 (Ind. 2002); In re Arnold, 274 Kan. 761 (2002); In re McClellan, 754 N.E.2d 500 (Ind. 2001); Fla. Bar Ass’n v. Ray, 797 So.2d 556 (Fla. 2001); In re Guy, 756 A.2d 875 (Del. 2000).}
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W. Bradley Wendel has written one of the few in-depth doctrinal treatments of attorney speech in his widely-cited article, *Free Speech for Lawyers*. However, Wendel does not address separately the problem of attorney speech critical of the judiciary. To the extent that he treats the problem, Wendel rejects the use of the *Sullivan* standard for lawyer speech, instead calling for analysis of “lawyer speech cases under ordinary constitutional rules, such as those employed by the Supreme Court in *Snyder, Sawyer*, and *Gentile*.” As shown below, these very cases have caused wide confusion and are used to support the misunderstanding that judiciaries can freely punish attorney speech—a proposition that Wendel does not ultimately support.

I will argue that the standard set forth in *Sullivan* and *Garrison* is the constitutional standard that must be employed to punish attorneys for speech impugning judicial integrity. Attorney speech critical of the judiciary is core political speech entitled to the fullest protection offered by the Constitution, and it clearly falls within *Sullivan* and *Garrison*, as shown in Part II.

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40 Commentators have examined issues related to the question, but fail to address—from a doctrinal position that takes into consideration the various forums where such speech is made—the constitutionality of restricting attorney speech that is critical of the judiciary. See, e.g., Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 FORDHAM L. REV. 569 (1998) (examining free speech issues regarding pretrial publicity to the press, solicitation and advertising, but not addressing lawyer speech impugning judicial integrity); Erwin Chemerinsky, *Silence Is Not Golden*, 47 EMORY L.J. 859 (1998) (arguing that *Sullivan*’s reckless disregard standard should apply for pretrial publicity); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705 (2004) (discussing courtroom speech from a political theory perspective rather than a doctrinal view).

Some law review articles have been written regarding a particular case where an attorney has been sanctioned. But these are in large part narrow discussions focusing on one decision or containing sparse analysis. See, e.g., Carol T. Rieger, *Lawyers’ Criticism of Judges: Is Freedom of Speech a Figure of Speech?* 2 CONST. COMMENT. 69 (1985) (discussing *Snyder* case, which was then on appeal); Butcher & MacBeth, *Comment, Lawyers’ Comments about Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. OF LEGAL ETHICS 659 (2004); Richard A. McGuire, *Comment, How Far Can a Lawyer Go in Criticizing a Judge?*, 27 J. LEGAL PROF. 227 (2002-2003); Caprice L. Roberts, *Note, Standing Committee on Discipline v. Yagman: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary?*, 54 WASH. & LEE L. REV. 817 (1997); Elizabeth A Bridge, *Note, Professional Responsibility and the First Amendment: Are Missouri Attorneys Free to Express Their Views?*, 57 MO. L. REV. 699 (1992).

41 W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L. Q. 305 (2001). Wendel’s article has a number of useful analogies and explores various principles of constitutional law as they might apply to attorney speech, but does not provide many concrete solutions to specific problems.

42 Id. at 427-32. Wendel seems to accept the argument that “the interests served by defamation law are different from those advanced by the law of professional discipline,” see id. at 427-28, a premise explored and refuted *infra* Part IV.C.

43 Id. at 431-32.

44 See id. at 440 (stating that “even the most vitriolic criticism of judges” should be protected).
Nevertheless, state and federal courts have discarded the requirements of *Sullivan* in this context, usually citing the imperative interest in preserving the public perception of judicial integrity. Part III will explore why this interest cannot justify suppression of attorney speech, and in fact is antithetical to democracy itself. Indeed, the interest in preserving judicial integrity, although asserted as the primary justification for suppressing speech, instead underscores why the speech rights of attorneys to criticize the judiciary must be preserved.

Courts have offered various rationales for disciplining attorneys for impugning judicial integrity, which are explored in Part IV, primarily relying on the following arguments: (1) the Supreme Court has exempted attorney speech critical of the judiciary from the strictures of *Sullivan*; (2) restrictions on attorney speech are a constitutional condition imposed on attorneys in return for granting attorneys the privilege of practicing law; and (3) the interests served by the tort of defamation are different from the interests served by imposition of attorney discipline. None of these rationales, however, withstands scrutiny, and ultimately can neither remove attorney speech impugning judicial reputation from the requirements of *Sullivan* nor justify a prophylactic viewpoint-based prohibition on political speech.

In Part V, I will briefly discuss the need for much greater regulatory and analytic precision in prohibiting attorney speech regarding the judiciary. Courts should not be punishing attorney speech solely to preserve judicial reputation—an interest that of itself cannot justify suppression of core political speech outside the requirements of *Sullivan* and *Garrison*. Significant state interests do exist that justify restrictions on attorney speech—even when that speech regards the judiciary. Narrow restrictions tailored to these state interests may be imposed constitutionally. Nonetheless, speech regarding the qualifications and integrity of members of the judiciary is essential for democracy to function properly, and cannot be suppressed merely to
II: Impugning Judicial Integrity is Core Political Speech

A. Historical and Theoretical Foundations of the First Amendment

Speech critical of the judiciary falls within the central purposes and core protection of the First Amendment. As Cass Sunstein has stated: “There can be little doubt that suppression by the government of political ideas that it disapproved, or found threatening, was the central motivation for the [speech] clause. The worst examples of unacceptable censorship involve efforts by government to insulate itself from criticism.” Historical rationales for the Speech Clause include the American theory of democratic self-government, the rejection of seditious libel, and the American view of sovereignty in the people rather than in government officials. These purposes directly correlate to major academic theories of Speech Clause protection, and were the very theories relied upon by the Sullivan and Garrison Courts in holding that speech critical of government officials could not be punished absent knowledge of or reckless disregard as to a statement’s falsity. An examination of these theories demonstrates that allowing speech critical of the judiciary is an essential component of the American system of government.

1. Self-Government

A major theory of the Speech Clause, initially propounded by Alexander Meiklejohn,

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45 Cass Sunstein, Free Speech Now, 59 U. CHI. L. REV. 255, 305 (1992). There are free speech theories that are more restrictive than that of Sunstein or Meiklejohn, such as the theory of Robert Bork. But even Bork recognizes that the Speech Clause must at least protect political speech. See Robert Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L. J. 26–27 (1971). Similarly, theories that expand the purpose for free speech protection beyond the realm of politics still protect political speech. Thus theories based on personal autonomy or individualism or on the marketplace of ideas would call for protection of critical speech about the judiciary.

46 See, e.g., Alexander Meiklejohn, Free Speech and Its Relation to Self-Government, [hereinafter Meiklejohn, SELF-GOVERNMENT] (basing theory for need for free speech on idea of self-government); John Hart Ely, Democracy and Distrust (discussing need for free speech to reinforce representation and preserve democratic process); Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. BAR FOUNDATION RESEARCH J. 521 (arguing that checking value embodies the rejection of seditious libel and was the primary purpose for the Speech Clause); Cass Sunstein, supra note 45, at 257 (arguing that “the American tradition of free expression” and its “extraordinary protection” for “political speech can well be understood as an elaboration of the distinctive American understanding of sovereignty”).
Meiklejohn posits that the purpose of free speech is to provide the means whereby the citizens of the United States can govern themselves. Thus, “[t]he First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’” Meiklejohn relied on the social contract created by the Constitution under which “We, the People of the United States” established a government where all citizens have the privilege and responsibility of participating in government and all agree to abide by the laws created. Meiklejohn contended that speech relevant to self-government is absolutely protected by the First Amendment. Meiklejohn’s theory encompassed all speech relevant to the responsibilities that a self-governing people must undertake—such as obtaining information related to understanding political and social issues, passing judgment upon the activities of governmental officials, and discussing methods for solving concerns raised.

Speech regarding members of the judiciary or their decisions is patently relevant to self-governance. Thirty-nine states elect their judiciary either initially or through retention elections. In order to vote with informed judgment, citizens should be free to make and to obtain opinions and information regarding such candidates. Even as to appointed judges, the

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47 Alexander Meiklejohn, *The First Amendment is Absolute*, 1961 SUP. CT. REV. 245 [hereinafter Meiklejohn, *Absolute*]; see also id. at 252 (“The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self government.”).


49 See id. at 46. Meiklejohn explains that “[s]o long as [a citizen’s] active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged.” See also Meiklejohn, *Absolute*, supra note 47, at 257. Notably, Meiklejohn does not believe that all speech is absolutely protected by the Speech Clause, but only speech related to self government. Meiklejohn expressly rejects that the First Amendment is “an unlimited license to talk” and contends that “there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment.” Id. at 258.

50 Meiklejohn’s theory would provide protection for all speech that helps “voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare” that assists self-government. See Meiklejohn, *Absolute*, supra note 47, at 255. Thus, within the protection of the Speech Clause should be included protection for such things as “[e]ducation in all of its phases,” as well as philosophic, scientific, literary and artistic speech. Id. at 256–57. Of course at the core of self-government protection is “[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues.” Id. at 257.

51 Id. at 255.

citizenry perform self-governance in selecting representatives responsible for appointing judges and can call upon those representatives to use their power to address concerns.

Meiklejohn’s theory has been extremely influential on the Supreme Court and the academy. Prior to Sullivan, Meiklejohn contended that libel regarding governmental officials should be constitutionally protected. While Meiklejohn, and other commentators, argued for absolute protection for statements regarding governmental officials, Sullivan and Garrison have been interpreted as partial adoptions of Meiklejohn’s democratic theory of free speech.

Martin Redish and Abby Mollen recently wrote that, at this point in time, “[t]he assertion that democracy and free expression are inextricably intertwined in a symbiotic relationship should hardly be considered controversial.” Although Redish and Mollen critique Meiklejohn’s theory as not comprising a broad enough understanding of speech essential to democracy, their

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53 See Blasi, supra note 46, at 554. Blasi states that “[t]he most influential scholarly analysis of the First Amendment to be published since World War II is Professor Alexander Meiklejohn’s Free Speech and Its Relation to Self-Government.”

54 Meikeljohn, Absolute, supra note 47, at 259.

55 See Paul LeBel, Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework, 66 NEB. L. REV. 249, 290 (arguing that “absolute immunity” from liability is needed “for speech about government”); Blasi, supra note 46, at 587 (concluding, that “an absolute privilege for communications about official behavior” would be the more appropriate approach, particularly in light of the “self-censorship danger”).

56 Shortly after Meiklejohn’s death, Justice Brennan, the author of both Sullivan and Garrison, noted that the language in those opinions “echoes” Meiklejohn’s writings. See William J. Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 HARV. L. REV. 1, 18 (1965). Harry Kalven opined that “in its rhetoric and sweep, [Sullivan] almost literally incorporated Alexander Meiklejohn’s thesis . . . .” See Harry Kalven, The New York Times Case: A Note on ‘The Central Meaning of the First Amendment,’ 1964 SUP. CT. REV. 191, 209. Kalven reports that Meiklejohn said the Sullivan opinion was “an occasion for dancing in the streets.” See id. at 221. See also Sunstein, supra note 45, at 269; (explaining that “observers often understand Sullivan to reflect Alexander Meiklejohn’s conception of freedom of expression”). Nevertheless, Blasi argues that subsequent history demonstrates that the Court did not accept the entirety of Meiklejohn’s theory and that the checking value represents a truer understanding of the Speech Clause and provides a better rationale for protecting speech. See Blasi, supra note 46, at 575. See infra Part II.A.2 (explaining the checking value).


58 See id. at 4-26. Redish and Mollen ultimately contend “that individual autonomy is both practically necessary for collective autonomy to exist and theoretically necessary for the value of collective autonomy to make sense in the first place. As a result, we argue that the purpose of democracy is to guarantee each individual the equal opportunity to affect the outcomes of collective decisionmaking according to her own values and interests as she understands them.” Id. at 11. Robert Post also criticizes Meiklejohn for his view of democracy as not being broad
theory equally covers speech punished for impugning judicial integrity. Redish and Mollen contend that any democratic theory of the First Amendment “must prohibit the government from managing public opinion, whether by overt coercion or by the indirect manipulation that comes with forcing a people to be ignorant.”

Significantly, punishment of attorney speech that impugns judicial integrity comprises both elements—it overtly coerces attorneys to utter only favorable opinions, and, through silencing that segment of society (which has the training, education, and exposure to be in the best position to criticize the judiciary), indirectly manipulates public opinion by keeping the public ignorant of derogatory opinions.

2. The Checking Value

Vincent Blasi has argued that “the checking value” provides a more appropriate and compelling rationale for Sullivan than does Meiklejohn’s self-government theory. The checking value is “the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials.” According to Blasi, the historical context of the Speech Clause demonstrates that the checking value “was uppermost in the minds of the persons who drafted and ratified the First Amendment.” Blasi further contends that the checking value remains a persuasive theoretical basis for interpreting what speech cannot be suppressed.

Blasi’s premises regarding the need for the checking value in our democratic society are compelling in the context of attorney speech critical of the judiciary. First, Blasi, points out that
“the abuse of official power is an especially serious evil”\(^{62}\) that relies for its correction on “the power of public opinion” to either retire officials or make other needed changes—complete with the ultimate threat of the power of the populace “to withdraw the minimal cooperation required for effective governance.”\(^{63}\) Blasi acknowledges that the United States government already has a structural system of checks and balances whereby “[e]ach branch of government may impose specific sanctions against members of the other branches.” Nevertheless, Blasi observes that this system breaks “down in certain political contexts” and is reliant on public opinion to effectively operate. He explains, “the system of checks and balances usually functions only when an aroused populace demands that one segment of the government perform its checking function.”\(^{64}\) Thus free speech not only provides a means whereby the populace can check official abuse, but also acts as a catalyst for the other branches of government to perform their checking functions.

As noted, a large majority of the states elects or popularly retains their judiciary. Thus, where speech regarding the judiciary is quelled, the public is denied its ability to learn of and check judicial power through voting. Where a judiciary is not elected or retained, the checking value maintains its importance and perhaps is strengthened. The very lack of the public power to directly check power intensifies the need for free speech regarding wrongdoing or incompetence so the public can call upon governmental powers to perform their checking functions.

Blasi explains that the checking value is additionally based on the “premise that the

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\(^{62}\) Blasi argues that official power is a particularly serious evil for several reasons, including that much human suffering “is caused by persons who hold public office,” \textit{id.} at 541. Thus persons should “value free expression primarily for its modest capacity to mitigate the human suffering that other humans cause.” \textit{Id.}

At a more universal level for government officials, Blasi explains that “because the investiture of public power represents a form of moral approval, public servants are probably more likely than those who wield private power to lose their humility and acquire an inflated sense of self-importance, often a critical first step on the road to misconduct,” and because they have been chosen by the people in an election or through appointment are received by the public with less skepticism than powerful private figures as “[w]e want to believe in the trustworthiness of our officials.” \textit{Id.} at 540. Further, once public trust is betrayed it has a greater “cost to society . . . if important expectations have been defeated.” \textit{Id.}

\(^{63}\) \textit{Id.} at 539.

\(^{64}\) \textit{Id.}
general populace must be the ultimate judge of the behavior of public officials” and must be the ones who determine whether misconduct has occurred.\textsuperscript{65} It is for “the general populace” to “defin[e] norms for public officials.”\textsuperscript{66} The populace cannot determine whether misconduct has occurred or define norms if they are kept in ignorance as to what is taking place. Further, in light of the size and complexity of modern government, a need exists for “critics capable of acquiring enough information to pass judgment on the actions of government.”\textsuperscript{67} In the context of the judiciary, it is attorneys who have such knowledge. As Blasi notes, the “historical abhorrence of seditious libel” and the consequent creation of a political system with a free speech guarantee “stem[med] largely from the fact that [sedition] was used by tyrants to silence potentially influential critics.”\textsuperscript{68} Notably, courts punishing attorneys for their speech have expressly acknowledged that a reason for such punishment is the influence that attorney views may have on public opinion regarding the judiciary.\textsuperscript{69} Indeed, there are some cases where attorneys are punished more harshly because of their excellent reputation and record—on the notion that views coming from reputable attorneys are more likely to be influential and thus are more dangerous.\textsuperscript{70}

The founding generation was certainly concerned about checking the power of the

\textsuperscript{65} Id. at 542. Blasi grounds this premise in the democratic theories of John Locke and Jospeh Schumpeter. See id.

\textsuperscript{66} Id.

\textsuperscript{67} Id. at 541. Blasi is contending that there is a need for “well-organized, well-financed, professional critics to serve as a counterforce to government.” Id. Although attorneys are not a well-organized and financed cohesive whole, they are the very critics capable of acquiring the requisite information to scrutinize judicial behavior.

\textsuperscript{68} Id. at 575 (emphasis added). Blasi argues, consequently, that the speech of public employees should be protected. He states:

Since under the checking value information about the conduct of government is accorded the highest possible valuation, speech critical of public officials by those persons in the best position to know what they are talking about—namely government employees—would seem to deserve special protection.

\textsuperscript{69} Id. at 634. Blasi urges that the “high standard of protection for such speech” found in \textit{Pickering} be “augmented and extended.” Unfortunately, the Supreme Court’s most recent case, \textit{Garret v. Cebello}, significantly curbs the prior protection afforded public employee speech found in \textit{Pickering} and pre-\textit{Garrettei} progeny.

\textsuperscript{70} See infra notes 175 & 183–86 and accompanying text.

See, e.g., In re Raggio, 87 Nev. 369 (1971); In re Westfall, 808 S.W.2d 829 (Mo. 1991). \textit{But see} In re Lacey, 283 N.W.2d 250 (S.D. 1979).
judiciary, as well as the legislative and executive branches. Indeed, there was such a great concern about the potential power of a federal judiciary that no lower federal courts were created by the Constitution. James Madison himself, who drafted the First Amendment, was the author of the great compromise that left the creation of the lower federal courts to Congress.\footnote{See Erwin Chemerinsky, \textit{FEDERAL JURISDICTION} § 1.1 (4th ed. 2003).} Thus to the extent, as Blasi convincingly argues, that the purpose behind the First Amendment was to check abuse of power, the Founders certainly were concerned with the power held by the judiciary at least as much as they were the power of the other branches. Moreover, at the time of the Fourteenth Amendment, the people and Congress distrusted state governments (including state judiciaries) to protect and enforce individual rights.\footnote{In \textit{Mitchum v. Foster}, 407 U.S. 225 (1972), the Supreme Court interpreted 42 U.S.C. § 1983, which was enacted contemporaneously with the Fourteenth Amendment and was intended “to enforce . . . the Fourteenth Amendment” against State executive, legislative, or judicial action. \textit{Id.} at 240. As discussed in \textit{Mitchum}, the legislative history for § 1983 reveals that “state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights” and that Congress “was concerned that state instrumentalities [including courts] could not protect those rights.” \textit{Id.} (emphasis added).} There is no basis in either the text or history of the First or Fourteenth Amendments to believe that either state or federal judiciaries were considered (or actually are) above abuse of power, and therefore are entitled to command respect by coercive law. Rather, the judicial power must be checked by popular discussion and exposure, as are the other branches.

