MERE WORDS: THE ROLE OF BAR ORGANIZATIONS IN MAINTAINING PUBLIC SUPPORT FOR THE JUDICIARY

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I

INTRODUCTION

The bashing of judges "has a long and distinguished tradition" in this country.[1] The freedom to do so is an important feature of any democracy. Yet some verbal attacks can unfairly undermine public support for courts, interfere with proper judicial functioning, and threaten judges' safety.[2] Bar organizations sometimes step up to defend judges or courts from "unjust" criticism, following protocols developed for that purpose.[3] They assume this role, in part, because judges' freedom to defend themselves is constrained by rules of judicial conduct.[4] Much less often, bar organizations will criticize courts to signal that courts have a problem. Justice Samuel Alito commented on this seeming anomaly following the U.S. Supreme Court's controversial decision in *Dobbs v. Jackson Women's Health Organization*:[5]

> We are being hammered daily, and I think quite unfairly in a lot of instances. And nobody, practically nobody, is defending us. The idea has always been that judges are not supposed to respond to criticisms, but if the courts are being unfairly attacked, the

This Article is also available online at http://lcp.law.duke.edu/.

* Hugh Macgill Professor of Law, University of Connecticut School of Law. I am grateful to Bruce Green and the participants in the workshops at the University of Connecticut Law School, the University of Denver Sturm College of Law, and Fordham University Law School for their generous comments. I also thank Maryanne Daly-Doran, Tanya Johnson, Adam Mackie, and Anne Rajotte, University of Connecticut Law Librarians, for truly extraordinary research assistance.

1. ABA, REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND INDEPENDENCE OF THE JUDICIARY vi (1997) [hereinafter REPORT OF THE COMMISSION ON SEPARATION OF POWERS].

2. These attacks can also deter qualified candidates from seeking judicial office and prompt sitting judges to resign. *See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office?*, 72 N.Y.U. L. REV. 308, 312 (1997). *See also id*. at 325 (asking "why would any conscientious lawyer want to accept a seat on one of those courts, knowing that one opinion may be used to misrepresent everything he or she may do as a judge?").

3. This Article sometimes refers to "judges" for the sake of accurate description, but the references to "courts" are generally meant to encompass individual judges, specific courts, and at times, the entire judiciary.

4. ABA, REPORT OF THE JUDICIAL DIVISION PRESENTED JOINTLY WITH THE SPECIAL COMMITTEE ON JUDICIAL INDEPENDENCE 373–74 (1998).

5. 138 S. Ct. 2448 (2022).

> organized bar will come to their defense. [Instead,] if anything, they've participated to some degree in these attacks."[6]

Although Justice Alito may have been surprised by bar organizations' failure to defend the Court, their criticism—like their defense of courts—can be seen as efforts to maintain public support for the judiciary.

These efforts were evident in bar organizations' very different responses to two recent presidents' attacks on courts. Several organizations vigorously defended judges and courts against attacks by President Donald Trump.[7] In 2016, then-candidate Trump aimed his remarks at Judge Gonzalo Curiel, a federal judge who was hearing two cases involving Trump University.[8] After the judge issued a ruling against Trump University, Trump stated—among other things—that Judge Curiel had "an absolute conflict" in presiding over the lawsuit because he was of "Mexican heritage."[9] In February 2017, two weeks after Trump took office, Judge James Robart temporarily enjoined Trump's executive order banning immigrants from seven Muslim-majority countries from entering the United States. Trump tweeted several times about the federal judge's decision, including, "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!"[10] Then in 2018, when Judge Jon Tigar, a federal judge in San Francisco, issued a temporary restraining order against Trump's new asylum policy, Trump called the decision a "disgrace," and complained about his administration's lack of success in the Ninth Circuit.[11] He added, "The Ninth Circuit, we're going to have to look at that. This was an Obama judge. And I'll tell you what, it's not going to happen like that anymore."[12] This provoked a public rebuke from Supreme Court Chief

6. *See* James Taranto & David B. Rifkin, Jr., *Justice Samuel Alito: This Made Us Targets of Assassination*, WALL ST. J. (Apr. 28, 2023), https://www.wsj.com/articles/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9.

7. *See* Leslie C. Levin, "*This is Not Normal": The Role of Bar Organizations in Protecting Constitutional Norms and Values,* 69 WASH. U. J. L. & POL'Y 173, 188–99 (2022).

8. Maureen Groppe, *What Trump Has Said About Judge Curiel*, INDYSTAR (June 11, 2016), https://www.indystar.com/story/news/2016/06/11/what-trump-has-said-judge-curiel/85641242/ [https://perma.cc/Y5T5-W766].

9. Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.

10. @RealDonaldTrump, TWITTER (Feb. 4, 2017), https://twitter.com/realDonaldTrump/status/827867311054974976?lang=en [https://perma.cc/JQB5-HYML].

11. Brian Naylor & Nina Totenberg, *Chief Justice Roberts Issues Rare Rebuke; Trump Fires Back*, NPR (Nov. 21, 2018), https://www.kuow.org/stories/chief-justice-roberts-issues-rare-rebuke-totrump-trump-fires-back.

12. *Trump Attacks Roberts. Transcript: 11/21/18, 11th Hour with Brian Williams*, MSNBC (Nov. 21, 2018), https://www.msnbc.com/transcripts/11th-hour-with-brian-williams/2018-11-21-msna1168696 [https://perma.cc/GZQ4-GD9K].

Justice John Roberts[13] and responses from some bar organizations.[14]

In contrast, no bar organization defended the Court after President Joe Biden's repeated attacks on it following the *Dobbs* decision. He stated, "It was three Justices named by one President—Donald Trump—who were the core of today's decision to upend the scales of justice."[15] He continued, "With this decision, the conservative majority of the Supreme Court shows how extreme it is, how far removed they are from the majority of this country."[16] The following month, he excoriated the decision as "terrible, extreme and I think totally wrong-headed."[17] He added, "The truth is, today's Supreme Court majority [is] playing fast and loose with the facts" and "what we're witnessing wasn't a constitutional judgment. It was an exercise in raw political power." He also stated, "We cannot allow an out-of-control Supreme Court, working in conjunction with extremist elements of the Republican Party, to take away freedoms and our personal autonomy."[18] Thereafter, Biden referred to the Court as "more of an advocacy group" than "evenhanded."[19] Bar organizations not only declined to criticize Biden's remarks, but some went so far as to criticize the *Dobbs* decision and the Court itself.[20]

13. Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), https://apnews.com/article/north-america-donald-trump-us-news-ap-top-newsimmigration-c4b34f9639e141069c08cf1e3deb6b84 [https://perma.cc/NLD2-23FS] ("We do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.").

14. *See* Levin, *supra* note 7, at 195–96 (noting the reactions of organizations such as the ABA and the Bar Association of San Francisco).

15. *Joseph R. Biden, Remarks on the United States Supreme Court Decision to Overturn Roe v. Wade*, AM. PRESIDENCY PROJECT (June 24, 2022), https://www.presidency.ucsb.edu/documents/remarks-the-united-states-supreme-court-decision-overturn-roe-v-wade [https://perma.cc/E7T6-Z635].

16. *Id.*

17. *Joseph R. Biden, Remarks on Signing an Executive Order on Protecting Access to Reproductive Health Care and an Exchange with Reporters*, AM. PRESIDENCY PROJECT (July 8, 2022), https://www.presidency.ucsb.edu/documents/remarks-signing-executive-order-protecting-access-reproductive-health-care-services-and [https://perma.cc/KRC2-GQFE].

18. *Id.*

19. John Wagner, *Biden Says Supreme Court "More of An Advocacy Group" Than "Even-Handed*," WASH. POST (Oct. 12, 2022), https://www.washingtonpost.com/politics/2022/10/12/biden-supreme-court-abortion-rights/ [https://perma.cc/FDX9-VU8T].

20. *See, e.g., Philadelphia Bar Association Releases Statement on Supreme Court Opinion in Dobbs v. Jackson Women's Health*, PHILA. BAR ASS'N (June 24, 2022), https://philadelphiabar.org/?pg=News&blAction=showEntry&blogEntry=77342 [https://perma.cc/3QF3-LX8R] ("The true purpose of law should be to make things clear; this decision does the opposite. It goes against our Association's core mission of promoting respect for the rule of law."); *The National LGBTQ+ Bar Supports Health, Dignity and Autonomy for All Pregnant People*, LGBTQ+ BAR (June 27, 2022), https://lgbtqbar.org/bar-news/dobbs-statement/ [https://perma.cc/7JKX-GFS6] (stating that it "strongly condemned" the decision and referring to it as "outrageous"); *Joint Statement Condemning the U.S. Supreme Court Decision and Underlying Reasoning in Dobbs v. Jackson Women's Health*, WOMEN'S BAR ASS'N OF D.C., https://wbadc.org/joint-statement-condemning-the-u-s-supreme-court-decision-and-underlying-reasoning-in-dobbs-v-jackson-womens-health/ [https://perma.cc/H47L-67UM] (stating we "are shocked by the reasoning used to support this decision. . . .The public's trust in and respect for the Court

Some possible reasons for the differing reactions to the presidents' statements will be discussed below, but it is worth emphasizing here that bar organizations are much more likely to defend courts than criticize them.[21] Indeed, they have been accused of defending courts reflexively.[22] This is not surprising. Lawyers value their close relationships with courts. Moreover, the *Model Rules of Professional Conduct* encourage lawyers "to defend judges and courts unjustly criticized," [23] but do not encourage criticism of courts when it is just. Instead, lawyers are urged by their professional rules to demonstrate respect for judges[24] and can be sanctioned for criticizing judges before whom they appear.[25] Bruce Green contends that today, "the organized bar's mission, in significant part, has been to defend the judiciary from attack, in order to protect the independence of the judiciary. The bar has not cultivated or encouraged lawyers' criticism of judges, has not defended it, and has discouraged it."[26]

In fact, it is not easy for many bar organizations to criticize *or* defend courts. Mandatory state bars, to which all lawyers in some jurisdictions are required to belong, seemingly feel constrained in their ability to defend the judiciary due to the Supreme Court's decision in *Keller v. State Bar of California.*[27] In that case, the Court held that mandatory bar dues can be used for activities pertaining to regulating the legal profession and improving the quality of legal services, but cannot constitutionally be used to "fund activities of an ideological nature which fall outside of those areas of activity."[28] Consequently, mandatory bars rarely even defend courts from attack.[29] Voluntary bars face some practical limits on

has now been severely damaged. People perceive that a handful of Justices' personal, religious, or political beliefs have prevailed over precedent and stability of the law."); *WBAI Statement on Dobbs v. Jackson Women's Health*, WOMEN'S BAR ASS'N ILL., https://wbaillinois.org/blog/wbai-statement-on-dobbs-v-jackson-womens-health-organization/ [https://perma.cc/6G35-9KPX] ("it is clear that the majority's opinion is riddled with misogyny").

21. "Criticize" is used in this Article to mean statements indicating some disapproval or concern that judges are conducting themselves in ways that may undermine public trust in courts, support for courts, or other important values.

22. *See* James L. Buckley, *The Constitution and the Courts: A Question of Legitimacy*, 24 HARV. J.L. & PUB. POL'Y 189, 191 (2000) (stating that "in the hoary tradition of too many professional associations, the ABA's response has largely been to circle the wagons in order to protect the judiciary against attacks from any quarter, however legitimate some of the attacks might be. . . .").

23. MODEL RULES OF PRO. CONDUCT r. 8.2 cmt. (AM. BAR ASS'N 2023).

24. *See* MODEL RULES OF PRO. CONDUCT preamble (AM. BAR ASS'N 2023). The closest it comes is the somewhat vague statement that lawyers may have a duty "to challenge the rectitude of official action."

