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As the guardians of constitutional rights, the judiciary often addresses and demonstrates its commitment to such important constitutional values as due process, court access, and free speech. Indeed, as the Supreme Court reaffirmed in 2009 in Caperton v. A.T. Massey Coal Co., Inc.: “It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process,’” which fairness, of course, includes a fair and impartial adjudicator. Nevertheless, the judiciary does not always appreciate having its own integrity questioned. Throughout the United States, state and federal courts discipline and sanction attorneys who make disparaging remarks about the judiciary and thereby impugn judicial integrity. In so doing, courts have almost universally rejected the constitutional standard established by the Supreme Court in New York Times v. Sullivan for punishing speech regarding government officials. The punishment imposed for impugning judicial reputation has often been severe, with suspension from the practice of law not uncommon and, in at least one state, mandatory. While courts have sanctioned attorneys

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1 Copyright 2009 by Margaret Tarkington, Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University.
4 Margaret Tarkington, The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation, 97 GEORGETOWN L. J. 1567, 1587–91 (2009). In The Truth Be Damned, I argue that Sullivan sets the constitutional standard that, in general, must be employed to punish attorneys for speech impugning judicial integrity. As explained therein, such speech is core political speech entitled to the fullest constitutional protection. Moreover, attorneys are the very class of persons with the knowledge and exposure to have informed opinions about the judiciary. By denying their right to speak and the public’s corresponding right to receive such speech, the central purposes of the Speech Clause are defeated, including self-governance, robust debate on public issues, the unique sovereignty of the American people over government, and the ability of the public to employ democratic correctives to check and define the abuse of judicial power. This in turn clogs the wheels of political change, allowing for judicial self-entrenchment and further abuse of judicial power. See generally id.
5 While The Truth Be Damned examines the problem of punishing speech regarding the judiciary in general, it does not examine the distinct issues and competing interests associated with punishment of speech made in court filings and proceedings.
6 See id. at 1569–70 (collecting cases).
7 See Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 433 (Ohio 2003) (per curiam) (“Unfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law.”).
regardless of the forum where the speech has occurred, many of the cases involve speech made by attorneys in court proceedings. The scholarly literature generally supports the denial of First Amendment protection in such cases, indicating that attorney speech when made in court proceedings is entitled to little, if any, constitutional protection. Indeed, in the plurality opinion, *Gentile v. State Bar of Nevada*, a majority of the Supreme Court stated in dicta: “It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.” Although *Gentile* did not involve any in-court speech or speech filed in a court proceeding, courts and commentators have relied on *Gentile* for the proposition that attorneys have limited or no free speech rights in judicial proceedings and have thereby rejected claims of First Amendment protection for attorney speech impugning judicial integrity that is contained in court filings. Despite the relative consensus to the contrary, it is my contention that attorneys have a free speech right to impugn judicial integrity in court filings and proceedings.

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7 Tarkington, *supra* note 4, at 1571–72 (explaining that “[a]ttorneys are punished for allegations in briefs 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, comments posted on blogs, and even correspondence with friends, family, and clients,” and citing cases).


10 *Gentile* involved pretrial statements to the press outlining the defendant’s theory of the case and impeaching the credibility of a government witness. See *id.* at 1044–45. It did not involve statements that impugned judicial integrity inside or outside of court proceedings. It also did not involve any speech that was verbally made to a court or included in court filings. Thus, the Court’s statement about speech in court proceedings is quintessential dicta.


12 The cases examined herein regard statements made in court filings, but the arguments regarding the essentiality for attorneys to raise the colorable claims of their clients would equally apply to in-court speech. Nevertheless, there are special concerns with protecting order in the courtroom beyond those involving statements in court filings. Nevertheless, as I argue in Part III, courts need not specially punish even verbal in-court speech for
Notably, in a number of cases where attorneys have been sanctioned for their speech, the arguments being made, although perhaps inartful and sometimes exaggerated, were relevant to a claim, argument, or motion before the court. Attorneys have been sanctioned in both criminal and civil cases for impugning judicial integrity for statements made in motions seeking recusal or disqualification of a judge, claims filed against judges, arguments that a litigant or criminal defendant was denied due process because of a biased judge, and arguments regarding judicial incompetency and error on appeal. As in other contexts, the sanctions imposed have been severe, including suspension from the practice of law, and have sometimes been imposed on the client as well, as in cases where the court strikes a brief or summarily rules against a party as impugning judicial integrity outside of Sullivan’s subjective standard. To the extent the speech is irrelevant to the matter being heard, disrupts the tribunal, or influences a witness or jury, the court has other rules that prohibit such conduct and can enforce them as it would in other contexts.


14 See, e.g., Ramirez v. State Bar of Cal., 619 P.2d 399 (Cal. 1980); In re Shearin, 765 A.2d 930 (Del. 2000); In re Shimek, 284 So. 2d 686 (Fla. 1973); Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct v. Ronwin, 557 N.W.2d 515 (Iowa 1996); Comm. on Prof’l Ethics & Conduct of the Iowa State Bar Ass’n v. Horak, 292 N.W.2d 129, 130 (Iowa 1980); In re Meeker, 414 P.2d 862 (N.M. 1966).

15 See, e.g., State v. Santana-Ruiz, 167 P.3d 1038, 1044 (Utah 2007); see also In re Frerichs, 238 N.W.2d 764, 767 (Iowa 1976).

16 See, e.g., In re Frerichs, 238 N.W.2d at 767; In re Wilkins, 777 N.E.2d 714, 719 (Ind. 2002) (per curiam); Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962, 964 (Utah 2007).

a sanction for the speech. Indeed, citing one such case, the Utah Supreme Court warned criminal defense attorneys to be wary of the “pitfalls” that accompany making arguments that a criminal defendant was denied due process because of a biased judge.

As they have done in other attorney-speech cases, courts imposing such discipline have rejected the constitutional standard for punishing speech regarding public officials created in *New York Times v. Sullivan* and applied to statements made by attorneys regarding the judiciary in *Garrison v. Louisiana*. The rejection of the *Sullivan* standard is particularly surprising because the rule under which discipline or sanctions are generally imposed is Model Rule of Professional Conduct (MRPC) 8.2, which expressly adopts the *Sullivan* standard and thus only prohibits statements “that the lawyer knows to be false” or that are made “with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”

Importantly, the *Sullivan* standard examines the speaker’s *subjective* intent—thus punishment is forbidden unless the speaker subjectively knew the statements were false or “*in fact entertained serious doubts* as to the truth of his publication.” Nevertheless, and in direct contradiction to *Sullivan* and prodigy, attorneys facing discipline for impugning judicial integrity have been required to show that their statements were objectively reasonable in order to obtain constitutional protection. Indeed, some courts have denied attorneys recourse to the First

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19 *Santana-Ruiz*, 167 P.3d at 1044.
20 *See Tarkington*, *supra* note 4, at 1587–91.
22 379 U.S. 64 (1964).
24 *See Garrison*, 379 U.S. at 79 (explaining that the Sullivan standard is not satisfied by examining the reasonableness of the person in making the statement); *St. Amant*, 390 U.S. at 731 (explaining 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”); *see also Tarkington*, *supra* note 4, at 1587–58.
25 *See Tarkington*, *supra* note 4, at 1588–90 (citing cases). Notably, the objective reasonableness standard applied to attorneys comes in two basic variations. Some courts require attorneys to show that their statements would be made by a reasonable attorney in the same circumstances and others require attorneys to show a
Amendment at all. For example, the Missouri Supreme Court has stated that “[A]n attorney’s voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary.”

Although courts generally apply the same objective reasonableness standard under MRPC 8.2 regardless of the forum where the speech is made, courts appear to be more justified in rejecting the subjective Sullivan standard where the speech occurs in court filings because of the differences between speech filed with a court and that which is made outside of a judicial proceeding. As Kathleen Sullivan contends in a related context: “the efficient operation of the government sector is incompatible with uninhibited robust, and wide-open debate.” Further, attorneys are only allowed to file their statements in court on behalf of clients by virtue of being admitted to the bar of that court. Thus the argument made by courts that an attorney, as a condition of her license to practice law, agrees to certain restrictions on her speech has greater appeal in the context of speech made in court filings than it has where an attorney makes statements in another forum open to public expression. Moreover, the judicial function is arguably impaired if the subjective Sullivan standard is employed for statements of fact regarding the judiciary (or anyone else) made in court filings. Courts cannot be expected to rely

reasonable basis of fact for the statements. See id. Neither is applied in a manner that is consistent with ordinary applications of similar standards. See id.

See, e.g., Notopoulos v. Statewide Grievance Committee, 890 A.2d 509, 521–22 n.17 (Conn. 2006) (“Several courts have held that attorneys may be punished under the Rules of Professional Conduct for engaging in derogatory speech toward the judiciary even when the speech is protected by the first amendment”).

In re Westfall, 808 S.W.2d 829, 834 (Mo. 1991).

See Tarkington, supra note 4, at 1571–72, 1587–91.

Sullivan, supra note 8, at 587.

Indeed, the argument has been made that because, prior to admittance to the bar, the attorney did not have the right to file papers with the court on behalf of a client, the attorney is not giving up any of her pre-existing constitutional rights. See, e.g., Wendel, supra note 8, at 373, 444. Wendel explains:
The unconstitutional conditions analysis does not apply to many lawyer free expression cases because the constitutional right that the lawyer claims is infringed is not a right which would exist outside the context in which it was asserted. Suppose a lawyer is disciplined for making racist remarks in a closing argument at trial. It is no avail to claim that the disciplinary agency is requiring the lawyer to surrender a constitutional right in exchange for the privilege of trying cases before the courts of the state because the lawyer had no preexisting right to address a jury in a courtroom.

Id. at 373.
on statements made in filings that are only supported by the subjective *Sullivan* standard: that is, statements would be permissible as long as the attorney did not know that the statements were false and did not subjectively entertain doubts about the falsity of the statements. Rather, courts do, and should be able to, require attorneys making statements in court filings to have some level of reasonable factual basis supporting their statements.

Additionally, when making statements about the judiciary in court filings, attorneys are acting as “officers of the court” with specific duties of candor to the court. Commentators have argued that attorneys have significantly fewer speech rights (if any) where they are acting in their capacity as an “officer of the court.”31 For example, Kathleen Sullivan32 and W. Bradley Wendel, along with others, analogize attorney speech to other lines of Speech Clause analysis, specifically, speech of public employees, government-funded speech, and speech in a non-public forum.33 As shown below, under any of these analogies, a lawyer would be afforded the right and opportunity to speak regarding the judiciary as a citizen in public arenas, separate from pending cases but would be subject to greater restrictions (and perhaps lose her First Amendment rights entirely) when the attorney makes statements in a court proceeding.34 Although such a

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31 Sullivan, supra note 8, at 569 (explaining that “lawyers are sometimes perceived as classic speakers in public discourse” but other times are “thought of as delegates of state power—officers of the court and professional licensees whose special privileges are conditioned upon foregoing some speech rights that others enjoy”); id. at 584 (“The lawyer speech cases reflect a dichotomy between the Court’s treatment of lawyers as participants in ordinary public or commercial discourse on a par with other speakers in those realms, and its treatment of lawyers as subject to some additional speech restrictions by virtue of their ties to state power.”)

32 In her article, Sullivan examines solicitation, advertising, and trial publicity restrictions on attorney speech under the First Amendment. See, generally Sullivan, supra note 8. Nevertheless her premises and ultimate thesis are relevant to the problem of attorney speech regarding the judiciary, particularly when made in court filings.

33 See Sullivan, supra note 8, at 585–87 (analogizing attorney speech to public employees, government-funded speech and speech in a non-public forum); Wendel, supra note 8, at 375–81 (same); Day, supra note 8, at 187–90 (analogizing attorney speech to public employee speech); 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, 846–54 (1997).

34 For example, Wendel concludes that “it may be helpful to think of lawyers’ speech that is directly related to representing clients as a kind of government-funded expression, to which content-based restrictions may be attached.” Wendel, supra note 8, at 379. Upon analogizing attorney speech to public employees, Terri Day explains “[a] lawyer’s First Amendment rights may be denied when he or she speaks in a courtroom as an officer of the court,” and extends this idea to speech in court filings. See Day, supra note 8, at 187–89 (emphasis added).
dichotomy would be an improvement over the current regime (where attorneys are denied their ability to impugn judicial integrity in any forum\textsuperscript{35}), denying or severely limiting speech rights of attorneys to impugn judicial integrity in court proceedings has serious implications.

In Part I of this article, I examine why a free speech right to impugn judicial integrity must be recognized for attorneys—even, and perhaps especially, when acting as an officer of the court and filing papers with a court. Such a right is necessary to protect the constitutional rights of litigants to an unbiased judiciary, as well as to preserve statutory rights and other protections granted to criminal and civil litigants regarding judicial qualifications. Further, the recognition of such a right in the attorney preserves litigants’ access to courts and due process rights. These rights belonging to litigants are lost or impaired if attorneys can be punished for or chilled from asserting them in court proceedings. Moreover, a free speech right residing in attorneys to make relevant arguments in court proceedings has been recognized by the Supreme Court as essential to the proper functioning of our judicial system in \textit{Legal Services Corporation v. Velazquez}.\textsuperscript{36}

I then examine, in Part II, the arguments made by courts and commentators that appear to require quite limited free speech rights (if any) for attorneys in court proceedings to impugn judicial integrity, and will show that none of them are persuasive. Specifically, I examine each of the proposed analogies to attorney speech when made as an officer of the court and will show that all three analogies (government-funded speech, public employee speech, and speech in a non-public forum) fail to account for (1) the constitutionally-required role of the court system as a branch of our government, (2) the constitutional rights of litigants and criminal defendants to access the courts and to protections provided them within the court system, and (3) the attorney’s role in representing a client in an adversarial system of justice. I also show that alternate forums

\textsuperscript{35} See Tarkington, \textit{supra} note 4, at 1571–72.

\textsuperscript{36} 531 U.S. 533 (2001).
to which attorneys have access are severely inadequate because they fail to protect the interests of clients in obtaining substantive relief from judicial abuses in the underlying proceeding. Similarly, I examine the argument that attorneys lack free speech rights in court proceedings because, prior to being admitted to the bar, they had no right to communicate with courts on behalf of others, and I show that this argument utterly fails to protect the constitutional and other rights of clients to fair judicial proceedings and to be represented by legal counsel.

Finally, in Part III, I examine how the legitimate interests of courts, attorneys, and litigants can be accommodated—even when employing the subjective Sullivan standard in punishing speech for impugning judicial integrity or harming judicial reputation. Attorneys are subject to a number of content- and viewpoint-neutral rules that require them to have a reasonable factual basis for statements made in court filings and proceedings. Where an attorney makes a statement that would violate Federal Rule of Civil Procedure (FRCP) 11 or MRPC 3.1, courts can punish attorneys for violating those rules to the same extent that they punish attorneys for violating those rules where the statements made are about opposing parties or other non-judicial actors. However, to the extent that courts require attorneys to make a stronger factual showing than is required by FRCP 11 and MRPC 3.1 when the factual allegation is critical of a member of the judiciary or have punished attorneys separately and more harshly for impugning judicial integrity, they are punishing attorneys for impugning judicial reputation and must comply with the subjective New York Times v. Sullivan standard.

