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Bastions of Independence or Shields of Misconduct?: Increasing Transparency in Judicial Conduct Commissions

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BASTIONS OF INDEPENDENCE OR SHIELDS OF MISCONDUCT?: INCREASING TRANSPARENCY IN JUDICIAL CONDUCT COMMISSIONS

*Katarina Herring-Trott**

In most states, the first time that the public learns about a state judge's misconduct is when a judicial conduct commission files formal charges against that judge. Judicial conduct commissions are independent state agencies that oversee and investigate allegations of misconduct against state judges. Commission investigations are kept almost entirely secret from the public, predominantly under the justification that the judiciary needs to be independent of outside influence. However, in light of recent failures to hold judges accountable for their improprieties, the utility of complete commission secrecy has been thrown into doubt. Questions arise as to why the commissions did not act sooner, especially when the judges continued their reprehensible behavior for years after an initial complaint was filed against them.

These shortcomings risk shaking public confidence in the judiciary, which may, in turn, hinder the judiciary's ability to remain fully independent in its oversight mechanisms. Therefore, there is a question of whether commission proceedings should remain confidential or be opened to the public at an earlier stage in their investigative process. In other words, at what point does the public's right to know about judicial misconduct outweigh a judge's right to privacy? This Note advocates for increased transparency of commission proceedings, arguing that the public's right to know should predominate when judicial misconduct has deprived a defendant of their fundamental constitutional rights. Thus, this Note proposes that commissions be subject to mandatory disclosure when they are investigating an accusation of egregious judicial misconduct. This would provide the public with notice that the commission is effectively investigating its complaints and taking steps to hold judges accountable when necessary.

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INTRODUCTION

When state judges are accused of misconduct, state-created judicial conduct commissions investigate the allegations and can initiate disciplinary proceedings against those judges.¹ The composition, structure, and disciplinary authority of these commissions vary greatly from state to state,² but one aspect typically remains the same: the proceedings in which they investigate judges are heavily cloaked in secrecy.³ As a result, the public rarely finds out about a judge’s alleged misconduct unless the commission decides to file formal charges or recommend discipline to the state’s highest court.⁴ And if the commission dismisses the case against the judge or chooses to discipline them privately, the public may never learn of the judge’s alleged misconduct at all.⁵

Although these extensive confidentiality requirements are often justified by the judiciary’s need to operate independently of outside influence,⁶ there are concerns that these requirements ultimately hide judicial misconduct

1. See Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 405 (2007).

2. See *id.* at 406.

3. See *id.* at 409.

4. See Jonathan Abel, Note, *Testing Three Commonsense Intuitions About Judicial Conduct Commissions*, 64 STAN. L. REV. 1021, 1025 (2012); see also *infra* Part I.E.3.

5. See *infra* Part I.E.3.

6. See, e.g., *Garner v. Cherberg*, 765 P.2d 1284, 1288 (Wash. 1988).

from the public.⁷ Judicial misconduct can have serious consequences for criminal defendants at trial, including the deprivation of their rights to counsel, a fair trial, and an impartial judge.⁸ Though these instances of judicial misconduct are said to be few and far between,⁹ they have the potential to cause far-reaching harm to the public perception of the judiciary.¹⁰

Recently, instances of judicial misconduct running roughshod over the rights of defendants have attracted media attention and led to the public exposure of that misconduct.¹¹ When this occurs, commentators have asked why oversight mechanisms, such as judicial conduct commissions, did not catch the misconduct sooner.¹² A notable example is the investigation and suspension of Judge Armstead Lester Hayes III, which occurred years after an initial complaint was lodged against him.¹³

During his eighteen years as a judge of the Municipal Court of the City of Montgomery, Judge Hayes primarily oversaw traffic and fine collection cases.¹⁴ In 2016, Alabama's Judicial Inquiry Commission filed a complaint against Judge Hayes in the Alabama Court of the Judiciary.¹⁵ The commission alleged that, among other things, Judge Hayes had repeatedly and unlawfully incarcerated indigent traffic offenders for their inability to pay fines.¹⁶ The commission stated that these failures to follow constitutional, statutory, and procedural law undermined public confidence in the judiciary's integrity, independence, and impartiality.¹⁷ Specifically, the complaint describes the impact of Judge Hayes's misconduct on thirteen former defendants, many of whom were wrongfully incarcerated under his watch.¹⁸

However, the commission's 2016 complaint came years after Judge Hayes's conduct was first brought to the commission's attention—and years after wrongful incarceration had trampled the rights of many indigent defendants. In as early as 2013, civil rights lawyers had filed a formal complaint with the commission regarding Judge Hayes's impropriety.¹⁹ That same year, a federal suit was filed, alleging that local judges, including Judge

7. *See infra* Part II.B.1.

8. *See infra* Part I.B.3.

9. *See* Carl E. Stewart, *Abuse of Power & Judicial Misconduct: A Reflection of Contemporary Ethical Issues Facing Judges*, 1 U. ST. THOM. L.J. 464, 465 (2003).

10. *See id.* at 477.

11. *See, e.g.,* Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS (Jun. 30, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-judges-misconduct/> [<https://perma.cc/7PQK-B87B>].