Finally, Blasi argues that the checking value provides a rationale for the Court’s concern in \textit{Sullivan}\footnote{In \textit{Sullivan}, a verdict of $500,000 was awarded against the New York Times for its technically inaccurate portrayal of civil rights abuses that occurred in the South in a paid advertisement. Further, four additional lawsuits were pending against the New York Times for the same ad by other southern officials—who sought an additional 2 million in damages. \textit{See New York Times v. Sullivan}, 376 U.S. 254, 278 n.18 (1964). Harry Kalven argues that the extent of liability was an additional rationale for the \textit{Sullivan} decision. \textit{See Kalven, supra} note 56, at 200.} and subsequent cases\footnote{Blasi primarily cites the Court’s decisions in \textit{Rosenbloom v. Metromedia}, 403 U.S. 29, 61 (1971) and \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 387 (1974) as cases where the Court emphasized “the danger of excessive damage awards.” \textit{See Blasi, supra} note 46, at 576. But Blasi also contends that in \textit{Sullivan} itself “the size of the award . . . undoubtedly had much to do with the Court’s initial perception that defamatory speech should no longer be considered outside the ambit of First Amendment protection.” \textit{See id.} at 579.} with the severity of the punishment imposed for speech, and
not solely with the fact of punishment.\textsuperscript{75} Blasi contends the press (and citizens) “will be unable to provide a powerful check against the misuse of government power” if their examination of the government is “distorted by financial disincentives.”\textsuperscript{76} Speakers will engage in greater self-censorship to the extent they fear, not merely liability, but “financially debilitating awards.”\textsuperscript{77}

Certainly an exacerbated chilling effect from the possibility of excessive punishment is relevant in the context of attorney speech about the judiciary. A sizeable number of attorneys have not merely been disciplined, but have been suspended from the practice of law for having made statements impugning judicial integrity.\textsuperscript{78} The Supreme Court of Ohio has stated that actual suspension from the practice of law is a \textit{mandatory} punishment for impugning judicial integrity.\textsuperscript{79} While an attorney threatened with admonition or reprimand might risk punishment to make a statement about the judiciary that she felt was important (even if the statement turned out to prove incorrect), the attorney threatened with suspension from practice and loss of her livelihood will likely walk as far from the line of impugning judicial integrity as possible. Thus speech impugning the judiciary is not merely chilled, it is frozen by the severity of the sanction that courts have imposed—even for relatively minor statements.\textsuperscript{80}

3. The Rejection of Seditious Libel

Related to the checking value, Harry Kalven contended, and interpreted the \textit{Sullivan} case as establishing, that “[t]he touchstone of the First Amendment has become the abolition of seditious libel and what that implies about the function of free speech on public issues in

\begin{itemize}
  \item \textsuperscript{75} Blasi, supra note 46, at 576-77.
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{Id.} at 588.
  \item \textsuperscript{78} See supra note 46 (citing cases where attorneys were suspended from the practice of law).
  \item \textsuperscript{79} Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 427 (Ohio, 2003).
  \item \textsuperscript{80} In \textit{United States District Court for the Eastern District of Washington v. Sandlin}, 12 F.3d 861 (9th Cir. 1993), the Ninth Circuit upheld a six month suspension from the practice of law for accusations made by Sandlin in confidence to authorities that a judge was editing the transcripts of court proceedings. Sandlin was found to have impugned judicial integrity even though, on investigation from those authorities, the judge did edit his transcript, because the judge only made clerical rather than substantive changes.
\end{itemize}
American democracy.”81 According to Kalven, it is not sufficient to merely have “leeway for criticism of the government”; rather, “defamation of the government is an impossible notion for a democracy” because “[p]olitical freedom ends when the government can use its power and its courts to silence its critics.”82 Kalven argues that speech critical of the government constitutes “a core of protection of speech without which democracy cannot function.”83

4. The American Conception of Sovereignty

Commentators, including Meiklejohn and Sunstein, have noted the importance of the American view of sovereignty in the protection of speech. Sunstein posited that “the American tradition of free expression” and its “extraordinary protection” for “political speech can well be understood as an elaboration of the distinctive American understanding of sovereignty.”84 Meiklejohn eloquently explained that “[a]ll constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of the corporate body politic.”85 Through the Constitution, the people have delegated specific and limited powers to “subordinate agencies, such as the legislature, the executive, [and] the judiciary.”86 Yet “[t]he people do not delegate all their sovereign powers.”87 Consequently:

Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing they have no power. Over their governing we have sovereign power.88

The idea that the people maintain sovereignty and power over governmental action has obvious

81 Kalven, supra note 56, at 209.
82 Id. at 205.
83 Id. at 208. Kalven further explains, “This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected. The theory of the freedom of speech clause was put right side up for the first time.” Id.
84 Sunstein, supra note 45, at 257.
85 Meiklejohn, Absolute, supra note 47, at 253.
86 Id. at 254.
87 Id.
88 Id. at 257.
implications for the restriction of speech regarding the judiciary. If the criticized arm of
government has ultimate power to punish speech regarding itself, the people have lost their
sovereign power over that branch of government. Further, as Sunstein points out, “[r]estrictions
on political speech have the distinctive feature of impairing the ordinary channels for political
change” and thus “are especially dangerous.” For “if the government forecloses political
argument, the democratic corrective is unavailable,” and the people cease to have their
sovereign control over their agents, the government.

B. The Supreme Court, Core Speech, and Official Reputation

The academic theories outlined above comprise the central rationales offered by the
Supreme Court in Sullivan and Garrison for categorically protecting speech regarding
government officials unless it is knowingly false or made with reckless disregard as to falsity.
Namely, the Court relied on the concept of democratic self-government requiring “uninhibited,
robust, and wide open” debate on public issues, the rejection of seditious libel and the need to
check abuse of power, and the American model of sovereignty in the people.

The Sullivan Court, in light of the history and purposes of the First and Fourteenth

89 Sunstein also points out that government is mostly likely to be biased in regulating speech when the
speech regards itself. See Sunstein, supra note 45, at 305–06.
90 Id. at 306.
91 Id.
92 See Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) (explaining that “speech concerning public affairs
is more than self-expression; it is the essence of self-government); Sullivan, 376 U.S. at 270.
1798 and ultimately concluding that it was unconstitutional as violative of the First Amendment).
94 See Sullivan, 376 U.S. at 274–75. The Court reiterated that “[t]he people, not the government, possess the
absolute sovereignty” and that the American form of government “dispersed power in reflection of the people’s
distrust of concentrated power and of power itself at all levels.” Id.
95 Sullivan involved a libel judgment of $500,000 against the New York Times for publishing a paid
advertisement soliciting donations to help with the civil rights movement in the South. The ad recited various events
that occurred in the South, including in Montgomery, Alabama, but was inaccurate in its descriptions. Sullivan was
the Montgomery Commissioner and supervised the police. He claimed the ad, which did not name him at all, would
be read as imputing abuses to him because at a few points it referred to abuses committed by the police. Because of
the inaccuracies in the ad, Sullivan was able to prevail on his libel claim, even though most of the inaccuracies were
seemingly trivial—e.g., they arrested Martin Luther King Jr. only four times and not seven, students were expelled
Amendments outlined above, “eschewed silence coerced by law—the argument of force in its worst form” and denied governmental power to impose “any kind of authoritative selection” in public debate regarding government officials.\textsuperscript{96} The Court instead concluded that “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”\textsuperscript{97}

The Court recognized that “erroneous statement is inevitable in free debate” and so “must be protected if the freedoms of expression are to have the ‘breathing space’ that they need . . . to survive.”\textsuperscript{98} Thus, while truth could never form the basis of liability or punishment,\textsuperscript{99} even false statements deserved some constitutional protection. Consequently, a government official could not recover for libel unless he showed that the statements were false and that the speaker knew they were false or made the statements with reckless disregard as to their falsity—even for “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”\textsuperscript{100} The Garrison Court extended this ruling to criminal defamation and expressly stated that “only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.”\textsuperscript{101}

It would thus seem obvious that punishment of attorney speech impugning judicial integrity would fall squarely within the Sullivan and Garrison rules. Indeed, both cases expressly contemplate their applicability to statements regarding the judiciary. In Sullivan, the Court noted that the judiciary cannot protect its reputation through contempt citations—even if the statements

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\textsuperscript{96} Id. at 270.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 271–72.
\textsuperscript{99} Garrison, 379 U.S. at 74 (“Truth may not be the subject of civil or criminal sanctions where discussion of public affairs is concerned.”)
\textsuperscript{100} Id. at 75; Sullivan, 376 U.S. at 270.
\textsuperscript{101} Garrison, 379 U.S. at 74.
contain “half-truths” and “misinformation.”102 The Court surmised “[i]f judges are to be treated as ‘men of fortitude, able to thrive in a hardy climate,’ . . . surely the same must be true of other government officials.”103 Further, Garrison directly involved speech by an attorney accusing judges of incompetence, laziness, and possible racketeer influences. Nevertheless, the Court adopted the Sullivan standard, despite the fact that the accusations were severe, and were made by an attorney about the judiciary. There is no basis in the language or rationale from Sullivan or Garrison that would exempt from their strictures attorney speech critical of the judiciary.

Moreover, by definition, speech that is punished because it impugns the integrity of a particular judge or the judiciary as a whole is what the Supreme Court has classified as core First Amendment speech—thus requiring strict scrutiny even outside the context of Sullivan. As the Court has recognized, “[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”104

The Supreme Court has repeatedly recognized core constitutional protection for speech about the judiciary. In Landmark Communications v. Virginia, the Supreme Court found unconstitutional a statute that criminalized reports (truthful or not) regarding the proceedings of the Virginia Judicial Inquiry and Review Commission.105 Virginia argued that the statute served interests of protecting the personal reputation of judges where complaints were unwarranted, and protected “confidence in the judiciary as an institution.”106 The Court held that the speech was

102 Sullivan, 376 U.S. at 272–73.
103 Id. at 273 (internal citations omitted).
105 Id.
106 Id. at 835. The state offered another justification, namely that judges will voluntarily retire in the face of complaints warranting suspension or removal if it will spare them publicity of the charges. Indeed, the Court notes that in California “not less than two or three judges a year have either retired or resigned voluntarily, rather than confront the particular charges that are made,” which closes such cases “without any public furor, or without any harm done to the judiciary.” Id. at 836 n.7. The idea is fascinating as it relates to the other justification offered in
core political speech, and although judges traditionally “will not respond to public commentary, the law gives judges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions.”

The Court explained that “[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern” and the speech at issue “served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.”

Similarly, in Republican Party of Minnesota v. White, the Court applied strict scrutiny in striking as unconstitutional Minnesota’s announce clause, which prohibited judges and attorneys running for judicial office from announcing “views on disputed legal or political issues.” The Court categorized the speech as being “at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office.” In like manner, speech about judicial qualifications and integrity would necessarily be political speech “at the core of our First Amendment freedoms.” As Justice O’Connor noted, “39 states currently employ some form of judicial elections.” Of course, “[i]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.”

Landmark Communications of preserving the public’s “confidence in the judiciary as an institution.” Public confidence in the judiciary is maintained by keeping them ignorant of charges levied against the judiciary. And apparently valid charges at least at that time were being brought somewhat frequently if at least 2–3 judges in the state of California alone were voluntarily resigning each year rather than face charges—again underscoring that the judiciary is not somehow immune from, as Blasi states, “the inherent tendency of government officials to abuse the power entrusted to them.” See Blasi, supra note 46, at 538.

Another interest asserted by the state in Landmark Communications was protecting the citizens who filed complaints from “possible retaliation or recrimination.” See Landmark Communications, 435 U.S. at 835. That interest is not relevant to the issue of attorney discipline for statements regarding the judiciary; when an attorney is disciplined, her identity obviously was not confidential.


Id. at 768.

Id. at 790 (O’Connor, J., concurring).

C: Treatment of Attorney Speech Impugning Judicial Integrity

1. Rejecting the Sullivan Standard

One 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 standard. This divergence is particularly surprising because generally the authority applied is MRPC 8.2, which expressly adopts the Sullivan standard, but which courts oddly read out of the rule. Some courts even determine that MRPC 8.2 is a constitutional restriction on speech because it adopts the standard set forth in Sullivan and Garrison, and then proceed to interpret the rule as creating the very standard that Garrison rejected as unconstitutional. 114

The Sullivan standard for determining whether a statement is made with reckless disregard as to truth or falsity has been extensively litigated, and is determined by examining the speaker’s subjective intent, which requires “that the defendant in fact entertained serious doubts as to the truth or falsity of his publication.”115 Indeed, an objective standard—what a reasonable person would believe was true or false—has been repeatedly rejected, beginning in Garrison.

As noted above, Garrison involved accusations of incompetence, laziness, and possible racketeer influence as to certain judges. Louisiana convicted Garrison of criminal libel because his statement was “not made in the reasonable belief of its truth,” on the theory that it was “inconceivable” that he “had a reasonable belief, that not one but all eight of these Judges . . .

114 See, e.g., In re Simon, 913 So.2d 816, 824 (La. 2005); Office of Disciplinary Counsel v. Gardner, 793 NE2d 425, 429 (Ohio 2003); Fla. Bar v. Ray, 797 So.2d 556, 558–59 (Fla. 2001). The Supreme Court of Louisiana explained that “[b]ecause this rule [8.2] proscribes only statements which the lawyer knows to be false or which the lawyer makes with reckless disregard for the truth, it comports with the First Amendment’s guarantee of free speech” and cites Garrison as support for that conclusion. See Simon, 913 So.2d at 824. However, the Court then adopts “an objective standard,” punishing the speech at issue unless “a reasonable attorney would believe in the truth of the allegations.” Id. As explained infra notes 116–20 and accompanying text, Garrison expressly rejected an objective standard based on the reasonable person. It seems incredible that Courts rely on Garrison to establish the constitutionality of Rule 8.2 as written and then interpret Rule 8.2 as creating the very standard that Garrison rejected as unconstitutional.

were guilty of what he charged them with.”116 The Supreme Court’s response is direct:

This is not a holding applying the New York Times test. The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard. According to the trial court’s opinion, a reasonable belief is one which ‘an ordinarily prudent man might be able to assign a just reason for’; the suggestion is that under this test the immunity from criminal responsibility . . . disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.117

In St. Amant v. Thompson,118 the Court reaffirmed that Garrison made it “clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.”119 Despite Garrison’s unambiguous rejection of a reasonableness standard in the precise context of attorney speech impugning judicial integrity, state courts have almost universally disciplined attorneys under a reasonableness standard.120

The objective standard adopted by the states comes in two basic variants. Some courts focus on whether the attorney had an “objectively reasonable factual basis for making the statements.”121 Other courts examine “what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.”122 Some courts combine these tests,123 or do not expressly adopt either while rejecting the subjective Sullivan standard

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116 Garrison, 379 U.S. at 78 (emphasis added).
117 Id. at 79 (emphasis added).
118 390 U.S. 727.
119 Id. at 731.
120 The exceptions are cases where the court did not reach the question of whether a subjective or objective standard applied. See In re Green, 11 P.3d 1078 (Colo. 2000); Okla. Bar Ass’n v. Porter, 766 P.2d 958 (Okla. 1988).
121 Fla. Bar Ass’n v. Ray, 797 So. 2d 556, 559 (2000); see also, e.g., In re Cobb, 445 Mass. 452 (2005).
122 In re Graham, 453 N.W.2d 313, 322 (Minn. 1990); see also, e.g., In re Westfall, 808 S.W.2d 829, 837 (Mo. 1991); Idaho State Bar v. Topp, 129 Idaho 414, 417 (1996); In re Holtzman, 78 N.Y.2d 184, 192–93 (1991); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165 (Ky. 1980); In re Simon, 913 So.2d 816 (La. 2005).
123 See, e.g, Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 431 (2003) (looking at “what the reasonable attorney in light of all his professional functions, would do in the same or in similar circumstances’ . . . [and] focus[ing] on whether the attorney had a reasonable factual basis”); Standing Committee on Discipline for the U.S. Dist. Ct. for the Cent. Dist. Cal. v. Yagman, 55 F.3d 1430, 1437 (9th Cir. 1995).
and instead adopting a reasonableness or objective approach.\textsuperscript{124}

The two approaches are not the same, although both are termed the “objective standard” by courts. For example, an attorney could arguably have a reasonable basis in fact for saying something, and yet a reasonable attorney in light of all of his functions and duties would still refrain from saying it. Indeed, in \textit{Idaho State Bar v. Topp},\textsuperscript{125} a part-time county attorney attended a politically sensitive hearing (but was not involved in the case) about a proposed county expenditure of 4.1 million dollars. After the hearing, he was asked by the press to comment on the court’s decision as compared to a similar issue that had been decided a different way by another judge. Topp responded that he thought the other judge “wasn’t worried about the political ramifications.”\textsuperscript{126} Topp was publicly reprimanded for violating MRPC 8.2, as the “statement necessarily implied that Judge Michaud based his decision on completely irrelevant and improper considerations” and thus “impugned his integrity.”\textsuperscript{127} At his disciplinary hearing, Topp brought forth three pieces of evidence that supported his statement,\textsuperscript{128} but the court rejected this, summarily concluding that “a reasonable attorney in considering these facts, would not have made the statement in question.”\textsuperscript{129}

Notably, the \textit{Topp} decision is typical in that the court and disciplinary authority garnered no evidence, standards, or testimony as to what a reasonable attorney would do or say in such a circumstance (indeed, I have yet to read such a case). The assumption in these cases appears to

\textsuperscript{125} \textit{Idaho} 414 (1996).
\textsuperscript{126} \textit{Id.} at 416.
\textsuperscript{127} \textit{Id.} at 418.
\textsuperscript{128} Specifically, Topp pointed to the following facts: (1) there had been “a political frenzy” in the County on the issue, of which the judge certainly was aware, see \textit{id.}; (2) the judge rendered an oral decision “immediately after the close of argument” and released a written decision “within minutes” of the end of the hearing, see \textit{id.} at 415, which Topp thought supported “an inference that the case was decided prior to argument and that Judge Michaud was concerned with disseminating that decision to the public quickly,” see \textit{id.} at 418; and (3) “another district judge in a similar case had reached a different decision,” see \textit{id.}
\textsuperscript{129} \textit{Id.} at 418.
be either (1) that the court itself is competent as attorneys to decide summarily what a reasonable attorney would or would not say; or (2) that a reasonable attorney would never impugn the dignity of the court without significant evidence of misconduct. The second idea is supported by a 2003 Ohio Supreme Court decision where the court held that objective reckless disregard (an oxymoron) could be found because Ethical Consideration 8-6, under the Code of Professional Conduct, “admonishes attorneys ‘to be certain’ that their criticism [of judges] has merit.” Thus failure to investigate and “be certain” demonstrates failure to live up to the attorney standard. The same logic could extend to incorporate an attorney oath to maintain the respect due the judiciary or a civility code: Reasonable attorneys are respectful to courts unless they have (substantial) evidence of serious misconduct, so if an attorney makes derogatory statements without substantial evidence, then, *a fortiori*, he has failed to act as a reasonable attorney.