25. *See, e.g.*, Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1569–70 (2009) (discussing sanctions courts impose on lawyers for impugning the integrity of the judiciary or bringing it into disrepute). Lawyers are also prohibited from making false statements about the qualifications or integrity of judges. *See* MODEL RULES OF PRO. CONDUCT r. 8.2(a) (AM. BAR ASS'N 2023).

26. Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 625–26 (2015).

27. 496 U.S. 1 (1990).

28. *Id.* at 13–14. The State Bar had used a portion of bar dues to lobby or speak on issues such as gun control, school prayer, and abortion. *Id.* at 15.

29. *See* Levin, *supra* note 7, at 231–32.

their ability to publicly speak on controversial issues because these organizations typically include members with a wide range of political views and personal values. Heterogeneous organizations may be constrained from speaking out due to concerns about losing members.[30] Many bar organizations also lack the resources to write statements and effectively disseminate their messages. Most do not consider it to be their responsibility. It is mostly the American Bar Association (ABA), large voluntary bar organizations on the east and west coasts, and specialty bars composed of lawyers who appear before courts that speak out in this manner.[31]

This Article examines bar organizations' efforts to defend courts from mere words of criticism,[32] the rare occasions when they will criticize courts, the reasons why these organizations do so, and the tensions inherent in these efforts. It then suggests when and why bar organizations should undertake these efforts in the future. Part II briefly discusses why public support for courts is needed to maintain courts' independence and legitimacy. It also describes evidence from social scientists indicating that negative statements by prominent speakers with salient political affiliations can reduce courts' legitimacy. Part III looks at the symbiotic relationship between the bench and the organized bar in the United States and why that relationship motivates some bar organizations to defend courts from attacks. This relationship also helps to explain why these organizations are much less willing to criticize courts. Part IV looks historically at some bar organizations' decisions to defend courts, criticize them, or deliberately remain silent when courts were being attacked. It also discusses bar organizations' efforts starting in the early 1970s to create procedures for publicly responding to unjust criticism of courts. Part V explores bar organizations' recent efforts to defend courts from President Trump's verbal attacks and suggests some reasons why bar organizations responded differently to President Biden's criticism of the Supreme Court following the *Dobbs* decision. Part VI considers which types of verbal attacks on courts by public officials merit a response from bar organizations and what these organizations can reasonably hope to accomplish. It focuses on public officials' attacks because their words are most likely to garner widespread attention, negatively affect public perceptions of courts, and in some cases, move listeners to take action. It also discusses why bar organizations' criticism of courts can be so

30. Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 231–32 (1996). This concern is particularly salient in recent years, when membership in many voluntary bar organizations is declining. *See* Dean Martinez, *Bar Associations Are Outdated: It's Time to Reinvent*, BLOOMBERG L. (Apr. 28, 2021), https://news.bloomberglaw.com/us-law-week/bar-associations-are-outdated-its-time-to-reinvent [https://perma.cc/63RQ-2Y6T].

31. Levin, *supra* note 7, at 192, 195–96. Less often, other specialty bars and affinity bars (i.e., organizations of lawyers who share common characteristics such as gender, ethnicity, or political views) will issue such statements. *Id.* at 190, 203–04, 207, 212–13, 232–33.

32. On the power of words, see OSCAR WILDE, THE PICTURE OF DORIAN GRAY (1891) ("Words! Mere words! How terrible they were! How clear, and vivid, and cruel! One could not escape from them . . . . Was there anything so real as words?").

important and suggests when these organizations should voice criticism of courts to help maintain public support for the judiciary.

II

JUDICIAL INDEPENDENCE, LEGITIMACY, AND PUBLIC SUPPORT FOR COURTS

Courts require a certain amount of public support to function optimally in a liberal democracy. Lacking both sword and purse, courts must rely on the elected executive and legislative branches to give effect to judicial decisions.[33] A key component of political will to enforce judicial decisions is public support for courts.[34] Public support is also needed to maintain the judiciary's independence and legitimacy.

"Judicial independence" as used by political scientists refers to the "ability to make decisions that are unaffected by political pressure from outside of the judiciary."[35] Of course, no court enjoys complete judicial independence.[36] In our democracy, some forms of popular or legislative pressure "are not only permissible, but indispensable."[37] Nevertheless, an independent judiciary requires a large measure of individual independence and branch independence. Individual independence is both substantive, "in that it allows judges to perform the judicial function subject to no authority but the law," and personal, in that it guarantees judges job security, adequate compensation, and physical security.[38] Branch independence involves "matters affecting the operation of the judiciary as a separate branch of government," including adequate appropriations to function and the freedom to administer itself without undue interference by the legislature.[39] Public support for courts helps to maintain courts' independence from encroachment by other branches of government.[40]

"Legitimacy" is also a layered and "notoriously fraught concept."[41] Richard Fallon divides claims about the legitimacy of a court and its decisions into three categories: sociological, moral, and legal legitimacy.[42] Sociological legitimacy considers whether the public views the law and formal legal authorities as worthy

33. TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 1 (2011).

34. *Id.* at 3–4.

35. *Id*. at 5.

36. Stephen P. Burbank & Barry Friedman, *Reconsidering Judicial Independence, in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9, 11–12 (Stephen P. Burbank & Barry Friedman eds. 2002).

37. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965 (2002). For example, if the legislature changes the law, judicial decisions should reflect that fact. *Id*.

38. REPORT OF THE COMMISSION ON SEPARATION OF POWERS, *supra* note 1, at iii.

39. *Id.*

40. CLARK, *supra* note 33, at 6, 20.

41. Logan Strother & Colin Glennon, *An Experimental Investigation of the Effect of Supreme Court Justices' Public Rhetoric on Perceptions of Judicial Legitimacy,* 46 LAW & SOC. INQUIRY 435, 437 n.4 (2021).

42. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018).

of respect and obedience for reasons that go beyond fear of adverse consequences.[43] Courts enjoy this legitimacy when people believe courts reach their decisions through fair and neutral processes.[44] This type of legitimacy is why the public will generally accept the enforcement of decisions with which it disagrees.[45] Legal legitimacy depends on whether judges use interpretive methods that are generally accepted within the legal culture.[46] Moral legitimacy focuses on whether people *should* treat a legal regime or its institutions as worthy of respect and obedience.[47] Fallon uses the example of the Nazi regime.[48] These types of legitimacy can be in tension.[49]

While bar organizations' defense of courts typically refers to judicial independence, they are often also attempts to defend courts' legitimacy. The concepts are closely related: courts that do not have decisional independence to act as neutral arbiters will lack sociological legitimacy. Courts must have sufficient sociological legitimacy to maintain their independence from the other branches of government.[50]

What kind of public support do courts need? Social scientists distinguish between specific support, which is "satisfaction with the performance of a political institution" and "diffuse support," which is independent of performance.[51] Diffuse support is the "belief that, although at times specific policies can be disagreeable, the institution itself ought to be maintained—it ought to be trusted and granted its full set of powers."[52] Courts need diffuse public support to overcome their institutional weakness vis a vis the elected branches of government.[53]

People are either socialized from childhood to believe in the authority of courts or for other reasons develop a reservoir of good will toward courts over time.[54] For individuals who agree with its decisions, a court does not need to draw from the reservoir of good will for its decisions to be accepted as legitimate.[55]

43. *Id.* at 22–23.

44. Strother & Glennon, *supra* note 41, at 437.

45. CLARK, *supra* note 33, at 4.

46. FALLON, *supra* note 42, at 35–36, 40.

47. *Id*. at 21, 24, 34.

48. *Id.* at 21.

49. Tara Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2245, 2250 (2019).

50. *See* CLARK, *supra* note 33, at 262.

51. *E.g*., James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120, 1126 (1992).

52. Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RES. Q. 333, 334 (2001).

53. *See, e.g.*, CLARK, *supra* note 33, at 17; Corey Barwick & Ryan Dawkins, *Public Perceptions of State Court Impartiality and Court Legitimacy in an Era of Partisan Politics,* 20 STATE POL. & POL'Y Q. 54, 57 (2020).

54. *See* CLARK, *supra* note 33, at 17; David Easton, *A Re-Assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435, 445–46 (1975).

55. Damon M. Cann & Jeff Yates, *Evaluating Diffuse Support for State High Courts Among*

Only those who disagree with a court decision must draw from their reservoir of good will to support the authority of courts. Continual disagreement with court decisions can reduce the reserves of diffuse support.[56] So, too, can an individual's belief that courts decide cases in a non-neutral or partisan manner.[57]

Most of the research on legitimacy and diffuse support has focused on the U.S. Supreme Court. Until recently, social scientists believed that diffuse support for the Court was relatively stable and unaffected by partisanship.[58] There is now evidence that diffuse support is malleable and more closely connected to political cues than previously believed.[59] The public relies on heuristics and trusted partisan source cues when generating political opinions.[60] Experiments reveal that certain political figures or other trusted high profile speakers with recognizable party affiliations can alter the level of diffuse support for the Court.[61] One experiment that looked at the effects of negative statements about the Court attributed to 2016 presidential candidates Donald Trump and Hillary Clinton revealed that such statements can modify individual level positivity toward the Court.[62] Changes in perceptions of legitimacy were a product of the individual's feelings toward Clinton and Trump. Individuals who disliked one of those political figures increased their level of support for the Court after that person's negative statements; those who liked the political figure reported decreased support for the Court.[63] Another experiment revealed that the more that people express confidence in the credibility of a speaker—Trump or a bipartisan group of distinguished law professors—the more the speaker's criticism had a deleterious effect on diffuse support for the Court. There was also a backlash among those who had little confidence in Trump, in that his negative statements increased their support for the Court.[64] The mechanisms through which these effects on diffuse support occur are still being determined and the durability of the effects of such

Individuals with Varying Levels of Policy Agreement, 102 SOC. SCI. Q. 2824, 2825 (2021); Barwick & Dawkins, *supra* note 53, at 58.

56. Cann & Yates, *supra* note 55, at 2825; Miles T. Armaly, *Extra-Judicial Actor Induced Change in Supreme Court Legitimacy*, 71 POL. RES. Q. 600, 601 (2018).

57. *See infra* note 173 and accompanying text. *See also* Barwick & Dawkins, *supra* note 53, at 60 (observing that the perception of impartiality "is the key factor that underwrites an institution's legitimacy"). Although most studies of court legitimacy have focused on the U.S. Supreme Court, some scholars have noted "substantial overlap" between those findings and their research on state court legitimacy. DAMON M. CANN & JEFF YATES, THESE ESTIMABLE COURTS: UNDERSTANDING PUBLIC PERCEPTIONS OF STATE JUDICIAL INSTITUTIONS AND LEGAL POLICY-MAKING 51 (2016). *See generally* Barwick & Dawkins, *supra* note 53, at 73-74 (reporting on evidence that when high state courts' decisions are not perceived as impartial, this erodes the courts' legitimacy).

58. Michael J. Nelson & James L. Gibson, *How Does Hyperpoliticized Rhetoric Affect the US Supreme Court's Legitimacy?*, 81 J. POL. 1512, 1512–13 (2019).

59. *See, e.g.,* Armaly, *supra* note 56, at 601.

60. *Id*. at 600; Stephen P. Nicholson & Thomas G. Hansford, *Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions*, 58 AM. J. POL. SCI. 620, 621 (2014).

61. Armaly, *supra* note 56, at 609; Miles T. Armaly, *Who Can Impact the US Supreme Court's Legitimacy?*, 41 JUST. SYS. J. 22, 28–32 (2020).

62. Armaly, *supra* note 56, at 601.

63. *Id.* at 607.