12. *See id.*

13. *See id.*

14. Complaint at 1, *In re Hayes*, No. 49 (Ala. Ct. of the Judiciary Jan. 5, 2017), 2016 WL 7743819.

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.* at 44–80.

19. *See* Berens & Shiffman, *supra* note 11.

Hayes, were unlawfully incarcerating the poor.²⁰ Three other federal suits asserting similar allegations were filed in 2014 and 2015.²¹ Despite having many reasons to be aware of Judge Hayes's misconduct, the commission did not begin its investigation until 2015—two years after the initial complaint was filed against him.²²

After the commission filed its complaint in 2016, Judge Hayes and the commission reached an agreement under which both parties stipulated that Judge Hayes had violated seven different parts of Alabama's judicial ethics code.²³ After acknowledging the troubling nature of the allegations, the Alabama Court of the Judiciary agreed that Judge Hayes had violated the ethics code and ordered the discipline stipulated in the agreement.²⁴ His punishment for these wrongful incarcerations was an eleven-month suspension and a fine, after which he was allowed to return to the bench until his term expired.²⁵

Local community activists, frustrated by the leniency afforded to Judge Hayes by the Alabama Court of the Judiciary, expressed their outrage that he had not been removed years ago when the misconduct began.²⁶ But when questioned, the commission claimed that confidentiality requirements prohibited its members from discussing why they did not investigate immediately upon receipt of the complaint in 2013.²⁷ Later, the community expressed shock and consternation at the fact that Judge Hayes was allowed to run for office again despite the gravity of his misconduct.²⁸

When the public learns of misconduct that has flown under the radar for years, as in Judge Hayes's case, it shakes public trust in the judiciary's ability to properly regulate itself.²⁹ Losing the public's trust has a dangerous implication for the judiciary: the public, ceasing to view the judiciary as legitimate and fair, may lose the desire to comply with its rulings.³⁰ Further, public perception of an ineffective disciplinary system could lead to an overhaul of the current disciplinary regime in favor of one that is more

20. See Complaint, *Cleveland v. City of Montgomery*, No. 13-CV-732 (M.D. Ala. Oct. 4, 2013), ECF No. 1; Complaint, *Watts v. City of Montgomery*, No. 13-CV-733 (M.D. Ala. Oct. 4, 2013), ECF No. 1. These suits were originally brought separately in state court and were consolidated upon removal to federal court. See *Cleveland v. City of Montgomery*, No. 13-CV-732, 2014 WL 6461900, at *1 (M.D. Ala. Nov. 17, 2014).

21. See First Amended Class Action Complaint, *Mitchell v. City of Montgomery*, No. 14-CV-186 (M.D. Ala. May 23, 2014), ECF No. 26; Complaint, *McCullough v. City of Montgomery*, No. 15-CV-463 (M.D. Ala. Jul. 1, 2015), ECF No. 1; Complaint, *Carter v. City of Montgomery*, No. 15-CV-555 (M.D. Ala. Aug. 3, 2015), ECF No. 1.

22. See Berens & Shiffman, *supra* note 11.

23. See *In re Hayes*, No. 49, 2017 WL 132929, at *4 (Ala. Ct. of the Judiciary Jan. 5, 2017).

24. See *id.*

25. See *id.*

26. Berens & Shiffman, *supra* note 11.

27. *Id.*

28. *Id.*

29. See *infra* Part II.B.1.

30. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 49–51 (2002).

intrusive and less accommodating of the judiciary's independence.³¹ Thus, there is a difficult balance to strike in configuring the judicial disciplinary system—between the public's right to information and the right of the judiciary to quietly self-regulate.

With these concerns in mind, this Note argues that judicial conduct commissions should be subject to mandatory disclosure when they are investigating allegations of egregious judicial misconduct. These instances of misconduct have dangerous consequences for the rights of defendants, and the public deserves to know that commissions are handling them accordingly.

Part I of this Note will first present an overview of judicial misconduct and the ways that it can deprive defendants of their fundamental rights. Then, Part I introduces the current mechanisms that are in place to proscribe and discipline judicial misconduct, as well as the conceptual foundations of the disciplinary methods. Last, Part I explains the fragmented structure of the current judicial disciplinary regime. Next, Part II contrasts the arguments in support of maintaining commission confidentiality with those in support of increasing transparency. Part II.A analyzes the justifications in support of confidentiality, and then Part II.B analyzes justifications in support of transparency. Finally, Part III proposes adding a mandatory disclosure rule to the American Bar Association's (ABA) rules governing judicial conduct commissions, requiring disclosure to the public when commissions are investigating egregious judicial misconduct.

I. THE DANGERS OF JUDICIAL MISCONDUCT AND AN OVERVIEW OF THE JUDICIAL DISCIPLINARY REGIME

This part introduces the legal landscape of judicial misconduct, as well as the oversight mechanisms in place to regulate and discipline such misconduct. Part I.A begins with a broad overview of the dangers of judicial misconduct, followed by a brief introduction of judicial ethics codes. Part I.B provides more specific examples of judicial misconduct to illustrate how it can deprive defendants of fundamental rights. Part I.C details the oversight mechanisms for judicial conduct, such as ethics codes that guide the proper conduct of judges, judicial conduct commissions that investigate judicial misconduct, and appellate review that corrects prejudicial judicial error. Then, Part I.D discusses the conceptual foundations underlying these oversight mechanisms and how those concepts should be balanced against one another. Finally, Part I.E explains how the judicial disciplinary regime is fragmented across the states, given that conduct commissions vary greatly in their disciplinary authority and confidentiality requirements.