The “reasonable basis in fact” standard also is not applied in a manner consistent with typical evaluations of that standard. In most contexts, such as Federal Rule of Civil Procedure (FRCP) 11 or MRPC 3.1, a reasonable basis in fact sets a very low threshold of proof. Indeed, federal appellate courts interpreting FRCP 11 allow a reasonable basis in fact to be shown by circumstantial evidence and even though evidence is weak. Indeed, sanctions are not warranted “unless a particular allegation is utterly lacking in support,” or is made in “deliberate indifference to obvious facts.” Further, “Rule 11 neither penalizes overstatement

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130 At the time, Ohio used the Model Code of Professional Conduct which is split into Canons, Ethical Considerations and Disciplinary Rules. The Ethical Considerations, “are aspirational in character and represent the objectives toward which every member of the profession should strive” while the “Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character” and subject lawyers to “disciplinary action.” *See Model Code of Professional Responsibility*, Preliminary Statement (1980).


133 Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1998).


135 *Baker*, 158 F.3d at 524.
nor authorizes an overly literal reading of each factual statement.” In contrast, courts applying the standard as to statements regarding the judiciary have required that the statements be supported by “substantial competent evidence” or “copious facts” and eschew circumstantial evidence or anything less than direct proof of the assertions. Further, courts have taken an extremely literal (and sometimes exaggerated) reading of statements regarding the judiciary.

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136 Navarro-Ayala v. Hernandez-Colon, 3 F.3d 464, 467 (1st Cir. 1993).
138 See, e.g., In re Wilkins, 777 N.E.2d 714, 716–17 (Ind. 2002). Wilkins signed a petition to transfer filed with the Indiana Supreme Court that stated that the lower court’s decision was “so factually and legally inaccurate that one is left to wonder whether the court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion . . . .” See id. at 716. At the disciplinary hearing, Wilkins brought in support of his statement evidence regarding the facts and law that the Court of Appeals had ignored or misstated. See id. The Court concluded, nevertheless, that Wilkins “offered no evidence to support his contentions that, for example the Court of Appeals was determined to find for appellee no matter what.” See id. at 717. The Court apparently wanted Wilkins to bring direct evidence of the motive of the court, prohibiting reliance on circumstantial evidence of the facts and law ignored. Similar scenarios occurred in In re Glenn, 256 Iowa 1233 (1964), and Peters v. Pine Meadow Ranch Home Association, 151 P.3d 962 (Utah 2007).
139 See, e.g., U.S. Dist. Ct. for E.D. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993). In Sandlin, the attorney had a reasonable basis in fact for his statements under an MRPC 3.1 or FRCP 11 standard when he accused the judge of substantively editing a transcript. Sandlin misremembered a statement from the Judge about a witness that was not in the transcript. Sandlin’s “memory of the TRO hearing agreed with that of his wife, his client, and his former law clerk, all of whom were present at the hearing.” Id. at 867. Sandlin “took and passed two polygraph tests regarding his memory of the hearing. Id. Further, the judge edited the transcript, which the court reporter told Sandlin, and Sandlin consulted experts who said that whether there had been editing of the audio tape was inconclusive. See id. at 864. Certainly this is sufficient evidence to have satisfied MRPC 3.1 or FRCP 11. See supra notes 132–36 and accompanying text. Yet the Court held that Sandlin did not have a “reasonable basis in fact” for his statement and thus suspension from the practice of law was warranted. See Sandlin, 12 F.3d at 867.
140 In re Westfall, 808 S.W.2d 829 (Mo. 1991), provides a striking example of construction of statements about the judiciary. Prosecutor Westfall made statements to the press about an appellate decision prohibiting him from pursuing a prosecution on the grounds of double jeopardy. Westfall stated in part that the decision did not follow the Supreme Court “for reasons that I find somewhat illogical and I think even a little bit less than honest” and that the opinion “distorted the statute and . . . convoluted logic to arrive at a decision that [the judge] personally likes.” Id. at 831. In disciplining Westfall and finding that he lacked evidence for the statement, the court rephrased his statement each time it addressed it, claiming, for example, that Westfall “accused Judge Karohl of deliberate dishonesty” and of “purposefully ignoring the law to achieve his personal ends”—not as “an implication of carelessness or negligence but of a deliberate, dishonest, conscious design on the part of the judge to serve his own interests.” Id. at 838. The dissent (in addition to pointing out that the majority’s construction was “not even grammatically plausible” as the phrase “a little bit less than honest” grammatically refers to “the reasons, not the judge”) points out that the majority used “at least six unsupportable paraphrases of the respondent’s actual words,” to support its decision, each of which, “are the words of the writer [the court], not the words of” Westfall. See Westfall, 808 S.W.2d at 841 (Blackmar, J., dissenting). Westfall claimed that what he meant was that “the court of appeals opinion was ‘intellectually dishonest.’” Id. at 833.
See also, e.g., In re Frerichs, 238 N.W.2d 764, 767 (Iowa 1976) (court construes attorney’s statement in petition for rehearing that court was “willfully avoiding the substantial constitutional issues” raised in this and two other cases as “easily” being read as “alleg[ing] commission of public offences,” including a misdemeanor and a felony, and thus as accusing the court of “sinister deceitful and unlawful motives and purposes”).
2. Placing the Burden of Proof on Attorneys and Presuming Falsity

Another major point of departure from Sullivan and Garrison is the failure of courts to verify that the statements for which attorneys are punished are in fact false.\textsuperscript{141} This occurs in large part because many courts place the burden of proof on the disciplined attorney to bring forth evidence supporting his statement. Thus, in a number of cases, the court holds that the speech is punishable because the \textit{attorney failed} to bring forth sufficient evidence to support his statement, and no further examination is made as to whether the statement is true or not.\textsuperscript{142}

Additionally, some courts appear to presume falsity. Applying an objective standard, they examine whether the attorney had a reasonable basis in fact for making the statement or whether a reasonable attorney would make the statement. If the answer to either of those inquiries is no, the court assumes that the assertion was therefore false.\textsuperscript{143} In a few extreme examples, courts have denied the attorney the opportunity to prove that the statement was true.\textsuperscript{144}

The Sullivan Court explained: “Truth may not be the subject of either civil or criminal

\textsuperscript{141} Notably, a few courts do require that the disciplinary authority prove that the statement was false. See Committee on Discipline for the U.S. Dist. Ct. for the Cent. Dist. Cal. v. Yagman, 55 F.3d 1430 (9th Cir. 1995); Okla. Bar Ass’n v. Porter, 766 P.2d 958 (Okla. 1988).

\textsuperscript{142} See, e.g., In re Glenn, 256 Iowa 1233, 1239 (1964) (stating that attorney “offered no evidence” supporting statements, although Glenn brought significant circumstantial evidence); Wilkins, 777 N.E. 2d at 717 (noting that attorney “offered no evidence to support his contentions” regarding the motive of the court, even though Wilkins did bring circumstantial evidence).

\textsuperscript{143} See, e.g., Office of Disciplinary Counsel v. Gardner 793 N.E. 2d 425, 431 (Ohio 2003) (court notes that attorney argued disciplinary authority must prove false and made with reckless disregard, but court holds that objective applies instead and finds that reasonable attorney would not make statement and so statement punishable); Wilkins, 777 N.E. 2d at 717 (failing to examine whether false, but relying on fact that attorney, allegedly, failed to bring forth sufficient evidence in support); In re Westfall, 808 S.W.2d 829 (Mo. 1991) (same); Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962 (2007) (same); In re Raggio, 87 Nev. 369 (1971) (failing to examine whether or not statements false).

At oral argument in the Peters case, an unidentified Justice stated in question to the offending attorney: “Would you care to address the question about [sanctions] or is your answer simply that you were right. That’s what I hear you saying is . . . that your material is not inappropriate simply because it’s correct.”

\textsuperscript{144} See, e.g., In re Antanga, 636 N.E.2d 1253 (Ind. 1994) (court excludes from evidence as “irrelevant” attorney’s proffered witnesses to testify regarding judge’s racism); Ky. Bar Ass’n v. Waller, 929 S. W.2d 181, 182-83 (Ky. 1996) (court denied attorney evidentiary hearing and rejected argument that “truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him”).

In In re Cobb, 445 Mass. 452, 468 (2005), the Court stated: “The Supreme Court decisions in the Bradley, Sawyer, and Gentile cases did not distinguish between true and false criticism, founded and unfounded criticism.” Notably, Bradley and Sawyer were decided before Sullivan and Garrison, see infra Part IV.A.2, and Gentile involved pretrial publicity rules rather than discipline for impugning judicial integrity, see infra Part IV.A.3.
sanctions where discussion of public affairs is concerned.” The Court further stated that the burden of proving truth should not be placed on the speaker because “under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.” Finally, the Court held that such constitutional requirements could not be avoided by the creation of presumptions.

III: Preserving Judicial Integrity Cannot Justify Suppression of Attorney Speech

The primary reason that courts impose serious sanctions for attorney speech impugning judicial integrity and reject the Sullivan standard is the belief that such measures are justified by “the state’s compelling interest in preserving public confidence in the judiciary.” The Supreme Court further stated that the burden of proving truth should not be placed on the speaker because “[u]nder such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.” Finally, the Court held that such constitutional requirements could not be avoided by the creation of presumptions.

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146 Id. at 279.
147 Id. at 283-84 (“The power to create presumptions is not a means of escape from constitutional restrictions”).
148 Fla. Bar v. Ray, 797 So. 2d 556, 559 (Fla. 2001); see also In re Wilkins, 777 N.E.2d 714, 718 (Ind. 2002) (citing the “state’s interest in preserving the public’s confidence in the judicial system and the overall administration of justice”); Idaho State Bar v. Topp, 129 Idaho 414, 416 (1996) (citing “the state’s legitimate interests in preserving the integrity of its judicial system”); Office of Disciplinary Counsel v. Gardner, 99 Ohio St. 3d 416, 423 (2003) (citing the state’s compelling interest in preserving public confidence in the judiciary” and “in the fairness and impartiality of our system of justice” as supporting rejection of Sullivan standard for attorney discipline); In re Cobb, 445 Mass. 452, 473 (2005) (holding that objective standard was proper because of the “state’s interest in protecting the administration of justice and the legal profession”); In re Graham, 453 N.W.2d 313, 322 (Minn. 1990) (same); U.S. Dist. Ct. for E.D. of Wash. v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (same); In re Garringer, 626 N.E.2d 809 (Ind. 1994) (contending that statements “do nothing but weaken and erode the public’s confidence in an impartial adjudicatory process”); In re Westfall, 808 S.W.2d 829 (Mo. 1991) (relying on “the state’s substantial interest in maintaining public confidence in the administration of justice”); In re Holtzman, 78 N.Y.2d 184, 185 (1991) (stating “in order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard”); In re Evans, 801 F.2d 703, 707 (4th Cir. 1986) (positing that “the public interest and administration of the law demand that the courts should have the confidence and respect of the people” and thus “[u]nhjust criticism, insulting language and offensive conduct toward the judges, personally, by attorneys, who are officers of the court, which tend to bring the courts and the law into disrepute and to destroy public confidence in their integrity, cannot be permitted” (internal citations omitted)); Ramirez v. The State Bar of Cal., 28 Cal.3d 402, 414 (1980) (holding that discipline was necessary to “protect[.] the public and preserve[.] respect for the courts and legal profession”); State v. Nelson, 210 Kan. 637, 642 (1972) (stating that cannot “create disrespect for courts or their decisions”); In re Raggio, 87 Nev. 369, 371 (1971) (positing that, as a result of an attorney’s public statements “[e]ssential public confidence in our system of administering justice may have been eroded”); In re Meeker, 76 N.M. 354, 363 (1966) (characterizing attorney’s comments about judiciary as an “attempt[.] to destroy the trust of the people of New Mexico, and elsewhere, in their courts and in their judges”)

Notably, the alleged interest in preserving public confidence could not have been served by the discipline imposed in Ray because the communication was made in a private letter to the chief immigration judge pursuant to local practice for complaining about an immigration judge. See Ray, 797 So. 2d at 560. The public would have never
Court of Delaware expounded: “Adherence to the rule of law keeps America free. Public respect for the rule of law requires the public trust and confidence that our legal system is administered fairly . . . .”

An attorney’s statement to the press regarding a court’s decision to hold a politically sensitive hearing ex parte was characterized as “chipping away at the public confidence in the integrity of the judicial system” and bringing “the judicial system into discredit in the public mind.” For “[e]very lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure.” Finally, in oft-quoted language, the Supreme Court of Indiana stated that the Sullivan standard is inappropriate because attorneys who disparage the judiciary commit “a wrong . . . against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations.”

A close examination of the interest in preserving the public perception of judicial integrity and the assumptions underlying it paradoxically underscores the important reasons why attorney speech critical of the judiciary must be protected, rather than demonstrating that such speech should be suppressed. Indeed, the Supreme Court has already addressed the validity of this interest in other related contexts. In Bridges v. State of California, the Court analyzed the

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known of the statements but for the filing of a disciplinary action against the attorney. This same disconnect between the interest asserted and the context of the speech occurs in several cases. See, e.g., Sandlin, 12 F.3d 861 (statements were made confidentially to authorities in FBI and U.S. Attorney’s office, who in turn were required to keep the information confidential, and insulted judge is the one who complained to the bar); Evans, 801 F.2d 703 (letter was sent solely to the insulted magistrate, who filed a grievance).

In re Abbott, 925 A.2d 482, 488 (Del. 2007); see also, In re Shimek, 284 So.2d 686, 688 (Fla. 1973) (stating, post-Sullivan, that “[n]othing is more sacred to man, and particularly to a member of the judiciary than his integrity” and “[o]nce the integrity of a judge is in doubt the efficacy of his decisions are [sic] likely to be questioned”); In re Antanga, 636 N.E.2d 1253, 1258 (Ind. 1994) (positing that “the judicial institution is greatly impaired if attorneys choose to assault the integrity of the process and the individuals who are called upon to make decisions”).

Ky. Bar Ass’n v. Heleringer, 602 S.W. 2d 165, 168 (Ky. 1980). Notably, the attorney’s comment that the ex parte hearing was “highly unethical and grossly unfair” was, at most, an overstatement. Further, the attorney was not engaged in the underlying case, but worked for Right to Life and was politically interested in the outcome.

Id.

In re Terry, 271 Ind. 499, 502 (1979); Cobb, 445 Mass. at 471 (2005) (same, quoting Terry); Holtzman, 78 N.Y.2d at 192 (same, quoting Terry); Graham, 453 N.W.2d at 322 (same, quoting Terry).

314 U.S. 252 (1941).
validity of a California court’s contempt citation against a newspaper and a non-attorney individual for publications made regarding a pending case. One of the justifications proffered by California was the possibility that the publications might create disrespect for the judiciary. The Court gave that interest precisely zero weight.\textsuperscript{154} The Court eloquently explained:

\begin{quote}
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.\textsuperscript{155}
\end{quote}

Similarly, in \textit{Landmark Communications}, Virginia offered as justifications for its statute the interests in preserving unwarranted injury to reputation of individual judges as well as preserving the integrity of the entire judiciary in the eye of the public.\textsuperscript{156} Citing \textit{Sullivan} and \textit{Garrison}, the Supreme Court explained that Virginia had “an interest in protecting the good repute of its judges, \textit{like that of all other public officials},” but that such an interest was “\textit{an insufficient reason for repressing speech} that would otherwise be free.”\textsuperscript{157} The Court then went further and explained that “the institutional reputation of the courts, is entitled to \textit{no greater weight} in the constitutional scales” than the reputation of government officials. The Court concluded: “\textit{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 \textit{spared the criticism to which in a democracy other public servants are exposed}.”\textsuperscript{158}

\textsuperscript{154} \textit{Id.} at 270–71.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} 435 U.S. 829 (1978).
\textsuperscript{157} \textit{Id.} at 841–42 (emphasis added; internal quotation marks omitted).
\textsuperscript{158} \textit{Id.} at 842 (emphasis added; internal quotation marks omitted). This statement also contradicts the worshipful rhetoric of the Florida and Michigan Supreme Courts. See \textit{In re Shimek}, 284 So.2d 686, 690 (Fla. 1973) (reaffirming “the essentiality of the chastity of the goddess of justice”); Grievance Administrator v. Fieger, 719 N.W. 2d 123, 144 (Mich. 2006) (attorneys cannot denigrate courts, which “gave [the attorney] the high privilege, not as a matter of right, to be a priest at the altar of justice”) (internal quotations omitted).
The Supreme Court’s flat denial of any validity in repressing speech solely to preserve the integrity of a specific court or the judicial system in both Landmark Communications and Bridges directly contradicts the core rationale for punishing attorney speech critical of the judiciary. Courts that impose discipline on attorneys often discount Bridges on the basis that it concerns speech by lay persons and the press. But Bridges is precisely on point as to the appropriate constitutional weight to be given the state’s interest in punishing and chilling speech as a method for maintaining public respect for the judiciary.