I. Attorney and Client Free Speech Rights in Court Proceedings

A. The Attorney’s Free Speech Rights Is Essential to Protecting the Rights of Litigants

“[A]bstract discussion is not the only species of communication which the Constitution protects”; rather, the First Amendment also protects “litigation . . . [as] a means for achieving the
lawful objectives of equality of treatment by all government.”37 The Supreme Court so held in *NAACP v. Button* when it struck down as unconstitutional Virginia’s regulation on attorney speech that prohibited certain forms of solicitation, including the NAACP’s solicitation and instigation of desegregation lawsuits. The Court noted, “whatever may be or may have been true of suits against government in other countries,” in the United States, litigants have “First Amendment rights to enforce constitutional rights through litigation.”38 The *Button* Court relied upon First Amendment rights to associate, to petition for redress of grievances, and also, as guaranteed by the Speech Clause, “protected freedoms of expression.”39 The Court explained, that, for the NAACP:

[L]itigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930’s, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.40

Notably, in *Button* the Court recognized a Speech Clause right belonging to the regulated attorney. This right of expression for the attorney was essential to preserve the rights to petition the government through litigation held by those people whom the NAACP would be representing. Virginia technically had only foreclosed attorney speech—but that restriction on attorney speech had the effect of (and apparently was intended to have the effect of41) denying African-Americans the ability to assert their constitutional rights by means of desegregation

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38 *Id.* at 439–40.
39 See *id.* at 437 (holding that the Virginia regulation “violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association”) (emphasis added); see also *id.* at 438 (holding that the regulation constituted a “serious encroachment . . . upon protected freedoms of expression”) (emphasis added).
40 *Id.* at 428–29 (emphasis added). The Court also noted that the same rights of expression would exist for those opposing the objectives of the NAACP. See *id.* at 444.
41 See *id.* at 445–46 (Douglas, J., concurring) (examining the history of the regulation as one of the “steps taken by Virginia to resist our Brown [v. Board of Education] decision”).
litigation. The Button Court emphasized that the racial setting of the lawsuit was “irrelevant to the ground of our decision” and that the First Amendment protections recognized by the Court would apply equally in other circumstances.42

In like manner, attorney regulations punishing and deterring attorneys from speech that impugns judicial integrity in court proceedings can have the effect of denying the litigants their underlying rights to pursue claims in litigation. As in Button, the speech regulation on attorneys affects the ability of litigants to enforce or pursue their rights through litigation. As described more fully below, litigants have constitutional rights to fair proceedings and an unbiased judiciary. Litigants also have access to courts and due process rights to assert and present their claims in litigation. To the extent that courts can curtail attorneys from and punish them for making arguments regarding judicial bias, incompetence, abuse and error, the corresponding rights of litigants—including criminal defendants—are lost.

a. The Right to an Unbiased Judiciary

The Supreme Court has repeatedly recognized that “[t]rial before ‘an unbiased judge’ is essential to due process”43—and this is so in both criminal44 and civil proceedings.45 As elaborated in In re Murchison: “A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.”46 Indeed,

42 Id. at 444–45.
46 Murchison, 349 U.S. at 136; see also Caperton, at 2259 (quoting Murchison in stating, “It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”).
in 2009, the Supreme Court in *Caperton v. A.T. Massey Coal Co., Inc.*, held that an objective “potential” or “probability of bias” by a judge or decisionmaker can reach unconstitutional proportions and deny a litigant due process.\(^{47}\)

The right to an unbiased judiciary is particularly compelling in criminal cases, where a person’s life or liberty is placed in the hands of a judge as an instrument of state power. Consequently, “[n]o matter what the evidence [is] against [a criminal defendant], he ha[s] the right to have an impartial judge.”\(^{48}\) Further, due process is not satisfied by invoking an assumption that judges are above common failings of other men and women. As the Supreme Court explained,

> the requirement of due process of law in judicial procedure is *not* satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer *a possible temptation to the average man* as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.\(^{49}\)

The Supreme Court in *Caperton* reaffirmed this statement as “the controlling principle.”\(^{50}\) Although the *Caperton* Court repeatedly noted that the criteria for finding a violation of due process “cannot be defined with precision,”\(^{51}\) it held that the inquiry is “objective,” does “not require proof of actual bias” (although “actual bias, if disclosed no doubt would be grounds for appropriate relief”\(^{52}\)), and requires “‘under a realistic appraisal of psychological tendencies and human weakness,’”\(^{53}\) a determination of “whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”\(^{54}\)

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\(^{48}\) *Tumey*, 273 U.S. at 535.

\(^{49}\) *Id.* at 532 (emphasis added).

\(^{50}\) *Caperton*, 129 S.Ct. at 2260.

\(^{51}\) *Id.* at 2261, 2265.

\(^{52}\) *Id.* at 2263.

\(^{53}\) *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

\(^{54}\) *Id.* at 2262.
The Court noted that its objective test “‘may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.’”\footnote{Id. at 2265 (quoting In re Murchison, 349 U.S., 133, 136 and explaining that “objective standards may [] require recusal whether or not actual bias exists or can be proved”) (emphasis added).} It is important to recognize that if due process will sometimes actually bar an unbiased, upright judge from hearing a case, then certainly challenges to judges in papers filed with courts will include challenges against judges who are in fact unbiased and upright. Attorneys should and must be able to assert and preserve their client’s due process rights—even when doing so results in attacking the neutrality or integrity of a judge who in actuality is unbiased and fair. Nevertheless, courts have required attorneys to prove the truth of allegations of bias or improper purpose—often extremely strictly\footnote{See, e.g., Burton v. Mottolese, 835 A.2d 998 (Conn. 2003); In re Wilkins, 777 N.E. 2d 714 (Ind. 2002); see also Tarkington, supra note 4, at 1591 & nn. 150–53.} and with an exaggerated view of the assertions made by attorneys.\footnote{See, e.g., In re Frerichs, 238 N.W.2d 764, 765 (Iowa 1976). In Frerichs, a criminal defense attorney wrote in petition for rehearing that the court “willfully avoided” and “refuse[d] to address themselves to the merits of a defendant’s substantial constitutional claims” and thus violated the defendant’s “rights to due process and equal protection of the laws.” Id. The Court construed this statement thus: “Respondent’s assertions easily could be said to allege commission of public offenses. Setting aside the concept of judicial immunity we note that, under § 740.3, The Code, it would be an indictable misdemeanor for any judge to willfully and maliciously oppress any person under pretense of judicial capacity” and “it would be a felony for judges to conspire to injure, oppress, threaten, or intimidate any citizen in the exercise of a constitutional right. We find respondent’s assertions unprofessional because they attribute to this court sinister, deceitful and unlawful motives and purposes.” Id. at 767; see also Tarkington, supra note 4, at 1591 n.153.}

Notably, not all questions regarding judicial qualification violate or even implicate due process.\footnote{See, e.g., Bracy v. Gramley, 520 U.S. 899, 904 (1997) (“Of course, most questions concerning a judge’s qualifications to hear a case are not constitutional ones . . . .”); see also Caperton, 129 S.Ct. at 2259 (“most matters relating to judicial disqualification [do] not rise to a constitutional level” (quoting FTC v. Cement Institute, 333 U.S. 683, 702 (1948))).} While due process “establishes a constitutional floor,”\footnote{Bracy, 520 U.S. at 904.} both Congress and the States have imposed more stringent requirements for judicial disqualification.\footnote{Cf. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 829 (1986) (“The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.”).} Under 28 U.S.C. § 455, for example, disqualification of a federal judge or magistrate is required “in any proceeding
in which his impartiality might reasonably be questioned”—in addition to requiring judicial disqualification in specified circumstances involving impediments such as personal bias or prejudice, personal knowledge of evidentiary facts, or pecuniary interest in or certain familial or professional connections with a particular proceeding.  

Further, under the ABA’s Model Code of Judicial Conduct, applicable in the majority of states, judicial disqualification is required under similar circumstances, including in proceedings where “the judge’s impartiality might reasonably be questioned” or when a judge “has a personal bias or prejudice concerning a party or a party’s lawyer.” The Model Code also requires disqualification if a judge, outside of a court opinion, “has made a public statement . . . that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding.”

Of course, in order for litigants to meaningfully assert any of these rights, attorneys must be allowed to express them. Additionally, attorneys may make statements that allegedly impugn

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61 28 U.S.C. § 455 (2000). In Liteky v. United States, 510 U.S. 540, the Supreme Court interpreted § 455(a)’s requirement of disqualification “in any proceeding in which [a judge’s] impartiality might reasonably be questioned” to generally be limited by the “extrajudicial source doctrine,” which requires that the impartiality come from some factor or source outside of the judicial proceeding itself. Thus, “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment in the case impossible.” Id. at 555. Of course, it would be very hard to make a showing that “fair judgment” is “impossible” in a particular case. The Court thus concluded that “judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge” unless “they reveal an opinion that derives from an extrajudicial source” or “reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” Id.

Attorneys whose clients (or who themselves) are abused by judicial hostility and seek disqualification of the judge under § 455, thus generally have to show that the source of that hostility came from something other than what the judge learned or heard in the pending matter. As the Liteky majority elaborated, “Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.” See id. at 555–56.

The four-justice dissent in Liteky, argued that “[t]he statute does not refer to the source of the disqualifying partiality.” Id. at 558 (Kennedy, J., dissenting). Thus, regardless of whether the source is “extrajudicial or intrajudicial,” disqualification should be “triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge’s rulings or findings.” Id. at 557–58 (Kennedy, J., dissenting).

62 In 2007, the ABA modified its Code of Judicial Conduct. Thirty-five states have adopted or are in the process of reviewing and adopting the new Code or modifications thereof. See also Caperton, 129 S.Ct. at 2266 (noting that “[a]lmost every State . . . has adopted the American Bar Association’s objective standard . . .”).

63 MODEL CODE OF JUDICIAL CONDUCT, R. 2.11 (2007).

judicial integrity in appellate briefs in order to seek reassignment of the case to a different judge on remand. In most of the federal appellate courts and in several states, reassignment is granted based on the weighing of three factors, including “whether reassignment is advisable to preserve the appearance of justice.” Other federal and state appellate courts examine whether reassignment is necessary to “preserve not only the reality but also the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice” or whether “impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.”

All of these tests make discussion in an appellate brief about the impartiality or potential bias of a judge relevant where reassignment upon remand is sought. Further, in reassigning cases, courts have granted (although they have also denied) reassignment on the basis that the judge expressed hostility or frustration toward one of the litigants or her attorney. Some cases have considered erroneous and adverse rulings against one party in determining that there was an

65 United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977). The factors are: “(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.” Id. These three factors comprise the Robin test, which has been adopted in all but the Third, Seventh, and Eighth Circuits in the federal courts of appeals.


66 Alexander v. Primerica Holdings, 10 F.3d 155, 167 (3d Cir. 1993); see also Wright v. Moore, 953 A.3d 223, 227 (Del. 2008) (examining “whether there is an appearance of bias sufficient to cause doubt about the judge’s impartiality”).

67 Sentis Group v. Shell Oil Co., 559 F.3d 888, 904 (8th Cir. 2009); see also People v. Enriquez, 160 Cal. App. 4th 230, 244 (Cal. Ct. App. 2008) (indicating that reassignment necessary “[i]f a reasonable man would entertain doubts concerning the judge’s impartiality”).

68 See, e.g., Sentis Group, 559 F.3d at 904–05 (judge expressed hostility to the plaintiffs and made adverse rulings); Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 142 (2d Cir. 2007) (judge made comments regarding appellant’s credibility).
appearance of impartiality sufficient to grant reassignment.\textsuperscript{69} Although not rising to the level of a constitutional right, where courts provide for reassignment on remand and a litigant would benefit therefrom, an attorney must be allowed to express concerns of impartiality or other defects in order to assert that interest of the client. This is so even where the court ultimately decides not to reassign the case.

Finally, it is the very function of appellate attorneys in our system of justice to highlight the failings of the lower court’s handling of and decision in the case in order to obtain a reversal for their clients. While a number of cases indicate that some appellate attorneys go further than they need (or than is wise) by attributing nefarious motives to the lower court or exaggerating the error,\textsuperscript{70} the question becomes whether they and/or their clients should be punished for so doing. As will be briefly discussed below, where the error of the attorney is something that would be punished if the speech regarded another participant or assertion—for example, for being frivolous or lacking a basis in fact, or being irrelevant—then the judiciary should punish the speech only to the extent that they would punish it if it regarded another actor. To the extent that the standard applied or the sanction imposed is more stringent than it would be in another context, then the judiciary is merely protecting its own reputation and the \textit{Sullivan} standard should apply.

Where attorneys are asserting, on behalf of their clients, constitutional or statutory rights to an impartial judiciary or are seeking reassignment on remand, they must be allowed to make

\textsuperscript{69} \textit{See} \textit{Sentis Group}, 559 F.3d at 904–05 (noting that in addition to expressing hostility to the plaintiffs, the court denied the plaintiffs an opportunity to respond during a sanctions hearing and misconstrued its own discovery orders in adopting the defendant’s mischaracterization thereof); Mitchell \textit{v.} Maynard, 80 F.3d 1433 (10\textsuperscript{th} Cir. 1996) (considering appellant’s evidence of bias including prior adverse rulings and finding reassignment appropriate); Living Designs, Inc. \textit{v.} E.I. DuPont de Nemours and Co., 431 F.3d 353 (9\textsuperscript{th} Cir 2005) (examining prior court rulings to determine if appearance of bias and ordering reassignment); Rhodes \textit{v.} Avon Products, Inc., 504 F.3d 1151 (9\textsuperscript{th} Cir. 2007) (examining partiality of court based on rulings favorable to one side, including granting a motion to dismiss without allowing the party against whom it was granted an opportunity to respond).

\textsuperscript{70} \textit{See}, \textit{e.g.}, In re Wilkins, 777 N.E. 2d 714 (Ind. 2002) (per curiam); Peters \textit{v.} Pine Meadow Ranch Home Ass’n, 151 P.3d 962 (Utah 2997); \textit{In re} Graham, 453 N.W.2d 313 (Minn. 1990).
arguments and assertions of bias or impropriety by the lower court. If attorneys are punished or deterred from bringing such claims, the underlying rights of the litigants are lost.

b. Access to Courts and Due Process Rights

The Supreme Court has recognized a constitutional right to access the courts for both criminal and civil litigants. Although the precise constitutional source for and scope of this right has remained unclear, the Court has recognized under the Due Process Clause a “meaningful” and “fundamental right of access to the courts” securing a right of access primarily for criminal defendants, civil rights litigants, and those being denied a fundamental right over which state courts have a monopoly. The Court has also recognized an access right arising under the First Amendment’s Petition Clause under which civil litigants have a right to bring (and thus cannot be punished for bringing) non-frivolous claims, including state and common law claims.

The Court has held that, regardless of the constitutional basis for the access to court right, the person claiming denial of access must establish an underlying claim or right that the litigant has been impeded in or foreclosed from pursuing in court. Thus, the person claiming denial of access “must identify a ‘nonfrivolous,’ ‘arguable’ underlying claim.” In the context of speech impugning judicial integrity, litigants have underlying rights to fair proceedings from an impartial judge as outlined above. By threatening punishment for bringing such claims, attorneys are chilled from asserting or strongly pursuing them, and thus the judiciary has created

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71 See, e.g., Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002) (explaining that “[d]ecisions of this Court have grounded the right of access to courts in the Article IV of the Privileges and Immunities Clause, the First amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses” (citations omitted).)
75 See Christopher, 536 U.S. at 414–15.
76 See id. at 415.
an impediment to raising them.\textsuperscript{77} Moreover, in cases where a court strikes a paper or summarily affirms a lower court’s ruling as a sanction, the litigant has been denied access to assert his underlying right.

Under the Petition Clause of the First Amendment, the Supreme Court has held that a civil litigant cannot be sanctioned or punished for bringing a non-frivolous claim in court. For example, in the antitrust context, the Court has held that litigants who file a non-frivolous lawsuit against a competitor cannot be held liable for engaging in anti-competitive conduct by filing the lawsuit—even if they have an anti-competitive motive in filing the suit. That is, a company with a non-frivolous claim against a competitor has a right to petition the courts for redress of grievances and cannot be punished for filing the claim under the federal antitrust laws. Thus, in \textit{Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.},\textsuperscript{78} Columbia Pictures sued Professional Real Estate Investors for copyright infringement. Professional Real Estate Investors then counterclaimed that Columbia Pictures’ copyright claim was a “sham that cloaked underlying acts of monopolization and conspiracy to restrain trade” in violation of the antitrust laws.\textsuperscript{79} Columbia Pictures’ claim for copyright infringement was ultimately unsuccessful. Nevertheless, the Court held that Columbia had a right pursue the claim under the Petition Clause and so could not be punished for filing the lawsuit under federal antitrust laws. Indeed, the Court held that in order to be liable under the antitrust laws for pursuing litigation against a competitor, the claims asserted must be “objectively baseless.”\textsuperscript{80} That is, under the Petition Clause, in order for someone to be punished for filing civil claims, the claims must be

\textsuperscript{77} See, e.g., State v. Santana-Ruiz 167 P.3d 1038 (Utah 2007) (warning criminal defense attorneys of the pitfalls that may accompany making an argument of judicial bias and citing to civil case where court summarily affirmed erroneous decision of lower court).
\textsuperscript{78} 508 U.S. 49 (1993).
\textsuperscript{79} \textit{Id.} at 52.
\textsuperscript{80} \textit{Id.} at 60.
“so baseless that no reasonable litigant could realistically expect to secure favorable relief.”

In other words, a litigant is required to have “no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication” to obtain protection under the Petition Clause from being punished for instituting civil proceedings.

In like manner, in *Bill Johnson’s Restaurants, Inc. v. NLRB*, the Supreme Court held that, under the Petition Clause, the filing of a civil lawsuit cannot be an unfair labor practice in violation of the NLRA unless the claim is “baseless.” The Court explained that the reason for its holding is that “baseless litigation is not immunized by the First Amendment right to petition.” Consequently, if a “plaintiff’s position is plainly foreclosed as a matter of law or is otherwise frivolous” then the litigation can be enjoined by the NLRB as an unfair labor practice. But “if there is any realistic chance that the plaintiff’s legal theory might be adopted,” then the claims are protected by the Petition Clause and the litigation cannot be enjoined.