64. Nelson & Gibson, *supra* note 58, at 1514. This was not true for law professors' statements.

statements are unknown.[65] This research suggests, however, that "attachments to partisan figures from whom citizens regularly adapt their political stances…may be legitimacy's unique vulnerability."[66]

Going forward, I mostly avoid using the words "legitimacy" or "independence." "Legitimacy," in particular, has led to significant confusion.[67] I will instead use the term "public support" to refer to the diffuse support courts need from the public to function relatively independently from the other political branches and to attain voluntary compliance with—or enforcement of—court decisions.

III

THE SYMBIOTIC BENCH-BAR RELATIONSHIP

Judges and bar organizations in the United States have had close connections since modern bar associations first appeared. In 1870, elite lawyers formed the first such organization, the Association of the Bar of the City of New York (NYCB).[68] The founding members wanted to restore "the honor, integrity and fame of the profession in its two manifestations of the Bench and Bar."[69] They were concerned that recurrent revelations of judicial corruption negatively reflected on "the legitimacy of the legal system and the standing of the legal profession."[70] One of the NYCB's first two committees, formed in 1870, concerned the independence and quality of the judiciary.[71] The NYCB initially worked to impeach three Tweed and Tammany Hall judges.[72] In 1881, it formed a Committee on Judicial Nominations to consider candidates' fitness for judicial office.[73]

Following the NYCB's lead, lawyers in other major cities formed bar associations in the 1870s. These included the Bar Association of San Francisco (1872), the Cleveland Bar Association (1873), the Chicago and St. Louis Bar Associations (1874), and the Boston Bar Association (1877).[74] State bar associations also

65. It should be noted that one study did not find that Trump's criticism affected diffuse support. It found Trump's tweet (about the "so-called judge") only diminished specific support for the Court, and only among those with low support for democratic values. Christopher D. Kromphart & Michael F. Salamone, *"Unpresidented!" or, What Happens When the President Attacks the Federal Judiciary on Twitter*, 18 J. INFO. TECH. & POL. 84, 91–95 (2021). It seems possible that this failure to find an effect on diffuse support was because Trump's statement was aimed at a lower court judge and not at the Supreme Court.

66. Armaly, *supra* note 56, at 601.

67. *See generally* Charles Gardner Geyh, *To Legitimacy and Beyond,* 87 LAW & CONTEMP. PROBS. no. 1, 2024, at 1.

68. MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 6 (1988).

69. *Id.* at 7–21.

70. *Id*. at 25.

71. *Id*. at 18.

72. *Id.* at 8.

73. Albert P. Blaustein, *The Association of the Bar of the City of New York: 1870-1951*, 6 REC. ASS'N BAR CITY N.Y. 261, 264 (1951).

74. *See* RICHARD L. ABEL, AMERICAN LAWYERS 45 (1989); KENNETH M. JOHNSON: THE BAR ASSOCIATION OF SAN FRANCISCO: THE FIRST HUNDRED YEARS 1872-1972, at 1 (1972).

began to appear, as did the ABA (1878).[75] Judges were among the founding members of some of these organizations and sometimes played important leadership roles.[76] Starting in the late nineteenth century, some bar organizations worked to improve the quality of judges and the functioning of the judiciary by advocating for more judges, court personnel, and improved methods of judicial selection, as well as for court reorganization and procedural reforms.[77]

As part of their effort to raise the standing of the legal profession, some local bar associations quickly attempted to establish a system for disciplining lawyers.[78] The associations were stepping into a regulatory vacuum, because courts were not regulating lawyer misconduct occurring outside of court.[79] In 1908, the ABA adopted *Model Canons of Ethics*,[80] which most states subsequently followed.

As Dana Remus has noted, the ABA also inserted itself into the judicial conduct reform movement of the early twentieth century, advancing the view that judges were simply a part of the legal profession.[81] In 1924, the ABA adopted the *Canons of Judicial Ethics* to guide the judiciary.[82] By 1972, when the ABA adopted a new judicial code with mandatory language, the ABA had established itself as the drafter of such codes.[83] The judicial codes granted lawyers and lawyer organizations "preferential access" to judges which, "in turn, facilitated informal and frequent interactions between lawyers and judges and further tightened

75. TERRENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 67 (1987).

76. For instance, Judge Samuel Hand served as the second president of the New York State Bar Association and several other Court of Appeals judges subsequently held that position. Francis Bergan, *History of the New York State Bar Association: A Century of Achievement*, 48 N.Y. STATE BAR J. 514, 517–527 (1976). Judge W. W. Morrow of the U.S. Circuit Court of Appeals was a charter member of the Bar Association of San Francisco and later one of its presidents. *See* J.O. DENNY, THE BAR ASSOCIATION OF SAN FRANCISCO: AN ILLUSTRATED HISTORY FROM 1872 TO 1924, at 26–27 (1923). *See also* Marshall D. Hier, *"A Spicy Time," The Creation of the Bar Association of St. Louis*, 61 ST. LOUIS BAR J. 36, 37 (2014) (noting that some judges attended the meeting that led to the formation of the St. Louis Bar Association).

77. *See* HERMAN KOGAN, THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION 1874-1974, at 46 (1974); DOUGLAS LAMAR JONES ET AL., DISCOVERING THE PUBLIC INTEREST: A HISTORY OF THE BOSTON BAR ASSOCIATION 63 (1993); POWELL, *supra* note 68, at 25–27; Bergan, *supra* note 76, at 517–21; *Our Bar Associations: The New York State Bar Association*, 47 A.B.A. J. 1111, 1112 (1961); BRITTA HARRIS, BRIEF HISTORIES OF SOME COUNTY BARS AND OTHER LEGAL ORGANIZATIONS IN ILLINOIS AND A BRIEF HISTORY OF THE ILLINOIS BAR ASSOCIATION – 1877 TO 1977, at 101, 101–02 (1977).

78. *See* JUDSON W. CALKINS ET AL., A CONTINUING LEGACY: COMMENTARY OF OUR FIRST 125 YEARS, at 25–26 (2000); JONES ET AL., *supra* note 77, at 57–63; POWELL, *supra* note 68, at 18–20; James F. Schneider, *A Commemoration of the Centennial of the Bar Association of Baltimore City, 1880-1980*, at 56 (1980).

79. POWELL, *supra* note 68, at 19.

80. MODEL CANONS OF ETHICS (AM. BAR ASS'N 1908).

81. Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 YALE L. & POL'Y REV. 123, 135 (2011).

82. *Id.* at 131.

83. *Id.* at 139.

relationships between bench and bar."[84] This included code provisions that enabled and encouraged judicial participation in bar associations.[85]

Due in part to this history—and the fact that U.S. judges train and usually first work as lawyers—today it seems natural that judges conceive of themselves as part of the legal profession. As a result, judges identify with lawyers and "[o]n a subconscious level when judges face a question that will affect the legal profession, judges naturally react in terms of how it will affect 'us' more than 'them.'"[86] This can be seen in the judiciary's tendency to regulate the legal profession in a manner that favors lawyers.[87] Thus, the legal profession has self-interested reasons for seeking to maintain good relationships with judges and for defending the judiciary when it is attacked.

Of course, these are not the only reasons why some bar organizations publicly defend courts. Statements defending courts may reflect an ideological commitment to preserving judicial independence. These statements can enhance lawyers' professional status (for example, as experts explaining the proper functioning of courts and the law). Bar organizations may also be motivated by the desire to maintain the organization.[88] They can acquire an "aura of professionalism" from associating themselves with and defending courts.[89] That aura provides a solidary incentive for members to identify with and belong to voluntary bar associations.[90]

IV

BAR ORGANIZATIONS' HISTORICAL DEFENSE AND CRITICISM OF COURTS

As noted, lawyers' professional rules expressly encourage defense of courts—but not criticism. Alabama's 1887 *Code of Ethics* stated that lawyers have a duty to defend courts from "unjust criticism and popular clamor."[91] The ABA's 1908 *Canons of Ethics*, which were based on Alabama's code, echoed this idea.[92] The

84. *Id*. at 129. Today, the ABA's Judicial Division is the umbrella for six conferences including the Appellate Judicial Conference and the National Conference of State Trial Judges. *Judicial Division Conferences*, AM. BAR ASS'N, https://www.americanbar.org/groups/judicial/conferences/ [https://perma.cc/K5NS-VMUS].

85. Remus, *supra* note 81, at 140.

86. BENJAMIN BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 37 (2014).

87. *Id.* at 137–38, 140; Leslie C. Levin, *The Politics of Lawyer Regulation: The Case of Malpractice Insurance*, 33 GEO. J. LEGAL ETHICS 969, 981–84 (2020).

88. *See* David Lowery, *Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying*, 39 POLITY 29, 46-47, 53 (2007) (arguing that the most fundamental goal of an organization is to survive).

89. *Cf.* Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 329 (2004) (noting that "[l]awyers as a group acquire an aura of professionalism from lawmaking").

90. Leslie C. Levin & Lynn Mather, *Beyond the Guild: Lawyer Organizations and Law Making*, 18 WASH. U. GLOB. STUD. L. REV. 589, 597–98 (2019).

91. ALA. CODE OF ETHICS (I)(4) (1887).

92. CANONS OF ETHICS I (AM. BAR ASS'N 1908) ("Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor.").

Canons provided that lawyers had a duty to submit "grievances to the proper authorities" when there was serious judicial misconduct, but did not otherwise address criticism.[93] Likewise, the current *Model Rules of Professional Conduct* state that "[t]o maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized."[94] Lawyers who know that judges have committed violations of judicial conduct rules that raise substantial questions about the judge's fitness are required to inform the appropriate authorities.[95]

Nevertheless, bar organizations have on occasion criticized judges. The NYCB criticized the Tweed and Tammany Hall judges it sought to remove from office in the late nineteenth century.[96] In the early 1930s, the Los Angeles County Bar Association led a successful effort to recall a judge who took bribes.[97] A few years later, the Chicago Bar Association criticized and investigated superior court judges who were flagrantly violating ethics rules by campaigning on behalf of local and national candidates for office.[98] These are easy cases. The criticism was aimed at protecting the integrity of courts and maintaining public trust in the judiciary.

Bar organizations defended the judiciary in 1937, after President Franklin Roosevelt announced his plan to pack the U.S. Supreme Court with additional justices in response to the Court's decisions striking down New Deal legislation.[99] As part of his efforts, Roosevelt excoriated the Court for leaving the federal government "powerless" to address the country's dire economic problems.[100] The ABA organized a campaign—including radio announcements—to oppose the court-packing effort and fostered the perception that lawyers uniformly opposed the court packing plan.[101] Although these actions can be viewed as fulfillment of the bar's obligation to defend courts, the ABA was no doubt partly motivated by the fact that many of its members strongly opposed much of the New Deal legislation.[102]

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93. *Id*. It stated that "[i]n such cases, but not otherwise, such charges should be encouraged."

94. MODEL RULES OF PRO. CONDUCT r. 8.2 cmt. 3 (AM. BAR ASS'N 2023).

95. MODEL RULES OF PRO. CONDUCT r. 8.3(b) (AM. BAR ASS'N 2023).

96. *See The Great Work Ahead,* N.Y. TRIB., Dec. 7, 1871, at 4 (discussing bar association's impeachment efforts and continued efforts to end corruption within the judiciary).

97. Andrea Sheridan Ordin, *A Delicate Balance: The Association Looks at Judicial Independence and Accountability*, L.A. LAW., Mar. 1992, at 9.

98. KOGAN, *supra* note 77, at 192–93.

99. *See* MARION MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, at 311–14 (2002); Bergan, *supra* note 76, at 524. This plan, which was submitted to Congress, was not "mere words," but it is important to include for context.

100. *Franklin D. Roosevelt, Address at the Democratic Victory Dinner*, AM. PRESIDENCY PROJECT (Mar. 4, 1937), https://www.presidency.ucsb.edu/documents/address-the-democratic-victory-dinner-washington-dc [https://perma.cc/GLP3-WQC9].