31. ROGER K. WARREN, THE NAT'L CTR. FOR STATE CTS., THE IMPORTANCE OF JUDICIAL INDEPENDENCE AND ACCOUNTABILITY (2003), <https://ncsc.contentdm.oclc.org/digital/collection/judicial/id/207/> [<https://perma.cc/9WXM-6MES>].

A. Judicial Misconduct: An Introduction

Described as the “bedrock of the American criminal justice system,” state courts hear over 100 million new cases every year and, in doing so, impact the lives of millions of individuals.³² Many experts agree that the majority of state judges perform their duties honorably, and judicial oversight mechanisms competently identify and weed out those who do not.³³ However, others doubt the efficiency of these mechanisms and are concerned that a number of corrupt judges are getting off with a mere slap on the wrist.³⁴

In part, these concerns arise from the fact that when judges commit misconduct, it is rare for either lawyers³⁵ or other judges³⁶ to report them. Even when lawyers or judges do report judicial misconduct, judicial disciplinary proceedings are largely confidential.³⁷ Thus, the public rarely hears about judicial misconduct unless there is a particularly egregious case or the case implicates a high-profile judge.³⁸ The dearth of reporting, secrecy of proceedings, and lack of public awareness prevent the public from gauging how often this misconduct occurs—and whether the appropriate discipline has been meted out.³⁹

Regardless of how frequent judicial misconduct may be, when it does occur, it poses a significant threat to justice by depriving a defendant of their constitutional right to due process.⁴⁰ Not only is such misconduct harmful to defendants, but it can also have deleterious effects on the legitimacy of the judicial branch by throwing its reliability into doubt.⁴¹ The protection of

32. Berens & Shiffman, *supra* note 11.

33. See Stewart, *supra* note 9, at 465; Berens & Shiffman, *supra* note 11 (explaining that many experts believe that most state judges respect and follow the law, and oversight agencies are effective in removing those who do not); Keith Swisher, *The Judicial Ethics of Criminal Law Adjudication*, 41 ARIZ. ST. L.J. 755, 768 (2009) (“The [oversight] commissions recently have taken an energetic role in policing judges who in their rulings violate these various rights.”).

34. See Erik Ortiz, *Robed in Secrecy: How Judges Accused of Misconduct Can Dodge Public Scrutiny*, NBC NEWS (Dec. 26, 2021, 8:27 PM), <https://www.nbcnews.com/news/us-news/robed-secrecy-judges-accused-misconduct-can-dodge-public-scrutiny-rcna7638> [<https://perma.cc/H8N9-AKKY>] (noting legal experts’ concern that the rarity of misconduct findings suggests a lack of judicial accountability, rather than a lack of misconduct); Berens & Shiffman, *supra* note 11 (describing the leniency with which judges are disciplined for misconduct and the risk that this “could give judges license to behave with impunity”).

35. See Michael D. Cicchini, *Combating Judicial Misconduct: A Stoic Approach*, 67 BUFF. L. REV. 1259, 1266 (2019).

36. LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 25 (1992) (describing how the ABA toughened the reporting provision of the ABA Model Code of Judicial Conduct because judges had previously ignored the standard).

37. See Abel, *supra* note 4, at 1024–25 (“[Conduct Commission] proceedings are largely confidential As a result, scholars pay them little attention, and the media largely ignores them.”).

38. See *id.* at 1025.

39. See SAMUEL R. GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE, AND OTHER LAW ENFORCEMENT 10 (2020) (noting the absence of data on judicial misconduct compared to other legal officials’ misconduct).

40. *Franklin v. McCaughy*, 398 F.3d 955, 959 (7th Cir. 2005).

41. See Stewart, *supra* note 9, at 465.

defendants' rights and public trust in the judiciary are highly regarded values in judicial ethics and are heavily referenced in the various judicial codes of conduct.⁴²

These codes, which establish the bases for identifying and defining judicial misconduct,⁴³ task judges with a duty to safeguard the rights of the accused⁴⁴ and visualize judges as protectors of a defendant's rights.⁴⁵ They also emphasize the importance of maintaining public confidence in the judiciary through frequent mandates for judges to uphold judicial integrity,⁴⁶ avoid impropriety,⁴⁷ and impartially perform their judicial duties.⁴⁸ Thus, the codes recognize the dangers of judicial misconduct and clearly proscribe it, especially when it harms the rights of the accused or the reputation of the judiciary.