Under the Petition Clause then, litigants have a right to access the courts and bring civil claims—even non-constitutional claims based on state or federal law—and thus cannot be punished for or enjoined from bringing such claims and arguments unless the claims are objectively baseless. Litigants claiming that they were (or will be) denied due process by a biased or partial judge are protected by the Petition Clause, which requires that the litigants *not* be punished unless the claims are “baseless.” Notably, “baseless” does not mean that the claim ultimately is unsuccessful. In *Professional Real Estate Investors*, the copyright infringement claim was ultimately unsuccessful, yet Columbia Pictures was protected from punishment under

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81 Id. at 62.
82 Id. at 62–63 (citation omitted).
84 Id. at 743.
85 Id. at 747.
86 Id.
the antitrust laws because the claim was not “so baseless that no reasonable litigant could realistically expect to secure favorable relief,”87 or in the words of the Bill Johnson’s Court, the claim was not “plainly foreclosed as a matter of law or [] otherwise frivolous”88

If Congress and government agencies like the NLRB are prohibited by the Petition Clause from punishing litigants who bring civil law claims unless the claims are objectively baseless, state and federal judiciaries (which are bound by the Petition Clause) should not be able to punish and deter litigants for bringing claims that are not objectively baseless even if the arguments or claims involve impugning judicial integrity. Although the Petition Clause right belongs to litigants and not to their attorneys, the right is all but lost if the client has a constitutional right to bring the claim or assert his legal rights, but the attorney is prohibited from expressing it in court filings and proceedings.89 The client would either have to proceed pro se, waive the right, or risk having his attorney punished. As Carol Andrews has argued regarding

87 Prof’l Real Estate Investors, 508 U.S. at 62.
88 Bill Johnson’s Restaurants, 461 U.S. at 747.
89 Notably, Carol Andrews argues that the right of access to courts under the First Amendment only applies to the filing of claims and counterclaims—accessing courts initially—and does not apply at all to the filing of subsequent papers in court, such as motions. See Carol Rice Andrews, The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct, 24 J. LEGAL PROF. 13, 71 (2000). Nevertheless, Andrews argues that the Due Process Clause protects the filing of “civil papers other than the initial complaint” and requires that regulations regarding them be “reasonable” although not rising to the protection afforded by the Petition Clause. See id. I do not read the case law as compelling such a limited right. Andrews declares that her dichotomy is justified because “the interest in preserving free motion practice is far less than that in preserving initial access to court to present a claim for relief” and that “[m]otions have less justification and more danger of abuse.” Id. at 74. Andrews’ dichotomy is superficial. A motion for disqualification of a judge may raise a constitutional right to an unbiased judiciary—and denial of that motion may result in a denial of due process. An appellant asserting that she was denied due process because of a biased judge is petitioning the government (the appellate court) for a redress of grievances. A defense (though not a claim found in the complaint or a counterclaim) may assert constitutional and other important statutory rights and equally protects the defendant’s right to petition for redress of grievances that arise from being subjected to suit or prosecution. It is my contention that the right to petition for redress of grievances does not discriminate on the basis of whether the assertion is made in a motion or in a complaint, or whether it is a claim, a defense, or something else. Rather, the relevant determinant should be whether the litigant (as a plaintiff or defendant) is asserting a legally cognizable right. If the litigant is pursuing a legally cognizable right—whether in a motion, in a complaint, on appeal, as a defense to a claim—then they are petitioning the government for redress and are protected from punishment as long as their assertion of entitlement under that right is nonfrivolous.
other Rules of Professional Conduct:\footnote{See id. at 60. Andrews argues that motive restrictions of the Rules of Professional Conduct—that is, rules that prohibit filing of claims based on the improper motives of the client or attorney—may run afoul of Petition Clause to the extent they are used to prohibit or punish the bringing of nonfrivolous claims. Andrews asserts that because the restrictions are only on attorney actions and not litigant’s actions, they “do not directly regulate the protected right but instead only indirectly impede or deter exercise of the right” and thus it is necessary to engage in a “breathing room analysis” and consider the “degree of intrusion” and “impact on the core right” from the rule. See id. Andrews then argues that “a law affirmatively banning assistance of a lawyer is a significant enough intrusion to require strict scrutiny of that law.” Id. at 64.

My argument is distinctly different—the client’s right to access the courts and assert legal rights that may impugn judicial integrity demonstrates the necessity of recognizing a free speech right residing in the attorney to assert such claims on the client’s behalf.}{90}:

In theory, even if the prohibition applies, the client is free to file the suit on his own, without the assistance of a lawyer. Yet, the prohibition unquestionably impacts the client. A typical plaintiff would be impeded, if not completely thwarted in his attempt to gain access to court if he could not use the services of a lawyer.\footnote{id. at 60.}{91}

Again, then, it is necessary to recognize the attorney’s free speech right to express in court proceedings relevant and non-frivolous arguments and claims of his client that impugn judicial integrity. The free speech right of attorneys to impugn judicial integrity in court proceedings is essential to preserving the litigant’s constitutional right to access courts and assert non-baseless claims under the Petition Clause.

Cases recognizing a court access right arising from the Due Process Clause have mainly involved criminal defendants. Again, courts have punished attorneys for impugning their integrity in criminal as well as civil proceedings. Under the Due Process Clause, the Supreme Court has repeatedly recognized a prisoner’s “right to bring to court a grievance that the inmate wished to present.”\footnote{Lewis v. Casey, 518 U.S. 343, 354 (1996).}{92} Thus prisoners have an access right to assert (whether during trial, on appeal or in habeas petitions) claims that they are being or were denied due process because of a biased judge. Indeed, the right of access to courts for criminal defendants and prisoners is intended “to remedy past or imminent official interference with individual inmates’ presentation...
of claims to the courts.”\footnote{\textit{Id.} at 349.} A criminal defendant must show that “a nonfrivolous legal claim had been frustrated or was being impeded.”\footnote{\textit{Id.} at 353.} Thus, the Supreme Court has stricken as unconstitutional fees and other financial requirements that barred impoverished defendants from filing appeals or seeking post-conviction relief.\footnote{\textit{See, e.g.}, Smith v. Bennett, 365 U.S. 708, 710–11 (1961); Griffen v. Illinois, 351 U.S. 12, 13–14 (1956).} Similarly, restrictions on an attorney’s ability to impugn judicial integrity—where the argument is relevant to the underlying claim or motion—can frustrate the bringing or presentation of criminal defendant and prisoner claims of judicial bias.

Additionally, the Court has found unconstitutional regulations that restrict the ability of prisoners to obtain legal counsel and aid from each other or from law students and paraprofessionals. The Court explained that “[r]egulations and practices that unjustifiably \textit{obstruct the availability of professional representation} or other aspects of the right of access to the courts are invalid.”\footnote{\textit{Procunier v. Martinez}, 416 U.S. 396, 419 (1974) (emphasis added); \textit{see also} \textit{Johnson v. Avery}, 393 U.S. 483, 484 (1969).} This aspect of the right to court access gets to the crux of the problem with restrictions that punish attorney speech made in pursuit of a claim of judicial bias or incompetence: although it is only the attorney’s speech that is prohibited, the criminal defendant must either abide by that restriction in presentation of his claim or proceed without an attorney. The regulations frustrate professional representation by restricting attorney expression even where the attorney is making a relevant argument on behalf of a client.

The Court has extended these principles of court access arising under the Due Process Clause to other situations where, as with criminal defendants, the court system is “not only the paramount dispute-settlement technique, but, in fact, the only available one.”\footnote{\textit{Boddie v. Connecticut}, 401 U.S. 371, 377 (1971).} Thus for

\begin{thebibliography}{99}
\bibitem{Id.} \textit{Id.} at 349.
\bibitem{Id.} \textit{Id.} at 353.
\end{thebibliography}
defendants, as well as for plaintiffs seeking vindication of a fundamental right (such as divorce
or termination of parental rights) over which courts have a monopoly in adjudication, the
Supreme Court has recognized a right of access under the due process clause that forbids state
imposition of impediments to presentation of claims and defenses, similar to that outlined above
for criminal defendants.\textsuperscript{98}

In addition to providing a right to access courts, the Due Process Clauses in general
require that there be fair proceedings and that “persons forced to settle their claims of right and
duty through the judicial process must be given a meaningful opportunity to be heard.”\textsuperscript{99}
Particularly for criminal and civil defendants, who do not have the option to resort to other forms
of dispute resolution, the Due Process Clauses of the Constitution require state and federal courts
“within the limits of practicability” to “afford to all individuals a meaningful opportunity to be
heard”\textsuperscript{100}—which means “an opportunity granted at a meaningful time and in a meaningful
manner.”\textsuperscript{101} While the precise requirements of due process may at times appear rather
amorphous,\textsuperscript{102} for the litigant or criminal defendant wishing to present a constitutional claim of
judicial bias (or to assert statutory or rule-based rights to a change or disqualification of a judge,
or to appeal a denial of such a right, etc.), a meaningful opportunity to be heard cannot be
provided when an attorney is threatened with punishment for impugning judicial integrity.

**B. A Free Speech Right to Express Claims and Arguments to a Court**

In addition to being necessary to preserve the underlying rights of clients to an unbiased

\textsuperscript{98} See, e.g., \textit{id.} (divorce proceeding); M.L.B. v. S.L.J., 529 U.S. 102, 105, 117 (1996) (termination of
parental rights).

\textsuperscript{99} \textit{Boddie}, 401 U.S. at 379 (1971); \textit{see also} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306,
313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but
there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be
preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

\textsuperscript{100} \textit{Boddie}, 401 U.S. at 379.

\textsuperscript{101} \textit{Id.} at 377.

\textsuperscript{102} For example, in \textit{Matthews v. Eldridge}, 424 U.S. 319, 335 (1976), the Court created a three-factor
balancing test to determine what process is due and if a meaningful opportunity to be heard has been given.
judiciary as well as access of courts and due process rights, a free speech right for attorneys to make relevant claims and arguments to a court is essential to the proper functioning of the judicial system, as recognized in *Legal Services Corporation v. Velazquez*.\(^{103}\)

*Velazquez* involved restrictions placed on attorneys who accepted funds from the congressionally-created Legal Services Corporation (the “LSC”), which grants money to organizations that provide legal assistance to the poor in non-criminal cases. At issue were Congressionally-imposed restrictions on recipients of LSC funds, specifically prohibiting them from providing any representation that “involves an effort to amend or otherwise challenge existing welfare laws,” including challenges as to their validity or constitutionality.\(^{104}\) Indeed, under the restrictions, if an attorney was already actively representing a client at the time that a constitutional or statutory challenge to welfare laws became evident in the litigation, the attorney was required to withdraw from the representation.\(^{105}\) The Supreme Court struck down the regulations as violative of the First Amendment, explaining that the restrictions were inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to *prohibit the analysis of certain legal issues* and to *truncate presentation* to the courts, the enactment under review *prohibits speech and expression* upon which the courts must depend for the proper exercise of the judicial power.\(^{106}\)

The Court further stated that Congress had designed the restriction “to insulate current welfare laws from constitutional and certain other legal challenges,” which the Court held “implicat[ed] central First Amendment concerns.”\(^{107}\) The First Amendment “‘was fashioned . . . [to] bring[] about . . . political and social changes.’”\(^{108}\) Thus Congress could not “impose rules and

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104 *Id.* at 536–37.
105 *Id.* at 539.
106 *Id.* at 545 (emphasis added).
107 *Id.* at 547.
108 *Id.* at 548 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).
conditions which in effect insulated its own laws from legitimate judicial challenge,"109 nor could it “exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.”110 The Court concluded: “The Constitution does not permit the Government to confine litigants and their attorneys in this manner.”111

As applied to the suppression or punishment of speech critical of the judiciary made in court filings, courts should not be able to “impose rules . . . which in effect insulated [their] own [actions] from legitimate judicial challenge”112 and “exclude from litigation those arguments and theories [that the judiciary] finds unacceptable [or insulting] but which by their nature are within the province of the courts to consider.”113 Indeed, to the extent that courts seek to prohibit the “analysis of certain legal issues and to truncate presentation to the courts” regarding judicial abuse, corruption, or bias, they prohibit the constitutionally protected “speech and expression” of the affected attorneys and their clients.114

Thus, despite Gentile’s dicta indicating that attorneys have virtually no free speech rights in court proceedings,115 the Court subsequently squarely held in Velazquez that attorneys and clients in fact have free speech rights in court filings and proceedings—at least extending protection to expression and presentation of relevant arguments. This holding is consistent with the First Amendment’s core protection for political speech. Although arguments made to a court may not generally be viewed as being within the tumultuous realm of “uninhibited, robust, wide-open debate” we generally conceive of as political speech—court proceedings are, as the

109 Id.
110 Id. at 546.
111 Id. at 548 (emphasis added).
112 See id.
113 Id. at 546.
114 See id. at 545.
Velazquez court noted, an essential instrument of social and political change in our system of
government. 116 Again, this was a central recognition of the Court in Button—that litigation can be, itself, “a form of political expression” and that restrictions on attorney speech (as in Button) may violate the Speech Clause. 117

Similarly, as the Court in Button recognized, litigation is a method of bringing about social change and vindication of constitutional rights that is accessible by any private person who is injured—despite the unpopularity of his position. Certainly private individuals can complain to their congressmen, attempt to enact referenda, vote for and against ballot measures, vote against legislators and executive members whose actions they disagree with or think are unconstitutional. But the courts are the method where a person who individually is injured by a legal or constitutional violation can obtain relief both from future violations through injunctions and from past harms through remedial compensation. Thus, “under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.” 118 As noted above, by denying and deterring attorneys their right to express arguments of judicial bias, abuse, corruption, and incompetence in court filings, the judiciary in turn denies the clients’ rights to access the courts and due process.

Yet even for the litigant not involved in civil rights litigation or trying to bring about mass social change, but instead involved in litigation between two private parties, that litigation binds and changes the social organization and relationships between people, their relative wealth, and their obligations. Thus, for individuals, litigation is a form of speech that will change the social order as to themselves and others. Indeed,

116 See Velazquez, 531 U.S. at 548 (explaining that the First Amendment “‘was fashioned . . . [to] bring[] about . . . political and social changes’”) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).
118 Id. at 430.
Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a ‘legal system,’ social organization and cohesion are virtually impossible . . . .

It is therefore important that this system—this ability for individuals to call upon the powers of the state to alter their relationship with others—be fair, which is a premise of due process. The specific ability to complain about and rectify unfairness in individual cases in the court system (such as those arising from a biased, incompetent, or abusive judge) serves a checking function by which the overall integrity and fairness of the system is monitored and ensured. As Vincent Blasi has argued, the ability to check official abuse of power was a fundamental purpose underlying the adoption of the Speech Clause. Not only do sanctions for challenging judicial integrity in court proceedings curtail the expression of criticism that could potentially lead the public to employ democratic correctives, it curtails the corrective itself. The assertions regarding government abuse or unfairness are suppressed in the very forum in which they should be remedied.

The ability to resort to the judicial system to assert one’s rights—including one’s rights to a fair proceeding in the court system itself—is part of the American system of self-

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\text{\textsuperscript{119}} \text{ Boddie v. Connecticut, 401 U.S. 371, 374–76 (1971).} \\
\text{\textsuperscript{120}} \text{Id. at 374–76. The Court elaborated:} \\
\text{It is to courts or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State’s monopoly over techniques for binding conflict resolution could hardly said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.} \\
\text{Id. at 375.} \\
\text{\textsuperscript{121}} \text{See Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 527 (1977) (arguing that the ability to check official use of power “was uppermost in the minds of the persons who drafted and ratified the First Amendment.”); see also Tarkington, supra note 4, at 1579–82 (discussing Blasi’s theory and the importance for the checking value of constitutionally protecting attorney speech regarding the judiciary).} 
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government. It has long been recognized that “[t]he right to sue and defend in the courts is the alternative of force” and thus, “[i]n an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.”

Protecting the right and preserving the speech necessary to enable American citizens to govern themselves was one of the central Speech Clause theories upon which the *Sullivan* Court relied in holding that speech regarding public officials (including the judiciary) must be constitutionally protected.

Indeed, it is important that citizens can challenge governmental action in court proceedings without fear of sanction for impugning government integrity. Freedom of expression does not solely protect uninhibited robust debate on street corners and in newspapers, but as declared in *Button*, also “vigorous advocacy” through the medium of litigation “against governmental intrusion.” For the criminal defendant who believes that his constitutional right to an unbiased judiciary has been violated, the ability of his counsel to freely and vigorously contest the impartiality of the trial judge is the defendant’s only “means for achieving the lawful objectives of equality of treatment by all government”—specifically the judiciary. This proposition seems obvious as applied to officers of other branches of government. For example, suppose an attorney brought a claim on behalf of a client against a state executive officer for discrimination on the basis of race or some other constitutional violation. If the claim were in fact frivolous or did not comply with FRCP 11 or MRPC 3.1, the attorney could

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123 See Tarkington, supra note 4, at 1576–79, 1584; see also 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” (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); see generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (basing theory for need for free speech on idea of self-government).
125 Id.
126 Although there is Eleventh Amendment and sovereign immunity for government, yet officers of state and federal government can be sued in their individual capacity for monetary relief and in their official capacity for prospective injunctive relief. See, e.g., Ex Parte Young, 209 U.S. 123, 159–60 (1908).
certainly be sanctioned under one of those rules. But it would seem truly bizarre if the court instead sanctioned the attorney for impugning the integrity of the executive branch by arguing that a member thereof had committed a constitutional violation. The judiciary is not somehow immune from having members that abuse their power, are biased, incompetent, or corrupt, or whose actions deny citizens their constitutional rights. The Supreme Court recognized this fact in *Mitchum v. Foster*, where the Court interpreted 42 U.S.C. § 1983 and explained that at the time of its enactment Congress found 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.”\(^{127}\)

Kathleen Sullivan, although analogizing attorney speech to various kinds of governmental speech,\(^{128}\) warns that “[i]t would plainly be untenable for the Court to treat lawyers as entirely the agents of the state, for part of their very job description within the administration of justice is to challenge the state—for example, in the capacities of criminal defense lawyer or civil rights litigator.”\(^{129}\) Although Sullivan’s point is correct, the essential role of the attorney in challenging the state extends far beyond the examples she provides of attorneys who directly litigate against the government as an opposing party. It is not solely the job of the criminal defense lawyer or the civil rights litigator to challenge state or governmental action. Rather every appellate attorney who challenges the decision of a lower court is challenging state or federal action—but the action is judicial in nature. Further, attorneys who seek to have a judge disqualified or who make arguments of judicial bias or denial of due process are challenging the government, specifically the judiciary. Judges should not be able to limit or curb the extent to which their actions can be called into question where there is a legal argument or remedy.