101. Kyle Graham, *A Moment in The Times: Law Professors and the Court-Packing Plan*, 52 J. LEGAL EDUC. 151, 157 (2002). *See also* Reorganization of the Federal Judiciary Before the S. Comm. on the Judiciary, 75th Cong. 1458, 1459-60 (1937) (Statement of Sylvester C. Smith, Chairman of the Special Committee, American Bar Association).

102. JEROLD S. AUERBACH, UNEQUAL JUSTICE 191–93 (1976).

Yet in the 1950s, the then-conservative ABA and other bar associations did not publicly defend the Court when it faced sustained and vituperative attacks for its decision in *Brown v. Board of Education*.[103] This included the introduction of a resolution by a United States senator calling for an investigation of the extent to which the Court had been brainwashed by left-wing pressure groups, who claimed that "the entire basis of American jurisprudence was swept away."[104] More than one hundred congressmen signed the Southern Manifesto, which declared that the Court "undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law" and commended the states "which have declared the intention to resist forced integration by any lawful means."[105]

Indeed, in mid-1957, after the Supreme Court issued a series of decisions that favored Communist defendants,[106] the staunchly anti-Communist ABA voted down a proposal that it go on record against attacks on the Court.[107] Opponents of the proposal argued that "it is the duty of all lawyers . . . to speak out against a decision with which they disagree, without impugning the integrity of members of the court."[108] Later that year, following criticism of the Court at an ABA meeting, Chief Justice Earl Warren resigned from the ABA.[109] In 1959, an ABA report repeatedly criticized the still-beleaguered Court for decisions it viewed as too protective of Communists and "decided in such a manner as to encourage an increase in Communist activity in the United States."[110] The National Lawyers Guild responded, noting that the ABA's attack on the Court "transcend[ed] the bounds of mere criticism" and "is marked by an alliance between opponents of civil liberties and of the segregationist critics of the Court."[111]

Bar organizations again failed to defend courts when President Richard Nixon launched his verbal attacks on the "activism" of courts, which included claims that some courts "have gone too far in weakening the police forces against

103. 347 U.S. 483 (1954). Indeed, the Virginia State Bar Association approved a resolution stating that it "deplores the present apparent tendency of the United States Supreme Court, as reflected in *Brown v. Board of Education*, to invade by judicial decision the constitutionally reserved powers of the states of the Union." Paul B DeWitt, *Bar Activities*, 41 A.B.A. J. 1055, 1056 (1955).

104. Fagan Dickson, *The Segregation Cases: Equal Justice Under Law for All Citizens*, 42 A.B.A. J. 730, 732 (1956).

105. *Id.* at 731; Declaration of Constitutional Principles, 102 CONG. REC. 4515–16 (1956).

106. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 98 (2000).

107. Harold Hutchings, *Bar Defends Right as Critic of High Court*, CHI. TRIB., July 17, 1957, at A1.

108. *Id.*

109. POWE, *supra* note 106, at 99–100.

110. REPORT OF THE SPECIAL COMMITTEE ON COMMUNIST TACTICS, STRATEGY AND OBJECTIVES, 84 REP. AM. BAR ASS'N 604, 608, 614 (1959). This was reportedly a "watered down" version of the ABA's report, which it revised in deference to the Chief Justice. *Bar Watering Down Attack on High Court*, CHI. DAILY TRIB., Feb. 14, 1959, at 17.

111. *Report of the National Lawyers Guild on the Recommendations of the American Bar Association*, 19 LAW. GUILD REV. 30 (1959).

the criminal forces in this country."[112] Throughout his presidency, Nixon repeatedly hammered on the theme that one of the major reasons for the increase in criminal activity was the "permissiveness" of some courts.[113] As Liva Baker noted, Nixon made it sound as if Justices Black, Brennan, Douglas and Warren were

> on the streets themselves, egging on the criminals, as if they were not bound by constitutional and statutory limitations but were free to lock up whom they chose, and it was only their insensitivity, the failure to be horrified at the muggings and murders in the streets, that had created crime.[114]

By 1973, Nixon was referring to unnamed judges as "soft-headed" and warning, "[w]hen permissive judges are more considerate of the pusher than they are of his victims, there is little incentive for heroin pushers to obey the law."[115]

Although bar organizations did not respond to Nixon's attacks, in 1971, the Florida Bar became the first such organization to adopt a program to defend judges from "unjust" criticism.[116] In 1975, an ABA Task Force issued a manual entitled *Meeting the Criticism of Bench and Courts*.[117] By the late 1970s, some bar organizations also became concerned about threats to judicial independence presented by the potential removal of judges for reasons other than serious misconduct.[118] This concern grew as the Chief Justice of the California Supreme Court, Rose Bird, faced seven recall campaigns. In 1986, Chief Justice Bird and three associate justices lost a brutal retention election that included attacks on her death penalty decisions.[119] That year, an ABA subcommittee on Unjust Criticism

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112. *See* JOSHUA E. KASTENBERG, THE CAMPAIGN TO IMPEACH JUSTICE WILLIAM O. DOUGLAS: NIXON, VIETNAM, AND THE CONSERVATIVE ATTACK ON JUDICIAL INDEPENDENCE 28–29 (2019).

113. *See, e.g.*, *Richard Nixon*, *Statement in Salt Lake City, Utah*, AM. PRESIDENCY PROJECT (Oct. 31, 1970), https://www.presidency.ucsb.edu/documents/remarks-salt-lake-city-utah-0 [https://perma.cc/MA9T-3DE6] (attributing rising crime to "permissiveness in the courts"); *Richard Nixon, Remarks at "Victory '72" Dinner in Los Angeles, CA*, AM. PRESIDENCY PROJECT (Sept. 27, 1972), https://www.presidency.ucsb.edu/documents/remarks-victory-72-dinner-los-angeles-california (referring to "an attitude of permissiveness that had grown up in our courts"); *Richard Nixon, Radio Address on Crime and Drug Abuse*, AM. PRESIDENCY PROJECT (Mar. 10,1973), https://www.presidency.ucsb.edu/documents/radio-address-crime-and-drug-abuse [https://perma.cc/SLC2-TPHJ] ("The dangerous trend of light or suspended sentences meted out to convicted pushers by permissive judges must be halted.").

114. LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 249 (1983).

115. *Richard Nixon*, *Radio Address about State of the Union Message on Law Enforcement and Drug Abuse Prevention*, AM. PRESIDENCY PROJECT (Mar. 10, 1973), https://www.presidency.ucsb.edu/documents/radio-address-about-the-state-the-union-message-law-enforcement-and-drug-abuse-prevention [https://perma.cc/5AU9-WWJT].

116. *See Report to You*, 45 FLA. BAR J. 248, 249 (1971). That year, the Conference of California Judges also adopted a policy for responding to criticism of judges. Scott Slonim, *Black Robes No Longer Shield Judges From Public Criticism*, 66 A.B.A. J. 433, 434 (1980).

117. *Id*. at 434.

118. *See, e.g.*, *Precis of Report on the Removal of Federal Judges Other than by Impeachment*, 32 REC. ASS'N BAR CITY N.Y. 239 (1977) (opposing proposed legislation providing for removal of federal judges by methods other than impeachment); Ordin, *supra* note 97, at 9 (describing Los Angeles County Bar Association's opposition to 1978 campaign against four California Supreme Court justices).

119. *See* KATHLEEN A. CAIRNS, THE CASE OF ROSE BIRD: GENDER, POLITICS, AND THE CALIFORNIA COURTS, at iv, 5 (2016); Wallace Turner, *Attacks on Chief Justice Presage Hot '86 Contest*, N.Y. TIMES, Mar. 20, 1985, at A16.

of the Bench published a *Model Program Outline for State and Local Bar Associations*, suggesting how bar associations could "meet inaccurate or unjust criticism of judges and the courts."[120] It noted that if judges attempt to respond, "it may be perceived as a 'self-serving' and/or as a 'defensive' position which fails for lack of credibility."[121] In 1996, bar associations opposed calls by public officials to impeach federal judge Harold Baer for a decision he issued in a criminal case,[122] and in 1998, the ABA House of Delegates adopted a revised version of the model program outline.[123] The ABA created a pamphlet on the topic in 2008, and in 2018, revised and renamed it *Rapid Response to Fake News, Misleading Statements, and Unjust Criticism of the Judiciary*.[124] Several bar associations have adopted some version of the ABA's protocol or created their own.[125] As a result, some bar organizations can now react quickly to defend courts from misleading or "unjust" criticism.[126]

V

THE PROTOCOL AND TWO PRESIDENTS

Before considering bar organizations' responses to recent presidents' criticism of courts, it is useful to start by describing the ABA's current rapid response protocol. Its purpose is "to provide timely responses to the serious, unjust

120. ABA SUBCOMMITTEE ON UNJUST CRITICISM OF THE BENCH, UNJUST CRITICISM OF JUDGES, at v (1986).

121. *Id.* at 1.

122. Daniel Wise, *26 Bar Groups Join to Defend Judiciary*, N.Y. L.J., Mar. 8, 1996, at 2.

123. STANDING COMM. ON THE AM. JUDICIAL SYS., RAPID RESPONSE TO FAKE NEWS, MISLEADING STATEMENTS, AND UNJUST CRITICISM OF THE JUDICIARY 1 (2018), https://www.americanbar.org/content/dam/aba/administrative/american-judicial-system/2018-rapid-response-to-fake-news.pdf [https://perma.cc/ZA7W-3L7J].

124. *See id*.

125. *See, e.g.*, AM. BD. OF TRIAL ADVOCS., PROTOCOL FOR RESPONDING TO UNFAIR CRITICISM OF JUDGES (2017), https://cal-abota.org/pdf/UnfairCriticismofJudges.pdf [https://perma.cc/25ZM-GHBW]; PHILA. BAR ASS'N, RESOLUTION ENDORSING THE PROPOSED MISSION STATEMENT OF THE SPECIAL COMMITTEE TO RESPOND TO ATTACKS ON THE JUDICIARY (1998).