B. The Consequences of Judicial Misconduct for the Rights of Defendants

Despite the significant ethical obligations that the codes of conduct impose on judges, there are notable examples of judicial misconduct that undermine such codes' conceptualization of the judge as a protector of defendants' rights.⁴⁹ The following sections illustrate an inexhaustive list of the ways in which judicial misconduct can deprive defendants of their rights in the courtroom. Part I.B.1 will discuss how judicial coercion of plea deals can harm defendants by depriving them of their right to a jury trial. Part I.B.2 will explain how judicial bias toward the prosecution can harm defendants by tainting the jury's opinion of the defense. And finally, Part I.B.3 will discuss other egregious deprivations of constitutional rights, such as violations of due process. These categories may overlap, as coercive and biased acts of judges often involve the deprivation of the accused's constitutional or fundamental rights.

42. See *infra* Part I.C.1.

43. Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1278 (2004).

44. STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1(a) (AM. BAR ASS'N 2000).

45. See Richard Klein, *Judicial Misconduct in Criminal Cases: It's Not Just the Counsel Who May Be Ineffective and Unprofessional*, 4 OHIO ST. J. CRIM. L. 195, 222 (2006).

46. CODE OF CONDUCT FOR U.S. JUDGES Canon 1 (JUD. CONF. OF THE U.S. 2019); STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.4 (AM. BAR ASS'N 2000); MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2010).

47. CODE OF CONDUCT FOR U.S. JUDGES Canon 2 (JUD. CONF. OF THE U.S. 2019); STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.6(a) (AM. BAR ASS'N 2000); MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2010).

48. CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (JUD. CONF. OF THE U.S. 2019); STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.6(b) (AM. BAR ASS'N 2000); MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2010).

49. See *infra* Part I.C.1.

1. Judicial Coercion of Plea Deals

At both the state and federal levels, the vast majority of criminal convictions in America result from plea deals.⁵⁰ A defendant's decision to plead guilty must be a voluntary one, and any improper influence may render that decision invalid.⁵¹ Judges must determine that a defendant's plea is voluntary by ensuring that the defendant understands the offense to which they are pleading and the rights that they are waiving.⁵² Beyond this, the extent to which judges can get involved at the plea deal stage greatly varies across federal and state courts.⁵³

Federally, judicial involvement in plea deals is significantly limited; the Federal Rules of Criminal Procedure make clear that judges must not be involved in plea discussions.⁵⁴ As for the states, the ABA recommends that state codes of conduct prohibit judges from encouraging or recommending that a defendant plead guilty.⁵⁵ The ABA explained that this prohibition is due to the inherently coercive nature of a judge's involvement in plea discussions.⁵⁶ Despite the ABA's warnings, many states do not prohibit judges from getting involved in plea deals, which increases the risk that overzealous judges, intentionally or not, may coerce pleas.⁵⁷

A judicial action is coercive if it places improper pressure on a defendant such that they feel compelled to plead guilty.⁵⁸ Some examples include the incarceration of defendants until they agree to a plea,⁵⁹ threats to revoke bail if the defendant does not plead guilty,⁶⁰ and threats to impose a harsher

50. As of 2003, scholars estimate that up to 95 percent of cases in both federal and state courts end in plea deals. See LINDSEY DEVERS, U.S. DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE, RESEARCH SUMMARY: PLEA AND CHARGE BARGAINING 1 (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> [<https://perma.cc/3XTT-GM9M>].

51. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (holding that guilty pleas must be "voluntary" and "intelligent"); *Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.").

52. See STANDARDS FOR CRIM. JUST.: PLEAS OF GUILTY Standard 14-1.4 cmt. (AM. BAR ASS'N 1999).

53. See Klein, *supra* note 45, at 196.

54. FED. R. CRIM. P. 11(c).

55. See STANDARDS FOR CRIM. JUST.: PLEAS OF GUILTY Standard 14-3.3(c) cmt. (AM. BAR ASS'N 1999).

56. See *id.*

57. See Klein, *supra* note 45, at 196. Currently, eighteen states and Washington, D.C. explicitly prohibit judicial involvement, eight states allow some involvement with limitations, and the remaining twenty-four states' codes are silent regarding judicial intervention in plea deals. See Kelsey S. Henderson, Erika N. Fountain, Allison D. Redlich & Jason A. Cantone, *Judicial Involvement in Plea-Bargaining*, 28 PSYCH., PUB. POL'Y & L. 356, 356 (2022).

58. See *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992).

59. See *generally In re Ellis*, 1982 WL 196857 (N.Y. Comm'n on Jud. Conduct July 14, 1982) (discussing twenty-three cases in which judges were removed for, among other things, incarcerating defendants for indefinite time periods in order to coerce them to plead guilty).

60. See *Disciplinary Couns. v. O'Neill*, 815 N.E.2d 286, 298 (Ohio 2004) (ordering a judge's suspension for, among other things, coercing plea deals by threatening to revoke or revoking bail if the defendant decided to go to trial).

sentence if the defendant chooses to go to trial.⁶¹ These acts directly violate provisions in the codes of conduct, such as those prohibiting partiality and impropriety.⁶² The coerciveness of these acts is compounded when the judge asks a defendant excessively complicated questions during the plea allocution.⁶³ A confused defendant who does not understand their rights and believes the judge wants them to plead guilty cannot plead voluntarily, as they may not understand the implications of their answer.⁶⁴

Moreover, a judge who coerces a defendant's guilty plea is typically the same judge who will make the ultimate determination as to the plea's voluntariness.⁶⁵ This overlap not only risks depriving a defendant of their constitutional right to an unbiased judge,⁶⁶ but it also risks violating ethical rules that require a judge to be impartial.⁶⁷ The threat of partiality arises by virtue of the judge's inherently biased position in these situations: the judge who coerces a defendant's guilty plea is naturally less likely to find that plea was made involuntarily.⁶⁸ Thus, judicial coercion of plea deals poses a significant threat to defendants' rights.