\(^{129}\) See id. at 587–88.
available to the affected client. It is a core function of an attorney to present and of the judicial system to hear a client’s colorable arguments and claims in court proceedings—even if those arguments implicate judicial integrity.

II. Arguments that Attorneys Lack Free Speech Rights Are Unpersuasive

A. Officers of the Court

Despite Velazquez and the essentiality of court proceedings in challenging judicial action and providing relief to litigants harmed by judicial abuse and bias, most courts reject the proposition that attorneys have free speech rights in court proceedings, often citing to the idea that an attorney is an “officer of the court.” When filing papers with a court, it is clear that attorneys are indeed “officers of the court,” meaning they are cloaked by the state with authority to represent another person in a court of law and could not file papers without having obtained their license. As Justice O’Connor stated in her concurrence in Gentile, “lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech.” But, as Erwin Chemerinsky pointed out, labeling an attorney an “officer of the court” does not provide any guidance as to the consequences or normative meaning of that label. Does the label mean that an attorney is an instrument of the State? Does the label mean that the attorney has limited or no First Amendment rights when acting in that capacity? The label itself does not provide any

130 See, e.g., In re Shearin, 765 A.2d 930, 938 (Del. 2000) (citing to idea that attorneys are officers of the court and “that there are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer’s constitutional right to freedom of speech.”); In re Pyle, 283 Kan. 807, 822 (Kan. 2007) (“Upon admission to the bar of this state, attorneys assume certain duties as officers of the court. Among the duties imposed upon attorneys is the duty to maintain the respect due to the courts of justice and to judicial officers.”); Ky. Bar Ass’n v. Waller, 929 S.W.2d 181, 183 (Ky. 1996) (“Officers of the court are obligated to uphold the dignity of the Court of Justice . . . .”); In re Frerichs, 238 N.W.2d 764, 769 (Iowa 1976) (“In his professional role a lawyer has a duty to the court which he serves as officer.”).


framework for determining the rights of attorneys or their clients.

Scholars have generally approached the ambiguity of the term “officers of the court” by analogizing attorney speech to other categories of speech where the Speech Clause analysis is more developed. Notably, attorneys acting in their capacity as officers of the court have been repeatedly analogized to public employees. Commentators have further analogized attorney speech to a form of government-funded speech or to speech made in a nonpublic forum. Nevertheless, each of these analogies fails to recognize and account for the following: (1) the nature of the court system as an essential part of our tripartite system of government that performs constitutionally-required functions; (2) the constitutional rights of litigants and criminal defendants to access that system and to protections within that system (including rights to an unbiased judiciary); and (3) the attorney’s role in representing his client in that court system—particularly in light of its American adversarial form. These failures are evident in analyzing each of the three analogies both in the specific context of attorney speech critical of the judiciary as well as more generally.

1. Analogy to Government-Funded Expression

Both Kathleen Sullivan and Bradley Wendel have analogized regulation of attorney speech to the regulation of government-funded speech. The idea is that state and federal governments fund the court system and attorneys use or are beneficiaries of that funding and are able to speak to the court through that funding. In a sense, the government is “subsidizing” attorney speech by providing the court system and thus can place restrictions on the speech that is allowed. Notably, at the time that Sullivan and Wendel made their analogies, the Supreme Court’s case law in the area of government speech was arguably more protective of speech than it has become in recent years where the Court has stated that “the Free Speech Clause has no
application” at all to government speech.\textsuperscript{133} For example, Sullivan notes as to government-funded speech that the “government’s mere refusal to subsidize speech of particular content is constitutional, unless aimed at the suppression of a particular viewpoint,”\textsuperscript{134} citing \textit{FCC v. League of Women Voters},\textsuperscript{135} \textit{Regan v. Taxation With Representation},\textsuperscript{136} and \textit{Rust v. Sullivan}.\textsuperscript{137} Similarly, Wendel argues that “it may be helpful to think of lawyers’ speech that is directly related to representing clients as a kind of government-funded expression, to which content-based restrictions may be attached,”\textsuperscript{138} and cites such cases as \textit{National Endowment for the Arts v. Finley},\textsuperscript{139} \textit{Rosenberger v. Rector of the University of Virginia},\textsuperscript{140} and \textit{Rust v. Sullivan}.\textsuperscript{141} Both Wendel and Sullivan read the then-existing government speech cases to allow content-based, but not viewpoint-based, restrictions on speech.\textsuperscript{142} However, in more recent cases, such as \textit{Pleasant Grove City v. Summum} and \textit{Johanns v. Livestock Marketing Ass’n}, the Supreme Court has held that government speech is “exempt from First Amendment scrutiny” entirely.\textsuperscript{143}

Moreover, since the time that Sullivan and Wendel proposed their analogies of attorney speech to government-funded speech, the Supreme Court in \textit{Velazquez} has in large part rejected the analogy. The major argument proffered in \textit{Velazquez} and rejected by the Court was that speech by the attorneys who received LSC funding was government speech—in like manner to

\begin{itemize}
  \item See, e.g., \textit{Pleasant Grove City v. Summum}, 555 U.S. \textsc{___}, slip op. at 4 (2009); \textit{see also Johanns v. Livestock Marketing Ass’n}, 544 U.S. 550, 553 (2005) (stating issue as whether the speech “is the Government’s own speech and therefore \textit{is exempt from First Amendment scrutiny}” and holding that it was (emphasis added)).
  \item Sullivan, \textit{supra} note 8, at 587.
  \item 461 U.S. 540 (1983).
  \item Wendel, \textit{supra} note 8, at 380.
  \item 524 U.S. 569 (1998).
  \item 515 U.S. 819 (1995).
  \item Consequently, under the case law existing when they wrote their articles, punishment for impugning judicial integrity—as a viewpoint-based restriction—would be unconstitutional. \textit{See infra} note 205.
  \item \textit{Johanns}, 544 U.S. at 553; \textit{see also Summum}, 555 U.S. \textsc{___}, slip op. at 1 (holding that placement of a monument is “a form of government speech and is therefore \textit{not subject to scrutiny under the Free Speech Clause}” (emphasis added)).
\end{itemize}
the speech of the doctors receiving Title X funding at issue in *Rust v. Sullivan*. The Court in *Velazquez* held that even when the attorneys *are paid through government subsidies*, the speech of the attorney is “private” rather than “government” speech because the attorney “speaks on the behalf of his or her private indigent client” rather than disseminating a specific governmental message.\(^{144}\) In so holding, the Court recognized that an attorney works under rules of professional responsibility “that mandate his exercise of independent judgment on behalf of the client” and that an assumption exists “that counsel will be free of state control.”\(^{145}\) The Court also argued that the subsidies impaired the traditional judicial function by precluding attorneys from “advis[ing] the courts of serious questions of statutory validity” and thus “prohibit[ed] speech and expression upon which courts must depend for the proper exercise of the judicial power.” Thus the Court concluded: “The advice from the attorney to the client and *advocacy by the attorney to the courts* cannot be classified as governmental speech even under a generous understanding of the concept.”\(^{146}\) If “advocacy by the attorney to the courts cannot be classified as governmental speech” when that advocacy is in fact funded by the government, then it would seem apparent that the significantly broader proposition analogizing attorney speech whenever made as an “officer of the court” to government speech cannot hold.

The four-Justice dissent in *Velazquez* argued that the restriction on attorney speech at issue in *Velazquez* was “indistinguishable” from that at issue in *Rust* and thus was constitutional.\(^{147}\) In *Rust*, doctors who received Title X subsidies were forbidden from encouraging, promoting, or advocating abortion as a method of family planning or referring a

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\(^{144}\) Legal Services Corp. v. Velazquez, 531 U.S. 533, 542 (2001).

\(^{145}\) *Id.* 542 (quoting Polk County v. Dodson, 454 U.S. 312, 321–22 (1981)).

\(^{146}\) *Id.* at 542–43 (emphasis added).

\(^{147}\) *Id.* at 558–59 (Scalia, J., dissenting).
pregnant woman to an abortion provider even if the woman requested as much. The Rust Court upheld the restriction, stating:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

The Velazquez dissent contended that “[i]t is hard to see how providing free legal services to some welfare claimants (those whose claims do not challenge the applicable statutes) while not providing it to others is beyond the range of legitimate legislative choice.”

Despite the dissent’s argument, there are substantial differences between the attorney speech in Velazquez and the speech at issue in Rust. As the Rust majority noted, Title X projects were limited in scope and did not provide for post-conception medical care; the Court therefore held that the program was not “sufficiently all encompassing as to justify an expectation on the part of the patient of comprehensive medical care.” Thus, a doctor in a Title X project was “free to make clear that advice regarding abortion is simply beyond the scope of the program.”

In contrast, in Velazquez, the attorney represented his or her clients in a regular manner. If it appeared that the client’s case included a challenge to the validity of welfare laws, the attorney was required to withdraw from the representation. Thus, unlike the doctors in Rust, the lawyers in Velazquez couldn’t offer their clients any help at all if the case included a possible challenge to a welfare law. Further, if the lawyer closed his eyes to any validity challenge and litigated the case without raising such a challenge, the client could not later receive that aid through another

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149 Id. at 193.
150 Velazquez, 531 U.S. at 557 (Scalia, J., dissenting); see also id. at 562 (“The only difference between Rust and the present cases is that the former involved ‘distortion’ of (that is to say refusal to subsidize the normal work of doctors, and the latter involves ‘distortion’ of (that is to say, refusal to subsidize) the normal work of lawyers.”).
151 Rust, 500 U.S. at 200.
152 Id.
attorney without running into problems of preclusion—as claims not brought are lost. Further, as the majority in *Velazquez* stressed, the problem was not just the failure to advise the client, but the failure to advise the courts of constitutional and other challenges to state and federal welfare laws. Thus in *Rust*, the sole recipient of the speech would be the patient—who could not receive post-conception medical care from the Title X project anyway; but in *Velazquez*, the recipient of the speech was not solely the client, but also the courts. The *Velazquez* majority clearly saw the congressional restriction on challenges to welfare laws as an attempt to significantly thwart the judicial role and separation of powers by insulating the legislature’s welfare laws from judicial scrutiny.

But even assuming that the *Velazquez* Court’s distinguishing of *Rust* was unpersuasive (and assuming that *Rust* was correctly decided), the analogy of attorney speech whenever made as “officer of the court” to government-funded speech is a far more tenuous proposition than recognizing the restrictions in either *Rust* or *Velazquez* as government speech. The analogy applies to all attorneys who use the state or federal court systems—even if the attorney is paid entirely by private clients. The analogy (and the attendant loss of free speech rights) is not applicable solely to attorneys who accept LSC funding (or in *Rust*, to doctors who accept Title X funding). Rather, the theory is that all attorneys when acting in their official capacities as officers of the court—which would include filing papers with a court—are participating in a sort of “government-funded expression,” and could be subject to the types of restrictions upheld in the other government speech cases.

The analogy—even before *Velazquez*—is thus unworkable. In several of the government speech cases, the court noted the option of an alternative—that is, a choice—whereby the
restricted person could speak in another forum.\textsuperscript{153} For example, in \textit{Rust}, the Court noted that doctors can decide to decline Title X funding and fund their own clinic.\textsuperscript{154} Moreover, even if they accept the subsidy, doctors working in a Title X project “can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy,” but they must “conduct those activities through programs that are separate and independent from the project that receives Title X funds.”\textsuperscript{155} But neither is true for attorneys in general bringing their clients’ claims in a court system. Even though the court itself is funded by the government and thus is a “subsidy” for attorneys practicing law, it is not something that the attorney can opt out of and still litigate her clients’ claims. For example, an attorney representing a criminal defendant who wants to make an argument that her client was denied due process because of a biased judge cannot choose to “decline” to accept the criminal justice system and choose to fund her own court system (like a doctor can decline Title X funds and fund his own clinic) and somehow obtain relief for her client in some other way. The only place to make the argument and obtain relief for her client is to do it in the court system where the criminal charges were brought by the state. No alternate forum is available that can provide any relief to the client. The same is true in civil litigation. If a client has civil claims brought on his behalf or against him in a court of law, the attorney cannot obtain relief for her client by making the argument in some other forum, or outside of court when \textit{not} acting as an officer of the court. The only place to make the arguments and obtain relief and vindication of the client’s legal rights is to bring them in the ongoing court


\textsuperscript{154} See \textit{Rust}, 500 U.S. at 199 n.5 (explaining that recipients are “in no way compelled to operate a Title X project; to avoid the force of the regulations [they] can decline the subsidy” and can “finance[e] their own unsubsidized program”).

\textsuperscript{155} \textit{Id}. at 196. In like manner, the attorneys in \textit{Velazquez} could reject LSC funding and use other funding sources to create their own legal aid association that challenged the validity of welfare laws.
proceeding itself. Thus, as noted above, the analogy fails to account for the fact that the court system performs an essential role of our government that cannot be fulfilled in some other place or way.

Further, as noted in the government speech cases, including Velazquez, part of the justification for the government speech doctrine is: “‘When the government speaks, for instance to promote its own policies or to advance a particular idea, it is in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.’”\(^{156}\) As applied in the scenario of speech critical of the judiciary, as I have argued elsewhere, restrictions forbidding attorneys from impugning judicial integrity in fact keep the electorate in the dark—obscuring political accountability.\(^{157}\) Even more narrowly in the context of court filings, particularly when made on behalf of individual private clients, the government is not promoting its own legitimate policies through the speech of the attorney and neither the attorney nor the court is going to be politically accountable to the electorate for the speech the attorney made. Indeed, the opposite is true—by punishing the speech of attorneys, the judiciary is only promoting the preservation of its own reputation—an interest that the judiciary cannot promote by punishing speech outside of the requirements of Sullivan.\(^{158}\)

Finally, attorney speech when made as an “officer of the court” is, at its core, different

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\(^{156}\) Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (quoting Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000)); see also Pleasant Grove City v. Summum, 555 U.S. _____, slip op. at 4 (2009) (Stevens, J., Concurring) (“Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views that it endorses or expresses through this means.” (emphasis added)); Johanns v. Livestock Marketing Ass’n, 544 U.S. 550, 563 (2005) (explaining that “[s]ome of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability,” and finding that sufficient accountability existed).

\(^{157}\) See Tarkington, supra note 4, at 1600–1605.

\(^{158}\) See id. at 1593–1609. Although the judiciary may claim to be preserving public confidence in the judiciary or preserving the public’s respect for courts, these are just alternative ways of saying judicial reputation. See id. at 1630–31.
from the other government-funded speech cases. In other government speech cases, the
government decided as a matter of political policy to fund something that it was not required to
fund at all. The government was not required to provide tax deductions for donations to
charitable organizations as in Regan,¹⁵⁹ was not required to provide Title X funding as in Rust,¹⁶⁰
was not required to create a National Endowment for the Arts as in Finley,¹⁶¹ was not required to
pay the publishing costs for independent student publications as in Rosenberger,¹⁶² was not
required to promote beef consumption as in Johanns,¹⁶³ and was not required to install donated
permanent monuments in public parks as in Summum.¹⁶⁴ Indeed, the government was not even
required to provide LSC funding for legal representation of civil cases as in Velazquez. In each
of these cases, the government decided to expend money for a project that it had no obligation to
fund, and, in turn, imposed conditions or restrictions on the receipt or use of the government
funds.

In stark contrast, our state and federal governments are constitutionally required to
provide access to courts and, thus, to have and to fund court systems. State and federal court
systems as a whole are not created and abolished on governmental whims or certain political
platforms and policies (like beef promotion, Title X funding, and park monuments), but are an
essential component of our tripartite system of government—and a component to which people
have a right of access. Even for the lower federal courts, which under Article III are created by
Congress, it has generally been conceded that if their jurisdiction (or existence) were limited to
such an extent that litigants were denied all judicial review, particularly for constitutional claims,

¹⁶⁰ Rust, 500 U.S. 173.
it would comprise a denial of due process.\textsuperscript{165} The Constitution contains several guarantees regarding court access, as discussed above, and court procedure—including rights to a jury trial and general due process for criminal and civil cases and specific procedural requirements for criminal proceedings, including a right to be indicted, a right to a public trial, a right to an attorney, a right to confront witnesses, a right against double-jeopardy, and a right against self incrimination.\textsuperscript{166} Thus the government “funding” or “subsidizing” of a court system is not something that government can conditionally offer to attorneys and clients in like manner to regulations and conditions upheld in cases regarding government speech or spending powers. Rather it is a core part of our form of government, complete with constitutionally-created rights for those who use it and, in turn, for the attorneys who represent them.