126. *See, e.g.,* Guy R. Cook, *Opinion: Abby Finkenauer's Remarks Were Unfair and Unprofessional and Contrary to Judicial Independence,* DES MOINES REG. (Apr. 21, 2022), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2022/04/21/abby-finkenauer-partisan-remarks-unfair-unprofessional-senate-candidate-democratic/7367499001/ [https://perma.cc/BU47-SK8P] (response by chair of the Iowa State Bar Association's Independence of the Judiciary Committee to U.S. Senate candidate's attack on judge); Nick Evans, *Ohio Bar Condemns Ad Attacking Democratic State Supreme Court Nominees*, OHIO CAP. J. (Oct. 22, 2022), https://ohiocapitaljournal.com/2022/10/31/ohio-bar-condemns-ad-attacking-democratic-state-supreme-court-nominees/ [https://perma.cc/WB3G-662N] (statement by Ohio State Bar Association concerning Republican state leadership's campaign ad that included misleading statements about three Democratic state supreme court nominees); Johnny Magdaleno, "*Attacking the Judiciary": Head of Indianapolis Police Fraternity Draws Ire From Lawyers*, INDYSTAR (Aug. 12, 2022), https://www.indystar.com/story/news/crime/2022/08/12/indianapolis-fraternal-order-of-police-local-lawyers-bar-association-attorneys/65401942007/ [https://perma.cc/8AMX-MA38] (statement by Indianapolis Bar Association condemning Indianapolis Fraternal Order of Police president's "inaccurate hyperbole" concerning the Marion County judiciary).

criticisms of judges and the judiciary, to fake news, or to misunderstandings about the role of a judge or the judicial system."[127] It does not distinguish among the speakers who criticize judges but as a practical matter, bar organizations' responses have been reserved for attacks by public officials and candidates for office. The protocol also does not define "unjust criticism," but it seemingly means something different than "misleading" statements.[128] The "standard of review" for considering when it is appropriate for bar organizations to respond to attacks is "1) whether the criticism or misleading statement unjustly impugns the integrity of the judge or the judiciary or 2) if response by the bar is necessary to address either a misunderstanding of the judge's role or a misunderstanding of the judicial system."[129] The protocol also provides "Guidelines to Determine Whether to Respond," which state that "except in unusual cases," responses are appropriate when "the criticism is materially inaccurate, the criticism displays a lack of understanding of the legal system and/or the role of the judge," and/or when the criticism will likely have "more than a passing or de minimis negative effect on the community."[130] There are eleven "factors" to consider when determining whether to respond in "close cases" and "in every case in determining the type of response."[131] These include whether "the overall criticism is not justified or fair" and whether "the criticism substantially and negatively affects the judiciary or other parts of the legal system."[132] Responses to criticism may not be appropriate when "the criticism is fair comment or opinion," the statement is "criticism of the merits of the case," or "[t]he matter may be too political or create a conflict with the interests of the Association."[133]

Thus, the protocol provides bar organizations with substantial flexibility. Under its terms, it was appropriate for bar organizations to respond to candidate Trump's claims that Judge Curiel had ruled unfairly against Trump University because he was of "Mexican heritage" and had "an absolute conflict of interest" as a result of Trump's campaign pledge to build a wall between the United States and Mexico.[134] Trump's statements actually went beyond misleading statements that impugned Judge Curiel's integrity; they moved into the realm of attempted intimidation when Trump further suggested that the judge should be investigated and threatened to sue the judge if he became president.[135] Bar organizations'

127. STANDING COMM. ON THE AM. JUDICIAL SYS., *supra* note 123, at 3.

128. *See id.* at 3–4.

129. *Id*. at 3.

130. *Id.* at 6.

131. *Id.* at 6-7.

132. *Id.*

133. *Id*. at 5, 7.

134. Kendall, *supra* note 9.

135. Harper Neidig, *Trump Doubles Down on Judge Attacks: 'He's a Mexican. We're Building a Wall,* HILL (June 3, 2016), https://thehill.com/blogs/ballot-box/presidential-races/282172-trump-doubles-down-on-judge-attacks-hes-a-mexican-were [https://perma.cc/8AMX-MA38]. In addition, at a campaign rally in San Diego (where Judge Curiel presides), Trump segued into a twelve-minute diatribe against Judge Curiel, who he described as a "very hostile judge" and "a hater of Donald Trump." Matt Ford, *Trump*

responses to Trump's statements sought to educate the public about the facts—for example, Judge Curiel was a former federal prosecutor born in Indiana—and communicate that Trump's statements were not only inappropriate, but dangerous.[136] ABA President Paulette Brown stated, "[L]evying personal criticism at an individual judge and suggesting punitive action against that judge for lawfully made decisions crosses the line of propriety and risks undermining judicial independence."[137] Some bar organizations' statements also attempted to communicate to then-candidate Trump acceptable norms for speaking about judges.[138]

In contrast, Trump's February 2017 statement about the "ridiculous" decision of a "so-called judge" did not attack Judge Robart's integrity, but instead denigrated his authority and capabilities as a federal judge. Trump's claim that the decision enjoining his travel ban "essentially takes law enforcement away from the country and puts our country in such peril" and that "[i]f something happens blame him and court system"[139] reflected both on Judge Robart and the judiciary.[140] Following these remarks, Judge Robart received 40,000 threatening messages.[141] Bar organizations' responses focused mostly on the use of the term "so-

Attacks a 'Mexican' U.S. Federal Judge, ATLANTIC (May 28, 2016), https://www.theatlantic.com/politics/archive/2016/05/trump-judge-gonzalo-curiel/484790/ [https://perma.cc/EUG8-9Z3R] ("The presumptive Republican nominee for president devoted almost a quarter of his hour-long rally in San Diego on Friday night to criticizing Curiel"); *Trump: Judge's Actions 'A Total Disgrace,'* USA TODAY (June 1, 2016), https://www.usatoday.com/story/opinion/2016/06/01/donald-trump-university-judge-gonzalo-curiel-editorials-debates/85258886/ [https://perma.cc/5ESF-EPP8].

136. *See NAPABA Denounces Donald Trump's Racist Attacks on Judges*, NAT'L ASIAN PAC. AM. BAR ASS'N (June 7, 2016), https://www.napaba.org/page/curiel_statement/ORGANIZATIONAL-STATEMENT—NAPABA-DENOUNCES-DONALD-TRUMPS-RACIST-ATTACK.htm (stating Trump's "remarks calling into question the ability of judges to be fair and impartial based on their ethnic background or religion are contemptible . . . . The fact that the comments came from a Presidential campaign podium only serves to make the comments even more disturbing — and dangerous").

137. Debra Cassens Weiss, *Trump Suggests Possibility of Civil Case Against Federal Judge; What About a Recusal Motion?*, A.B.A. J. (June 2, 2016), https://www.abajournal.com/news/article/trump_suggests_possibility_of_civil_case_against_federal_judge_what_about_a [https://perma.cc/6X27-MX2W].

138. *See, e.g.*, *Statement of the Philadelphia Bar Association Chancellor Gaetan J. Alfano on Unjust Criticism of the Judiciary*, PHILA. BAR ASS'N (June 6, 2016), https://philadelphiabar.org/?pg=News&blAction=showEntry&blogEntry=72133 [https://perma.cc/B4L7-5VCJ] ("It is appalling that a presidential candidate would criticize a judge based upon the judge's ethnicity and reveals a true disrespect for our justice system."); *BASF Issues Statement Regarding Donald Trump's Comments About Judge Curiel*, BAR ASS'N OF S.F. (June 8, 2016), https://www.sfbar.org/blog/basf-issues-statement-regarding-donald-trumps-comments-about-judge-curiel/ [https://perma.cc/H26E-QXUU] ("Out of respect for the independence of the judiciary, The Bar Association of San Francisco calls on Donald Trump to withdraw his statements calling into question Judge Curiel's fitness to serve as a judge in this case based on his ethnic heritage.").

139. @RealDonaldTrump, TWITTER (Feb. 5, 2017), https://twitter.com/realDonaldTrump/status/828342202174668800 [https://perma.cc/UP5F-XHBD].

140. The ABA Rapid Response protocol states that another factor to be considered is "[w]hether the criticism is directed at a particular judge but unjustly reflects on the judiciary generally . . . ." STANDING COMM. ON THE AM. JUDICIAL SYS., *supra* note 123, at 6.

141. *See* Madison Hall, *The Judge Who Blocked Trump's First Travel Ban Said He Received 40,000 Threatening Messages, Forcing US Marshals to Guard His Home*, BUS. INSIDER (Feb. 22, 2021), https://www.businessinsider.com/judge-who-blocked-trumps-muslim-ban-received-40000-threats-2021-2 [https://perma.cc/HP9K-MWAS].

called judge" and concerns about judicial independence,[142] rather than Trump's suggestion that a court was endangering the safety of Americans. Some of these responses were again intended as a direct message to Trump—then two weeks in office—about the role of the president and separation of powers norms.[143] In 2018 and 2020, bar organizations again responded to Trump's criticism of federal judges.[144]

This brings us to bar organizations' failure to defend the Supreme Court when President Biden and others repeatedly criticized it following the decision in *Dobbs*. That decision, which overturned the almost fifty-year-old decision in *Roe v. Wade*,[145] upended the law protecting women's reproductive rights. Biden's statement about "an out-of-control Supreme Court, working in conjunction with extremist elements of the Republican Party," and his claim that the Court acted as "more of an advocacy group" than even-handed,[146] challenged the perception of the Court as a neutral arbiter. His statement, "[t]oday's Supreme Court majority [is] playing fast and loose with the facts" and that the *Dobbs* decision "wasn't a constitutional judgment. It was an exercise in raw political power" suggested that the Court's reasoning was not legally legitimate. As noted, not only did bar organizations remain silent about Biden's remarks, but some also criticized the Court.

Responding to some of these attacks, Chief Justice Roberts stated, "Yes, all of our opinions are open to criticism. . . . But simply because people disagree with an opinion is not a basis for criticizing the legitimacy of the court."[147] Likewise, Justice Samuel Alito stated, "It's one thing to say the court is wrong; it's another thing to say it's an illegitimate institution."[148] The justices were correct in describing the criticism by Biden and others as an attack on the Court's sociological and

142. *See, e.g.*, *ABA President Rails Against Trump Tweets Attacking Judge Who Blocked Ban*, LAW.COM (Feb. 6, 2017), https://www.law.com/dailybusinessreview/almID/1202778503087/ [https://perma.cc/J8JT-CUND] (stating "[t]here are no 'so-called judges' in America. There are simply judges—fair and impartial. We must keep it that way."); Statement on Judicial Independence by ISBA President Vincent F. Cornelius, ILL. STATE BAR ASS'N (Feb. 7, 2017), https://www.isba.org/barnews/2017/02/07/statement-judicial-independence-isba-president-vincent-f-cornelius [https://perma.cc/D9P6-QDX9] ("While reasonable Americans can disagree with a judge's rulings, questioning the legitimacy of a federal judge is inappropriate. In the words of [ABA] president Linda Klein, 'There are no so-called judges in America.'").

143. *See, e.g.*, Claire P. Gutekunst, President, N.Y. State Bar Ass'n, Judicial Independence and the Rule of Law (Feb. 4, 2017), http://readme.readmedia.com/JUDICIAL-INDEPENDENCE-AND-THE-RULE-OF-LAW-STATEMENT-BY-NEW-YORK-STATE-BAR-ASSOCIATION-PRESIDENT-GUTEKUNST/14550974/print [https://perma.cc/34YH-NBDK] ("[p]ersonal denigration of judges is improper and demeans respect for the co-equal third branch of government that our constitution requires").

144. *See* Levin, *supra* note 7, at 194–98 (describing responses from bar associations).

145. 410 U.S. 113 (1973).

146. *See supra* notes 18–19 and accompanying text.

147. Robert Barnes & Michael Karlik, *Roberts Says Supreme Court Will Reopen to Public and Defends Legitimacy*, WASH. POST (Sept. 22, 2022), https://www.washingtonpost.com/politics/2022/09/10/supreme-court-roberts-legitimacy/ [https://perma.cc/S4LE-R5BZ].

148. Taranto & Rifkin, *supra* note 6.

legal legitimacy.[149] They were wrong to suggest that the *Dobbs* decision had not created a reason for doing so.

Without straying too far back into legitimacy-speak, it is useful to note Fallon's discussion of legitimate constitutional decisionmaking. As he explains, to attain legitimacy, justices must use "reliable methods for ascertaining historical facts that bear on what past legitimate authorities have established."[150] In addition, they must use "good faith in argumentation and consistency in the application of legal norms."[151] He observes, "We cannot respect relentlessly outcome-driven jurists whose avowed methodological premises vary from one case to the next as they seek to justify whatever position they find the most politically or ideologically attractive."[152]

Fallon's analysis suggests one reason why bar organizations did not defend the Court from Biden's criticism. It seems that the leadership of bar organizations may have believed that Biden was speaking about a Court that had undermined public support for the institution by its seemingly outcome-driven reasoning. The Court's historical account of abortion in the United States was not only unreliable, but was described as "misrepresentations" by the American Historical Association and the Organization of American Historians.[153] *Dobbs* was not the only recent case in which the Court overruled long-standing precedent the conservative majority seemingly did not like.[154] Moreover, because Biden, a lawyer, had otherwise demonstrated some restraint when commenting upon adverse court decisions, the bar organizations may have felt it unnecessary to attempt to educate him about the desirability of the president showing restraint when discussing courts and judicial decisions.