2. Display of Judicial Bias at Trial

Before ascending to the bench, federal judges take an oath to be impartial and administer "justice without respect to persons, and do equal right to the poor and rich."⁶⁹ State judges take similar oaths upon entering office.⁷⁰

Consistent with these oaths, the codes of conduct strictly uphold similar values. For example, they prohibit judges not only from actual impropriety and bias, but also from behaving in any manner that gives the mere *appearance* of impropriety and bias.⁷¹ According to the ABA, "actual" improprieties consist of violations of the law, court rules, or code

61. See *State v. Filchok*, 688 N.E.2d 1063, 1065–66 (Ohio Ct. App. 1996) (criticizing a judge who threatened to impose a harsher future sentence if the defendant chose to go to trial).

62. See CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (JUD. CONF. OF THE U.S. 2019); STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.6(b) (AM. BAR ASS'N 2000); MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2010).

63. See Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1399 (2004) (using a plea allocution question from *Ohio v. Higgs*, 704 N.E.2d 308 (Ohio Ct. App. 1997), as an example of a question that would be difficult for defendants to understand).

64. See *id.* at 1399–1402.

65. See Klein, *supra* note 45, at 213.

66. See *id.* at 217–18 (discussing how judicially coerced plea deals violate defendants' constitutional rights to trial by jury and against self-incrimination).

67. See *id.* at 220.

68. See Klein, *supra* note 63, at 1400.

69. 28 U.S.C. § 453.

70. See, e.g., N.Y. CONST. art. 13, § 1 (requiring judges to take the following oath before entering office: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of . . . , according to the best of my ability.").

71. STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standards 6-1.6, 6-3.4 (AM. BAR ASS'N 2000); CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (JUD. CONF. OF THE U.S. 2019) (entitled "A Judge Should Perform the Duties of Office Fairly, Impartially, and Diligently"); MODEL CODE OF JUD. CONDUCT Canons 1, 2 (AM. BAR ASS'N 2010).

provisions.⁷² The “appearance” of impropriety, on the other hand, entails a more abstract inquiry: would the judge’s conduct, viewed with a reasonable mind, violate the code or reflect adversely on the judge’s “honesty, impartiality, temperament, or fitness to serve as a judge”?⁷³ Meanwhile, judicial bias includes insults, harassment, hostility, and intimidation, but it is not limited to overt statements, as it can also include body language and facial expressions.⁷⁴ Such biases violate defendants’ constitutional rights, such as the right to due process and an impartial judge.⁷⁵

Impropriety, bias, or the appearance of either can negatively affect the jury’s opinion of the defendant and, thus, unfairly sway the verdict.⁷⁶ Courts have recognized the power that judges have over the jury⁷⁷ and that their “slightest remark or intimation is received with deference and may prove controlling.”⁷⁸ So, when judges make hostile remarks,⁷⁹ express doubt about a defendant’s innocence,⁸⁰ roll their eyes at a defense witness,⁸¹ or castigate a defense attorney during a closing argument,⁸² they display impropriety and bias that impairs the jury’s ability to reach a fair verdict.⁸³ This type of misconduct deprives a defendant of their fundamental rights to a fair trial and impartial judge.⁸⁴

3. Other Judicial Deprivations of Constitutional Rights: Egregious Error

Judicial coercion and bias belong to a broader category of judicial deprivations of defendants’ constitutional rights, which some scholars refer to as “egregious errors.”⁸⁵ Although commissions and reviewing courts do not necessarily use this term to label judicial misconduct, scholars use it to

72. MODEL CODE OF JUD. CONDUCT r. 1.2 cmt. 5 (AM. BAR ASS’N 2010).

73. *Id.*

74. *See id.* r. 2.3 cmt. 2.

75. *See Franklin v. McCaughty*, 398 F.3d 955, 959 (7th Cir. 2005) (“The Due Process Clause guarantees litigants an impartial judge, reflecting the principle that ‘no man is permitted to try cases where he has an interest in the outcome.’” (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))).

76. *See infra* notes 78–82 and accompanying text; *see also* Cicchini, *supra* note 35, at 1285.

77. *See People v. Eckert*, 551 N.E.2d 820, 824 (Ill. App. Ct. 1990); *United States v. Tilghman*, 134 F.3d 414, 416 (D.C. Cir. 1998) (explaining that judges may not ask witnesses questions that suggest their belief or disbelief because judges “wield enormous influence over juries”).

78. *Eckert*, 551 N.E.2d at 824.

79. *See id.* at 823–25 (holding that a judge’s hostile conduct toward the defense attorney in front of the jury deprived the defendant of a fair and impartial trial).