The analogy of attorney speech to government speech, particularly as to speech impugning judicial integrity, also fails to account for the role of the attorney in the adversarial system and the attorney-client relationship. The adversarial system would be frustrated if the government could select the viewpoints and content of allowable speech that it wanted to be presented in courts and disallow others. Again—the government is free to promote some messages with its own speech (like, “Beef. It’s What’s for Dinner”\textsuperscript{167}), but it cannot promote one side’s message by prohibiting another’s in the court system. The idea of the adversary system is that both sides of an issue will be heard, which cannot be accomplished where one viewpoint is selectively punished.\textsuperscript{168} Finally, as noted above, treating attorney speech as government speech

\textsuperscript{165} \textit{See}, e.g., Erwin Chemerinsky, \textit{FEDERAL JURISDICTION} (5\textsuperscript{th} Ed. 2007) (“There is a strong argument that due process would be violated if the effect of the jurisdictional restriction is that no court, state or federal, could hear a constitutional claim.”).

\textsuperscript{166} \textit{See} U.S. CONST. amend. V, VI, VII, & XIV.

\textsuperscript{167} \textit{See} Johanns, 544 U.S. at 554.

\textsuperscript{168} As the Fourth Circuit has expounded:

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system’s process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence,
fails to recognize that attorneys are employed to protect and advocate the rights of their clients. Court proceedings do not exist so that attorneys can praise judges or promote any particular government message; rather, court proceedings exist and attorneys represent clients to advocate on behalf of their client to protect that client’s life, liberty, or property. Thus, as discussed above, it is essential that attorneys have a speech right sufficient to protect and vindicate the rights of their clients. As the Velazquez Court recognized, attorneys must be free to “exercise [] independent judgment on behalf of the client” and be “free of state control” in making relevant and colorable arguments to a court.169

2. Analogy to Public Employees

A number of commentators, including Wendel and Sullivan, have analogized attorney speech to restrictions on the speech of government employees.170 Most recently, Terri Day, proffered an analogy between “attorneys as ‘officers of the court’ and public employees,” relying on the Supreme Court’s 2006 decision in Garcetti v. Ceballos to contend that attorneys should be protected “against discipline for all out-of-court speech about non-pending matters.”171 Of course, the corollary from Day’s analogy is that, as in Garcetti, an attorney loses her free speech rights when speaking as an officer of the court. Indeed, Day states: “A lawyer’s First Amendment rights may be denied when he or she speaks in a courtroom as an officer of the court,”172 including, apparently, when the attorney speech is made in a court filing or even in

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169 Legal Services Corp. v. Velazquez, 531 U.S. 533, 542 (quoting Polk County v. Dodson, 454 U.S. 312, 321–22 (1981)).

170 See, e.g., Wendel, supra note 8, at 375–76; Sullivan, supra note 8, at 586–87; Day, supra note 8, at 187–90 (“Although all attorneys are not public employees, there are some similarities between attorneys as ‘officers of the court’ and public employees”); Roberts, supra note 34, at 846–54; Comm. on Legal Ethics of the W. Va. State Bar v. Douglas, 370 S.E.2d 325, 331–32 (W. Va. 1988);

171 Id. at 188.

172 Id. at 187.
regards to a pending case.\textsuperscript{173}

Prior to \textit{Garcetti}, and at the time that Wendel and Sullivan made their analogies, the public employee cases, beginning with \textit{Pickering v. Board of Education of Township High School District 205},\textsuperscript{174} offered a somewhat appealing analogy for analyzing attorney speech cases. In \textit{Pickering}, the Supreme Court rejected “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable” and created a formula for examining the free speech rights of public employees. Specifically the \textit{Pickering} Court held: “The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”\textsuperscript{175} The \textit{Pickering} test evolved over time, but the basic test (until \textit{Garcetti}) remained the same: balancing the speech interests of the employee to comment on issues of public concern with the government’s “interest in achieving its goals as effectively and efficiently as possible.”\textsuperscript{176}

Thus, at its most basic level, the \textit{Pickering} framework involved a recognition and examination of both the free speech interests of the speaker as well as the interests of the government in efficient administration. An attorney version of the \textit{Pickering} test might be articulated thus: balancing (1) the interests in the right of the attorney to speak on matters of public concern and vindicate the legal rights and interests of her client, and, as recognized in latter formulations of the \textit{Pickering} test, the interests of recipients in that speech, on the one hand, with (2) the interest of the judiciary in the effective, efficient, and fair administration of

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\textsuperscript{173} \textit{Id.} at 180, 188-89.  \\
\textsuperscript{174} 391 U.S. 563 (1968). \\
\textsuperscript{175} \textit{Id.} at 568. \\
\textsuperscript{176} Waters v. Churchill, 511 U.S. 661, 675 (1994).
\end{flushright}
justice, on the other hand. Applied in the context of speech made in court filings, such a test would at the very least acknowledge the existence of interests on both sides and require the government to assert an interest that justified restrictions on speech and was intended to promote effective and efficient operation of the court system. Restrictions of attorney speech based on relevance, timeliness, page-limitations, for example, would easily pass muster under such a test, as they are all neutral restrictions on speech that are essential to the effective, efficient, and fair administration of justice.

Post-Garcetti, however, and as proposed by Day, the public employee analogy to attorney speech is unpersuasive. In Garcetti, the Supreme Court held that as a threshold matter, the Pickering balancing test only applied where the public employee was speaking “as a citizen,” but does not apply at all where “public employees make statements pursuant to their official duties.”177 The Court held in essence that a public employee has no First Amendment rights at all whenever speech is made pursuant to an official duty, and “the Constitution does not insulate [such] communications from employer discipline.”178 Indeed, the Court borrowed its new rule from the government speech cases discussed above,179 and held, as it did in Summum and Johanns,180 that where public employee speech is made pursuant to a public employee’s “official duties,” the public employee has no free speech rights at all.

Unfortunately, Garcetti involved the speech of an attorney—who also happened to be a publicly-employed prosecutor. Indeed, the most troubling aspect of Garcetti is, as noted by the

177 Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (“We hold that when public employees make statements pursuant to their official duties the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”)
178 Id.
179 See id. at 422 (citing Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819 (1995), as support for its denial of First Amendment rights); see also Pleasant Grove City v. Summum, 555 U.S. ____, slip op. at 1, 129 S.Ct. 1125 (2009), (Stevens, J., concurring) (including the Garcetti decision as one of “the recently minted government speech” cases along with Johanns, both of which he believes are “of doubtful merit”).
180 See supra note 143 and accompanying text.
dissenting justices, that the speech involved was made by Richard Ceballos, a deputy district attorney in Los Angeles County, in order to fulfill what he believed was required of him by both the Constitution and rules of professional conduct. After examining the crime scene and speaking with the affiant, who was a Los Angeles County deputy sheriff, Cebellos came to believe that the deputy sheriff’s affidavit, which was used to obtain a critical search warrant, contained serious misrepresentations. Cebellos wrote a memo to his supervisor expressing his concerns that government misconduct had occurred and recommending dismissal of the case. As noted in Justice Breyer’s dissent, Cebellos believed the speech contained in the memo “fell within the scope of his obligations under *Brady v. Maryland*” and progeny “to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence.”

The Model Rules of Professional Conduct contain similar requirements for prosecutors. Indeed, after writing the memo and unsuccessfully advocating the dismissal of the case to his supervisors, Cebellos gave the memo outlining the inaccuracies of the warrant (“with his own conclusions redacted as work product”) to the defense as exculpatory evidence and testified regarding his observations at the suppression hearing. Cebellos subsequently was subject to adverse employment actions, including reassignment, transfer, and denial of a promotion.

Despite the fact that Ceballos’ communication was made to secure constitutional rights of a criminal defendant, to fulfill his professional responsibility requirements as a prosecutor, and to expose potential government misconduct, the Supreme Court characterized Cebellos’
speech, as contained in the memo,\(^{185}\) as “government speech” for which Cebellos could be disciplined by his employer without any recourse to or rights under the Speech Clause.

Post-\textit{Garcetti}, and under Day’s thesis, the analogy of attorney speech to public employee speech denotes that when performing their official duties, attorneys have no free speech rights at all and can be freely punished for their speech by the court of which the attorney is an officer. Thus, judges and the State bar could punish speech that occurs when the attorney is performing her official duties—even if the attorney is attempting to expose government misconduct or to secure the constitutional rights of a litigant (as was Ceballos, whose speech was intended to secure the constitutional rights of a criminal defendant).

To the extent that the analogy is accepted, the determinative question becomes what is the scope of an attorney’s official duties as an officer of the court as to which the attorney has no free speech rights. Day only states what would certainly not be included in an attorney’s official duties: “out-of-court speech about non-pending matters.”\(^{186}\) The definition is unhelpful because the inverse is vast: attorneys potentially would have no speech rights for in-court speech or speech about pending matters. In \textit{Garcetti}, the scope of what the Court considered to be within Ceballos’s “official duties” and thus exempt from free speech scrutiny is strikingly broad—pretty much anything that fell within his “daily professional activities,” whether or not it was specifically requested or produced on the employee’s own initiative.\(^{187}\) The Court stated:

\textit{Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper

\(^{185}\) Cebellos’s other communications, including his testimony at the suppression hearing, were not at issue before the Supreme Court.

\(^{186}\) Day, \textit{supra} note 8, at 188.

\(^{187}\) Indeed, the memo that Ceballos wrote was written on Ceballos’s own initiative, yet the Court specifically included the memo in its list of “official duties” because the memo “addressed the proper disposition of a pending criminal case.” \textit{See Garcetti}, 547 U.S. at 422.
disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.\textsuperscript{188} By analogy, the scope of an attorney’s speech that would be considered part of her “official duties” by virtue of being an “officer of the court” could be viewed very broadly as including any speech that the attorney was able to make by virtue of being licensed by the state. This broad view could include advising clients even in non-pending matters because a lay person is prohibited from providing specific legal advice under unauthorized practice of law rules. But even under a narrow construction, attorney speech made as an “officer of the court” certainly would include in-court speech, speech contained in court filings, and speech made pursuant to an attorney’s official capacity in a pending proceeding, such as in depositions or conferences.

Importantly, if this analogy were accepted, it would fail to adequately protect the underlying rights of clients. As discussed above, the reason that a free speech right for attorneys is necessary is to allow attorneys full expressive ability to protect and vindicate their client’s rights. As the facts of \textit{Garcetti} demonstrate, public employees can be punished for their speech even when they are vindicating the constitutional rights of litigants (as was Ceballos). The problem expands depending on how broadly one interprets the scope of an attorney’s official duties.

But even in its most narrow form, and even pre-\textit{Garcetti}, the analogy between attorney and public employee speech is flawed. Both attorneys and public employees were once seen in a similar light as having virtually no rights to their licenses or positions, respectively. This was because both membership in the bar and public employment were seen as “privileges” as opposed to “rights.”\textsuperscript{189} As noted above, in the public employment context, the Supreme Court in

\textsuperscript{188} \textit{Id.}

\textsuperscript{189} As explained in \textit{Connick v. Meyers}, 461 U.S. 138, 143 (1983), “[f]or most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of
*Pickering* departed from this model and held that public employees retain some rights—even though they do not have a right to the employment itself. The evolution for attorneys was different in significant ways. Notably, unlike public employees (who still have no “right” to employment), attorneys who meet the requisite admission requirements have a right to receive a license to practice law. In the plurality case, *Baird v. State Bar of Arizona*, Justice Douglas declared: “[t]he practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character.” There is no accident in the divergence. Qualified individuals who comply with licensing requirements are entitled to be admitted to a state bar and the state can admit all of them. However, despite its wishes, a state cannot hire all qualified applicants that apply for a specific government job. Moreover rejection of a license to practice is significantly different from rejection of employment for a specific job. If a person does not get (or is fired from) a government job, they can generally get a different job in the private sector or apply for a different government job. However, if a state refuses to admit an applicant into the state bar or suspends or disbars that person, the entire vocation of law practice is foreclosed to him in the public and private sector. The attorney loses his vocation—not just his job—and is stripped of the ability to practice law anywhere.

Further, unlike the development of the *Pickering* analysis for public employee speech, post-*Baird* the cases regarding attorney regulation have not adopted a special analysis that can be applied to test future regulations in the specific context of regulations on attorney speech. For example, in challenges to regulations on attorney advertising, the Supreme Court has analyzed employment—including those which restricted the exercise of constitutional rights.” The traditional rule regarding public employees was explained by what has been termed a “Holmes’ epigram”: “A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *See id.* at 143–44 (quoting McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892)).

In similar terms, Cardozo famously articulated the same idea as to attorneys: “Membership in the bar is a privilege burdened with conditions.” *See In re Rouss*, 221 N.Y. 81, 84 (1917).

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regulation of attorney speech through methods that it would use for restrictions on any other regulated industry—that is, the Court employs the *Central Hudson* commercial speech test with no special modifications based on the fact that the regulation is on attorney speech.\(^{191}\) Of course, the interests asserted by the government may be keyed to issues specific to attorneys, but the level of scrutiny and the constitutional analysis is the same as that used for restricting the speech of other regulated industries. Similarly, in *Republican Party of Minnesota v. White*,\(^ {192}\) the Court applied strict scrutiny to declare unconstitutional the announce clause forbidding attorneys, and judges, running for judicial office from expressing their views on certain political issues.\(^{193}\)

Again, while the interests asserted by the state were context-specific to attorneys, the test applied was the traditional test for restrictions on political speech—strict scrutiny.\(^{194}\) And in *NAACP v. Button*, cited above, the court reaffirmed in the context of a regulation on attorney speech that “only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms” and thus “it is no answer to the constitutional claims . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.”\(^ {195}\) Restrictions on attorney speech have generally been treated in the same manner as a restriction on any other regulated profession.

Further, the rationale underlying *Garcetti* is:

Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment and promote the employer’s mission.\(^{196}\)


\(^{192}\) 536 U.S. 765 (2002).

\(^{193}\) *See id.*

\(^{194}\) *See id.* at 788.


The *Garcetti* Court also discussed the need for “exercise of employer control over what the employer itself has commissioned or created” and explained that when the government uses its funds (to pay employees) “to promote a particular policy of its own it is entitled to say what it wishes.”

In contrast, attorneys are not licensed by the state in order to promote a particular policy of the government. Under our adversary system, in any given case, there are at least two different positions or messages that are presented to the court and are largely controlled by the attorneys in the case. As recognized in *Velazquez*, it is assumed that attorneys “will be free of state control” because “[a]n informed independent judiciary presumes an informed independent bar.” The judiciary relies on attorneys to present arguments to it—the judiciary does not promote its own message or policies and has no control over what cases are brought before it or what arguments attorneys will make or fail to make. The situation is entirely different from public employment—even the public employment of attorneys (where a prosecutor’s office, for example, can decide what cases to pursue or not as a matter of policy). Further, the judiciary, unlike the public employer, does not “commission or create” the attorney’s work submitted to it. Even when a court requests briefing on an issue—the arguments, the message, the theories, the facts discussed are all left up to the attorneys, and again the expectation is that there will be multiple and opposing messages produced from the request. The judiciary does not have the role of determining the specific message that is presented to it or ensuring that only one point of view is presented or prevails.

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197 *Id.* at 422 (quoting *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 833 (1995)).
199 *Id.* at 545.
In the context of speech critical of the judiciary, it is important that the judiciary not be able to control the message that is submitted to the court by discouraging or sanctioning attorneys for relevant arguments that may be read to impugn judicial integrity. The judiciary’s role in so doing is sheer viewpoint discrimination and is aimed at insulating judicial conduct from scrutiny and protecting judicial reputation, which, again, it can only protect constitutionally under Sullivan’s subjective standard.

Of course for publicly employed attorneys, Garcetti is not an analogy, but a flawed reality—but only to the extent that the punishment comes from their employer. There is no indication in Garcetti that Velazquez is being overturned or being called into question. The issues in the two cases are distinct. One involves punishment from one’s employer, and the other involves a free speech right of attorneys and their clients to raise relevant claims and arguments in the courts. Thus, under the rationale of Garcetti and Velazquez, while a publicly-employed attorney could be demoted by his employer for filing a claim on behalf of her client if the employer found that action objectionable, the same publicly-employed attorney should not be sanctioned by a court for filing that same claim if the claim is colorable—even if the claim implicates judicial integrity.

3. Analogy to a Nonpublic Forum

Wendel\(^{200}\) and Sullivan\(^{201}\) also analogize attorney speech to the Supreme Court’s public and non-public forum cases. Indeed, Wendel concludes his article by stating that attorneys’ “expressive rights may be restricted to further goals related to the judicial system, consistent with the Court’s non-public forum doctrine. Thus lawyers’ speech in trials, depositions, formal and informal pretrial proceedings (such as letters to other lawyers), and court filings may be subject

\(^{200}\) See Wendel, supra note 8, at 381, 444.
\(^{201}\) See Sullivan, supra note 8, at 585–86.
to reasonable regulations.” Wendel argues that this “domain of non-public forums, in which lawyers’ speech is subject to extensive regulation, should be understood as limited to communications which are essential to the accomplishment of core court business, such as resolving disputes.”