Further, the rejection of Bridges and the other contempt cases as being irrelevant to the question of disciplining attorney speech partakes of historic irony. The constitutional standard eventually adopted in Bridges and the other contempt cases is adopted from earlier caselaw as to the appropriate scope of the federal contempt statute. Notably, that contempt statute was adopted in response to, and in order to curtail future instances of, punishment of an attorney for criticizing the decision of a court. In 1831, James H. Peck, a United States District Court Judge for the District of Missouri, used the contempt power to imprison attorney Luke E. Lawless for one day and to suspend Lawless from the practice of law for eighteen months. The reason for the contempt citation and suspension was a newspaper article that Lawless wrote in which he criticized Peck’s decision in a case Lawless had argued before Peck. Judge Peck was impeached as a result of punishing Lawless, which punishment the Articles of Impeachment

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159 See, e.g., In re Cobb, 445 Mass. 452, 467 (2005); In re Evans, 801 F.2d 703, 706 (4th Cir. 1986); In re Frerichs, 238 N.W.2d 764, 768 (Iowa 1976).

160 See Nye v. United States, 313 U.S. 33, 44-45 (1941) (interpreting federal contempt statute); Bridges, ; Bridges v. California, 314 U.S. 252, 267 (1941) (looking to Nye in determining if use of contempt power was unconstitutional); Craig v. Harney, 331 U.S 367, 372-73 (1947) (same); see also id. at 387-89 (Frankfurter, J., dissenting) (noting that Nye interpreted the federal contempt statute).

161 See Stansbury, REPORT OF THE TRIAL OF JAMES H. PECK, 52 (1833) (quoting the articles of impeachment). Judge Peck published his opinion in a newspaper, and Lawless published a response noting eighteen legal errors on the opinion. When Lawless published his article, the underlying case was on appeal to the United States Supreme Court. See id. at 1, 50-51.

162 See id. at 52 (quoting the articles of impeachment).
declared was an “abuse of judicial authority” and a “subversion of the liberties of the people of the United States.”

In the Senate proceedings, soon-to-be President James Buchanan, who “had charge of the prosecution of Judge Peck,” argued that Peck had in essence punished Lawless for libel of the judiciary without a jury, explaining,

> To allow the judiciary to dispense with this tribunal [a jury], whenever any publication has been made affecting the dignity or the official conduct of a judge, is to create a privileged order of men in the state whose will is law, and who are not only judges in their own cause [i.e., when the judges are the victims] of the guilt of the accused, but also of the extent of his punishment. Such a power, so far as it goes, partakes of the very essence and rankness of despotism.

Although not convicted, the impeachment trial of Judge Peck led to the enactment of the current federal contempt statute. As Buchanan stated, “whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim.”

Thus, the constitutional standard adopted in *Bridges* et al. had its germinal seed in the idea that the judiciary cannot use its power to punish members of the bar (without a jury) to quell attorney speech critical of the bench. Unfortunately, courts have used the disciplinary process to achieve this same end.

But beyond historic justifications and Supreme Court precedent, there are several reasons, vital to democracy itself, why the specific interest of preserving public confidence in the integrity of judiciary (which, as discussed below is another way to say preserving judicial reputation) cannot of itself justify the suppression of speech. First, the interest sounds in the constitutionally forbidden idea that dangerous ideas (such as that the judiciary may be biased, impartial, or incompetent) must be suppressed to preserve society. Second, the interest is

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163 *Id.*
164 *Nye*, 313 U.S. at 46.
166 *See Nye*, 313 U.S. at 44-45 (explaining that the Act of March 2, 1831, arose in response to the “impeachment proceedings against James H. Peck, a federal district judge, who had imprisoned and disbarred one Lawless for publishing a criticism of one of his opinions in a case which was on appeal”).
167 *Id.* at 46.
premised on keeping the public in ignorance as to the actual performance of government officials, an idea completely contrary to the essential workings of our American government. Finally, the promotion of this interest enhances self-entrenchment by members of the judiciary, both those that are elected and those who can only be removed for serious cause, and correspondingly lessens the electoral and sovereign power of the people.

A. Suppressing the Dangerous Idea

The theory of the cases that punish attorney speech impugning judicial integrity is that *Sullivan* and *Garrison* should not apply because of the state interest in preserving the public perception of and confidence in an impartial judiciary. The reason why public perception and confidence must be maintained—apparently more so than for the legislative and executive branches who remain subject to the *Sullivan* standard—is that if the judiciary (or individual members of it) are perceived by the public to be impartial or to abuse power then there will be a corresponding loss in respect for the rule of law and for judicial decisions. Judicial decisions will lose their power and people will stop obeying them.

The idea, therefore, that the judiciary (whether as individual members or on the whole) may lack qualifications of integrity, impartiality, or competence is a “dangerous” idea. That is, it is an idea that is subjected to greater regulation, suppression, and chilling because of the effect that the idea itself may have on the public. Further, the idea appears to be much more dangerous when espoused by attorneys, who are perceived as knowing what the judiciary is and should be.

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168 See supra notes 148—52 and accompanying text.
169 See supra note 149 and accompanying text.
170 See, e.g., *In re Shimek*, at 688 (Fla. 1973) (stating, post-*Sullivan*, that “[o]nce the integrity of a judge is in doubt the efficacy of his decisions are [sic] likely to be questioned”). No rationale is offered in the caselaw why this is more true for the judiciary than the other branches of government. If the people begin to believe that their police are corrupt, they will likely lose their confidence in and perhaps feel less of a need to obey the police. Further, if the people believe the legislature has been bought off in making laws, the people may feel less of a need to follow and obey those laws. While political impartiality may (or may not—see *Republican Party v. White*, 536 U.S. 765 (2002)) be an attribute unique to the judiciary, integrity and competence in performing one’s office is universally needed in government.
doing. Alternatively, and more cynically, if attorneys are quelled from making the assertion, it will be made less frequently and by someone who can be discounted as less informed.

Our national experience of two red scares has concluded with the recognition that speech cannot be suppressed constitutionally on the basis that it constitutes allegedly “dangerous ideas.” But states have failed to recognize that they are suppressing an idea for its dangerous impact when they use the terms “preserving the public perception of judicial integrity” as justifying the punishment of speech. As John Hart Ely explained:

[R]estrictions on free expression are rarely defended on the ground that the state simply didn’t like what the defendant was saying; reference will generally be made to some danger beyond the message, such as a danger of riot, unlawful action, or violent overthrow of the government.

Ely contends that asserted state interests “will always be unrelated to [suppression of] expression” and so one must examine the “causal connection” between the ultimate harm and the suppression or punishment of speech. Attorneys are punished for impugning judicial integrity because the public’s belief in the impartiality and integrity of the court system cannot be tarnished lest people cease to respect the judiciary and follow their decisions. The causal connection is based entirely on the communicative impact of the message on the public.

This causal connection is enhanced by the fact that the restriction is merely on attorneys.

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172 See John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1496 (1975) [hereinafter Ely, Flag Desecration]. In Democracy and Distrust, Ely contends:
Allowing people to assault our eardrums with outrageous and overdrawn denunciations of institutions we treasure will inconvenience, annoy, and infuriate us on occasion, even set us to wondering about the stability of our society: that’s exactly what such messages are meant to do, and exactly the price we shouldn’t think twice about paying. By silencing such people we may be protecting something, but we certainly won’t be protecting “the American way.”
Id. at 116.
173 See Ely, Flag Desecration, supra note 172, at 1497. Ely elaborates: “If, for example the state asserts an interest in discouraging riots, the Court should ask why that interest is implicated in the case at bar. If the answer is (as in such cases it will likely have to be) that the danger of riot was created by what the defendant was saying, the state’s interest is not unrelated to the suppression of free expression. . . .” Id.
174 See supra notes 148–52 and accompanying text.
One of the major justifications proffered by courts in avoiding the *Sullivan* standard is a belief that greater restrictions on attorney speech are needed because attorneys “possess and are perceived by the public as possessing, special knowledge of the workings of the judicial branch” and thus “[c]ritical remarks from the Bar [] have more impact on the judgment of the citizen than similar remarks by a layman.” Again, the concern is one of communicative impact, or as Geoffrey Stone phrases the problem, the regulation is based on “a fear of how people will react to what the speaker is saying.” The fear of the impact on people is enhanced by the credentials of the messenger. Not only will the public receive disparaging statements about the judiciary, but, because the statements come from attorneys, the public may believe them.

The fact that the idea itself is what is being repressed is further underscored by the viewpoint-discriminatory nature of the regulation. The punishment of attorneys for speaking about courts in a manner that lessens the respect owed the judiciary or for impugning their integrity is aimed not merely at the *content* of the expression (statements about the judiciary), but at the particular *viewpoint* expressed (criticism or derogation of members of the judiciary). No restriction is placed on the opposing viewpoint. Attorneys are free to pronounce embellished praises of courts and judges, and to do so in every forum—in briefs, to the media, in letters, or in pamphlets. Thus, if an attorney after receiving a decision in favor of her client states that the judge fairly decided the case and disregarded any political influences, no punishment can be brought. If, however, her opponent states to the press that the judge acted unfairly and was politically motivated—punishment could well be expected.

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175 Fla. Bar v. Ray, 797 So.2d 556, 560; see also, e.g., In re Pyle, 283 Kan. 807, 831 (2007) (“Precisely because lawyers are perceived to have special competence in assessing judges, the public tends to believe what lawyers say about judges, even when lawyers speak inappropriately or make claims about which they are uncertain.”).

Viewpoint-based restrictions have been consistently declared unconstitutional.¹⁷⁷ Among the many problems with viewpoint-based restrictions is that they distort public debate by allowing the public to hear only one side of an issue. We, as a people, should “be extremely skeptical about the claims of the judiciary to be competent to act as some sort of Consumer Product Safety Commission for [the] marketplace” of ideas—especially when the viewpoint being suppressed regards defects in the judiciary.¹⁷⁸ Distortion of public debate is particularly problematic whenever it regards the qualifications and integrity of government officials—an area that requires “uninhibited, robust, and wide open” debate. Consequently, as explored below, the distortion is not merely the distortion of debate, but the distortion of democracy.

B. Coerced Public Ignorance and Democracy

Perhaps the greatest problem with suppressing attorney speech critical or disparaging of the judiciary is that the public loses its right to receive that information. Again, the premise underlying these cases is that public confidence in the judiciary must be preserved, and the manner of preservation is suppressing speech significantly beyond that allowed by *Sullivan* for speech regarding government officials. In essence, public confidence is preserved through public ignorance. Government-coerced public ignorance regarding the qualifications of public officials is antithetical to democracy. It deprives the citizen of the ability to self-govern.¹⁷⁹ It deprives American people, who possess the ultimate sovereignty over government, to exercise their power to respond to or correct government abuses. It eliminates the checking power of the people, and denies them the right to define misconduct. To the extent that they are left in the dark, the people

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¹⁷⁸ Paul LeBel, *supra* note 55. LeBel made this statement assuming that *Sullivan* would provide the applicable standard, which standard he believes “offers insufficient protection for the critic of government.”

¹⁷⁹ “Popular choice will mean relatively little if we don’t know what our representatives are up to.” Ely, DEMOCRACY AND DISTRUST, 125.
cannot exercise their democratic power and right to govern themselves.

The Supreme Court has recognized in the context of commercial speech the separate speech right granted people to receive information, including information from attorneys. In *Virginia Board Pharmacy*, for example, the plaintiffs were the listeners and not the speakers. The Court held that even though the State could regulate the dissemination of the prescription drug information at issue, the First Amendment protection “is enjoyed by the appellees as recipients of the information, and not solely, if at all,” by the speakers. Thus even if courts could constitutionally restrict attorney speech on the theory that attorneys agree to such regulation as a condition of their admittance to the bar, that would not eliminate the right and need of the public to receive this information.

Further, as noted above, it is the very class of people who have the knowledge and exposure to comment on judicial operations whose speech is restricted. While this fact has been offered as a justification for such restrictions (e.g., “[p]recisely because lawyers are perceived to have special competence in assessing judges, the public tends to believe what lawyers say about judges”), the quandary with this justification is why it fails to cut the other way and provide for greater rather than less protection. The fact that lawyers have the education and training to recognize, understand, and articulate problems with the judiciary, and are actually regularly exposed to and experiencing those problems as they bring their clients’ cases before judges, makes attorneys more expert and able to comment on the judiciary and on judicial qualifications. This is precisely the kind of information that the public has a right and need to receive in order to make informed decisions about the judiciary, to fulfill their self-governing role, and check

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judicial abuses. As Justice Goldberg explained: “The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.”\footnote{New York Times v. Sullivan, 376 U.S. 254, 304 n. 5 (Goldberg, J., concurring); see also id. at 281 (“It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.”)} But by silencing all lawyers, the courts have denied the public the opportunity to gain an informed opinion regarding deficiencies in the judiciary from those who know (because of education, training, and exposure to actual judges)—leaving relatively few other effective critics in that wake.\footnote{As the Sullivan Court observed: “Criticism of [] official conduct does not lose its constitutional protection merely because it is effective criticism.” Id. at 273.} The Supreme Court of Oklahoma is the only court to examine these ideas and to recognize the free speech interests of the recipients in obtaining informed and educated criticisms about the judiciary from attorneys.\footnote{Okla. Bar Ass’n v. Porter, 766 P.2d 958, 968–69 (Oklahoma 1988). The Oklahoma Supreme Court explained:}

The general rule seems to be one of keeping the public in ignorance for the good of society. But such paternalistic arguments do not even withstand scrutiny for commercial speech—let alone in the area of core political speech about the qualifications and integrity of governmental officials. As the Supreme Court has commented in the area of restrictions on advertising, “on close inspection, it is seen that the State’s protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance.”\footnote{Va. State Bd., 425 U.S. at 769.} The Court in \textit{Bates v. State}
Bar of Arizona\(^{188}\) applied this same reasoning as to lawyer advertising (the restrictions on which were based on preserving respect for the legal profession), explaining that “we view as dubious any justification that is based on the benefits of public ignorance” as “the preferred remedy is more disclosure, rather than less.”\(^{189}\) As the Virginia Board Court had explained, state interests that, at heart, are aimed “at keeping the public in ignorance” not only fail to support the suppression of speech, but demonstrate the need for protection of the speech sought to be restricted.\(^{190}\) “It is precisely this kind of choice, between the dangers of suppressing information and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”\(^{191}\)

Many courts have argued that the restriction on attorney speech is appropriate because the attorney can always file a complaint with the relevant judicial disciplinary authority if there is a real problem.\(^{192}\) But this alternate forum is wholly inadequate for a number of reasons.\(^{193}\) Perhaps the most important reason being that, in every state, complaints filed with the judicial disciplinary authority are confidential—at least until a formal charge is filed, and sometimes are confidential until discipline is ordered by the state supreme court.\(^{194}\) Thus the use of this forum continues to keep the public in ignorance as to assessments of and information regarding the

\(^{189}\) Id. at 375.
\(^{191}\) Id.; see also Bates, 433 U.S. at 365 (quoting Va. State Bd.).
\(^{192}\) See Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962, 964 (Utah 2007) (stating that attorneys “faced with genuine judicial misconduct” have “appropriate avenues” for complaint, including “a separate proceeding before the Judicial Conduct Commission”); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (stating that if “had reason to believe in good faith” that improper conduct “then the proper forum in which to have made his claim was the Judicial Retirement and Removal Commission as provided in our Constitution”); In re Wilkins, 777 N.E.2d 714, 717 (Ind. 2002) (“Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission.”); Rameriz v. State Bar of California, 28 Cal. 3d 402, n.13 (Cal. 1980); In re Westfall, 808 S.W.2d 829 (Mo. 1991); In re Evans, 801 F.2d 703 (4th Cir. 1986); In re Lacey, 283 N.W.2d 250 (S.D. 1979).
\(^{193}\) As a doctrinal point, an ample alternate forum only cures a content-neutral restriction on speech, making such restriction a valid time, place, and manner regulation. See United States v. Grace, 461 U.S. 171, 177 (1983); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). As noted, see supra note 177 and accompanying text, the punishment of attorney speech critical of the judiciary is not only content-based, but is moreover viewpoint-based. Thus under normal First Amendment doctrine, it cannot be saved by the provision of an ample alternate forum.
judiciary. Further, this forum does not avoid the problem of authoritative selection and distortion of public debate. Not all complaints are made public, but only those that the disciplinary authority determines warrant official investigation or punishment. Consequently, the people do not have the opportunity to perform their checking function and determine what constitutes misconduct—as the people do not have access to the complaint unless and until a government authority has passed on the validity and seriousness of the alleged misconduct. Thus the people are denied their ultimate sovereignty as the censorial power remains “in the government over the people,” rather than where it belongs, “in the people over the Government.”

Certainly complaints against judges, even if they do not warrant discipline in the eyes of the state, would be relevant for citizens in evaluating the effectiveness and competence of the judiciary. If the citizenry are denied access to such information, they cannot invoke democratic corrections thereto. Moreover, attorneys may have opinions regarding members of the bench that would not be of sufficient magnitude that the attorney would file a complaint against the judge, but again would be relevant to the public’s exercise of their democratic responsibilities.

It is probably a truism that attorneys will be much more hesitant to file complaints with a judicial disciplinary authority than they would to express opinions as to judges, their competence, and motivations in ordinary public fora. An attorney may say, and have reason to believe, that she thinks a decision of a court is politically motivated, but may be unlikely to file a complaint with a judicial disciplinary authority on that basis, particularly in those states where such complaints must be verified, notorized, or otherwise sworn under penalty of perjury as to their truth. This method of allowing speech solely through the filing of official complaints

195 See supra notes 65–66 and accompanying text.
197 Connecticut, Idaho, Indiana, Michigan, Nevada, New Mexico, Rhode Island, Tennessee, West Virginia, and Wyoming all require that complaints filed with their judicial conduct authority be notorized and verified,
cannot be squared with the prohibition on “rule[s] compelling the critic of official conduct to
guarantee the truth of all his factual assertions”198 or with the uninhibited, robust, wide-open
debate regarding government officials envisioned by the Sullivan Court as necessary to our
American form of government.199 Indeed, it grinds against the underlying premise of Sullivan
“[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the
freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’”200

Further, in both Sullivan and Garrison, the Court expressly recognized both the
importance and probability that people would attribute motives to actions of government
officials. Yet, in a number of cases, attorneys have been punished precisely because the attorneys
went beyond stating the facts (which they did truthfully) and attributed possible motives to the
actions of the court.201 However, The Sullivan Court contemplated that included in the speech it
was protecting would be “[e]rrors of fact, particularly in regard to a man’s mental states and
processes, [which errors] are inevitable.”202 In Garrison, the Court explained:

The public-official rule protects the paramount public interest in a free flow of
information to the people concerning public officials, their servants. To this end,
anything which might touch on an official’s fitness for office is relevant. Few
personal attributes are more germane to fitness for office than dishonesty,
malfeasance, or improper motivation . . . .