80. *People v. Conyers*, 487 N.W.2d 787, 789 (Mich. Ct. App. 1992) (holding that the defendant was deprived of a fair trial when the judge said, among other things, that he could not presume the defendant to be innocent).

81. *See Cicchini, supra* note 35, at 1288.

82. *See Brown v. State*, 678 So. 2d 910, 913 (Fla. Dist. Ct. App. 1996).

83. *See supra* notes 79–82 and accompanying text.

84. *See supra* notes 75–79 and accompanying text.

85. *See, e.g., Gray, supra* note 43, at 1270; Swisher, *supra* note 33, at 786.

categorize errors that, due to their severity and consequences, exceed the scope of “mere legal error” that is undeserving of discipline.⁸⁶

Typically, these errors include instances in which a judge has failed to comply with the law such that a defendant’s due process rights have been stripped away. This harkens back to Judge Hayes, whose failure to follow the law resulted in the wrongful incarceration of multiple defendants.⁸⁷ Other examples include judges finding a defendant guilty without a guilty plea or trial,⁸⁸ knowingly convicting a defendant of an offense with which they were not charged,⁸⁹ detaining a juvenile for nearly six weeks without the assistance of counsel,⁹⁰ and failing to inform defendants of their constitutional right to a grand jury indictment.⁹¹

These violations pose a significant threat to defendants because each is capable of inflicting “illegal losses of life, freedom, or constitutional safeguards.”⁹² In committing these errors, judges fail to fulfill their role as an arbiter of a defendant’s fundamental constitutional rights, causing detrimental and often irreversible consequences for defendants.⁹³

C. *Methods in Place to Rein in Judicial Misconduct*

When judges commit misconduct, there are limited methods by which they can be disciplined. Judges have absolute immunity and therefore cannot be sued for acts committed within their capacity as judges.⁹⁴ In light of this immunity from suit, the availability of disciplinary or corrective measures that *can* be imposed often depends on whether the judge is a state or federal judge. For example, if a federal judge commits misconduct that warrants removal, only Congress has the authority to remove them.⁹⁵ At the state level, state governments vest the power of removal in either the highest court of that state or a judicial conduct commission.⁹⁶

This section focuses on the procedures used to regulate and discipline state judges’ conduct, given that the majority of criminal convictions occur at the

86. See Gray, *supra* note 43, at 1270. “Mere legal error” is explained in more depth in Part I.C.3.

87. See generally Complaint, *supra* note 14.

88. See Comm’n on Jud. Performance v. Wells, 794 So. 2d 1030, 1034 (Miss. 2001) (public reprimand for convicting a defendant based on affidavits alone); *In re Hise* (N.Y. Comm’n on Jud. Conduct May 17, 2002), <http://www.scjc.state.ny.us/determinations/h/hise.htm> [<https://perma.cc/B86B-D95Y>] (relying on a defendant’s incriminating statements at arraignment to convict an unrepresented defendant and impose a jail sentence without a trial).

89. See *In re Brown*, 527 S.E.2d 651, 657 (N.C. 2000).

90. See *In re Benoit*, 487 A.2d 1158, 1167 (Me. 1985).

91. See *In re Williams*, 987 S.W.2d 837, 842–44 (Tenn. 1998) (removing the judge in part for failing to inform the defendant of their right to grand jury indictment, right to cross-examination, and right to counsel).

92. Swisher, *supra* note 33, at 779.

93. See *id.* at 778–79.

94. See *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967).

95. See U.S. CONST. art. I, § 3, cl.7; *id.* art. II, § 4.

96. See *infra* note 201 and accompanying text.

state level.⁹⁷ Part I.C.1 explains the codes of conduct that are meant to guide judges' behavior. Part I.C.2 details the commissions that are tasked with investigating and typically recommending discipline for judicial misconduct. Finally, Part I.C.3 discusses the role played by appellate review of judicial error in the disciplinary scheme and how judicial errors differ from judicial misconduct.

1. The Judicial Codes of Conduct

There are multiple ethics codes that govern the conduct of judges. The Code of Conduct for United States Judges, for example, establishes the ethical obligations of federal judges in the United States.⁹⁸ For state judges, the ABA has promulgated several codes for the purpose of instructing proper judicial conduct and establishing a basis for disciplinary action when judges fail to adhere to those standards.⁹⁹ Two such codes are the ABA's Model Code of Judicial Conduct and the ABA's Criminal Justice Standards: Special Functions of the Trial Judge.¹⁰⁰

Although the ABA designed its Model Code of Judicial Conduct to be "mandatory and enforceable,"¹⁰¹ it is not directly binding on state judges.¹⁰² Rather, it is meant to provide uniform ethical standards for states to rely on in drafting their respective versions of these codes.¹⁰³ All states have adopted this code in some form, and most have altered it to their choosing.¹⁰⁴ The ABA's Criminal Justice Standards: Special Functions of the Trial Judge, on the other hand, lay out specific guidelines for judges conducting criminal trials.¹⁰⁵ The states have not uniformly adopted these standards, but both

97. See, e.g., Beth Schwartzapfel, Abbie VanSickle & Annaliese Griffin, *The Truth About Trials*, MARSHALL PROJECT (Nov. 4, 2020), <https://www.themarshallproject.org/2020/11/04/the-truth-about-trials> [<https://perma.cc/56KS-7X2H>]; Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST. (Dec. 2, 2015), <https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases> [<https://perma.cc/JLR5-DTBR>].