Both Wendel and Sullivan recognize that under the Supreme Court’s nonpublic forum cases, regulations on speech are permissible as long as they are reasonable and viewpoint-neutral. Such a rule is arguably more workable than the government speech and public employee speech analogies, particularly post-\textit{Summum} and post-\textit{Garcetti}, which would leave attorneys representing clients without any speech rights at all. In the context of speech critical of the judiciary, the ultimate rule from the nonpublic forum analogy may work fairly well and would prohibit courts from imposing viewpoint-based restrictions—such as those punishing attorneys for impugning judicial integrity. However, overall, the analogy of state and federal court systems to nonpublic forums is ill-fitted and flawed.

The state and federal court systems are not a “forum” susceptible to traditional forum analysis even though speech is involved and the speech takes place on government-owned property. Rather, the court systems exist as a constitutionally-required function of our tripartite system of government, to which litigants have a right of access. It would certainly seem absurd

\begin{itemize}
  \item [202] Wendel, supra note 8, at 444.
  \item [203] \textit{Id.} at 381.
  \item [204] Sullivan, supra note 8, at 586 (explaining that in a nonpublic forum the “government may condition access as selectively as it likes so long as it acts reasonably and avoid discrimination on the basis of viewpoint”); Wendel, supra note 8, at 381 (explaining that non-public forums are “subject to reasonable viewpoint-neutral regulations”).
  \item [205] If the judiciary is punishing speech made in court filings because the attorney has not complied with \textit{FRCP 11} or \textit{MRPC 3.1} because the attorney lacks a basis in fact or law to make the argument, and if the judiciary applies that rule as it would to any other factual or legal assertion and with no harsher punishment, then the restriction is viewpoint neutral and is a reasonable restriction consistent with the purpose of the forum—namely to resolve disputes in a manner that is reasonably grounded in fact and law. However, if the judiciary punishes the attorney for impugning judicial integrity (most likely under \textit{MRPC 8.2}) and requires the attorney to make a greater factual and/or legal showing than would be required for other factual or legal assertions in support of a claim, then the punishment is viewpoint-based. That is, the attorney is being punished because he expressed a viewpoint (that a member of the judiciary may be corrupt, biased or abuse her power) that the judiciary finds offensive.
\end{itemize}
to argue that Congress (another branch of our tripartite system of government performing constitutionally-required functions) was a “nonpublic forum” where content-based restrictions on speech (such as legislation introduced, hearings, floor debates, or lobbying) were appropriate and where restrictions on speech need only be “reasonable” in light of the purpose of the forum in order to be upheld. Indeed, in *Cornelius*, the Supreme Court stated that, although inappropriate for a public forum, a justification as vague and weak as “avoidance of controversy” is a reasonable and valid ground for restricting speech in a nonpublic forum. For both Congress and the judiciary, it would be implausible to contend that content-based restrictions on speech—aimed at avoiding controversies, like forbidding discussion of abortion or same-sex marriage—were consistent with the fulfillment of the constitutional role of either branch of government. Indeed, in the judicial context, the Supreme Court has declared unconstitutional state court attempts to avoid adjudicating federal law and constitutional claims—even though the restrictions are arguably content, rather than viewpoint based.

Further, under the Supreme Court’s nonpublic forum caselaw, the justifications for restrictions need not be significant or compelling (it need only be reasonable and need not be the “most reasonable”), the government is not required to demonstrate the actual existence of the alleged harms sought to be avoided, and there is no requirement of narrow tailoring for the restriction or incompatibility of the prohibited speech with the purpose of the forum. Thus

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208 *Cornelius*, 473 U.S. at 808 (noting that in light of “the nature of a nonpublic forum,” a decision “to restrict access . . . need only be reasonable; it need not be the most reasonable or the only reasonable limitation”).
209 Id. at 810 (explaining that “lack of conclusive proof” of the alleged harm was not problematic because “the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum”).
210 Id. at 809 (“Nor is there a requirement that the restriction be narrowly tailored . . . .”)
the restrictions on speech in a nonpublic forum end up looking akin to rationale basis review. Most assuredly, constitutional guarantees of court access and due process (which cannot be preserved without “speech” by attorneys on behalf of clients) cannot be secured if they are allowed to be restricted on such a weak basis.

Further, the rationale behind the relatively low-level review for speech restrictions in nonpublic forums does not fit with the idea of the fulfillment of the constitutionally-required functions of our court systems. For example, in the nonpublic forum speech cases, the Court has noted that speakers generally have access to alternative channels of communication because “[r]arely will a nonpublic forum provide the only means of contact with a particular audience.”

As noted below, the court systems are the sole means for invoking constitutional rights to have the judiciary resolve controversies between private parties and for criminal defendants to assert their rights. There is no adequate alternative forum—and there is no other means to contact the judicial “audience” in a manner that will preserve a litigant’s legal rights.

Further, the Court has noted that in nonpublic forums, unlike public forums, “the principal function of the property would be disrupted by expressive activity.” Yet the principal function of courts is fulfilled entirely through expressive activity—specifically, the expressive activity of attorneys making arguments and asserting claims on behalf of clients. As the Court has explained, “forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the

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211 Id. at 808 (“In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated.”) (emphasis added).

212 Id. at 809.

213 See infra Part II.B.

214 Cornelius, 473 U.S. at 804.
speaker.” If the access sought is that of attorneys making arguments in court proceedings, that expressive activity cannot be said to disrupt the principal function of the court system, but indeed is necessary to its proper functioning.

In fact, to the extent that one attempts to fit (awkwardly) the court system into “forum analysis,” there are several ways in which the court systems are more akin to a traditional public forum than to either a limited or nonpublic forum. As Hyde Park and street corners are the traditional forum to unofficially express grievances or advocate social change, the courts are not only a traditional place, but the “forum” given the constitutional function of providing people a method to vindicate legal rights and obtain relief from private and governmental grievances. Access to courts and due process are constitutionally guaranteed—thus, there is a stronger right to allow adjudicative speech by attorneys and clients in courts than there is to allow protesters in parks and streets. Public parks are not a branch of our government, access to which is defined and required by the Constitution. As with public forums, narrowly-tailored, content-neutral, time, place, and manner restrictions are appropriate. But courts should not be closed to any members of the public or their attorneys who seek to vindicate colorable legal rights or claims.

But, this again highlights the problem with forum analysis. No other cases involving forum analysis—even the traditional public forums—are in actuality a branch of our tripartite system that performs constitutionally-required functions and the speech at issue is essential to the

215 Id. at 801; see also Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983) (competing union sought access to school system’s internal mail system); Widmar v. Vincent, 454 U.S. 263 (1981) (access sought was by other student groups—court did not create access for all expressive activity by anyone, but equal access for student groups).

216 In Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001), the Supreme Court analogized the restrictions on speech in a court system to its “limited forum” cases. See id. at 543–44. However, the case law regarding limited forums is not entirely clear. Prior to Good News Club v. Milford Central School, 533 U.S. 98 (2001), limited forums to the extent open to speech had the same basic rules as public forums. See, e.g., Perry Educ. Ass’n, 460 U.S. at 45–46 (stating that a limited forum “is bound by the same standards as apply in a traditional public forum”). But in Good News Club the Court determined that the forum was limited, but then adopted the rules for a nonpublic forum. See Good News Club, 533 U.S. at 106.
fulfillment of the constitutional function. Further, in no other forum, is the speech necessary to preserve constitutionally guaranteed rights, including due process rights to an unbiased judiciary. As with the other analogies, the forum analogy fails to take into account the nature of the court system as an essential branch of our system of government, the constitutional rights of litigants and criminal defendants to access that system and to protections within that system, and the attorney’s role in representing his client and asserting and preserving those rights.

Whatever the term “officer of the court” means, it cannot mean something that denies the very function of the court system and the role of attorneys therein—particularly where it results in the loss of rights and protections for litigants. Under each of these analogies, such protections are lost. Even as “officers of the court,” as I argued above, attorneys must have the ability to access the courts to challenge judicial conduct and to assert their client’s rights to a fair proceeding.

B. The Alternate Forum

In addition to the arguments that attorneys are obliged as officers of the court to refrain from impugning judicial integrity, courts routinely justify their sanctions of attorney speech based in part on the idea that there is an appropriate alternate forum for the speech where complaints about judicial conduct can and should be made.217 The Indiana Supreme Court went so far as to say that where a person has evidence of judicial misconduct, the judicial disciplinary authority is the only appropriate forum in which to raise a complaint.218

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217 See, e.g., In re Evans, 801 F.2d 703, 707 (4th Cir. 1986) (explaining that “when there is proper ground for serious complaint against a judge it is the right and duty of a lawyer to submit his grievances to the proper authorities” (quoting People ex rel. the Chicago Bar Ass’n v. Metzen, 125 N.E. 734, 735 (1919))); Ramirez v. State Bar of Cal., 619 P.2d 399, 405 n.13 (Cal. 1980); In re Lacey, 283 N.W.2d 250, 252 (S.D. 1979); Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962, 964 (Utah 2007) (explaining that attorneys “faced with genuine judicial misconduct” have “appropriate avenues” to complain of grievances, including “a separate proceeding before the Judicial Conduct Commission”).

218 In re Wilkins, 777 N.E.2d 714, 717 (Ind. 2002) (per curiam) (“Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission.”).
similarly argues in the context of speech derogatory of the judiciary in court filings:

In just about any conceivable case, the government can show a significant interest and alternative channels of communication that are not foreclosed by the restriction. For example, many courts, considering allegations of corruption by judges, have responded that lawyers are free to make these accusations in the appropriate time, place, and manner—such as to a state commission on judicial conduct. The government’s interest is in maintaining orderly recusal or disqualification procedures, and the alternative channels of communication are established by these mechanisms, which permit complaints to be filed by aggrieved attorneys.\textsuperscript{219}

Wendel concludes that “[i]n general, these decisions are unobjectionable.”\textsuperscript{220}

However, a judicial disciplinary authority is a particularly problematic alternate forum for statements that are originally made by an attorney in a court filing, such as a motion, as part of a relevant argument. Attorneys who make statements regarding the judiciary (however unwisely) in court filings generally do so in order to obtain some sort of relief from perceived unfairness or incompetence in the underlying case itself. Attorneys making such arguments are not trying to have the judge punished in the abstract, but are primarily interested in obtaining remedies on behalf of a client in the underlying case.\textsuperscript{221}

What is essential, then, for statements made in court filings, is that parties receive relief from actions made by biased, abusive, or incompetent judges—and that relief must happen in the underlying case itself (usually through an appeal or some other form of review by another tribunal or authority). Criminal defendants, as well as civil litigants, have due process rights to an impartial tribunal. The problem with prohibiting attorneys from making statements in court

\textsuperscript{219} Wendel, supra note 8, at 394.
\textsuperscript{220} Id. Wendel notes, alternatively, that even such “time, place, manner” restrictions can be enforced in a discriminatory manner, and thus “courts should take seriously the possibility that a rule requiring dignified speech is not a modal [time, place, and manner] regulation at all, but impermissible viewpoint-discrimination.”
\textsuperscript{221} Further, while it certainly could happen, it is doubtful that attorneys generally include statements about judges in their briefs in order to raise public awareness of perceived judicial abuses. As one dissenting judge pointed out—statements made in a petition for rehearing would have as much affect on public perception of integrity as statements “written on the wind.” See Office of Disciplinary Counsel v. Gardner, 793 N.E. 2d 425, 434 (Ohio 2003) (Priefer, J., dissenting).
filings and, instead, requiring attorneys to bring such complaints solely to a judicial disciplinary authority, is that judicial disciplinary authorities are powerless to effect any remedy in the underlying case as to the affected client. Websites for judicial disciplinary authorities warn those filing complaints that the remedy offered by the commission is discipline against the judge, and not any merit-based or case-specific relief. The only forum whereby a litigant and her counsel can obtain recusal, disqualification, or reassignment of a judge in a case or bring a claim for denial of due process on the basis of a biased judge, or obtain reversal or remand because of an incompetent or erring judge is by filing something in the underlying case itself. Further, challenges of a lower court’s handling of a case must be made on appeal if any relief is to be afforded the affected client. No alternative forum is adequate, because no alternative forum can grant the requisite remedy. Indeed, in the criminal context, if the due process claim is not brought in the case initially, it may be determined to be procedurally defaulted and lost to the criminal defendant forever, including on habeas review absent a showing of cause and prejudice.

Thus, the free speech rights of attorneys and clients to raise arguments regarding judicial integrity in court filings cannot be denied on the theory that an alternate forum is available. The alternate forum fails to preserve a litigant’s rights in the context in which it matters—that is, when it can affect the outcome of their case and thus their ultimate legal entitlements. The argument is particularly compelling in the criminal context. It is worthless as a method of securing a criminal defendant’s rights to due process, to inform the defendant who seeks relief from a conviction or sentence imposed by an incompetent, biased, or abusive judge, that he or she can file a complaint against the judge and the judge may be disciplined for her conduct. The Constitution guarantees the criminal defendant a fair proceeding and an unbiased judge. The

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222 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.
criminal defendant must be able to assert his or her right in court—which, of course, means that the defense attorney must be able to make that argument freely without fear of sanction for its substance.

Indeed, as noted above, the Due Processes Clauses of the Constitution require that where a litigant has a claim or defense—particularly for the civil or criminal defendant who is forced to resolve their rights to life, liberty and property in a court proceeding—the litigant be able to be heard “at a meaningful time and in a meaningful manner.” In *Boddie v. Connecticut*, the Court explained regarding defendants (both civil and criminal) and their due process rights:

> [T]he successful invocation of this [judicial] governmental power by plaintiffs has often created serious problems for defendants’ rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant’s full access to that process raises grave problems for its legitimacy.

It is emphatically not a “meaningful” time and manner for attorneys and litigants to be able to file a complaint with a state judicial qualifications authority rather than to obtain redress and relief in the underlying case. For example, if a defendant is entitled to a new trial on the basis that she was denied due process because of a biased judge, then it does nothing to redress the client’s right for a judicial qualifications commission to reprimand the judge rather than having a court grant the defendant the new trial in the underlying case. A judicial qualifications commission can reprimand, suspend, or discipline a judge; but they cannot reverse a conviction, order a new trial in a case, remand a case to a different judge, or reverse the decision of a lower court. It thus is a denial of the client’s due process rights to a meaningful opportunity to be heard for attorneys (and thus their clients) to be restricted from or punished for making relevant arguments regarding the judiciary in court proceedings on the theory that the attorney can express herself in the alternate forum of a judicial qualifications proceeding. It cannot be that

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224 *Id.* at 376.
such an “alternate forum” saves regulations and punishment from condemnation under the Speech Clause, where, at the same time, forcing the litigant and his attorney to use that alternate forum rather than allowing the expression in a court proceeding works a denial of the due process right to court access and to an opportunity to be heard “at a meaningful time and in a meaningful manner.”

C. The Lack of an Unconstitutional Condition

As I have examined in a separate article, Courts often justify restrictions on attorney speech critical of the judiciary on the idea that attorneys forfeited the right to criticize the judiciary as a condition of their admittance to the bar. For speech that occurs outside of a court setting, the argument obviously raises the issue of whether or not the condition, which deprives the attorney of a pre-existing speech right to criticize public officials, is constitutional. Prior to becoming an attorney, the individual seeking admission had the constitutional right to publicly criticize the judiciary; but upon admission to the bar, he gives up that constitutional right in exchange for admission to the practice of law. However, the problem is somewhat different in the scenario of an attorney’s ability to make statements in court filings and proceedings. Because an attorney, prior to admission to the bar, had no constitutional right to make claims or speak on behalf of others in a court proceeding, the attorney allegedly gives up nothing when restrictions are made on his speech in court filings as a condition of practicing law. He did not have the right to criticize the judiciary in court filings before he became an attorney and, after becoming an attorney, he still has no right to criticize the judiciary in court filings. Having given up no constitutional rights that he previously

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225 See Tarkington, supra note 4, at 1622–29.
226 Id.
had as a lay citizen, there has been no “unconstitutional” condition placed on his law practice.  

For example, as Wendel contends:

The unconstitutional conditions analysis does not apply to many lawyer free expression cases because the constitutional right that the lawyer claims is infringed is not a right which would exist outside the context in which it was asserted. Suppose a lawyer is disciplined for making racist remarks in a closing argument at trial. It is no avail to claim that the disciplinary agency is requiring the lawyer to surrender a constitutional right in exchange for the privilege of trying cases before the courts of the state because the lawyer had no preexisting right to address a jury in a courtroom.  

Thus, Wendel concludes: “When individuals are admitted to the bar, they do not lose expressive rights that they had possessed as private citizens . . . . In contexts in which they would not have had the right to speak as non-lawyers, however, their expressive rights may be restricted to further goals related to the judicial system . . . .” While I agree that attorney’s expressive rights may constitutionally be restricted to further certain central goals of the judicial system, as discussed in Part III below, I disagree with Wendel that a restriction is justified or does not implicate the attorney’s free speech rights merely because an attorney did not have a right to speak in a representative capacity to a court prior to being admitted to the bar. 