Of course, there are other explanations that cannot be fully discounted. Lawyers as a group lean to the ideological left,[155] and many deeply disagreed with the *Dobbs* decision. Yet bar organizations have occasionally defended conservative

149. *See, e.g.*, Dahlia Lithwick & Neil S. Siegel, *The Lawlessness of the* Dobbs *Decision*, SLATE (June 27, 2022), https://slate.com/news-and-politics/2022/06/dobbs-decision-glucksberg-test-lawlessness.html [https://perma.cc/YA4U-2B5L]; Reva Siegal, *The Trump Court Limited Women's Rights Using 19th Century Standards*, WASH. POST (June 25, 2022), https://www.washingtonpost.com/outlook/2022/06/25/trump-court-limited-womens-rights-using-19th-century-standards/ [https://perma.cc/8R3A-GEP4].

150. FALLON, *supra* note 42, at 129. Curiously, he ties this discussion to "morally legitimate constitutional decisionmaking," but it seems more relevant to legal or even sociological legitimacy. *Id*. at 127.

151. *Id*. at 130.

152. *Id*. at 131.

153. *History, the Supreme Court, and Dobbs v. Jackson: Joint Statement from the American Historical Association and the Organization of American Historians*, AM. HIST. ASS'N (July 2022), https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022) [https://perma.cc/2N6N-2X6A].

154. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019), *overruling* Davis v. Bandemer, 478 U.S. 109 (1986); Janus v. Am. Fed'n of State, Cnty., & Mun. Emp., 138 S. Ct. 2448 (2018), *overruling* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

155. *See* Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 292 (2016).

judges from criticism after the judge issued a decision with which the organization's members likely disagreed.[156] It may be, however, that the feelings about the *Dobbs* decision ran so deep that these organizations did not want to create controversy within their ranks or risk losing members by appearing to defend the *Dobbs* Court in any way.

Another possibility is that bar organizations view the Supreme Court as different than other courts when it comes to withstanding verbal attacks. Recall that historically, bar organizations generally have not defended the Court from mere words of criticism. One rare exception occurred when the ABA stated that it was "deeply troubled" by Senator Chuck Schumer's statement in 2020, made on the steps of the Supreme Court, in which he threatened Justices Neil Gorsuch and Brett Kavanaugh over their votes in a pending abortion case.[157] In most cases, however, bar organizations may view the Court as different because it is the highest court, and its members have lifetime tenure. They may also believe that there is some safety in numbers and that the nine justices can readily defend the Court from verbal attacks. Indeed, some justices did so after the *Dobbs* decision.[158]

VI

LOOKING FORWARD: BAR ORGANIZATIONS' DEFENSE AND CRITICISM OF COURTS

In a country where many judges are elected, and appointed judges are often selected through a partisan political process, judges *are* political and operate within a deeply political context. It is a part of our system of checks and balances that each branch of government undergoes some pressure from the other two branches. Public officials' criticism of courts can alert courts to the public's values, inform the public's understanding of courts' rulings, and improve judicial decisionmaking. It is against this backdrop that bar organizations should consider what they are trying to accomplish when they defend courts. Which attacks are problematic? Are the organizations simply trying to correct the factual record? Or are they attempting to promote a particular vision of how courts "should" operate (for example, the neutral arbiter) or how judges "should" be discussed (for example, respectfully) in an effort to maintain public support for courts? Are they also seeking to educate the critic? Who actually hears these organizations' statements? The discussion below addresses these questions and suggests when

156. *See infra* notes 159, 177–78 and accompanying text.

157. During oral arguments in the case, Schumer stated, "I want to tell you, Gorsuch; I want to tell you, Kavanaugh: You have released the whirlwind, and you will pay the price. You won't know what hit you if you go forward with these awful decisions!" Marc A. Thiessen, *If Trump Incited Jan. 6, What About Schumer's Threat's Against Kavanaugh?*, WASH. POST (June 9, 2022), https://www.washingtonpost.com/opinions/2022/06/09/democrats-cant-blame-trump-jan-6-absolve-schumer-threatening-kavanaugh/ [https://perma.cc/KTY3-QM3B].

158. *See supra* notes 147–148 and accompanying text; Chandelis Duster, *Justice Amy Coney Barrett Says Supreme Court is "Not a Bunch of Partisan Hacks,"* CNN (Sept. 13, 2022), https://www.cnn.com/2021/09/13/politics/amy-coney-barrett-supreme-court-not-partisan/index.html [https://perma.cc/44BG-XYZ7].

defense of courts is warranted. It then discusses why and when bar organizations should join in the criticism.

A. Defending Courts from Verbal Attacks

1. False and Misleading Statements.

In some circumstances, a public official's false or misleading statements about a judicial decision might merit a response from bar organizations. This would include, *inter alia*, false statements about the facts, the legal reasoning, the court's power to decide an issue, and the implications of the decision. Such statements can unfairly affect the outcome of judicial elections and unnecessarily undermine the public's confidence in and support for the judiciary. Likewise, false or misleading statements about judges or statements that falsely or misleadingly impugn their honesty or integrity may merit a bar organization's response. For example, after California Governor Gavin Newsom called a federal judge who had struck down a state law banning assault weapons "a wholly owned subsidiary of the gun lobby and the National Rifle Association," the San Diego Bar Association issued a statement chastising the governor and defending the judge.[159]

It can be especially important for bar organizations to respond to misleading statements about a judge who has ruled on a hot-button issue. For example, New Jersey Governor Phil Murphy's spokesman responded to a recent ruling by Judge Renee Bumb—an appointee of President George W. Bush—by stating, "We are disappointed that a right-wing federal judge, without any serious justification, has chosen to invalidate common sense restrictions around the right to carry fire arms in certain spaces."[160] The Association of the Federal Bar of New Jersey issued a statement rebuking the spokesman's "[u]nsubstantiated suggestions that the decision is predicated upon a judge's political affiliation," noting further that "baseless attempts to undermine the judge's integrity are improper."[161] The bar organization's statement also called such attacks "a danger and threat" to judges and their families, in an apparent reference to Judge Esther Salas—a colleague of Judge Bumb whose son was murdered in 2020 by a lawyer who had appeared in Judge Salas's courtroom.[162] Following criticism by the bar association and others,

159. *See County Bar Association Denounces Newson's Criticism of Local Federal Judge Overturning Assault Weapons Ban*, TIMES OF SAN DIEGO (June 30, 2021), https://timesofsandiego.com/politics/2021/06/30/county-bar-denounces-newsoms-criticism-of-local-federal-judge-overturning-assault-weapons-ban/ [https://perma.cc/C7T6-AFKZ].

160. Editorial, *Judge Bashing by Another Name,* LAW.COM (Jan. 22, 2023), https://www.law.com/njlawjournal/2023/01/22/judge-bashing-by-another-name/ [https://perma.cc/65PS-RJ5N].

161. *Right-Wing Judge? Criticism After Jurist Labeled Following a Ruling*, N.J. L.J. (Jan. 17, 2023), https://www.law.com/njlawjournal/2023/01/17/right-wing-judge-criticism-after-jurist-labeled-following-a-ruling/ [https://perma.cc/X2WU-VDSM].

162. *Id.*

Governor Murphy stated, "Whether we agree or disagree with a federal judicial decision, we respect the judiciary. . . . [W]e're going to play by the rules."[163]

2. Threats.

Even more than public officials' false statements, verbal threats aimed at judges merit a response. Thus, when Senator Schumer made his threatening statement aimed at Supreme Court justices on the steps of the Court, it was appropriate for bar organizations to speak out. For example, the NYCB responded, "By stating that judges "will pay the price" for their decisions, his comments crossed the line from fair criticism to intimidation. Statements like these risks compromising the independence and even the personal safety of our judges."[164] It seems very unlikely that Schumer's statement would affect any justice's vote, but concerns about their safety are real.[165] Although Schumer had already acknowledged his unfortunate word choice, the bar organizations' responses reinforced for Schumer and other observers that that sort of verbal attack was beyond the bounds of acceptable rhetoric.

3. Claims of Judicial Partisanship.

The earlier statement about the New Jersey "right-wing federal judge" also raises the question of whether and when bar organizations should respond to claims that a judge decided a case based on partisan preferences. So does Trump's reference to Judge Tigar as an "Obama judge" after the judge temporarily enjoined Trump's asylum policy. Trump also complained about his administration's lack of success in the Ninth Circuit, saying "it's not going to happen like that anymore."[166] The American College of Trial Lawyers (ACTL) responded "[t]hat the President used inappropriate language" and it "considers such an attack as a direct assault on judicial independence, the backbone of our constitutional democracy."[167] Furthermore, it commented that it was "wrong for the Chief Executive of the Executive Branch to politicize a decision by the judiciary in this way."[168]

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163. *Id.*

164. *Statement by City Bar President Roger Juan Maldonado on Comments by Elected and Appointed Officials that Denigrate or Threaten Judges*, N.Y. CITY BAR (March 20, 2020), https://www.nycbar.org/media-listing/media/detail/statement-by-city-bar-president-roger-juan-maldonado-on-comments-by-elected-and-appointed-officials-that-denigrate-or-threaten-judges [https://perma.cc/6LW5-AGSA].

165. *See, e.g.*, Mark Sherman et al., *Armed Man Arrested for Threat to Kill Justice Kavanaugh*, ASSOCIATED PRESS (June 2022), https://apnews.com/article/us-supreme-court-brett-kavanaugh-district-of-columbia-maryland-government-and-politics-179d18e7f933b3decbaddb542ceb0b29 [ttps://perma.cc/KEV2-BZFB].

166. *See supra* note 12 and accompanying text.

167. *ACTL Issues Statement in Support of Response by Chief Justice Roberts to Remarks by President Trump Concerning Federal Judiciary*, AM. COLL. OF TRIAL LAWS. (Nov. 21, 2018), https://www.actl.com/detail/news/2018/11/21/actl-issues-statement-in-support-of-response-by-chief-justice-john-roberts-to-remarks-by-president-trump-concerning-federal-judiciary [https://perma.cc/GA5P-YS32].

168. *Id.*

Was it "wrong" for Trump to politicize the decision by calling Judge Tigar an "Obama judge"? The term is a shorthand way of saying that President Barack Obama appointed the judge, with the pejorative implication that the judge decided the case as he did because of partisan leanings. So Trump impugned the judge's integrity as a neutral arbiter. The implication that Judge Tigar and the Ninth Circuit ruled against the Trump administration based on partisan preferences potentially corrodes public trust in and support for the judiciary.

At the same time, we know that judicial decisions sometimes *are* affected by judges' political preferences.[169] The public receives frequent messages from the media to this effect.[170] People now acknowledge, at least with respect to the Supreme Court, that it has a hybrid nature that is both "legal" *and* "political."[171] While people believe that the Court "*should* be fundamentally legal," they view the Court's decisions as "political"—that is, not based on a neutral, legal standard—when they disagree with the decisions.[172] When the public views the Court as more "political," this lessens the public's support for the Court.[173]

Bar organizations should be realistic about what they can reasonably hope to accomplish by defending courts against claims that judicial decisions are the product of partisan preferences. Certainly, we want our judges to believe that they should be neutral arbiters—to the extent neutrality is humanly possible. We also want the public to believe it because this maintains public support for courts.[174] So, there is some value in bar organizations defending courts from claims that their decisions are based on partisan preferences when it appears the

169. *See, e.g.*, Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. OF POL. 1206, 1207 (1997) (noting "that votes cast by members of the U.S. Supreme Court largely reflect the justices' political preferences"); Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 254 (2019) ("The cumulative empirical research is very clear: Being a conservative or a liberal (or being appointed by a Republican or a Democrat) is highly predictive of decision making . . . ."). Moreover, elected state court judges will often vote in ways that conform to their constituencies' political and ideological preferences. *See, e.g.*, Brace & Hall, *supra* at 1223.