Combined, Sullivan and Garrison contemplate that speech regarding the motivation of
government officials is one of the most important subjects to be discussed in free debate and
disseminated to the public, but is also a topic regarding which “errors of fact . . . are inevitable.”

at test ing to the truth of the allegations. Georgia and Maryland specifically require that complainants sign under
penalty of perjury. This information can be found on the individual websites of the various states’ commissions,
which websites are listed by the American Judicature Society at http://www.ajs.org.

198 Id. at 279.
199 Id. at 270.
200 Id. at 271-72.
201 Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962 (Utah 2007); In re Wilkins, 777 N.E.2d 714
(Ind. 2002); Idaho State Bar v. Topp, 129 Idaho 414 (1996); In re Antanga, 636 N.E.2d 1253 (Ind. 1994); In re
Raggio, 87 Nev. 369 (1971).
202 Sullivan, 376 U.S. at 272.
This is one of the reasons why the subjective *Sullivan* test for punishing speech about
government officials is so important. Generally, people do not really know what motivates
others, but improper motivation is an important factor in measuring the fitness of government
officials. Thus, either the discussion of motivation must be removed from the table of free debate
by punishing it whenever it is inaccurately ascribed\(^2^0^3\) or it should not be punished unless a
person knows it to be false or subjectively entertains doubts as to its truth or falsity.

**C. Judicial Self-Entrenchment**

As noted above, the severity of sanctions imposed on attorneys and the objective
standard offered, requiring the attorney to prove the truth of the assertion, has a chilling if not
freezing effect on attorney speech critical of the judiciary. Further, as noted, attorneys are in the
best position to know of judicial incompetence and abuse and have the training and education to
aptly recognize and criticize such behavior. Attorney discipline thus silences the most effective
critics of the judiciary. In *Democracy and Distrust*, John Hart Ely argued that a representative
government malfunctions, not when substantive ends are achieved with which one may disagree,
but “when the *process* [of representative government] is undeserving of trust.”\(^2^0^4\) One way that
such malfunction occurs is when “the ins are choking off the channels of political change to
ensure that they will stay in and the outs will stay out.”\(^2^0^5\) In other words, democratic

\(^2^0^3\) An additional wrinkle with punishing attributions of motivation is illustrated by the *Topp* case. In *Topp*,
129 Idaho 414, the parties stipulated to certain facts, including that the judge would testify, if called, and say that his
decision was not politically motivated. The Court took this stipulation as establishing that the decision in fact was
not politically motivated, and not as an admission that (as would any judge) the judge would deny political
motivation. *Topp* presented several facts from which political motivation could certainly be inferred, but the Court
took the stipulated testimony of the judge as the definitive answer as to the judge’s ultimate motivation and *Topp*
was consequently disciplined for his incorrect attribution.

Even if the judge honestly testified that he was not politically motivated, that does not in fact answer the
question as to what motivated the judge. The problem with punishing speech as to potential motivations for actions
is that even the person acting often cannot pinpoint or cannot recognize what actually motivated him. Try as one
might to be completely objective, it is probably safe to say that everyone is biased in some way or another. And
sometimes a person is most biased when she cannot even recognize the bias.


\(^2^0^5\) *Id.*
malfunction occurs when those in government positions use their power to entrench themselves.

An example provided by Ely is the problem of allowing the legislature to manipulate voting rights. As Ely notes, voting is “essential to the democratic process” and its “dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo.”206 In like manner, the judiciary has authority to punish attorneys, their most likely and effective critics. Public debate as to the qualifications, integrity, and impartiality of the judiciary is essential to the democratic process—which is particularly obvious where the judiciary is elected or retained by election, but is also true where the judiciary is appointed—for institutional checks will generally only be invoked as a result of public insistence.207 As with Ely’s example, the punishment of speech critical of the judiciary “cannot safely be left to [the judiciary], who have an obvious vested interest in the status quo” and in preserving their own reputations. To the extent that public debate is distorted to be rid of attorney criticism and disparagement of particular judges, the populace will not be aware of the problem and will not vote them out, if the judges are elected, or, if not elected, call upon the people’s elected legislative and executive officials to investigate and remove offending judges.

Indeed, because it is the judiciary who punishes the attorney, the situation is more suspect than the scenario presented in Sullivan or Garrison. In Sullivan the punishment for offensive speech had to come from a jury, and in Garrison, the punishment for criminal defamation of the judiciary came from the executive branch. But in the scenario of attorney discipline, the punishment is made by the branch being criticized, which has an obvious interest in keeping the ins in and in avoiding negative public exposure.

206 Id. at 117.
207 See Blasi, supra note 46, at 539.
An example can be found in *In re Raggio*. William J. Raggio was an attorney of excellent reputation, who “was prominently mentioned as a candidate for either governor or United States senator” for Nevada. Raggio made a statement in an interview with the press about a decision of the Nevada Supreme Court to rehear a death penalty case he had prosecuted, and called that decision “most shocking and outrageous” and “judicial legislation at its very worst.” Raggio was disciplined for his statements. The Nevada Supreme Court revealed its concern with Raggio’s comments. Noting Raggio’s prominence, the Court related:

Maximum dissemination was given to his views. His initial comments were frequently repeated in the press and on television during the weeks and months to follow. *The public was quick to respond. This court became the center of controversy.* Essential public confidence in our system of administering justice may have been eroded.

Certainly the Nevada Supreme Court did not appreciate being “the center of controversy”—which is precisely why they should not be the entity punishing such speech, or at the very least should not be allowed to carve out an exception to the *Sullivan* rule for itself.

But even the protection promised in *Sullivan* may not be enough. Justice Goldberg argued that the *Sullivan* standard was insufficient to protect critics of the government because of the possibility of “friendly juries” who would protect government and find that the requisite mental state had been met. Thus Goldberg argued that “the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.”

The possibility of a government-friendly jury is hard to actually quantify. But in cases involving attorney

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208 87 Nev. 369 (1971).
209 *Id.* at 371.
210 *Id.*
211 *Id.* (emphasis added).
213 *Id.* at 298 (Goldberg, J., concurring).
discipline for statements regarding the judiciary, Goldberg’s hypothetical problem of a judiciary-friendly “jury” is a reality. As Justice Boehm of the Indiana Supreme Court stated in a dissenting opinion, “[t]his Court acts as judge, jury, and appellate reviewer in a disciplinary proceeding,” and, “[w]here the offense consists of criticism of the judiciary, we become the victim as well.”

The problems of self-entrenchment do not involve solely the malfunction of the democratic process and the ins staying in. Rather, self-entrenchment and the protection of one’s own dignity leads to additional abuses of power made in pursuit of that end. Again, as Justice Goldberg argued in his Sullivan concurrence:

The American Colonists were not willing, nor should we be, to take the risk that “[m]en who injure and oppress the people in their administration [and] provoke them to cry out and complain” will also be empowered to “make that very complaint the foundation for new oppressions and prosecutions.”

Unfortunately, Goldberg’s scenario has occurred on a few occasions in the context of punishing speech critical of the judiciary. In In re Antanga, Judge Donald C. Johnson rescheduled a hearing in a criminal case for a day that the judge knew defense attorney Jacob A. Antanga (who was African-American) could not attend because Antanga had to appear in court in another county at that same time. The judge then held Antanga in contempt for missing the hearing, had Antanga arrested at his office and jailed, had Antanga brought before the court and forced him to defend his client while Antanga was dressed in prison clothes. Antanga was interviewed by an editor of an ACLU newsletter about the episode. Antanga told the editor regarding Judge Johnson, “I think he is ignorant, insecure, and a racist.” Antanga was suspended from the

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214 In re Wilkins, 777 N.E.2d 714, 720–21 (Ind. 2002).
215 Sullivan, 376 U.S. at 301 (Goldberg, J., concurring).
216 In re Antanga, 636 N.E.2d 1253, 1255 (Ind. 1994).
217 Id. at 1255-56.
218 Id. at 1256
practice of law for thirty days for this statement, which allegedly violated MRPC 8.2.\textsuperscript{219} But Indiana never proved Antanga’s statement to the press was false (that Johnson was not ignorant, insecure, and a racist) and indeed excluded as irrelevant Antanga’s proffered testimony from witnesses in support of his statement.\textsuperscript{220} In suspending Antanga, the Supreme Court of Indiana explained that “the judicial institution is greatly impaired if attorneys choose to assault the integrity of the process and the individuals who are called upon to make decisions” and thus “[t]his court must preserve the integrity of the process and impose discipline.”\textsuperscript{221} The Indiana Supreme Court apparently believed that punishing speech about Judge Johnson and an opinion regarding him for what was clearly outrageous judicial conduct is the best way to “preserve the integrity of the process” rather than fixing or addressing the blatant underlying abuse of power. Indeed, the Indiana Supreme Court downplayed the extreme nature of Judge Johnson’s conduct, by characterizing it as “not represent[ing] contemporary jurisprudence in this state” and as being a “questionable practice.”\textsuperscript{222} While using understatement regarding Judge Johnson’s behavior, the court cracked down on Antanga and suspended him from the practice of law. The scenario is precisely along the lines predicted by Justice Goldberg in Sullivan. Antanga was “injure[d] and oppress[ed]” by Judge Johnson and then when Antanga spoke “out and complain[ed],” “that very complaint [became] the foundation for new oppressions and prosecutions.”

Other cases follow similar lines where a judge does something that cannot be condoned, an attorney complains about it, and the attorney is severely sanctioned for his speech, while the disciplining authority downplays the conduct of the criticized judge.\textsuperscript{223} Thus the manner by

\textsuperscript{219} Id. at 1257.
\textsuperscript{220} See id.
\textsuperscript{221} Id. at 1258.
\textsuperscript{222} Id. at 1257.
\textsuperscript{223} In In re Glenn, 236 Iowa 1233 (1964) an attorney was punished for circulating a leaflet that questioned what was behind a rather strange set of circumstances regarding the arrest and forfeiture of bail bonds of 79 people for patronizing a bootlegging establishment in violation of a city ordinance while letting the establishment out on a
which some courts have “preserved the integrity” of the judiciary is to sugar-coat judicial abuses and errors to make them more palatable, while at the same time punishing attorney speech that amplifies it. This in itself is an abuse of judicial power. The Constitution does not condone such a method—“silence coerced by law” and “authoritative selection”—as a proper means of improving the public perception of judicial integrity. Acknowledging wrongs and addressing them would, by definition, improve “integrity.” For “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”\footnote{New York Times v. Sullivan, 376 U.S. 254, 270 (1964).} Perhaps public perception of judicial integrity (as opposed to integrity itself) is more readily obtained by punishing critical speech, but the First Amendment forbids governmental resort to that option.\footnote{See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350, 365 (1977) (“The choice between the dangers of suppressing information and the dangers arising from its free flow [is] seen as precisely the choice ‘that the First Amendment makes for us.’”).}

IV: Purported Rationales for Punishing Speech Do Not Withstand Scrutiny

As demonstrated, prohibiting attorney speech critical to the judiciary is antithetical to democracy and, as a viewpoint-based prohibition on speech regarding the qualifications of government officials is patently unconstitutional under \textit{Sullivan} or any regular Speech Clause._

\textit{Sullivan} or any regular Speech Clause _
analysis. Nevertheless, state and federal courts have imposed punishment of attorney speech critical of the judiciary based on the following arguments (none of which withstand scrutiny): (1) the Supreme Court has exempted attorney speech critical of the judiciary from the strictures of *Sullivan*; (2) restrictions on attorney speech are a constitutional condition imposed on attorneys in return for granting attorneys the privilege of practicing law; (3) the interests served by the tort of defamation are different from the interests served by imposition of attorney discipline.

**A: The Alleged Exceptions found in Bradley, Sawyer, and Snyder**

The Supreme Court has decided a few cases where the issue of discipline for impugning judicial integrity was directly raised, but in each, the Supreme Court failed to address the constitutional question. Unfortunately, the Supreme Court’s avoidance of the constitutional issue has made possible state court interpretation of the cases as creating an exception to the general constitutional rules (such as *Sullivan*) and thus as granting the states wide latitude to punish attorney speech that impugns judicial integrity.

1. **The Shifting Legal Landscape.** One of the fundamental problems with state court analysis of attorney speech is the consistent failure of courts to reanalyze precedent in light of major shifts in the legal landscape, most notably incorporation of the First Amendment, but equally important, the handing down of major decisions such as *Sullivan* and *Garrison*, and other cases that established that rules of professional conduct could violate the First Amendment.

One of the cases regularly cited into the 21st Century as authorizing punishment of attorney speech critical of the judiciary is *Bradley v. Fisher*. In *Bradley*, the Court declared that, when admitted, attorneys take upon themselves the obligation “to maintain at all times the respect due to courts of justice and judicial officers,” which “includes abstaining out of court.

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from all insulting language and offensive conduct toward the judges personally for their judicial acts.” While arguments can be made that the statement is dicta, the biggest problem with citing *Bradley* as answering a First Amendment challenge is that it was decided in 1871 when the Fourteenth Amendment was less than a decade old. While the Fourteenth Amendment technically existed at this time, the doctrine of incorporation of the Bill of Rights as prohibitions on state authority had not been announced and would not be recognized for more than thirty years, and the First Amendment would not be incorporated as a limitation on state government until 1925—over 50 years later. The *Bradley* case thus could have nothing authoritative to say regarding the First Amendment’s limitation on state power to regulate attorney speech.

The legal landscape problem pervades this area because the first regulations on attorney conduct were drafted by the ABA in 1908—again, well before incorporation of the First Amendment. While the ABA subsequently changed its rules to conform with *Sullivan*, states have continued to cite their older caselaw based on earlier regulations. Under the 1908 Canons of Professional Ethics an attorney had a duty of respect and courtesy to the judiciary and was advised to “submit his grievances to the proper authorities” for a “serious complaint” about a

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227 *Bradley*, 80 U.S. at 355 (emphasis added).
228 See, e.g., Westfall, 808 S.W.2d at 845 (Blackmar, J., dissenting). As Justice Cavanagh of the Michigan Supreme Court explained in his dissent in *Fieger*:

Even a cursory reading of Bradley reveals three important facts. First, the attorney in *Bradley* criticized the judge in the courtroom in the context of litigation. Second, the entire *Bradley* opinion was devoted to whether the judge, who thereafter struck the attorney from the rolls, was entitled to [judicial] immunity for the act. Third, the statement the majority quotes was quintessential dicta: the Court decided that the judge was entitled to absolute immunity for his act, and thus, no commentary on the attorney’s behavior was necessary or relevant to the holding.

*See Fieger*, 719 N.W.2d at 174 (Cavanagh, J., dissenting) (emphasis in original).

229 *Bradley*, 80 U.S. at 336. Indeed, *Bradley* concerns a spat between a judge and an attorney during the trial of John H. Suratt for the murder of Abraham Lincoln.


232 In similar fashion, the California Supreme Court, post-*Garrison*, relied on precedent from its own court from 1894 as its authority for rejecting the proposition that “‘outrageous’ and ‘unwarranted’ statements concerning a justice of this court were protected by free speech considerations.” Ramirez v. State Bar of Cal., 28 Cal. 3d 402 (Cal. Sup. Ct. 1980) (quoting *In re Philbrook*, 105 Cal. 471 (Cal. 1894)).
judge. If the attorney did so, “but not otherwise, such charges [against the judiciary] should be encouraged and the person making them should be protected.” Ethical Consideration 8-6 found in the Model Code of Professional Conduct admonished attorneys to “be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms” of the judiciary. These regulations became entrenched in the caselaw prior to the adoption of the Model Rules of Professional Conduct. And while MRPC 8.2 is the governing rule, the language of Ethical Consideration 8-6, like Bradley, surfaces as authoritative in cases decided in the 21st Century.

2. Stretching Authority. Another stumbling block in this area is reliance on In re Sawyer and In re Snyder as creating an exception to regular constitutional rules and as allowing punishment of attorney speech contrary to Sullivan, when, in fact, neither the Sawyer nor Snyder Court addressed—and thus could not have made an exception for—the constitutional question.

In In re Sawyer, which is paradoxically set in the context of a trial of four alleged communists under the notorious Smith Act, defense attorney Harriet Bouslog Sawyer held a public meeting during the pendency of the trial. Sawyer gave a speech where she told “about some rather shocking and horrible things that go on at trial.” Noting the gross inequities generally concomitant with Smith Act prosecutions, Sawyer declared “there’s no such thing as a fair trial in a Smith Act Case”—“all the rules of evidence have to be scrapped or the government can’t make a case.” Sawyer provided examples from the trial, explaining that hearsay rules were not applied, and that “a federal judge sitting on a federal bench permits Crouch [a key witness at the trial] to tell what was said when [one of the criminal] defendant[s] was five years

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233 MODEL CODE OF PROF’L RESPONSIBILITY, EC 8-6.
234 See In re Arnold, 274 Kan. 761, 767 (2002) (quoting language from former EC 8-6, even though 8.2 is the governing rule); In re Simon, 913 So.2d 816, 824 (La. 2005) (same).
236 Id. at 641.
237 Id. at 644.
old. There’s no fair trial in the case. [T]hey just make up the rules as they go along.” Sawyer was suspended from the practice of law for one year for her remarks. The basis for the suspension was that Sawyer “impugned the integrity of the judge presiding” in the Smith Act case, and thus “create[d] disrespect for the courts of justice and judicial officers generally.”

Sawyer’s suspension was reversed by the Supreme Court in a plurality opinion. Justice Brennan announced the judgment of the Court, but his opinion only garnered four votes. Justice Stewart concurred solely in the result reached by Justice Brennan, writing his own separate opinion, and Justice Frankfurter wrote a dissenting opinion for four justices.

Justice Brennan’s opinion was narrowly decided on the facts and expressly avoided any treatment of the constitutional question of whether Sawyer’s speech was protected by the First Amendment. Because the Hawaii Bar failed to discipline Sawyer on the basis of obstructing justice or violating any sort of trial publicity rule (such as Canon 20 of the Canons of Professional Ethics, applicable in Hawaii at the time), Brennan ignored these aspects of Sawyer’s remarks.

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238 Id. at 645. Sawyer provided another example from the trial itself, concerning the testimony of a witness named Johnson, who said he came back from San Francisco with communist books and literature in a duffel bag. He said when he got to Honolulu he told Jack Hall [one of the defendants] the names of some of the books. Then the government for two days reads from books supposed to have been in the duffel bag—on cross-examination Johnson said he did not tell the names of the books, but just showed Jack Hall the duffel bag. So Jack Hall violated the Smith Act because he saw a duffel bag with some books on overthrowing the government in it. It’s silly. Why does the government use your money and mine to put people in jail for thoughts. . . . [U]nless we stop the Smith trial in its tracks here there will be a new crime. [P]eople will be charged with knowing what is included in books—ideas. . . . [T]here’ll come a time when the only thing to do is to keep your children from learning how to read.