98. See CODE OF CONDUCT FOR U.S. JUDGES, introductory cmt. (JUD. CONF. OF THE U.S. 2019).

99. See generally MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 2010); STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE (AM. BAR ASS'N 2000).

100. See generally MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 2010); STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE (AM. BAR ASS'N 2000).

101. Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. L. REV. 1, 3 (1988).

102. See *infra* note 106.

103. See Shaman, *supra* note 101, at 20.

104. See Gray, *supra* note 43, at 1246 n.4 ("Forty-nine states, the U.S. Judicial Conference, and the District of Columbia have adopted codes based on (but not identical to) either the 1972 or 1990 model codes."). At the time of Gray's article, Montana was the only state that had not adopted any version of the ABA's code. *Id.* This changed in 2009 when Montana updated its code based on the ABA's Model Code. See generally *In re* 2008 Mont. Code of Jud. Conduct, No. AF 08-0203, 2008 Mont. LEXIS 825 (Dec. 12, 2008).

105. See generally STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE (AM. BAR ASS'N 2000).

state and federal courts often cite them as guidance for descriptions of judges' ethical duties in the courtroom.¹⁰⁶

As discussed in Part I.A.1, the ethical standards imposed by these codes emphasize the importance of preserving judicial integrity, impartiality, and propriety.¹⁰⁷ Often, the code upholds these values by mandating that judges use their supervisory authority over the courtroom to protect the rights of litigants.¹⁰⁸ Some rules provide for the explicit protection of defendants' rights; for example, by requiring judges to safeguard the rights of the accused and to ensure that they receive a fair outcome.¹⁰⁹ Others require judges to protect the rights of litigants more generally, for example, by ensuring that all parties have the right to be heard and are behaving with dignity and courteousness.¹¹⁰ Judges are also tasked with protecting these rights outside of the courtroom, as they are required to report other instances of legal officials' misconduct.¹¹¹

To help enforce the codes of conduct, the ABA promulgated the Model Rules for Judicial Disciplinary Enforcement in 1994.¹¹² These rules do not impose direct ethical obligations and prohibitions on judges like the Model Code of Judicial Conduct does. Instead, they advise states on how to run their judicial conduct commissions, which oversee allegations of judicial misconduct.¹¹³ In the preamble to these rules, the ABA acknowledges that each state can make the choice to accept or modify the rules, which are merely meant to guide the drafting of enforcement procedures.¹¹⁴ For example, the rules clarify that a "Commission on Judicial Conduct" will administer judicial discipline,¹¹⁵ instruct how those commissions are to be organized,¹¹⁶ determine disciplinary grounds for misconduct,¹¹⁷ create the procedure for initiating disciplinary proceedings,¹¹⁸ and so forth.

2. Judicial Conduct Commissions

As mentioned above, judicial conduct commissions investigate allegations of state judges' misconduct.¹¹⁹ These commissions have jurisdiction over

106. *See, e.g.*, *Richardson v. Palmer*, 941 F.3d 838, 854 (6th Cir. 2019); *Commonwealth v. Williams*, 215 A.3d 1019, 1029 (Pa. Super. Ct. 2019); *State v. Carey*, 856 N.W.2d 1, 11 (Iowa Ct. App. 2014); *Douglas v. State*, 214 P.3d 312, 331 (Alaska 2009) (Fabe, C.J., dissenting).

107. *See supra* Part I.A.1 and accompanying text.

108. *See* STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1 (AM. BAR ASS'N 2000).

109. *See id.*

110. *See* MODEL CODE OF JUD. CONDUCT r. 2.6 (AM. BAR ASS'N 2010); *id.* r. 2.8.

111. *See id.* r. 2.15.

112. *See* MODEL RULES FOR JUD. DISCIPLINARY ENF'T preface (AM. BAR ASS'N 2018).

113. *See id.* at pmb1.

114. *Id.*

115. *Id.* r. 2.

116. *Id.* r. 3.

117. *Id.* r. 6.

118. *Id.* rs. 17–25.

119. *See* CYNTHIA GRAY, AM. JUDICATURE SOC'Y, STATE JUST. INST., A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 3 (2002), https://www.ncsc.org/_data/assets/pdf_file/0026/18881/study-of-state-judicial-discipline-sanctions.pdf [<https://perma.cc/KA47-2EAP>]

trial judges, intermediate appellate judges, and judges of the highest state court.¹²⁰ Each state has its own conduct commission,¹²¹ created through either the state's constitution, a statute, or a court rule.¹²² These commissions are usually composed of a mix of judges, lawyers, and laypeople, although this varies state by state.¹²³ The highest court of the state typically elects the members of the commission.¹²⁴ Described as holding an “awkward” position in the justice system, commissions receive thousands of complaints every year and receive criticism from the public and judges alike for their determinations on these complaints.¹²⁵