170. *See* Logan Strother & Shana Kushner Gadarian, *Public Perceptions of the Supreme Court: How Policy Disagreement Affects Legitimacy*, 20 FORUM 87, 93 (2022) (noting that the information the public receives about the Court overwhelmingly comes from media coverage, and that the coverage is "'political'—even partisan—in tenor"); Matthew P Hitt & Kathlen Searles, *Media Coverage and Public Approval of the U.S. Supreme Court*, 35 POL. COMM. 566, 568, 580 (2018) (observing that television news reports emphasize political competition and use game frames when reporting on the Court's decisions, which can lead to a decline in the public's support for the Court).

171. Stephen P. Nicholson & Thomas G. Hansford, *Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions*, 58 AM J. POL. SCI. 620, 620 (2014); Strother & Gadarian, *supra* note 170, at 88.

172. Strother & Gadarian, *supra* note 170, at 92–93.

173. *Id.* at 104. *See also* James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, J. EMPIRICAL LEGAL STUD. 592, 613 (2017) (reporting that perceptions of politicization of the Supreme Court are negatively associated with legitimacy).

174. *Cf.* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 317 (1999) (stating "it is possible that a society cannot function without myths that capture its aspirations").

judge was simply following the law. Bar organizations are unlikely, however, to change the thinking of those who hold strongly partisan views.[175] Moreover, bar organizations cannot credibly claim that court decisions are *always* the product of neutral decisionmaking. Nor should these organizations try to defend courts when their reasoning or rhetoric in judicial decisions twist the law or facts in ways that are obviously driven by partisan preferences. It is appropriate—and potentially valuable signaling—in such cases for courts to endure this criticism on their own.

4. Disrespectful and Demeaning Language.

Should bar organizations also defend judges from attacks containing "disrespectful" or demeaning language? The ABA protocol does not directly address this question. In some cases, however, the standing of the speaker—along with other factors—will move the organizations to defend courts from such attacks. Consider Trump's reference to Judge Robart as a "so-called judge." The issue for some organizations was not just the demeaning language, but the fact that it came from the President of the United States. As one bar organization stated, "When a president questions the legitimacy of a judge who disagrees with him . . . it undermines the rule of law and the propriety and authority of judicial review."[176] Similarly, after the Fifth Circuit declared a federal statute prohibiting the possession of firearms by persons subject to a domestic violence restraining order to be unconstitutional, Governor Newsom stated, "These three zealots are hellbent on a deranged vision of guns for all, leaving government powerless to protect its people."[177] The American Board of Trial Advocates responded: "It is the job of judges to follow the law and binding precedent such as the precedent established by the United States Supreme Court in [*Bruen*]. . . . [R]egardless of one's opinion regarding the merits of the issue, the personal denigration of judges should not be tolerated, especially when done by those who hold powerful governmental offices."[178]

175. Partisans engage in motivated reasoning and are more likely to fall victim to political misinformation when it conforms to their prior beliefs. *See* Barwick & Dawson, *supra* note 53, at 59.

176. Nathan Tempey, *Trump Draws Condemnation from Bar Association Popular with Federal Prosecutors and Judges*, GOTHAMIST (Feb. 10, 2017), https://gothamist.com/news/trump-draws-condemnation-from-northeastern-bar-association-popular-with-federal-prosecutors-judges. *See also ABOTA Defends Federal Judge James L. Robart from Attacks by President Trump*, AM. BD. OF TRIAL ADVOCS. (Feb. 6, 2017), https://www.abota.org/Online/News/2017_News/ABOTA_defends_federal_Judge_James_L._Robart_from_attacks_by_President_Trump.aspx/ [https://perma.cc/GA5P-YS32] ("We respectfully urge President Trump to extend to the judicial branch and its members the same degree of dignity and respect that he would expect our citizens to show to the executive branch of our government.").

177. *Governor Newsom on Fifth Circuit Decision Allowing Domestic Violence Abusers to Possess Guns*, OFF. OF GOV. GAVIN NEWSOM (Feb. 2, 2022), https://www.gov.ca.gov/2023/02/02/governor-newsom-on-fifth-circuit-court-ruling-allowing-domestic-violence-abusers-to-possess-guns/ [https://perma.cc/S6FC-LBUL].

178. *ABOTA Defends Federal Judges Against Unfair Criticism,* AM. BD. OF TRIAL ADVOCS. (Feb. 16, 2023), https://www.aota.org/Online/News/2023_News/ABOTA_Defends_Federal_Judges_Against_Unfair_Criticism.aspx [https://perma.cc/7466-F82S].

These organizations were communicating to the speaker, possibly other public officials, and the public that the norms for speech by the chief executive about the judiciary had been violated. This makes some sense: we want people to believe that courts should, in most cases, be shown respect, so that the public will voluntarily obey the courts. Moreover, there is evidence that incivility can result in a loss of trust in politicians and the political system.[179] At the same time, it is not possible for bar organizations to defend judges from all demeaning language aimed at them by all public officials. Nor would these organizations be very effective if they tried to do so. Nevertheless, there is potential value in reminding highly placed public officials—and even local officials whose comments receive significant media attention—that demeaning speech aimed at judges has real costs for the political system. Although Trump and Newsom did not seem chastened when bar organizations called them out on their demeaning statements, some political figures have walked back such statements. Other office holders may also have been reminded to avoid demeaning speech about courts.

Before leaving this topic, it is important to note how hard it is to articulate useful guidelines for identifying when to respond to demeaning language aimed at courts. Drawing lines between critical opinion and unacceptably "demeaning" language can be difficult. Not only the speaker's position, but the context and court are important when determining whether to respond. Greater latitude might be afforded speakers during judicial elections, when the public may discount the speakers' rhetoric due to the context. There may be occasions when judicial misconduct is so egregious that the judge should not be defended, even from demeaning attacks. The point here is that a bar organization's decision to defend courts in the wake of demeaning attacks should not be reflexive. Nevertheless, there may be times when such a defense can serve as an important signal to the speaker and the public.

5. Who Hears the Defense of Courts?

Unfortunately, even when bar organizations defend courts, their efforts may not garner much public attention. For example, after Trump referred to Judge Robart as a "so-called judge," the ABA's president made fiery remarks before the organization's House of Delegates and issued a statement defending the judge, but her views only appeared in one mainstream media outlet.[180] Some state, local, and specialty bars also issued statements defending the judge, but

179. *See, e.g.*, Ina Goovaerts & Sofie Marien, *Uncivil Communication and Simplistic Argumentation: Decreasing Political Trust, Increasing Persuasive Power?,* 37 POL. COMM'N 768, 769, 779 (2020); Diana C. Mutz & Byron Reeves, *The New Videomalaise: Effects of Televised Incivility on Political Trust*, 99 AM. J. POL. SCI. 1, 11–12 (2005).

180. *See* Levin*, supra note* 7, at 191–92. Her views were publicized because she wrote an opinion piece. Linda A. Klein, *ABA Will Protect the Rule of Law*, MIA. HERALD (Feb. 8, 2017), https://www.miamiherald.com/opinion/op-ed/article131553474.html [https://perma.cc/7DWB-D5Q4].

they, too, received little mainstream media coverage.[181] Bar organizations' messages are more likely to reach the public when they appear in the local media in defense of local judges.[182] Bar organizations' statements posted on their websites and Facebook pages—where they are often placed—are unlikely to be seen by anyone but lawyers and judges. Thus, if bar organizations want their messages to reach the original speaker and the public, most need to find ways to publicize their messages more effectively.

B. Bar Organizations' Role as Court Critics

Most bar organizations will never publicly criticize courts. Some of the reasons are self-interested. Moreover, most of these organizations are focused on social, economic, and educational opportunities for members and do not devote substantial effort to outward facing functions. For others, criticizing courts may seem counter-intuitive: these organizations want to maintain the public's confidence in courts, and criticism can undercut that confidence. Yet sometimes criticizing a court is the best way to fulfill lawyers' responsibilities to further the public's "confidence in the rule of law and the justice system."[183]

Bar organizations are well-positioned to deliver this criticism. Due to their social and occupational connections, the legal profession constitutes an important reference group for judges.[184] Judges care about lawyers' evaluation of their work.[185] Moreover, when bar organizations criticize courts, judges hear it.

Bar organizations have only rarely aimed criticism directly at the U.S. Supreme Court since they did so in the 1950s. For example, bar organizations did not publicly criticize the Court following its controversial decision in *Bush v. Gore,*[186] which decided the 2000 presidential election in a 5-4 vote along party lines.[187] As noted, some bar organizations sharply criticized the Court following

181. *See* Levin, *supra* note 7, at 237–38. For exceptions, see Randy Ludlow, *Ohio State Bar Association Objects to Trump Attack on Judiciary*, COLUMBUS DISPATCH (Feb. 8, 2017); Kerry Lester, *No "So-Called Judges*," CHI. DAILY HERALD (Feb. 13, 2017), https://www.dailyherald.com/article/20170213/news/170219667/ [https://perma.cc/R356-C4YC] (reporting on comments by the Illinois State Bar Association president).

182. *See, e.g.*, *supra* note 126. *See also* Russ McQuaid*, Indy Bar Association Defends Judge Against Top State Cop Criticism*, FOX59 NEWS (Oct. 6, 2023), https://fox59.com/news/indy-bar-association-defends-judge-against-top-state-cop-criticism/ [https://perma.cc/DR8P-Q62P].

183. MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 2023).

184. *See* LAURENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 98 (2006).

185. *Id.* at 98, 114.

186. 531 U.S. 98 (2000).

187. For examples of attacks on the Court from other quarters, see Anne Gearing, *Divided Supreme Court Ruling May Leave Lasting Taint on Court,* SOUTHCOAST TODAY (Dec. 12, 2000), https://www.southcoasttoday.com/story/entertainment/local/2000/12/13/divided-supreme-court-ruling-may/50465444007/ [https://perma.cc/5QWW-ME7N]; Jeffrey Rosen, *Disgrace: The Supreme Court Commits Suicide*, NEW REPUBLIC (Dec. 25, 2000), https://newrepublic.com/article/70674/disgrace [https://perma.cc/DPR8-4TZZ].

the *Dobbs* decision. Since then, a few have criticized the Court for other decisions.[188]

Then in early 2023, following revelations concerning possible ethical improprieties by some of the justices, the ABA adopted a resolution that implicitly criticized the Supreme Court for its failure to adopt ethics rules to apply to itself and offered proposed rules for the Court's consideration.[189] The resolution began by stating, "[n]o man is above the law" and noted that "public support for an independent judiciary can only be sustained if there is public confidence in the legitimacy of the judiciary."[190] The ABA's president followed up with a second call for the Court to adopt an ethics code a few months later.[191] The Boston Bar Association and the New York County Lawyers Association (NYCLA) also issued statements urging the Court to adopt a binding ethics code.[192] Pointing to concerns about declining confidence in the Court—for which it partially blamed the justices—the NYCLA argued that Congress should enact an ethics code if the Court declined to do so.[193] Later that year, following pressure from Congress and unrelenting media coverage, the Court adopted an ethics code.[194]

It is even harder for state and local bar organizations to publicly criticize their state courts. For example, after A.T. Massey Coal Company lost a $50 million verdict to plaintiffs, Massey's CEO poured $3 million into the 2004 campaign to

188. *See, e.g.*, *AILA Condemns SCOTUS Ruling Extending Title 42 Border Expulsion Policy*, AM. IMMIG. LAWS. ASS'N (Dec. 27, 2022), https://www.aila.org/advo-media/press-releases/2022/aila-condemns-scotus-ruling-title-42 [https://perma.cc/8D9W-T9WK]; *WBASNY Expresses Dismay with U.S. Supreme Court's Decision Overturning Affirmative Action in College Admissions*, WOMEN'S BAR ASS'N OF STATE OF N.Y. (July 3, 2023), https://www.wbasny.org/post_news/wbasny-expresses-dismay-with-u-s-supreme-courts-decision-overturning-affirmative-action-in-college-admissions/ (referring to the "hypocrisy" underlying the Court's reasoning).