See id. at 644–45.

239 The Bar Association for the then-territory of Hawaii amended its rules specifically for the purpose of making it possible to bring a charge against Sawyer. Judge Wiig, who presided at the Smith Act trial, “requested the local Bar Association to investigate” Sawyer’s conduct. But under the Hawaii rules, professional misconduct charges could only be made by an aggrieved client or by the Attorney General. The Bar Association referred it to the Attorney General, who decided not to file a complaint. So the Sawyer matter was “referred to the Committee on Legal Ethics to study amendments to the Rules.” The applicable rule was amended and the President of the Bar Association then filed a complaint against Sawyer on behalf of the Association. See Sawyer, 360 U.S. at 624 n. 2.

240 Id. at 626.

241 Id. at 627 (expressly stating that the opinion did “not reach or intimate any conclusion on the constitutional issues presented”).

242 Id. at 627 (expressly stating that the opinion did “not reach or intimate any conclusion on the constitutional issues presented”).
speech.\textsuperscript{243} Rather than examine the Constitution at all, Justice Brennan examined whether the statements that the Hawaii Bar found worthy of discipline in fact impugned the integrity of the trial court.\textsuperscript{244} Brennan sorted Sawyer’s speech into categories of speech that factually could not form the basis for Sawyer’s discipline because they did not impugn the personal integrity of the trial court judge. Namely, Brennan stated that attorneys could, without impugning judicial integrity, “criticize the state of the law,”\textsuperscript{245} “criticize the law-enforcement agencies of the Government and the prosecution,”\textsuperscript{246} and criticize a judge as being “wrong on his law.”\textsuperscript{247}

Brennan’s opinion has been hopelessly misconstrued by subsequent state and federal courts. Courts have cited Brennan’s categorization of speech that cannot impugn judicial integrity and determined by negative implication that anything not listed by Brennan is both (1) subject to punishment, and (2) constitutionally so.\textsuperscript{248} Because Brennan did not reach the constitutional question, Sawyer cannot provide the authority that States construe it to create: namely, that certain attorney statements are “the subject of professional discipline”\textsuperscript{249} or “properly censurable”\textsuperscript{250} under the Constitution. The only negative implication of Brennan’s opinion is that certain statements not listed might impugn judicial integrity. But that does not mean that punishment for impugning judicial integrity would be constitutional—a proposition that must be examined in light of the Court’s subsequent holdings in Sullivan and Garrison.

\textsuperscript{243} See Sawyer, 360 U.S. at 627.
\textsuperscript{244} Id. at 626–27.
\textsuperscript{245} Id. at 631–32 (explaining that “[s]uch criticism simply cannot be equated with an attack on the motivation or the integrity or the competence of the judges”).
\textsuperscript{246} Id. at 632.
\textsuperscript{247} Id. at 635 (explaining that because “appellate courts and law reviews say that of judges daily and it imputes no disgrace”).
\textsuperscript{248} For example, the Supreme Court of Oklahoma has read Brennan’s opinion as establishing that “criticism by an attorney amounting to an attack on the motivation, integrity or competence of a judge whose responsibility it is to administer the law may be under certain circumstances properly censurable.” Oklahoma Bar Ass’n v. Porter, 766 P.2d 958, 965 (Okla. 1988) (emphasis added); see also Neb. State Bar Ass’n v. Michaelis, 316 N.W.2d 46, 52–53 (1982); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 167 (Ky. 1980); In re Meeker, 76 N.M. 354, 365 (1966).
\textsuperscript{249} Michaelis, 316 N.W.2d at 52–53 (1982).
\textsuperscript{250} Porter, 766 P.2d at 965.
Finally, Brennan rejected the idea that Sawyer’s critical remarks were improper because she was counsel of record in an ongoing trial. Brennan’s focus again was with what Sawyer had been charged—namely, “impugn[ing] the integrity of Judge Wiig.” As to these charges, Brennan said, in words that are frequently quoted:

A lawyer does not acquire any license to do these things [impugn the integrity of the court] by not being presently engaged in a case. They are equally serious whether he currently is engaged in litigation before the judge or not.

This statement is quoted in modern cases to punish attorneys for speech about the judiciary even when the attorney is not engaged in a pending case. *Kentucky Bar Association v. Heleringer* provides an example. The Supreme Court of Kentucky quoted the above language from Brennan’s *Sawyer* opinion as support for disciplining an attorney for Right to Life for making a statement to the press about a judge even though the attorney was not engaged as counsel in the underlying lawsuit. What courts fail to consider is Brennan’s remaining explanation:

We can conceive no ground whereby the pendency of litigation might be thought to make an attorney’s out-of-court remarks more censurable, other than that they might tend to obstruct the administration of justice. . . . But this distinction is foreign to this case, because the charges and findings in no way turn on an allegation of obstruction of justice or of an attempt to obstruct justice, in a pending case. To the charges made and found, it is irrelevant whether the Smith Act case was still pending. Judge Wiig remained equally protected from statements impugning him, and petitioner remained equally free to make critical statements that did not cross that line.

Notably, Brennan’s overall point was that, absent obstruction to the administration of justice, *even attorneys engaged in pending cases* like Sawyer should be allowed to speak without being disciplined. Ironically, the statement is construed to prohibit speech not only from attorneys

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251 *Sawyer*, 360 U.S. at 635.
252 *Id.* at 636
253 *Id.*
254 602 S.W.2d 165 (Ky. 1980)
255 *Id.*
256 *Sawyer*, 360 U.S. at 636.
engaged as counsel in cases, but also from attorneys not engaged in a pending case. Further, Brennan acknowledged that statements might be more worthy of censure depending on the context and timing in which they are made, but argued that if the problem with a statement is obstructing justice, then an attorney should be charged with obstructing justice. Notably, Sawyer is decided five years before Sullivan and Garrison, which is reinforced by Brennan’s statement that Judge Wiig would “remain[] equally protected from statements impugning him.”257 The Court had yet to declare that the Constitution prohibited punishment for speech regarding government officials unless the Sullivan standard is met. But the Court refused to reach this constitutional issue in Sawyer. Brennan’s opinion should be read as saying that if impugning judicial integrity is, of itself, a constitutionally valid basis for punishing and restricting speech (an issue the Court does not reach), then it is sanctionable regardless of when made. On the other hand, if the speech is sanctionable for some other reason—obstructing justice, interfering with the trial or jury venire, etc.—then the State needs to punish the lawyer’s speech on that basis.

The thrust of Brennan’s opinion, and certainly its effect on Sawyer, was to allow speech by an attorney (even one engaged in a trial before the criticized judge) and to define broadly permissible speech. Ironically, it has been interpreted to constitutionally enshrine punishment of speech critical of the judiciary even for attorneys not engaged in a pending case.258

Justice Frankfurter’s dissent reached the constitutional issue, but he took care to limit his argument to the specific facts at issue.259 Frankfurter contended that Sawyer’s speech was “a

257 Id.
258 Stewart’s concurrence, discussed below, is frequently interpreted to mean that attorneys have no constitutional rights to free speech. Yet Stewart’s concurrence cannot be authority as to the protections of the Constitution. See infra Part IV.B.

Black wrote a concurrence and joined Brennan’s decision. Black’s cryptic concurrence is almost never cited. The gist of it seems to be that Hawaii could not have a law (constitutionally) that prohibited an attorney from impugning the integrity of a court. See Sawyer, 360 U.S. at 646 (Black, J., concurring).

259 Id. at 653 (Frankfurter, J., dissenting). Frankfurter emphasized Mrs. Sawyer’s role in the then-pending trial and other “severely aggravating circumstances”—including that motions as to the very evidence Sawyer
plainly conveyed attack on the conduct of a particular trial, presided over by a particular judge” and thus fell within the charge against her.\(^{260}\) While Frankfurter argued that the Constitution did not protect Sawyer’s conduct, he emphasized that “[w]hat we are concerned with is the specific conduct, as revealed by this record, of a particular lawyer, and not whether like findings applied to an abstract situation relating to an abstract lawyer would support a suspension.”\(^{261}\)

Finally, even if Sawyer had held that statements about a judge could be punished, that holding would need to be reevaluated in light of Sullivan and Garrison. It is quite likely that Justice Brennan, who authored the Sullivan and Garrison opinions, thought that the constitutional question left open in Sawyer was answered in Garrison when the Court held in the very context of lawyer speech regarding the judiciary that “only those false statements made with castigated were still pending, that the speech was advertised to the public, that accounts of the speech were included in newspapers, that the jury was still open and receptive to media accounts of the speech, and that the day after the speech the judge “felt called upon to defend his conduct of the trial in open court.” \(^{262}\) at 656.

\(^{260}\) Justice Frankfurter concluded his opinion by stating:

Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpen what he says but he imparts to his attack inflaming and warping significance. He says that the very court-room into which he walks to plead his case is a travesty, that the procedures and reviews established to protect his client from such conduct are a sham.

‘We are a society governed by law, whose integrity it is the lawyer’s special role to guard and champion.’ \(^{263}\) at 669 (Frankfurter, J., dissenting) (emphasis added). Despite the initial opener that sounded quite liberal as to the ability and even duty of lawyers to “fearlessly” engage in criticism of the judiciary, Frankfurter ends by saying that a lawyer such as Sawyer has a duty to guard and champion the law. But again, context matters. And the Sawyer context is also that of an attorney defending clients convicted for knowing and learning about communism. Sawyer could have prejudiced the jury or the trial by her conduct—and to that extent her conduct likely should not be condoned. \(^{264}\) supra note 40 (arguing that even as to pretrial statements to the press only knowingly false or reckless statements should be prohibited). Nevertheless the substance of Sawyer’s speech needed to be published at some point—if not during trial, then afterwards. The Smith Act prosecutions at issue were “a travesty” and “a sham.” And there is no good reason to prohibit lawyers from so saying or to require lawyers “to guard and champion” law when the law at issue is contrary to the basic rights guaranteed by our Constitution.

\(^{261}\) Sawyer, 360 U.S. at 667–68 (Frankfurter, J., dissenting). In widely-quoted language, the Seventh Circuit has said of Sawyer: “[A]ll of the Justices assumed or stated that a lawyer’s false accusations of criminal conduct directed against named judges may be the basis of discipline.” In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995). It is hard to construe any basis in Sawyer for this statement. Brennan, for four of the Justices, did not reach the Constitution and thus did not reach what “may [or may not] be the basis of discipline.” Further, Frankfurter’s dissent did not talk in terms of whether the accusations about the judiciary were true or false or were of criminal conduct or lesser gravity, but whether the statements were made by an attorney in the midst of a pending trial.
the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.”

The Court’s next discussion of attorney speech critical of the judiciary occurred a quarter century later in In re Snyder. Snyder made repeated unsuccessful attempts to be paid for having performed indigent defense work in the Eighth Circuit. Frustrated, Snyder wrote a letter to the district court where he said he was “appalled by the amount of money which the federal court pays for indigent defense work,” and complained that he had “to go through extreme gymnastics even to receive th[ose] puny amounts.” He closed his letter saying he was “extremely disgusted by the treatment” he had received from “the Eighth Circuit in this case” and asked to have his name removed from the list of attorneys willing to do indigent criminal defense work. Snyder was suspended from the practice of law in the Eighth Circuit for six months for refusing to apologize for writing the letter. The Supreme Court reversed, but did not reach the constitutional issue of whether Snyder could be punished for criticizing the Eighth Circuit’s administration of the Criminal Justice Act. Rather, since Snyder was disciplined by the en banc Eighth Circuit under Federal Rule of Appellate Procedure (FRAP) 46, the Supreme Court held as a matter of federal law interpreting the reach of FRAP 46 that Snyder’s “criticism of the [Criminal Justice] Act or criticism of inequities in assignments under the Act” did not warrant “discipline or suspension.” Nevertheless, rather than point out how excessive it was for the Eighth Circuit to suspend an attorney for writing a private letter to a court to complain about real administrative problems—and which letter actually led to “a study of the

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263 In re Snyder, 472 U.S. 634 (1985).
264 Id. at 637.
265 Id.
266 Id. at 640–41.
267 Id. at 646.
administration of the CJA” in the Eighth Circuit and to improvements in the way the Act was administered, the Supreme Court instead chastised Snyder for the “tone” of his letter (the harshest portions of which are quoted above) and recognized, in dicta, a “duty of courtesy” owed by “[a]ll persons involved in the judicial process . . . to all other participants.” The Court further stated: “The 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.” The Court failed to explain why the “inherently contentious setting of the adversary process” required that attorneys cast criticisms of the judicial system (rather than just criticisms of persons who are contending adversaries such as opposing counsel, opposing parties, or witnesses) in a professional and civil tone or how the contentious nature of adversary proceedings was even relevant in a situation where no case was pending and the criticism was made outside of that setting in a private letter to a court. While the Court’s actual holding as to what cannot warrant suspension from federal courts under FRAP 46 was not binding on States, its decision to chastise Snyder for his tone and to admonish attorneys to “cast criticisms of the system in a professional and civil tone” signaled to state courts approval of attorney discipline for speech critical of or disrespectful to the judiciary.

Even though the Snyder Court did not reach the First Amendment, Snyder is additionally problematic because the underlying criticisms of the Eighth Circuit apparently were true and justified, as demonstrated by the fact that the letter formed the basis for subsequent changes made in the Eighth Circuit’s administration of the CJA. The Snyder Court’s failure to cite or mention Garrison or Sullivan as squarely prohibiting Snyder’s suspension, implied their inapplicability. The Court also failed to acknowledge that Snyder’s statements constituted core

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268 Id.
269 Id. at 647.
270 Id. (emphasis added).
political speech requiring the highest level of protection. These omissions further implied to state courts that attorney speech is somehow exempted from the restrictions placed on punishing core political speech criticizing government. However, it is important to recognize that the Snyder Court did not purport to reach, rely on, or look to any constitutional caselaw or principles, and thus cannot be authority for what is and is not constitutionally permitted.

Sawyer and Snyder are the only two Supreme Court opinions on disciplining attorneys for speech critical of the judiciary or impugning judicial integrity. Yet neither reached the Speech Clause issues raised in both. Unfortunately, state courts look to both decisions as intimating an answer to the constitutional question and assume that the pair constitutionally authorizes disciplining attorneys for speech that impugns judicial integrity or is overly discourteous.

3. Recognizing Inapplicability of Cases Implicating Other Interests. State and federal courts have also erred by relying on cases that involve significant state interests and/or lower level speech interests as compared to the interests at issue in disciplining attorney speech that impugns judicial integrity.271

For example, the plurality opinion in Gentile v. State Bar of Nevada is generally cited for the following statement, which was joined by a majority of the Court:

It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to free speech an attorney may have is extremely circumscribed... Even outside the courtroom, a majority of the Court in two separate opinions in the case of In re Sawyer,... observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.272

This statement is generally construed by states as authorizing nearly any punishment of attorney speech (both inside and outside of judicial proceedings) without analysis of the interests

271 See, e.g., In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995) (arguing in support of punishing speech impugning judicial integrity that “given cases such as Gentile and Went For It the Constitution does not give attorneys the same freedom as participants in political debate”).
involved. But that is not what the *Gentile* Court held, and it ignores entirely the extremely important interests at stake in *Gentile*. As emphasized by the *Gentile* Court majority, the case involved the sensitive context of pretrial publicity by an attorney to the press outlining the theory of a pending criminal case and publicly impeaching the government’s witnesses. The Court explained that it “express[ed] no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made.” The Court held: “When a state regulation implicates First Amendment rights, the Court must balance those interests against the State’s legitimate interest in regulating the activity in question.” The *Gentile* Court did not summarily determine that the balancing test had been satisfied, but instead examined the validity of state’s asserted interests and the relevance of those interests to the restrictions at issue. Finally, the *Gentile* Court for a majority concluded:

The restraint on speech is *narrowly tailored* to achieve those objectives. The regulation of attorneys’ speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys’ comments until after the trial.

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273 *Id.* at 1064. *Gentile* involved pretrial statements to the press by criminal defense attorney Dominic Gentile setting forth the theory of the defense that the crime was committed by a police officer who would be a primary witness at trial. Gentile was disciplined with a private reprimand for his statements for violating Nevada’s rule forbidding pretrial publicity that has “a substantial likelihood of materially prejudicing an adjudicative proceeding.” *Id.* at 1033. In a plurality opinion, the Court held that the standard employed by Nevada—which is arguably less stringent than the “clear and present danger” standard applied for punishing statements about a case made by the press—was constitutionally permissible for attorneys, but as interpreted by the Nevada Supreme Court the rule was “void for vagueness.” *See id.* at 1048 (Kennedy, J.); *id.* at 1070–71 (Rehnquist, J.); *id.* at 1081–82 (O’Connor J.). Justice Kennedy wrote an opinion for four holding, in part, that the rule as applied was void for vagueness, which Justice O’Connor joined in part making a fifth vote for that proposition. However, Justice O’Connor also became the fifth vote for part of Justice Rehnquist’s opinion holding that attorneys could be held to a lower standard than that required by the Constitution for pretrial publicity by the press.

274 *Id.* at 1072 n. 5.

275 *Id.* at 1074.

276 The state asserted that pretrial publicity limitations are “aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.” *Id.* at 1074. In holding that these state interests outweighed the free speech interests at stake, the Court explained that “[f]ew, if any interests under the Constitution are more fundamental then the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.” *Id.* at 1075.

277 *Id.* at 1076 (emphasis added).
Thus, despite its statements indicating lesser protection owed to attorney speech, the *Gentile* Court did not grant states free reign. Rather, the Court upheld the restriction in *Gentile* because it was narrowly tailored to the “substantial state interest” of preserving due process rights to a fair trial, it only applied to statements that would have a “materially prejudicial effect” on judicial proceedings, was viewpoint neutral, and postponed speech until after the trial was completed.

Such analysis is completely foreign in the context of attorney speech critical of the judiciary. Even in the rare situations where courts recognize some need to “balance” the free speech interests of the attorney with the interests of the state, the actual “balancing” is empty. For example, in *In re Wilkins*, the Indiana Supreme Court claimed to be applying a balancing test, where it examined “the factual setting . . . in light of the affected State interest and measured against the limitation placed on the freedom of expression.” Yet the Court suspended Wilkins from the practice of law for making the following statement in a footnote of an appellate brief:

> “[T]he opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).”