A similar argument was made by the Garcetti majority as to public employee speech (and is equally unpersuasive). The Court stated: “Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.” As a private citizen, the employee would have never made the speech and did not have the liberty to make speech in the capacity of a public employee. Therefore, none of his pre-existing liberties are infringed by punishing or restricting speech that is made as part of his official duties as a public employee. To put it in the context of the Garcetti facts, prior to being hired as a deputy district attorney, Ceballos had no right as a

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227 Wendel, supra note 8, at 373-74.  
228 Id. at 444.  
private citizen to investigate exculpatory evidence and write an internal memo in the district attorney’s office recommending the dismissal of criminal charges. Thus, because the memo “owed its existence” to his public employment—he would not have written it if he had never been hired—none of his pre-existing, private citizen speech rights were infringed. To extend the analogy to attorney speech: Because speech made by attorneys in court filings “owes its existence” to the fact that the attorney was admitted to practice, under Garcetti’s rationale, the attorney can be punished for his speech without infringing any liberties that the attorney would have enjoyed as a private citizen and thus the Speech Clause is not violated.

However, just because an attorney did not have a constitutional or any other right to represent others before being admitted to the bar does not mean that she lacks that constitutional right after being admitted to the bar. First, as the Velazquez Court held, attorneys in fact have free speech rights to make relevant claims and arguments to courts on behalf of their clients—even though the attorney previously had no right to speak in court in a representative capacity. Further, beyond Velazquez, it would be nonsensical if attorneys did not have such free speech rights. To illustrate: criminal defendants have a constitutional right to counsel even where they cannot afford one. They also have a constitutional right to an unbiased judge. It would be anomalous, then, if criminal defense attorneys have no free speech rights to express arguments impugning judicial integrity and asserting their clients’ rights to an unbiased judiciary on the theory that the attorneys previously had no right as private citizens to represent criminal defendants. Such a theory denies criminal defendants the ability to assert their rights and denies them their right to the assistance of counsel. If attorneys are denied free speech rights and can freely be punished or deterred from making arguments about judicial conduct on their clients’

behalf, then clients ultimately lose their rights to an unbiased judiciary and a fair disposition of their cases.

Civil litigants also have “a constitutional right to retain hired counsel.” Thus, although they will not be appointed counsel if they cannot afford an attorney, the Supreme Court has held that it “would be a denial of a hearing, and therefore of due process” under the Fifth and Fourteenth Amendments if civil litigants were prohibited from obtaining and employing attorneys to represent their interests. Certainly, the attorney must have a free speech right to express what the client herself would be allowed to express if proceeding pro se. The pro se litigant is not an “officer of the court,” and, yet, as a private citizen has the right to bring relevant arguments and claims to the court. Private citizens thus do have the right and ability to speak to a court and file papers therewith when representing themselves. They should not lose the ability to bring or make certain arguments merely because they hire an “officer of the court” to represent them and speak on their behalf. The fact that the representative did not have a right as a private citizen (before he became a representative) to speak on behalf of the client should not limit the client’s ability to express relevant arguments through that representative. If it did, that would frustrate the client’s right to counsel.

Being admitted to the bar endows the entrant with certain rights, including expressive rights to speak on behalf of clients and raise their relevant arguments and claims to the courts. The Velazquez court recognized this as a constitutional right afforded both attorneys and their clients and arising from the Speech Clause. The cases from state courts punishing attorneys for speech impugning judicial integrity take a completely opposite view of the matter. In the words of the Missouri Supreme Court: “[A]n attorney’s voluntary entrance to the bar acts as a voluntary admission to a constitutionally protected class that is afforded certain privileges and rights. The bar regulates only the practice of law, not the right to engage in speech.”

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231 Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir. 1980); see also Powell v. Alabama, 287 U.S. 45, 69 (1932).
232 Powell, 287 U.S. at 69.
waiver of the right to criticize the judiciary.” 233 And as the Supreme Court of Kansas stated in 2007, attorneys lose this right whether or not they’re acting as an attorney or “officer of the court.” 234 But, contrary to these cases, not only do attorneys maintain their pre-existing rights to criticize the judiciary outside of the context of court proceedings, 235 attorneys actually gain a new constitutional right of expression upon admittance to a bar—that is, to criticize and officially challenge judicial behavior in court filings on behalf of clients, even though they did not have that right prior to their admission to the bar.

The necessity of such a right again is particularly compelling in the criminal context where defendants are threatened with state-imposed loss of life or liberty. Yet, in 2007, the Utah Supreme Court admonished criminal defense attorneys to remember “the pitfalls that may accompany the pursuit of” an argument of judicial bias resulting in a denial of due process. 236 The court cited a prior civil case where the Utah Supreme Court had stricken the briefs of an attorney and summarily affirmed a lower court’s decision that was factually and legally erroneous because the attorney questioned the motives of the lower court judge. 237 The court went on to explain that any arguments regarding judicial bias must be “supported by copious facts and record evidence” and “made in a reserved, respectful tone, shunning hyperbole and name-calling.” 238 By citing a case where the court had summarily affirmed an erroneous decision as a sanction for impugning judicial integrity, the court demonstrated its intention to

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233 In re Westfall, 808 S.W.2d 829, 834 (Mo. 1991); see also In re Shearin, 765 A.2d 930, 938 (Del. 2000); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 429 (Ohio 2003); 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).


235 See Tarkington, supra note 4, at 1622–29.


237 See id.; see also Peters v. Pine Meadow Branch Home Ass’n, 151 P.3d 962, 963, 967–68 (Utah 2007).

238 Santana-Ruiz, 167 P.3d at 1044.
chill attorney speech made in court filings regarding judicial bias—even when made on behalf of criminal defendants.\textsuperscript{239}

Criminal defense attorneys should not be admonished to be wary of making any colorable constitutional claim on behalf of their clients whose liberty or lives are at stake. Nor should there be extra judicially-imposed “pitfalls” (namely, sanctions or other punishment) that “accompany” arguments made by attorneys that a criminal defendant was denied due process because of a biased judge. It is shocking that a court would be more concerned with ensuring respectful rhetoric regarding the judiciary than with ensuring, whenever there is any question, that criminal defendants are afforded due process by impartial judges before losing their liberty. The only way that the due process rights afforded to all criminal defendants can be vindicated is if their attorneys actively seek their enforcement during the actual criminal proceedings and subsequent judicial review. If the attorney fails to raise such arguments, they are generally waived and lost forever—even on habeas review. For courts to chill (as did the Utah Supreme Court in \textit{Santana-Ruiz}) and/or to punish attorney speech raising such claims all but denies the existence of the right for the criminal defendant. Thus attorneys must have the right to make such arguments, when colorable, on behalf of their clients without threat or fear of punishment—even though the attorney had no such expressive right prior to becoming an “officer of the court.”

While a private citizen does not have a free speech right to make arguments of judicial bias, corruption, error, or abuse in court filings on behalf of another individual, once that private citizen becomes an attorney, the attorney gains that expressive right whenever the arguments are colorable and relevant. Due process guarantees to criminal and civil litigants of an unbiased

\textsuperscript{239} “First Amendment freedoms ‘are delicate and vulnerable,’ and ‘the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.’” \textit{United States v. Grace}, 461 U.S. 171, 188 (1983) (Marshall, J., concurring in part and dissenting in part) (quoting \textit{NAACP v. Button}, 371 U.S. 415, 433 (1963)).
judge and basic guarantees and expectations of justice are defeated if the attorney has no right to express and vindicate them in court proceedings.

III. Accommodating Both Free Speech and Judicial Functions

As noted in the introduction, under *New York Times v. Sullivan* and *Garrison v. Louisiana*, speech regarding public officials (including the judiciary) can only be punished if the speaker subjectively knew that the statement was false or “in fact entertained serious doubts as to the truth of his publication.” The Supreme Court has made clear that a “reasonableness” standard does not comply with *Sullivan*. Yet, despite the express language of MRPC 8.2 in adopting the *Sullivan* standard, courts punish speech for impugning judicial integrity under an objective reasonableness standard, requiring attorneys to show that “the attorney had an objectively reasonable factual basis for making the statements” or that “the reasonable attorney, considered in light of all his professional functions,” would make such statements under “the same or similar circumstances.” Further, courts often punish such speech without examining whether the statements made are in fact false. Rather, the burden is generally placed on the attorney to substantiate the truth or reasonableness of the statements.

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241 See Garrison v. Louisiana, 379 U.S. 64, 79 (1964) (explaining that the *Sullivan* standard is not satisfied by examining the reasonableness of the person in making the statement); *St. Amant*, 390 U.S. at 731 (explaining 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”); see also Tarkington, *supra* note 4, at 1587–58.
242 See MODEL RULE OF PROFESSIONAL CONDUCT, R. 8.2 (“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . .”).
243 Fla. Bar Ass’n v. Ray, 797 So. 2d 556, 559 (Fla. 2001) (per curiam); see also *In re Cobb*, 838 N.E.2d 1197, 1214 (Mass. 2005).
244 *In re* Graham, 453 N.W.2d 313, 322 (Minn. 1990); see Idaho State Bar v. Topp, 925 P.2d 1113, 1116 (Idaho 1996); *In re* Simon, 913 So. 2d 816, 824 (La. 2005) (per curiam); *In re* Westfall, 808 S.W.2d 829, 837 (Mo. 1991); *In re* Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam); see also Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 166, 168 (Ky. 1980) (per curiam).
cases, attorneys have been denied the opportunity to prove the truth of their statements. All of these requirements are directly in opposition to the holdings of *Sullivan* and *Garrison*.

Courts apply the objective reasonableness standard in interpreting MRPC 8.2 regardless of the context or forum in which the statements are made. Thus statements made in court filings, in personal letters, to the press, and in blogs are punished under the same “objective” interpretation of 8.2 and in contradiction to the requirements of *Sullivan* and *Garrison*. As I have fully argued in a previous article, under core First Amendment theory and doctrine and as essential to our representative American form of government, *Sullivan* and *Garrison* set forth the constitutional standard that must be employed to punish attorneys for speech impugning judicial integrity—regardless of the forum in which that speech is made. Thus MRPC 8.2 should be interpreted to mean what it says: an attorney should be punished for impugning judicial integrity only if the attorney knows the statement was false or acts with reckless disregard as to the truth of the statement as defined in *Sullivan* and *prodigy*.

Courts have noted special concerns with applying a subjective *Sullivan* standard in punishing statements that appear in court filings. For example, in *In re Cobb*, the Massachusetts Supreme Court rejected the *Sullivan* standard, and instead adopted an objective standard for MRPC 8.2 in a case where, in court filings, an attorney accused a judge of being involved in a criminal conspiracy. The court explained that the objective standard for MRPC 8.2 “is essential to the orderly and judicious presentation of cases,” explaining that courts are “not a place for

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247 See id. at 1592 & n.157 (citing cases).
248 See id. at 1587–93.
249 See id. at 1571–72 (citing cases).
250 See id. at 1575–1605, 1637–38.
251 MRPC 8.2 on its face adopts the Sullivan standard, and the drafts of the rule indicate that the ABA intended to adopt the Sullivan standard. However, courts have interpreted the rule as not requiring the application of Sullivan, but allowing punishment based on an objective reasonableness analysis. See Tarkington, supra note 4, at 1587–91 & n.123.
groundless assertions, whatever their nature.” 252 Certainly, in adjudicating a case, the judiciary cannot be expected to rely on assertions of fact that are only supported by the Sullivan standard: that is, a statement would be permissible as long as the attorney did not know that it was false or did not subjectively entertain serious doubts as to its truth or falsity. In a system of justice that attempts to be fair, assertions on which the court is asked to rely in ruling on a case must have some basis in fact. Indeed, Federal Rule of Civil Procedure 11 and Model Rule of Professional Conduct 3.1 both require the attorney to have a reasonable basis in fact for assertions presented to a court. Other rules contain similar requirements that forbid groundless and frivolous assertions. 253 These requirements are supported by the attorney’s duty of candor to the court as set forth in the Rules of Professional Conduct.

Importantly, the fact that statements in court filings should have a reasonable factual basis does not require the rejection of the Sullivan standard for MRPC 8.2 or other punishment based on impugning judicial integrity. Rather, where the problem with statements regarding the judiciary made in court proceedings is that the statements lack sufficient factual basis, then attorneys should be sanctioned under one of the several rules (such as FRCP 11 or MRPC 3.1) that require a sufficient factual basis for statements in court filings, rather than being sanctioned for impugning judicial integrity. When punishing attorneys under rules such as FRCP 11 or MRPC 3.1, it is appropriate for the burden to be placed on the attorney to show what formed her reasonable factual basis for the assertions. If, however, the problem with statements regarding the judiciary made in court proceedings is that the statement impugns judicial integrity or fails to accord proper respect to the judiciary, then the interest being served by the rule is protection of judicial reputation and the subjective Sullivan standard should apply with the requirement that

253 See, e.g., FEDERAL RULE OF APPELLATE PROCEDURE, R. 46; FEDERAL RULE OF CIVIL PROCEDURE, R. 12(f).
the disciplining authority prove the falsity of the statement.\textsuperscript{254} Of course, if it can be proven that the statements satisfy the \textit{Sullivan} standard as well, then an attorney can be sanctioned for violating both MRPC 8.2 \textit{and} for failing to have a reasonable basis for assertions made in court filings under FRCP 11 or MRPC 3.1.

Discipline under the proper rule and for the appropriate reason is not a mere academic nicety. There are several problems with punishing attorneys under MRPC 8.2 or other rules for impugning judicial integrity where the actual problem is that the attorney lacked a reasonable factual or legal basis for the statements. Notably, courts have recognized that MRPC 8.2 on its face applies to any and all statements made by attorneys regardless of the capacity in which the attorney made the statement.\textsuperscript{255} Thus, where courts interpret MRPC 8.2 in the context of statements made in court filings and determine that an objective standard applies and that the attorney has the burden to demonstrate the truth or reasonableness of the statement, that same standard is then used for other applications of MRPC 8.2 even where the statements are made by an attorney who is not acting in a representative capacity. For example, in \textit{Iowa Supreme Court Attorney Disciplinary Board v. Weaver}, the Iowa Supreme Court rejected the \textit{Sullivan} standard and instead adopted a standard requiring an attorney to show that he had “‘an objectively

\textsuperscript{254} N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); see also Tarkington, \textit{supra} note 4, at 1592–93.

\textsuperscript{255} \textit{See}, e.g., Notopoulos v. Statewide Grievance Comm., 890 A.2d 509, 518–19, 521 (Conn. 2006) (holding that “the Rules of Professional Conduct apply to attorneys acting in their individual capacity unless the rule clearly indicates otherwise” and that “[n]either the language of rule 8.2(a) nor the commentary associated with it clearly suggests that the rule should apply only to attorneys’ professional, as opposed to personal or pro se, statements”); Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 92 (Iowa 2008) (noting, in suspending lawyer for making statements about the judiciary to the press, that the relevant “ethics rules apply to attorneys even when they are not acting in their professional capacity”); \textit{In re Pyle}, 156 P.3d 1231, 1243 (Kan. 2007) (“Upon admission to the bar of this state, attorneys assume certain duties as officers of the court. Among the duties imposed upon attorneys is the duty to maintain the respect due to the courts of justice and to judicial officers. A lawyer is bound by the Code of Professional Responsibility in every capacity in which the lawyer acts, whether he is acting as an attorney or not and is subject to discipline even when involved in nonlegal matters . . . .’’’); \textit{In re Donohoe}, 580 P.2d 1093, 1096 (Wash. 1978) (holding that predecessor to Rule 8.2 “‘permeate[s] all aspects of an attorney’s life, whether he be engaged in the active practice of law’ or other pursuits).
reasonable basis for making the statements."\textsuperscript{256} Notably, in \textit{Weaver}, the statements at issue were made to the press regarding a lower court’s ruling while the case was on appeal. Yet the \textit{Weaver} court adopted the standard set forth by the Massachusetts Supreme Court in \textit{In re Cobb}.\textsuperscript{257} As noted, \textit{Cobb} involved statements made in court filings, and among the justifications cited by the Massachusetts court in rejecting the \textit{Sullivan} standard was the necessity of orderly “presentation of cases” and the need for a reasonable basis in fact supporting statements made in court filings.\textsuperscript{258} Of course, those same interests are not at stake for statements made to the press. But courts rejecting the \textit{Sullivan} standard for MRPC 8.2 have not done so solely in the context of statements made in court filings or in the attorney’s official capacity.\textsuperscript{259} In rejecting the \textit{Sullivan} standard for interpreting MRPC 8.2 courts rely interchangeably on earlier cases involving statements made in court filings and those made in other contexts.\textsuperscript{260} Thus adoption of the “objective” standard and rejection of \textit{Sullivan} not only chills attorneys from making statements regarding the judiciary in court proceedings, but also chills them from making comments about the judiciary in any forum.\textsuperscript{261}

But even where the statements are made in court filings (and thus attorneys have additional duties under rules such as FRCP 11 and MRPC 3.1 that require a reasonable basis in fact for the statements), punishment under the “objective” MRPC 8.2 standard is not harmless.