189. AM. BAR ASS'N, KINGS COUNTY BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 400 (2023) https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2023-midyear-supplemental-materials/400-midyear-2023.pdf [https://perma.cc/4CEM-RSUU].

190. *Id.* (quoting Chesterfield Smith, President, American Bar Association, Oct. 22, 1973). The resolution was careful to note, however, that there was no suggestion that any justice had violated ethical rules.

191. *ABA Urges Supreme Court to Adopt a Code of Ethics*, AM. BAR ASS'N (May 15, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/05/supreme-court-ethics/?login [https://perma.cc/AJ78-YZN9].

192. *Boston Bar Association Calls on U.S. Supreme Court to Adopt Ethics Code*, BOS. BAR ASS'N (Apr. 20, 2023), https://bostonbar.org/news/boston-bar-association-calls-on-u-s-supreme-court-to-adopt-ethics-code/ [https://perma.cc/UF4A-Y382]; THE SUPREME COURT SHOULD ADOPT AN ETHICS CODE, OR CONGRESS SHOULD DO IT FOR THEM: A REPORT OF THE TASK FORCE ON THE SUPREME COURT OF THE UNITED STATES OF THE NEW YORK COUNTY LAWYERS ASSOCIATION 1–4 (Apr. 17, 2023), https://www.nycla.org/wp-content/uploads/2023/04/Report-of-the-NYCLA-Task-Force-on-SCOTUS-Code-of-Ethics.pdf [https://perma.cc/SS2G-864V] [hereinafter THE SUPREME COURT SHOULD ADOPT AN ETHICS CODE].

193. THE SUPREME COURT SHOULD ADOPT AN ETHICS CODE, *supra* note 192, at 4.

194. Annie Gersh & Nina Totenberg, *The Supreme Court Adopts First-Ever Code of Ethics*, NPR (Nov. 13, 2023), https://www.npr.org/2023/11/13/1212708142/supreme-court-ethics-code [https://perma.cc/9TK8-FA27].

elect Brent Benjamin to the West Virginia Supreme Court of Appeals.[195] The contributions accounted for sixty percent of the contributions to Benjamin's campaign.[196] Justice Benjamin later refused to recuse himself from Massey's appeal and cast the deciding 3-2 vote to reverse the judgment against Massey.[197] The West Virginia bar organizations issued no statements about the failure to recuse. The ABA and some national specialty bars, but no West Virginia bar organizations, filed amicus briefs in opposition to the failure to recuse when the case reached the U.S. Supreme Court.[198] The Court ruled that the Due Process Clause required Benjamin's recusal.[199]

Only rarely have state and local bar organizations even obliquely criticized their state courts when they acted in ways that threatened to undermine public support for, and confidence in, the judiciary. When Alabama Chief Justice Roy Moore refused to follow a federal judge's order to remove a Ten Commandments monument from the Alabama Judicial Building in 2002, the mandatory Alabama State Bar issued a statement emphasizing the importance of the rule of law, and the organization's president met privately with Moore to discuss the issue.[200] In 2014, after a scandal erupted over pornographic emails seemingly sent and received on official servers by at least one Pennsylvania Supreme Court justice, the Philadelphia Bar Association called for appointment of a special master and urged the court to move quickly.[201] A year later, when a second justice appeared implicated,[202] the Philadelphia Bar Association called for an independent investigation.[203] More recently, the voluntary Colorado Bar Association (CBA) responded to sustained media coverage of serious problems with the state's judicial disciplinary system, including an alleged cover-up of the handling of sexual

195. Caperton v. Massey Coal Co., 556 U.S. 868, 872–73 (2009).

196. *Id.* at 873.

197. *Id.* at 874–75.

198. *See Caperton v. Massey*, BRENNAN CTR. FOR JUST. (June 8, 2009), https://www.brennancenter.org/our-work/court-cases/caperton-v-massey [https://perma.cc/J5HA-HZZS].

199. 556 U.S. at 872.

200. William Clark, *President's Page*, 64 ALA. LAW. 152 (2003); Alabama State Bar Addresses Ten Commandments Issue (Aug. 19, 2003) (on file with author).

201. *Statement of Philadelphia Bar Association Chancellor William P. Fedullo*, PHILA. BAR ASS'N (Oct 16, 2014), https://philadelphiabar.org/?pg=News&blAction=showEntry&blogEntry=71975 [https://perma.cc/LH8W-8J8D] (stating that court should "take action immediately to prevent any further erosion of public confidence in the judiciary").

202. William Bender, *Glaring Conflict in Porngate Probe?*, PHILA. INQUIRER (Nov. 11, 2015), https://www.inquirer.com/philly/news/politics/state/20151111_Glaring_conflict_in_Porngate_probe_.html [https://perma.cc/5CAW-UPKP].

203. *A Statement from Chancellor Albert S. Dandridge III Regarding "Porngate,"* PHILA. BAR ASS'N (Nov. 17, 2015) ("Only when there is a full accounting of all facts can we take necessary action to restore the public's trust in our justice system."). The Pennsylvania Bar Association also issued a more muted statement. *See PBA Board of Governors Calls for Fair, Thorough and Impartial Review of Email Communications* (Nov. 18, 2015), https://www.pabar.org/public/news%20releases/pr111815.asp [https://perma.cc/WV37-RUBM] (recommending "a fair, thorough and impartial review of the content of the email communications and actions that are under investigation").

harassment claims against the former chief justice.[204] The CBA issued a statement calling the allegations against the Judicial Department "grave and serious," and expressing support for an independent investigation.[205] Yet bar organizations in Louisiana and South Carolina issued no statements after repeated media reports of serious problems with judicial discipline in those states, including discipline involving a Louisiana state supreme court justice and other sitting judges.[206]

There are, of course, many reasons why it is difficult for state and local bar organizations to criticize their state courts. The legal limits on the speech of mandatory state bars may have left them unwilling to criticize courts. Moreover, mandatory bars are often established as state agencies or as public corporations that are instrumentalities of the judiciary and operate under the supervision of the state supreme court.[207] Voluntary state and local bar organizations will not wish to antagonize the state courts that they lobby for changes in the laws governing lawyers. Criticism of courts may create controversy among members who disagree with the message or simply do not wish to "take on" courts. Close personal relations between judges and the bar leadership can also make such criticism difficult. Moreover, many bar organizations have no history of—or mechanisms for—issuing public statements of that sort.

Nevertheless, in every state, some of the larger bar organizations should assume the role of occasional critic when courts proceed in irregular ways that seriously threaten to undermine public support. These organizations understand judicial norms and are better positioned than most other critics to credibly speak out in such situations. They cannot rely on the ABA, which mostly focuses its

204. *E.g.*, David Migoya, *Colorado Supreme Court Releases Memo Citing Examples of Sex-Discrimination, Judicial Misconduct that Led to Alleged Contract for Silence,* DENVER POST (Feb. 9, 2021), https://www.denverpost.com/2021/02/09/colorado-supreme-court-memo-sex-discrimination-harassment-lawsuit/ [https://perma.cc/WKL4-AFNA].

205. *Colorado Bar Association*, FACEBOOK (Apr. 16, 2021).

206. *See, e.g.*, Joseph Cranney, *South Carolina: The State Where Judges Rule Themselves in Secret*, PROPUBLICA (Apr. 25 2019), https://www.propublica.org/article/what-happens-when-judges-police-themselves-in-secret-not-much [https://perma.cc/AZX5-77DG]; Andrea Gallo & John Simerman, *Jeff Hughes Case Shows How a Judge's Misbehavior Can Remain Hidden Forever in Louisiana*, ADVOC. (Aug. 11, 2019), https://www.theadvocate.com/baton_rouge/news/courts/jeff-hughes-case-shows-how-a-judge-s-misbehavior-can-remain-hidden-forever-in-louisiana/article_56cceb18-b3ad-11e9-9946-e7afe5a9c1a4.html [https://perma.cc/E9F6-TZ3W]; Andrea Gallo & John Simerman, *Secret Complaints, Outcomes: How Louisiana's Judiciary Commission Protects Judges Its Meant to Police*, NOLA.COM (Dec. 30, 2019), https://www.nola.com/news/courts/article_278f83de-25c6-11ea-a8c1-ff3562324659.html [https://perma.cc/7CRK-CMBS]; Editorial, *Supreme Court Falls Short on Accountability for Louisiana Judges*, ADVOC. (Apr. 23, 2020), https://www.theadvocate.com/baton_rouge/opinion/our_views/our-views-supreme-court-falls-short-on-accountability-for-louisiana-judges/article_4ae3c126-7f56-11ea-b52f-530ac4029265.html [https://perma.cc/ZT2A-22ET]; Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on Bench*, REUTERS (June 30, 2020), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ (reporting on problems with judicial discipline in Louisiana, South Carolina, and elsewhere).

207. Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 2 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf [https://perma.cc/LA4P-L2FG].

efforts on the U.S. Supreme Court and lower federal courts. Moreover, the ABA's criticism may lack credibility with some state courts that view the ABA as an outsider or a left-leaning organization. Due to their size or the status of their members, voluntary state bars, large local bars, and specialty or affinity organizations with close connections to courts are the ones whose criticism is most likely to be heard. Their criticism can provide an important reality check for judges, who may be insulated or may not fully appreciate the seriousness of the threat to public support of the institution.

Finally, this is not a call for bar organizations to become frequent court critics. They can usually accomplish more by making thoughtful recommendations for change and otherwise assisting courts with their work. Even when concerns about court conduct arise, there may be times when it is preferable for bar organizations to communicate criticism privately. At times, however, public criticism may be necessary to clearly communicate the urgency and seriousness of the problem. Public criticism should occur only rarely, when a judge's conduct seemingly violates the law or judicial norms or when courts are conducting their work in irregular ways that seriously undermine public support for the judiciary. Frequent criticism and disrespectful rhetoric will lose its impact if courts come to view bar organizations more as adversaries than allies. It is bar organizations' strong and generally supportive relationships with courts that make their critical statements so powerful—and important.

VII

CONCLUSION

Misleading and vituperative attacks on courts are only one of the reasons for loss of confidence in the judiciary. But such attacks by public officials should not be ignored, because they can seemingly lower public support for the courts, at least among co-partisans. Bar organizations have an important dual role they can play to help bolster the public's confidence in, and support for, courts. These organizations should continue to defend courts from misleading attacks by public officials, so that the public can contextualize the critical statements and better understand what judges do. By defending courts following demeaning attacks, bar organizations can also remind public officials of the desired norms for speaking about judges. Through these efforts, bar organizations can not only help to maintain respect for courts but may be able to defuse the effects of heated rhetoric that can intimidate judges or endanger their physical safety.

At the same time, sometimes the public's confidence in courts can be lost due to judges' misjudgments, errors, or malfeasance. Bar organizations should be willing to publicly criticize courts that are proceeding in irregular ways that threaten to seriously undermine public support for the judiciary. When bar organizations speak out publicly, they send vitally important signals to courts. While judges may not change course in response to this criticism, they will almost certainly hear it. Through these efforts, bar organizations can serve their original mission to improve courts and maintain support for the justice system.