Upon balancing the state interest “in preserving the public’s confidence in the judicial system and the overall administration of justice” with Wilkin’s free speech interests, the court concluded: “Without evidence, *such statements should not be made anywhere*. With evidence, they should be made to the Judicial Qualifications Commission.” Such “balancing” completely denies both the attorney’s right to speak and the public’s right to receive speech. Indiana’s balancing act is a far cry from *Gentile*, where it was noted

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278 *In re Wilkins*, 777 N.E.2d 714, 717 (Ind. 2002)
279 *Id.* at 716. Wilkins’ suspension was later reduced to a public reprimand. *See In re Wilkins*, 782 N.E.2d 985 (Ind. 2003).
280 *Wilkins*, 777 N.E.2d at 717.
281 *See supra* Part III.B.
that speech was not suppressed, but merely postponed until after trial, and required that
the speech materially prejudice a proceeding. 282 Nor did the Indiana Supreme Court have
any support or evidence for the validity of its state interest—the court assumed that
preserving public confidence in the judiciary was a state interest worthy to suppress
speech, which, as shown above, it is not. 283 The situation is not like Gentile where the
state’s interest was preserving the integrity of jury trials, an interest of compelling
constitutional magnitude. Indeed, state courts consistently equate the state interests in
Gentile with the dubious interest in protecting public perception of judicial integrity. 284

The cases that follow Gentile and “balance” the interests at stake when the state
interest is preserving the integrity of the court inevitably balance in favor of the state and
against speech regardless of the forum where the speech is made (in briefs, to the public,
in a private letter), regardless of whether the attorney is actively engaged in a case or not,
regardless of the possible impact of the speech on the asserted interest of preserving
public perception of judicial integrity, and without any discussion of the strength or
validity of the state interest of preserving the public perception of judicial integrity. 285

282 See Gentile, 501 U.S. at 1076.
283 See Wilkins, 777 N.E.2d at 717–18.
284 See In re Cobb, 445 Mass. 452, 467–68 (2005); In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995); Idaho
State Bar v. Topp, 129 Idaho 414, 416 (1996); In re Shearin, 765 A.2d 930, 938 (Del. 2000). But see Standing
Committee on Discipline for the U.S. Dist. Ct. for the Cent. Dist. Cal. v. Yagman, 55 F.3d 1430, 1442–43 (9th Cir.
1995) (explaining the differences between the interests in Gentile and interest in preserving judicial integrity).
285 For example, in Kentucky Bar Ass’n v. Heleringer, 602 S.W.2d 165 (Ky. 1980), the Kentucky Supreme
Court explained that it would balance the state’s interests with the right of the free speech, and concluded its
balancing by surmising that “free speech does not give an attorney the right to openly denigrate courts in the eyes of
the public”—even when done by an attorney not engaged in the underlying case.

In In re Arnold, 274 Kan. 761 (2002), the Kansas Supreme Court recognized the need to balance attorney
speech with the need to protect the public perception of judicial integrity, and then found sanctionable a private
letter sent to a judge after the attorney had been disqualified from a case before that judge, telling the judge he
should retire. The insult was entirely personal to the judge and was published to no one but the judge, was not an ex
parte communication because it was written by an attorney who was no longer on the case and not acting in a
representative capacity. In Idaho State Bar v. Topp, 129 Idaho 414 (1996), the State of Idaho claimed to perform the
balancing required by Gentile, by applying an objective standard, but placing the burden to prove falsity on the state.
But the court applied its standard to basically nullify the state’s standard while strictly requiring Topp to prove the
truth of his statement. See id.
Courts that undertake “balancing” in this situation additionally fail to recognize that the Supreme Court already balanced the relative interests between preserving governmental reputation and free speech, which balancing resulted in the *Sullivan* and *Garrison* decisions. As explained by Melville Nimmer, the *Sullivan* rule was one of constitutional balancing at a definitional level.\(^\text{286}\) The Court did not adopt an ad hoc balancing rule whereby in each case the value of the speech would be “balanced” with the value of preserving the face of government. Rather, in *Sullivan* and *Garrison*, the Court balanced the interests for all subsequent cases involving the punishment of speech for harming the reputation of government officials and determined that “only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.”\(^\text{287}\)

Finally, courts have relied on cases such as *Florida Bar v. Went For It*,\(^\text{288}\) where the Court upheld a restriction on targeted lawyer advertising, as allowing curtailment of attorney speech. Such reliance fails to recognize the relative weight of the competing interests in that context. Notably, *Went for It* and similar cases involve commercial speech, which, while protected, does not have nearly the same constitutional value as political speech regarding the qualifications of government officials. The *Went for It* Court even explained: “We have always been careful to distinguish commercial speech from speech at the First Amendment’s core.”\(^\text{289}\) Thus the relative weight of the constitutional protection for the speech at issue was significantly less in *Went For It* than


\(^{289}\) Id. at 623.
it is in cases involving political speech regarding judicial integrity. Further, on the state interest side of the scale, *Went For It* involved interests not at play with speech regarding the judiciary. Specifically, *Went For It* involved interests in protecting "the personal privacy and tranquility of [Florida’s] Citizens." Thus *Went For It* does not demonstrate that courts can freely regulate attorney speech, but only, in the context of lesser protected commercial speech with heightened state interests in protecting the public from harassment and duress, the regulations at issue were constitutionally permissible.

**B: A Constitutional Condition of the Privilege of Practicing Law**

The vast majority of the decisions regarding punishing attorney speech critical of the judiciary do not rely on any *Gentile*-styled balancing. Rather, they hold, usually relying on Stewart’s concurrence in *Sawyer* or statements by Justice Rehnquist in *Gentile*, that attorneys have given up their free speech rights in exchange for the privilege of being an attorney. In its classic Cardozian formulation, “Membership in the bar is a privilege burdened with conditions.” The idea is that no one has a “right” to be an attorney, and so in return for granting a person the privilege of being an attorney, the state can place certain conditions on lawyers by which they agree to abide, but which the state otherwise could not constitutionally impose. Further, commentators, including Wendel, have argued that constitutional conditions

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290 The Court in *Went For It* specifically noted the problem inherent in failing to recognize the relative weight of speech. It explained its observation that “[t]o require parity of constitutional protection for commercial and noncommercial speech alike could invite dilution simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.” See id. at 623. When courts, such as the Seventh Circuit in *Palmisano*, 70 F.3d 483, 487 (1995), rely on *Went For It* as allowing prohibitions on public speech critical of the judiciary, they create this kind of leveling—they dilute protection for political speech by relying on authority to suppress forms of commercial speech.

291 *Went for It*, 515 U.S. at 630.

292 Matter of Rouss, 221 N.Y. 81, 84 (1917).

293 The idea of the importance of separating rights from privileges was expounded by Wesley Hohfeld in his influential article, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16 (1913).
and a privilege/rights distinction are useful in the attorney speech context.\textsuperscript{294} Notably, outside of the attorney speech context, this doctrine is stated in the reverse as “unconstitutional conditions” and “holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”\textsuperscript{295} The doctrine is used to protect constitutional rights and to prohibit government from coercing people to give up constitutional rights through creating a condition on the receipt of a benefit.

But in the area of attorney free speech, the doctrine is reversed and constitutional conditions ideas are cited by state courts to justify restrictions on and punishment of attorney speech. The Missouri Supreme Court summarized the view thus: “[A]n attorney’s voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary.”\textsuperscript{296} And the Supreme Court of Kansas explained last year “[u]pon admission to the bar of this state, attorneys assume certain duties,” including “the duty to maintain the respect due to the courts” and an attorney “is bound” thereby “whether he is acting as an attorney or not.”\textsuperscript{297} In sum, the idea is that attorneys implicitly agree when admitted to the bar to forfeit their rights to free speech and thus the state can constitutionally punish such speech without violating the First Amendment.\textsuperscript{298}

To the extent that the state courts rely on the idea of “constitutional conditions” as

\textsuperscript{294} Wendel, supra note 41, at 372–79.
\textsuperscript{295} Kathleen Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989).
\textsuperscript{296} In re Westfall, 808 S.W.2d 829, 834 (Mo. 1991); see also Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 429 (Ohio 2003) (“Thus attorneys may not invoke the federal constitutional right of free speech to immunize themselves from evenhanded discipline for proven unethical conduct.”); In re Shearin, 765 A.2d 930, 938 (Del. 2000) (holding that “there are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer’s constitutional right to freedom of speech” and thus “members of the Delaware Bar are subject to disciplinary sanctions for speech consisting of intemperate and reckless personal attacks on the integrity of judicial officers” and defining “reckless” as an objective standard requiring attorneys to have a reasonable factual basis “before the First Amendment protections for such speech can apply”); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165 (Ky. 1980); In re Frerichs, 238 N.W.2d 764, 767 (Iowa 1976); In re Raggio, 87 Nev. 369, 370 & 372 (1971).
\textsuperscript{297} In re Pyle, 283 Kan. 807, 822–23 (Kan. 2007).
\textsuperscript{298} See also Iowa Sup. Ct. Board of Prof’l Ethics and Conduct v. Ronwin, 557 N.W.2d 515, 519 (Iowa 1996) (stating that “a lawyer’s right to free speech does not include the right to violate the statutes and canons proscribing unethical conduct”); In re Erdmann, 33 N.Y. 2d 559, 561-62 (1973) (Burke, J., dissenting) (explaining that statements by attorney for article in LIFE magazine “violate restrictions placed on attorneys which they impliedly assume when they accept admission to the Bar”).
supporting nearly all restrictions on attorney speech, they find support in language from Supreme Court opinions—although not from a majority of the Court. The primary source for the theory is the concurrence of Justice Stewart in *In re Sawyer.*

Justice Stewart said:

> If . . . there runs through the principal opinion an intimation that *a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct,* it is an intimation in which *I do not join.* 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.*

The problem with this formulation is apparent from the opening line—it is practically limitless. Justice Stewart claims that if there has been “even-handed discipline for proven unethical conduct”—which apparently means a proven violation of any rule of professional conduct enacted by a state—then a lawyer cannot “invoke the constitutional right of free speech” as a defense. Stewart assumes that *all* “inherited standards of propriety and honor” or “ethical precepts” are “necessary” to the practice of law and must be conformed to, even though they “may require abstention” from rights of free speech. Thus, if a state has created a restriction on the practice of law (whether as a matter of “ethical precepts” or from “inherited standards”), that restriction is, *a fortiori,* permissible, and the regulated attorney cannot “invoke the constitutional right of free speech” but “must conform” and “[o]be[y].”

Stewart’s statement was perhaps justifiable at the time he wrote it because the Supreme Court had never stricken as unconstitutional by virtue of the First Amendment any state rule

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299 *See, e.g.,* Pyle, 283 Kan. at 830 (quoting as authoritative Stewart’s concurrence in *Sawyer*); Grievance Administrator v. Fieger, 719 N.W. 2d 123, 247, 259 (Mich. 2006) (same); *Gardner,* 793 N.E.2d at 429 (same); *Ronwin,* 557 N.W.2d 515, 517 (Iowa 1996) (same); Westfall, 808 S.W.2d at 835 (same); *Heleringer,* 602 S.W.2d at 167–68 (same); *Frerichs,* 238 N.W.2d at 767 (same); *Raggio,* 87 Nev. at 370 (same).


301 *See also* Gardner, 793 N.E.2d at 429 (concluding from Stewart’s concurrence that “attorneys may not invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct”).
regarding attorney conduct. Even prior to Sawyer, however, the Court had recognized some limitations on the state’s regulation of attorneys by holding that states could not deny an applicant admission to the bar on the basis of former membership in the communist party. In so holding, the Court noted that “a person cannot be prevented from practicing [law] except for valid reasons” as “[c]ertainly the practice of law is not a matter of the State’s grace.”

Of course, it did not take long for Justice Stewart’s formulation to be proven utterly untrue even as to rules applicable to all attorneys rather than denials of individual applications to the bar. In ensuing years, the Supreme Court struck down several state rules regulating attorney conduct as violative of the First Amendment. In 1963, the court struck down restrictions that prohibited political associations like the NAACP from soliciting clients. Throughout the 1970s and 1980s the Court repeatedly struck down as violative of the Speech Clause state bans and restrictions on attorney advertising. Most recently, in Republican Party of Minnesota v. White, the Court struck down Minnesota’s announce clause, a rule of professional conduct that prohibited attorney candidates for judicial positions from expressing their views on certain political issues, as violating the Speech Clause. In each of these cases, the Court did not find

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302 The Sullivan Court noted that Madison believed that states (who are the primary licensing authority for attorneys) had the power to restrict speech. Thus traditional licensing of attorneys by the states could constitutionally restrict speech. It has since been recognized that the 14th amendment eliminated that state power. But it was not until Gitlow v. New York, 268 U.S. 652, in 1925 that the Speech Clause was incorporated by the Fourteenth Amendment to restrict state power. Further, even at the time of Sullivan, as evidenced by that opinion itself, there was considerable question as to whether—despite incorporation—the states retained greater power to restrict speech than did the Federal government. See New York Times v. Sullivan, 376 U.S. 254, 276–77 (1964). Thus, Stewart’s belief that states’ regulations of attorney conduct were not subject to attack as abridging free speech had some contemporary and historical support.


304 Schware, 353 U.S. at 239 n.5.


the restrictions or punishments imposed on attorneys constitutional just because the rules satisfied the Stewart criteria of either being historically accepted as necessary and honorable (like solicitation bans) or containing some “ethical precept.” Indeed, in both White and Primus, the Court subjected the state’s restrictions to strict scrutiny because White involved “speech that is at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office”\textsuperscript{308} and because Primus involved “limitations on core First Amendment rights” since the ACLU was engaged in a “form of political expression” in its solicitation of clients.\textsuperscript{309}

Unfortunately, in the context of speech critical of the judiciary the Stewart idea of constitutional conditions is still widely cited and quoted as the law—despite the subsequent precedent of the Court demonstrating otherwise. Indeed, state courts wishing to uphold restrictions on attorney speech often just cite the Stewart statement as the analysis for any free speech challenge raised by disciplined attorneys.\textsuperscript{310}

Regrettably, Stewart’s concurrence has been given reviving life through Chief Justice Rehnquist’s opinion in Gentile. Rehnquist quoted Stewart’s formulation in reviewing the Sawyer case, explaining that Stewart “provided the fifth vote for reversal of the sanction” and, consequently characterizing Stewart’s statement as representing a “majority” view.\textsuperscript{311} Rehnquist is not the first to make the assertion that Stewart’s opinion was for a majority—either because Stewart provides the fifth vote for reversal, or because, ostensibly, Stewart’s statement is in line with the four dissenters, thus creating a majority.\textsuperscript{312} But neither the Sawyer dissent nor majority adopted Stewart’s broad view of constitutional conditions or permissible punishment of attorney

\textsuperscript{308} Id. at 775 & 781.
\textsuperscript{309} Primus, 436 U.S. at 432.
\textsuperscript{310} See supra note 299 and accompanying text.
\textsuperscript{312} See, e.g., Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 167–68 (Ky. 1980) (stating that Stewart “was speaking for five members of the court” in his concurrence); In re Frerichs, 238 N.W.2d 764, 767 (Iowa 1976) (stating that Stewart “clearly was speaking for at least five members of the Court”).
speech and so cannot provide a “fifth vote” for either. Indeed, the majority did not reach the constitutional question, and the dissent limited its discussion to the precise facts. In the end, Stewart’s concurrence is for exactly one member of the court—and is dicta at that because Stewart joined Brennan’s holding that Sawyer did not impugn the integrity of the court (which makes the constitutional question disappear).

Regrettably, in addition to citing Stewart’s formulation, Rehnquist, speaking only for four justices, concludes his Gentile opinion:

When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that “I will support, abide by, and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court” . . . The First Amendment does not excuse him from that obligation, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.

This formulation is even more unworkable than Stewart’s concurrence for several reasons. First, it is patently untrue. As noted above, the Supreme Court had in fact excused attorneys from obligations imposed by rules of professional conduct (and attendant discipline) based on First Amendment guarantees. Second, it is even more limitless than Stewart’s statement. Stewart’s statement was at least grounded in necessity based on historic practice or ethical precepts for a given rule. But Rehnquist’s version means that if a state, as Nevada and certainly other states in fact do, requires attorneys to promise upon admission to uphold any regulation the state has made or will yet make, then the attorney cannot be relieved from this obligation and has no

\[\text{313 See supra note 242 and accompanying text.}\]

\[\text{314 In re Sawyer, 360 U.S. 622, 667–68 (Frankfurter, J., dissenting); see also id. at 666 (stating that the “problem raised by this case” was “the particular conduct in which this petitioner engaged constitutionally protected from the disciplinary proceedings of courts of law”); id. at 667 (says that a criminal defense attorney does not have “a constitutionally guarded freedom to conduct himself as this petitioner has been found to do”(emphasis added)).}\]

\[\text{315 See id. at 646-47 (Stewart, J., concurring).}\]

\[\text{316 Gentile, 501 U.S. at 1081 (Rehnquist, J.) (emphasis added). Despite this strong statement in Gentile, Rehnquist joined the majority in Republican Party v. White, 536 U.S. 765 (2002), and allowed the attorney to be relieved of his obligation to abide by the announce clause, a rule of professional conduct, on the basis that the regulation was unconstitutional.}\]

\[\text{317 See supra note 242 and accompanying text.}\]
constitutional argument against any existing or future regulation enacted by the state. If this system works, then rules of professional conduct can never be stricken as unconstitutional.

The Rehnquist and Stewart formulations of constitutional conditions as applied to restrictions on attorney speech are not and cannot be the law. There is no basis to pretend that attorneys agree to any and all restrictions on their conduct imposed by the state no matter how unconstitutional because the attorneys were admitted under oath or were provided the privilege of being an attorney. The oath of the attorney does not create a license to the state to impose unconstitutional regulations on citizens who practice law.

Because the Rehnquist and Stewart formulations are contrary to the actual state of the law, they are useless. These formulations serve only as an excuse, allowing states to forego any analysis of constitutionality of their attorney conduct rules. The formulations do not delineate any method for determining when a regulation on attorney speech is or is not constitutional—but instead ignores the reality that such a regulation can be unconstitutional.