\textsuperscript{256} \textit{Weaver}, 750 N.W.2d at 81–82 (Iowa 2008) (quoting \textit{In re Cobb}, 838 N.E.2d 452 (2005)).
\textsuperscript{257} \textit{See id.} The court in \textit{Weaver} also relied on \textit{Office of Disciplinary Counsel v. Gardner}, 793 N.E. 2d 425, 431 (Ohio 2003), and \textit{In re Disciplinary Action Against Graham}, 453 N.W.2d 313, 322 (Minn. 1990), both of which also involved statements made in court filings. \textit{See Weaver}, 750 N.W.2d at 80–82.
\textsuperscript{258} \textit{Cobb}, 445 Mass. at 472–73 (emphasis added).
\textsuperscript{259} \textit{See, e.g.}, Idaho State Bar v. Topp, 425 P.2d 1113 (Idaho 1966); Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165 (Ky. 1980) (per curiam).
\textsuperscript{260} \textit{See, e.g.}, Notopoulos, 890 A.2d at 517 (relying in large part on prior case, \textit{Burton v. Mottolese}, 835 A.2d 998 (Conn. 2003), which involved statements made by an attorney in affidavit filed with the court); \textit{In re Westfall}, 808 S.W.2d 829, 837 (Mo. 1991) (relying on \textit{Graham} case in adopting objective standard, even though \textit{Graham} involved statements in court filings and \textit{Westfall} involved statements to the press); \textit{U.S. Dist. Ct. for the E. Dist. of Wash. v. Sandlin}, 12 F.3d 861, 867 (9th Cir. 1993) (relying on both \textit{Westfall} and \textit{Graham} in adopting objective standard even though \textit{Westfall} involved statements to the press and \textit{Graham} involved statements in court filings).
\textsuperscript{261} \textit{See Tarkington, supra} note 4, at 1571–72.
Courts applying the “objective reasonableness” interpretation of MRPC 8.2 have required a higher factual showing than that generally required by FRCP 11 or MRPC 3.1. Generally, as I have explained elsewhere, the threshold for compliance with FRCP 11 or MRPC 3.1 is quite low. Federal appellate courts interpreting FRCP 11 allow a reasonable basis in fact to be shown based on circumstantial evidence and even where evidence is weak.262 Thus, sanctions will not be imposed “unless a particular allegation is utterly lacking in support”263 or is made in “deliberate indifference to obvious facts.”264 Further, “Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement.”265 In stark contrast, courts imposing or threatening attorney discipline for impugning judicial integrity have required that the attorney have “substantial competent evidence”266 or “copious facts”267 supporting the assertions.268 Courts likewise have discounted circumstantial evidence,269 requiring direct proof of the specific allegations.270 Courts have penalized overstatement and rhetorical hyperbole.271 Indeed, some courts have denied attorneys the opportunity to substantiate their statements.272

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262 Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1998).
264 Baker, 158 F.3d at 524 (internal quotations omitted).
265 Navarro-Ayala v. Hernandez-Colon, 3 F.3d 464, 467 (1st Cir. 1993).
266 Ky. Bar Ass’n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam) (emphasis added).
268 See also In re Donohoe, 580 P.2d 1093, 1097 (Wash. 1978) (imposing discipline for impugning judicial integrity for statements regarding judicial candidate and stating that “criticism must be well founded, on a high plane, factual, and not personal”).
270 See Tarkington, supra note 4 at 1587–91; see also, e.g., U.S. Dist. Ct. for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993). In U.S. Dist. Ct. for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993), Sandlin was suspended from the practice of law for substantively editing a transcript. Applying the general standards for FRCP 11, discussed above, Sandlin would have had a reasonable basis in fact for his statements. The court reporter informed Sandlin that the judge edited transcripts, Sandlin remembered (although incorrectly) the judge saying something 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, he “took, and passed, two polygraph tests,” he consulted experts who determined it was inconclusive whether the audio tape had been edited, see id. at 864, and the judge in fact edited the transcript, just not substantively. Nevertheless the court concluded under the objective reasonableness standard of 8.2 that Sandlin did not have a “reasonable basis in fact” for his allegation of substantive editing by the judge, and Sandlin was suspended from the practice of law. See Sandlin, 12 F.3d at 867.
In addition to applying a strikingly different “reasonable basis in fact” requirement for statements about the judiciary than is applied for other assertions, courts imposing punishment for impugning judicial integrity have imposed exceptionally severe punishments, including suspension from the practice of law or summarily deciding a case in favor of the opposing party. In contrast, under FRCP 11, the sanction “must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”

Suspension from the practice of law may be warranted where the statements violate the subjective Sullivan standard—the attorney knew the statements were false or in fact entertained serious doubts about the truth or falsity of the statements. This is the standard that courts should be applying in disciplining attorneys for impugning judicial integrity, including under MRPC 8.2. But, unless there are extreme circumstances, suspension as a punishment for a failure to have a reasonable basis in fact for an assertion made in a court filing seems out of proportion—particularly under the heightened showing required by courts under their objective interpretation.

271 See, e.g., In re Wilkins, 777 N.E.2d 714, 719 (Ind. 2002) (Sullivan, J., dissenting) (explaining that “respondent made a statement of ‘rhetorical hyperbole,’ incapable of being proved true or false” and arguing that “[t]he First Amendment provides lawyers who use such hyperbole concerning the qualifications or integrity of the judge protection from sanction”).

272 See, e.g., In re Atanga, 636 N.E.2d 1253, 1257 (Ind. 1994) (per curiam) (excluding 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) (denying attorney evidentiary hearing and rejecting argument that “truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him”).


274 Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962 (Utah 2007); Wilkins, 777 N.E.2d 714; Stilley, 259 S.W.3d 395.

of MRPC 8.2.\textsuperscript{276} For example, in \textit{United States District Court v. Sandlin}, Sandlin was suspended from the practice of law in that court for six months for alleging that the district court judge substantively edited the transcript of a TRO hearing.\textsuperscript{277} In fact, the judge had edited the transcript, which had been reported to Sandlin by the court reporter—but the judge had not edited the transcripts substantively so Sandlin was held not to have a basis in fact for his statements under the objective standard for MRPC 8.2.\textsuperscript{278}

If courts use the appropriate rule and discipline attorneys under MRPC 3.1 or sanction them under FRCP 11, then courts will employ the case law interpreting those rules, rather than requiring a heightened showing or imposing a more severe punishment. To the extent that courts employ FRCP 11, MRCP 3.1 or other facially content- and viewpoint-neutral rules more harshly where the allegations regard the judiciary, then courts are protecting judicial reputation and the \textit{Sullivan} standard should apply.

\textsuperscript{276} Similarly, in \textit{Board of Professional Responsibility v. Davidson}, 205 P.3d 1008, (Wyo. 2009), the Supreme Court of Wyoming suspended Sue Davidson from the practice of law for two months, in large part for filing a Motion for Reassignment of Judge wherein Davidson asserted that the trial judge had engaged in an ex parte communication with opposing counsel. Davidson explained in the motion the basis for this belief—namely, that opposing counsel had obtained a trial date before motions regarding assignment of the judge had been heard. The Court repeatedly noted that Davidson’s assertion had not been made in compliance with FRCP 11 and MRPC 3.1 because Davidson failed to ask opposing counsel about it or make any sort of reasonable inquiry. Nevertheless, Davidson was punished under MRPC 8.2 rather than MRPC 3.1. Notably, the court additionally found a violation of 8.4 (engaging in conduct prejudicial to the administration of justice) based on the same facts. The Court explained that the motion “violated WRCP 11 and Wyo. R. Prof. Conduct Rule 3.1(c) due to lack of any reasonable inquiry” and “[t]here can perhaps be no more egregious blow to the administration of justice than an unfounded accusation that a judge has violated the Code of Judicial Conduct.” \textit{Id.} at 1017.

Similarly, in \textit{In re Wilkins}, Wilkins was suspended from the practice of law for including a footnote in his appellate brief that stated: “[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).”\textsuperscript{278} Further, the Court struck Wilkins’ petition to the Indiana Supreme Court because Wilkins included this footnote, although the court did say it considered the merits of the claims (without discussing them). Wilkins’ suspension was later reduced to a reprimand. \textit{See In re Wilkins}, 782 N.E.2d 985 (Ind. 2003).

\textsuperscript{277} 12 F.3d 861 (9th Cir. 1993). Sandlin’s assertions were made to authorities regarding the judge and not in filings in the pending case. But as in cases regarding court filings, Sandlin made the complaints to obtain relief in the underlying case and was severely sanctioned therefore.

\textsuperscript{278} \textit{See id.} at 867; \textit{see also supra} note 270.
Importantly, courts don’t need to resort to severe punishments (like suspension) or adopt an objective standard for MRPC 8.2 in order to protect their justifiable interests in ensuring that assertions regarding the judiciary that are made in court filings have a reasonable legal and factual basis and are relevant. Courts already have the rules and tools, including sanctions, to deal with problems of irrelevancy, lack of factual and legal basis, courtroom order, etc. It is equally important to the proper functioning of the judiciary and fair resolution of cases that assertions made in court proceedings regarding non-judicial actors have a basis in fact and be relevant. Courts do not need extra protection or extra sanctions where statements or allegations regard the judiciary. They do not need an objective interpretation of MRPC 8.2 or an exception to the Sullivan standard carved out for themselves in order to preserve judicial functions. Rather, courts can use the normal content and viewpoint neutral rules used in other contexts if the problem with a statement is irrelevancy or legal or factual insufficiency. If and when courts are doing more—including requiring a greater showing to avoid punishment or the imposition of greater punishments—than they would do if the statements did not regard the judiciary, then they are simply protecting judicial reputation and the requirements of Sullivan apply. The only element that the objective approach to MRPC 8.2 adds to the already-existing requirements placed on attorneys by MRPC 3.1 and FRCP 11 is a viewpoint-based prohibition on speech regarding the qualifications and integrity of public officials, which by definition is core political speech. The judiciary does not—and constitutionally cannot—impose such a prohibition unless the Sullivan standard is satisfied.

IV. Conclusion

As compelled by Sullivan and Garrison themselves, speech can only be punished for impugning judicial integrity if the speaker knew the statements were false or made the statements
with reckless disregard as to their truth. The speech at issue by definition is political speech—speech regarding the qualifications and integrity of public officials—and thus is entitled to the fullest protection offered by the Constitution. But rather than protecting such speech, courts have imposed viewpoint-based punishment regardless of the forum in which the speech is made, whether to the press, on blogs, in personal letters, or otherwise. Suppressing attorney speech regarding the judiciary frustrates democracy by denying the right of the attorney speakers to contribute to the robust, uninhibited, wide-open debate regarding public officials that is central to our ability to self-govern.\(^{279}\) Such suppression correspondingly denies the right of the public to receive opinions from those who have the education, training, and exposure to best offer informed views regarding the judiciary.\(^{280}\) This manipulation of public debate regarding the judiciary in turn frustrates the ability of the public to employ democratic correctives to check and define the abuse of judicial power and allows for judicial self-entrenchment.\(^{281}\)

But even in the narrow context of speech made in court filings and proceedings, there are important reasons why attorneys should be able to impugn judicial integrity without fear or threat of punishment for harming judicial reputation outside of the *Sullivan* standard. First is the preservation of the constitutional, statutory, and other rights of clients to an impartial and otherwise qualified judiciary. While clients assuredly have these rights as a matter of due process and other law, these rights are all but meaningless to the extent that attorneys are chilled from or punished for asserting them. Civil and criminal litigants have constitutional rights to an unbiased judiciary and constitutional rights to be represented by counsel. Punishing attorneys to preserve judicial reputation results in the frustration of the combined promise of these rights—

\(^{279}\) See Tarkington, *supra* note 4, at 1576–79.
\(^{280}\) See *id.* at 1600–05.
\(^{281}\) See *id.* at 1597–1610.
that attorneys be able to raise on behalf of their clients colorable claims and arguments that challenge, and thus potentially impugn, judicial integrity.

Recognition of this free speech right of the attorney thus preserves the attorney-client relationship. Attorneys are to zealously and competently represent their clients. At least, such representation should entail presenting their client’s colorable claims. It certainly would include raising colorable claims that their client’s constitutional rights have been violated. Attorneys should not be required to pull their punches merely because their client’s rights involve questioning actions of the judiciary. This is particularly so where the harm sought to be avoided is maligning judicial reputation, an interest that constitutionally cannot be protected outside of the requirements of Sullivan. As the Fifth Circuit held in reversing a district court’s suspension and fine of attorney for an alleged violation of MRPC 8.2: “Attorneys should be free to challenge, in appropriate legal proceedings, a court’s perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court.”°282 Unfortunately, there have been a number of cases where comments have been so misconstrued and sanctions imposed.

Moreover, allowing attorneys to raise such claims preserves the role of the attorney in the American adversarial system. Each side is to raise the arguments of its own client. A viewpoint-based prohibition on court speech is particularly problematic in the adversarial system because it ensures that only one side’s view of the matter will be heard. Although it has been argued that speech regarding the judiciary is punishable in part because the judiciary does not generally respond to and thus cannot retort criticism, that concern is largely superficial in the context of court proceedings. Notably, the judiciary, in response to allegations of judicial bias or incompetence raised in court filings, can respond to and address them in the form of an opinion.

°282 United States v. Brown, 72 F.3d 25, 29 (5th Cir. 1995).
Moreover, the opposing side will often have an incentive to articulate the opposing viewpoint and thus to vindicate the judiciary’s reputation. Although the judiciary may “not take to the talk shows to defend themselves,”\textsuperscript{283} it is certain that an opposing party who does not want a new trial granted, for example, will vigorously advocate on behalf of the judge and the fairness of the underlying proceedings. The judiciary need not take up the soapbox or punish the attorney who questioned the integrity of the proceedings to vindicate its reputation. Further, the adversary system is intended to help ensure the fairness of the proceedings by allowing both sides to air their view of the facts, law, and proceedings.\textsuperscript{284} By silencing only one side and one viewpoint, the premise and purpose of the adversary system is frustrated.

Somewhat ironically, to the extent that the judiciary deters and punishes speech questioning the integrity of an underlying proceeding, it is also frustrating its own role in the proper functioning of the judicial system. As pointed out in \textit{Velazquez}, prohibiting “the analysis of certain legal issues” and “truncating presentation to the courts . . . prohibits speech and expression upon which the courts must depend for the proper exercise of the judicial power.”\textsuperscript{285} This is because the judiciary relies on attorneys to bring arguments and claims—including those of constitutional magnitude—to it for resolution. The judiciary does not investigate and determine on its own whether a particular party has been afforded due process. The judiciary can only examine and rectify such problems when attorneys raise the problems for judicial review. Nevertheless, the judiciary serves a special role in preserving and protecting constitutional rights when abridged by government, and ought to be particularly jealous of ensuring that it also fulfills

\textsuperscript{283} \textit{In re} Palmisano, 70 F.3d 483, 487 (7th Cir. 1995).
\textsuperscript{284} \textit{See, e.g.}, Koller v. Richardson-Merrell, Inc., 737 F.2d 1038, 1056 (D.C. Cir. 1984) (“[T]he adversary system is based on the premise that the truth is best ascertained . . . through the zealous and competent presentation by each side of its strongest case.”); \textit{see also} Strickland v. Washington, 466 U.S. 668 (1984) (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”).
\textsuperscript{285} \textit{Id.} at 545.
constitutional rights. Yet, the judiciary cannot ensure that due process is being afforded by judges when it turns a blind eye—and even enforces that blindness through punishment and threat of punishment—to possible judicial deficiencies in providing due process.

Beyond all this, the judiciary does not need to carve out an exception to *Sullivan* to preserve its legitimate judicial functions. It already has rules that are content- and viewpoint-neutral and supported by significant interests in the fair and just resolution of cases that require attorneys to have a reasonable basis in fact for assertions made in court proceedings. Courts can use those rules and can enforce them to the same extent and use the same standards as are used where assertions regard non-judicial actors. Thus, employing the *Sullivan* standard in applying MRPC 8.2 or other rules protecting judicial reputation and respect does not give attorneys free license to fill their court filings with irrelevant and frivolous claims of judicial corruption and bias. Rather, use of the *Sullivan* standard just ensures that the judiciary punishes speech that fails to have a basis in fact for that failure; punishes speech that is irrelevant for being irrelevant; and punishes speech that disrupts a proceeding for disrupting a proceeding. This in turn ensures that the judiciary is in compliance with the Speech Clause when it punishes speech to protect its own reputation.

In the words of Justice Thurgood Marshall: “It would be ironic indeed if an exception to the Constitution were to be recognized for the very institution that has the chief responsibility for protecting constitutional rights.” 286 Courts who carve out an exception to *Sullivan* for themselves—even in the context of court proceedings—frustrate the protection of the underlying constitutional and other legal rights of litigants, the relationship between attorney and client, and

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the judiciary’s own role and responsibility in remedying constitutional violations and providing fair proceedings.