C: Different Interests Underlying Defamation and Professional Misconduct

Finally, states offer several arguments in an attempt to distinguish Sullivan and Garrison legally and factually from attorney discipline for statements impugning judicial integrity. First, courts contend that the purposes underlying defamation law are different from the purposes behind professional conduct rules.\(^{318}\) True enough, but upon closer scrutiny, irrelevant. The First

\(^{318}\) Fla. Bar v. Ray, 797 So. 2d 556, 558–59 (Fla. 2001). In Ray, the Court rejected the Sullivan subjective actual malice standard despite the language of Rule 8.2 because “of the significant differences between the interests served by defamation law and those served by ethical rules governing attorney conduct” and explaining: “The purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another’s defamatory statements. However, ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system.”

See also In re Terry, 271 Ind. 499, 502 (Ind. 1979) (“The Respondent is charged with professional misconduct, not defamation. The societal interests protected by these two bodies of law are not identical.”); In re Cobb, 445 Mass. 452 (2005) (same, quoting Terry); Office of Disciplinary Counsel v. Gardner, 99 Ohio St.3d 416,
Amendment gloss on defamation found in *Sullivan* and progeny was never intended to promote the underlying purposes of the tort of defamation. Indeed, the First Amendment gloss directly detracts from the purposes of defamation law and allows harm to reputation for government officials in all but fairly extreme circumstances. Rather, the reason the First Amendment comes into play in the defamation context is because, at its core, the First Amendment protects certain speech from being repressed or chilled—particularly speech regarding public figures and government officials (such as judges). Thus the reason for the First Amendment gloss is the same in both the defamation and attorney discipline scenario. In both, the judiciary is punishing a person for speech regarding a public figure. Indeed, in the MRPC 8.2 context—as the rule applies only to speech regarding the “qualifications or integrity” of a judge—319—the speech, by definition, is core First Amendment speech. Thus the same concerns regarding the need for breathing room that prompted the *Sullivan* Court exist for speech critical of the judiciary.320

Further, while defamation and attorney discipline in the abstract aim at different ends, in this particular context, both harms are entirely reputational—defamation protects the reputation

793 N.E.2d 425 (2003) (same); In re Holtzman, 78 N.Y.2d 184 (1991); In re Graham, 453 N.W.2d 313 (Minn. 1990); Standing Committee on Discipline for the U.S. Dist. Ct. for the Cent. Dist. Cal. v. Yagman, 55 F.3d 1430, 1437 (9th Cir. 1995) (“[T]here are significant difference between the interests served by defamation law and those served by rules of professional ethics.”)

Wendel similarly cites this distinction as a persuasive reason to reject *Sullivan* in the attorney-discipline context. See Wendel, *supra* note 41, at 427–28.

319 *MODEL RULES OF PROF’L CONDUCT* 8.2.

320 Ironically, courts enforcing MRPC 8.2 have seen it precisely the other way around—namely, that because the speech regards the “qualifications or integrity” of a judge, the *Sullivan* and *Garrison* rules do not apply.

For example, in *Ray*, 797 So. 2d at 558, the court said that because “the statements at issue concerned ‘the qualifications or integrity of a judge’” there was “no error in the burden then shifting to Ray to provide [prove] a factual basis in support of the statements.” In other words, if the subject matter of the speech is the qualifications or integrity of a judge, the attorney speaker must prove or substantiate his statements to avoid liability. Similarly, in *In re Shearin*, 765 A.2d 930, 938 (Del. 2000), the court held that “there must be some factual basis for the lawyer’s accusations of judicial dishonesty before the First Amendment protections for such speech can apply”—thus an attorney must first prove a factual basis before the First Amendment becomes applicable. *Id.* (emphasis added).

Prior to the Model Rule approach, but after *Sullivan* and *Garrison* were decided, the Florida Supreme Court responded to an assertion of First Amendment protection thus: “On the contrary, it appears to us that if the Bench . . . were being assaulted from all angles, with or without justification, it would be the duty of the lawyer above all others to exercise every measure of care and caution to avoid creating any justification for the suspicions.” In re Shimek, 284 So. 2d 686, 688 (Fla. 1973).
of the individual and discipline for criticism of the judiciary protects judicial reputation. As noted, courts claim that the interest served by punishing speech critical of the judiciary is the need “to preserve public confidence in the fairness and impartiality of our system of justice.”

As the Fourth Circuit stated, “the public interest and administration of the law demand that the courts should have the confidence and respect of the people” and “[u]njust criticism, insulting language and offensive conduct toward the judges,” from attorneys “tend[s] to bring the courts and the law into disrepute and to destroy public confidence in their integrity.” On closer scrutiny, keeping someone from being brought “into disrepute” in order to preserve the public’s respect for or confidence in that person, is what it means to protect that person’s reputation.

Second, courts make the argument that defamation provides a personal remedy for “a private wrong,” while ethical rules “are designed to preserve public confidence in the fairness and impartiality of our system of justice.” But this argument cannot form a principled distinction between the Sullivan and Garrison context and the context of attorney criticism of the judiciary—indeed no such distinction can be seriously made. In both situations, the relevant context is criticism of government officials. Neither Sullivan nor Garrison dealt with private

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321 Although judges are additionally concerned with their private reputations as well. In Shimek, 284 So.2d at 688, the court said when disciplining an attorney for speech made in a brief: “Nothing is more sacred to man, and particularly, to a member of the judiciary, than his integrity. Once the integrity of a judge is in doubt the efficacy of his decisions are[sic] likely to be questioned.”

322 Yagman, 55 F.3d at 1437. See also infra Part III.

323 In re Evans, 801 F.2d 703, 707 (1986) (emphasis added; internal citations omitted).

324 Ray, 797 So.2d at 558–59 (Fla. 2001); see also In re Terry, 271 Ind. 499, 502 (1979) (stating that “[d]efamation is a wrong directed against an individual and the remedy is a personal redress of this wrong” while “[p]rofessional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system and the system of justice as it has evolved for generations”); In re Cobb, 445 Mass. 452 (2005) (same, quoting Terry); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425 (Ohio 2003) (same, quoting Terry); In re Holtzman, 78 N.Y.2d 184 (1991) (same, quoting Terry); In re Graham, 453 N.W.2d 313 (Minn. 1990) (same, quoting Terry); Standing Committee on Discipline for the U.S. Dist. Ct. for the Cent. Dist. Cal. v. Yagman, 55 F.3d 1430, 1437 (9th Cir. 1995) (explaining that “[d]efamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community” while “[e]thical rules that prohibit false statements impugning the integrity of judges, by contrast, 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”).
defamation lawsuits by private citizens whose actions did not reflect on government. Rather, *Sullivan* involved speech that exaggerated wrongs of governmental officials in Alabama, and *Garrison* involved severe accusations regarding members of the Louisiana judiciary by an attorney. Consequently, the harm sought to be remedied through the defamation actions at issue in *Sullivan* and *Garrison* was far more than just a private wrong; rather, the actions were specifically aimed at preserving the face of government officials in performing their official duties and, consequently, the reputation of that arm of the government. Indeed, if preservation of public confidence in our government were a valid reason for suppressing speech contrary to the requirements of *Sullivan*, the *Sullivan* rule itself could not exist. The whole idea of the *Sullivan* rule is that speech regarding public or government officials cannot be suppressed in the name of preserving the reputation of either the specific public official or of the government more broadly. *Sullivan* and *Garrison* expressly contemplated that protected speech would “include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” as well as “erroneous statement,” but that such was necessary to establish “uninhibited, robust, and wide-open debate” on public issues and to provide “the breathing space” that free debate needs to survive.\(^{325}\) Further, the *Sullivan* Court recognized that a speaker “[t]o persuade others to his own point of view . . . at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state” and that there would be “excesses and abuses.”\(^{326}\) But the Court found such probabilities an insufficient basis to chill speech about government officials.

The *Sullivan* Court directly addressed the concern of government reputation, stating that “[i]njury to official reputation error affords no more warrant for repressing speech that would

\(^{326}\) *Sullivan*, 376 U.S. at 271.
otherwise be free than does factual error.” Indeed, the Court goes on to explain that the judiciary cannot protect its public reputation and so neither can other branches:

Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. . . . This is true even though the utterance contains ‘half truths’ and ‘misinformation.’ . . . If judges are to be treated as ‘men of fortitude, able to thrive in a hardy climate,’ surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations. 328

The Court contemplates that statements regarding public officials will in fact hurt their official reputation and thus the reputation of their branch of government—but does not give this distinction any weight. Instead, the Court invites other branches of government to follow the judiciary’s example and undergo such criticism. Ironically, state and federal courts have since interpreted Sullivan and Garrison as inapplicable to attorney statements about the judiciary.

Allowing an exception to the Sullivan rule on the basis of protecting official reputation of a government official would require a rule exactly opposite of that found in Sullivan—instead of more breathing room where statements regard government figures, there would need to be less breathing room and greater restrictions. 329 Of course such restrictions would eat at the core of the First Amendment and would hearken back to the Sedition Act castigated by the Sullivan and

327 Id. at 272.
328 Sullivan, 376 U.S. at 272–73 (emphasis added; internal citations omitted).
329 Courts consistently pay lip-service to the idea that they are not engaging in any sort of authoritative selection and that attorneys are free to criticize courts, but this liberality is belied by the fact that the courts then refuse to apply the Sullivan standard, often requiring the attorney to establish the truth or basis for his statements, and presume falsity of statements impugning their integrity. See supra Part II.C. Indeed, some courts have directly qualified their statements allowing liberal criticism with exceptions that in large part swallow the allowance of critical speech. For example, several courts continue to rely on the ABA’s former Ethical Consideration 8-6, which requires attorneys “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.” Further, the Iowa Supreme Court has stated: “An attorney has the right to criticize the courts of this state so long as his criticisms are made in good faith, and in respectful language, and with no design to willfully or maliciously misrepresent the position of the courts or bring them into disrepute or lessen the respect due them.” See In re Glenn, 256 Iowa 1233, 1239 (1964). How one can possibly provide effective criticism of a public institution without bringing that institution into disrepute or lessening the respect given it is a quandary.
Further, as shown above, it would be antithetical to democracy itself and the American view of sovereignty in the people.

A related distinction made by courts to justify rejection of the *Sullivan* rule is that defamation protects a private interest in reputation while ethical restrictions protect the public interest in the reputation (or integrity) of the judicial system as a whole. But this distinction is also unconvincing. In these cases, the comments made and for which attorneys are sanctioned invariably regard the actions of a specific judge or panel and not the judicial system as a whole. Certainly a comment about one senator cannot be read as being subject to suppression because it brings all of Congress into disrepute and thus can shake the foundation of the entire legislative branch. Similarly, negative statements regarding a particular CEO of one company do not amount to destroying the entire free market system or undermining capitalism. Even if comments regarding an individual judge (or senator or CEO) could be seen as affecting the public’s perception of the overall integrity of the system, how does that make it speech worthy of suppression under *Sullivan* and *Garrison*? Like the argument regarding private versus official reputation, if speech is punishable as long as one can characterize comments made about one government official as affecting the reputation of that entire branch of government, then the *Sullivan* rule can never be applied to statements made about government officials. No good reason is offered as to why imputation of the flaws of one bad apple to the entire branch would be more problematic for the judiciary than for other branches of government.

Finally, courts have rejected the applicability of *Sullivan* and *Garrison* on the slight distinction that *Sullivan* dealt with civil penalties and *Garrison* dealt with criminal penalties, but

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330 As noted in *Sullivan*, the Sedition Act of 1798 punished “any false scandalous and malicious writing or writings against the government of the United States,” Congress or the President that would bring “them into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States” *Sullivan*, 376 U.S. at 273-74 (quoting Sedition Act of 1798).”
neither dealt with quasi-criminal penalties such as attorney discipline.\textsuperscript{331} Both \textit{Sullivan} and \textit{Garrison} address this argument. In \textit{Sullivan} it was argued that a civil lawsuit for libel was private and not equivalent to criminal prosecution from the state and thus the Constitution did not prohibit civil lawsuits by public officials. The Court in \textit{Sullivan} responded: “[T]he Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action that it is common law only, though supplemented by statute . . . . The test is not the form in which state power has been applied but \textit{whatever the form, whether such power has in fact been exercised}.”\textsuperscript{332} Certainly disciplining attorneys is the exercise of state power and comes within prohibitions on such power to restrict free speech. Further, in \textit{Garrison}, the Court explained that “even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area \textit{preclude attaching adverse consequences} to any except the knowing or reckless falsehood.”\textsuperscript{333} Again, the use of state power to discipline attorneys constitutes “attaching adverse consequences” to speech critical of public officials.

**IV: Permissible Narrowly Tailored Regulation of Attorney Speech**

States assuredly have the power to regulate attorney speech—however, they do not have carte blanche to do so. Courts are required to follow \textit{Sullivan} and \textit{Garrison} in punishing attorney speech on the basis that the speech impugned judicial integrity, was discourteous to the judiciary, or reduced the respect owed the judiciary. Avoidance of the \textit{Sullivan} standard on the basis of the allegedly “compelling” or “significant” governmental interest in preserving the public’s

\textsuperscript{331} See, e.g., \textit{In re Westfall}, 808 S.W.2d 829, 833 (Mo. 1991) (noting that neither civil nor criminal penalties can be imposed on attorneys for derogatory statements about the judiciary under \textit{Sullivan} and \textit{Garrison}, but holding that attorney discipline does not fall within that rule).

\textsuperscript{332} \textit{Sullivan}, 376 U.S. at 256; \textit{see also id.} at 277 (explaining that “[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel”).

\textsuperscript{333} \textit{Garrison} v. Louisiana, 379 U.S. 64, 73 (1964).
perception of judicial integrity should have the same weight that it has been given in other contexts—nothing.\textsuperscript{334} That weight is appropriate. As was the case in \textit{Landmark Communications}, courts offer “little more than assertion and conjecture to support” this interest—often hypothesizing a parade of horribles where judicial authority becomes meaningless if speech is allowed.\textsuperscript{335} Further, allowing punishment beyond the realm of \textit{Sullivan} under the guise of this interest would undo \textit{Sullivan} entirely. For surely the protection of the integrity of any branch of government in the eye of that branch would be so important as to justify an exception to the \textit{Sullivan} rule. Moreover, the \textit{Sullivan} rule as applied to statements regarding the judiciary is essential to the democratic governing by the people of the United States. It is they who hold the ultimate sovereignty, even over the judiciary. In many states the judiciary is elected and the public must be informed to exercise their electoral powers. Where the judiciary is appointed, the judiciary must remain in the scrutiny of the public so that abuses and incompetency can be checked and, where necessary, steps can be taken to remove judges.

Requiring the judiciary to adhere to \textit{Sullivan} when the basis for punishment is impugning judicial integrity does not deny courts the ability to regulate attorney speech on the basis of other important state interests. Notably, the state can curb attorney speech that has the potential to interfere with a criminal defendant’s right to an impartial jury trial. \textit{Sawyer} itself is an example. If Hawaii had punished Sawyer’s speech on the basis of attempting to improperly influence the jury or interfere with the administration of justice, it could have done so. Similarly, where attorneys make statements in briefs, the state has a legitimate interest in assuring that briefs contain relevant allegations that have a reasonable basis of fact. The state can require attorneys to adhere to such standards that are inextricably tied to the just and fair resolution of disputes—as


\textsuperscript{335} See Landmark Comms., 435 U.S. at 841; \textit{see supra} notes 149–52 and accompanying text.
long as the state does not employ a harsher standard for statements regarding the judiciary (and
thus punish the statements for impugning judicial integrity as opposed to being irrelevant or not
having a sufficient basis in fact). Other significant state interests justify a vast number of
regulations of attorney speech, including confidentiality rules, candor rules, rules regarding ex
parte communications with judges in pending cases, rules regarding the collection of fees, many
advertising rules, pretrial publicity rules, and the like.\footnote{336}

What is needed is far greater precision in regulating and punishing lawyer speech that
regards the judiciary. When speech is punished and that speech regards the judiciary, close
examination needs to be made as to whether the punishment is merely a protection of judicial
reputation (in which case, \textit{Sullivan} controls) or whether the punishment is based in another valid
state interest unrelated to suppressing speech that impugns judicial integrity.

\textbf{V. Conclusion}

Speech concerning government (including judicial) officials, their competence, their
integrity, the wisdom or folly of their decisions, their biases and political aims, and their overall
fitness for office, \textit{is}, as the \textit{Garrison} Court claimed, “more than self-expression; it \textit{is} the essence
of self-government.”\footnote{337} When courts punish speech to protect their own reputation and that of the
judges of lower courts, it does not just damn truth—as problematic as that may be. It also damns
self-governance, robust public debate, the unique sovereignty of the American people, and the
ability of the people to check and define the abuse of judicial power and to call upon democratic
correctives to fix such abuses. In short, it damns democracy. It chills speech from the very class

\footnote{336} \textit{Gentile v. State Bar of Nevada}, 501 U.S. 1030 (1991) provides a guideline for other restrictions on
attorney speech not based on preserving judicial reputation. The Court in \textit{Gentile} noted that the restriction on pretrial
publicity was “narrowly tailored” to significant government interests, “applie[d] only to speech that is substantially
likely to have a materially prejudicial effect” on a judicial proceeding, was “neutral as to points of view,” and
“merely postpone[d] the attorneys’ comments until after the trial.”

\footnote{337} \textit{See} Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
of persons with the knowledge and exposure to have informed opinions about the judiciary—
 denying the public that information. Further, it clogs the wheels of political change, allowing for
self-entrenchment—keeping the ins in and the outs out. And all of it is done in the name of
preserving our government by preserving public perception of its integrity.

Paul LeBel, in discussing Sullivan, posited:

Perhaps the fragility of a government is too easily forgotten in this country since we have managed to escape the turbulence and unrest that causes governments to fall with predictable regularity in much of the rest of the world. . . . [I]t is at least possible that one of the techniques that is successfully used to diffuse the revolutionary spirit in this country is . . . the effect of the imposition of limits on what the government can do to its critics. Viewed from this perspective, Sullivan emerges as a decision that was at least as much protective of the fundamental stability of the existing government structure as it was of the free speech interests of the defamation defendants in that case.

Even the best governments have officials who are incompetent or corrupt. Some officials may not start out corrupt, but may become corrupt as they exercise power. One method of preserving public confidence in government is to shield this fact from the citizenry. Our American form of government combined with the First Amendment’s guarantee of free speech compels an alternate solution: “Sunlight is the most powerful of all disinfectants.”

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338 See Ely, DEMOCRACY AND DISTRUST, 103.
340 Blasi, supra note 46, at 538 (noting that political thinkers at time of the founding believed it necessary to “check[] the inherent tendency of government officials to abuse the power entrusted to them”) (emphasis added).