Although commission procedure varies across the states, each generally adheres to a similar process.¹²⁶ First, the commission will begin an investigation upon the receipt of a complaint, which may be filed by a lawyer, another judge, or even a layperson.¹²⁷ If the commission does not find probable cause that the judge committed misconduct, or if it lacks jurisdiction over the subject matter, it will dismiss the complaint.¹²⁸ If instead the commission does find probable cause, formal proceedings begin.¹²⁹ The commission initiates these proceedings by filing a formal charge or complaint against the judge, which the judge may answer.¹³⁰ Then, a factfinding hearing is held in which the commission adjudicates the charges and determines whether discipline is warranted.¹³¹ The commission will then, depending on its disciplinary authority, either impose the discipline itself or recommend that discipline to the state's highest court.¹³²

When deciding whether a judge has committed misconduct, the ABA instructs that commissions look for violations of the relevant ethics code.¹³³ Disciplinary action may consist of private admonitions, public reprimand, suspension, and even removal from office.¹³⁴ However, most states have not

(“Each of the 50 states and the District of Columbia has established a judicial conduct organization charged with investigating and prosecuting complaints against judicial officers.”).

120. Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY L.J. 811, 814 (1988).

121. GRAY, *supra* note 119, at 3.

122. Twenty-eight states have created their commissions through constitutional amendment, sixteen through statute, and seven through court rules. *See* Gray, *supra* note 1, at 406–07.

123. *See id.* at 406. The fact that judges themselves serve on these commissions has elicited criticism from those skeptical of their ability to be impartial when judging the conduct of other judges. *See, e.g.,* Berens & Shiffman, *supra* note 11.

124. *See* Gray, *supra* note 1, at 406.

125. *See id.* at 417.

126. *See id.* at 405. For more detailed information on the procedure, structure, and membership of these commissions, see generally Shaman, *supra* note 120.

127. *See* Gray, *supra* note 1, at 408.

128. *See id.*

129. *See id.* at 413.

130. *See id.* at 414.

131. *Id.* This step may not be reached if the judge reaches an agreement with the commission or resigns. *Id.*

132. *Id.*; *see also infra* Part I.E.1.

133. *See* MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 2 cmt. (AM. BAR ASS'N 2018).

134. *See id.* r. 6(1).

granted their conduct commissions extensive disciplinary authority.¹³⁵ Instead, commissions typically must recommend their preferred sanction to the state's highest court after conducting an investigation, and the court will then either approve or decline to enforce it.¹³⁶ Perhaps this is because the purpose of commissions is not necessarily to punish bad judges—rather, commissions describe their purpose as the maintenance of public confidence in the judiciary and protection of the public from misconduct.¹³⁷

Commissions may have authority over allegations of judicial misconduct, but they lack any authority over judicial acts that are considered to be “mere legal errors.”¹³⁸ The review of these errors is solely within the jurisdiction of appellate courts.¹³⁹ It is not always clear which errors constitute misconduct and which constitute mere legal errors, but delineations exist in each state's code of judicial conduct.¹⁴⁰ Scholars have identified several categories of error that constitute misconduct, such as bad-faith errors, egregious errors, patterns of errors, and failure to adhere to proper contempt procedures.¹⁴¹ These categories are often reflected in state codes of conduct and attempt to limit the conduct that is reachable by judicial conduct commissions.¹⁴² The next section will provide a more in-depth explanation of the types of errors that fall within the jurisdiction of appellate review.

3. Appellate Review

Commissions may recommend judicial discipline, but only appellate courts have the authority to vacate a judge's erroneous decision.¹⁴³ This is because appellate review serves a different purpose than commission discipline: commissions aim to prevent prejudice to future litigants, and appellate review aims to correct legal error that prejudiced former litigants.¹⁴⁴ Appellate review entails an evaluation of a decision's merits,

135. See *infra* Part I.E.1.

136. See *infra* Part I.E.1.

137. See, e.g., *Mission Statement*, TEX. ST. COMM'N ON JUD. CONDUCT, <http://www.scjc.texas.gov/about/mission-statement/> [<https://perma.cc/UCX8-AX9N>] (last visited Oct. 6, 2023); *Adams v. Comm'n on Jud. Performance*, 897 P.2d 544, 548 (Cal. 1995).

138. See *In re Benoit*, 487 A.2d 1158, 1162–63 (Me. 1985); see also Gray, *supra* note 43, at 1245–46.

139. See Gray, *supra* note 43, at 1245–46.

140. See *id.* at 1277–78.

141. See generally Gray, *supra* note 43.

142. See, e.g., ARIZ. CODE OF JUD. CONDUCT r. 2.2 cmt. (2021) (“A good faith error of fact or law does not violate this rule. However, a pattern of legal error or an intentional disregard of the law may constitute misconduct.” (emphasis added)); MASS. CODE OF JUD. CONDUCT r. 2.2 cmt. (2022) (“In the absence of fraud, corrupt motive, or clear indication that the judge's conduct was in bad faith or otherwise violates this Code, it is not a violation for a judge to make findings of fact, reach legal conclusions, or apply the law as the judge understands it.” (emphasis added)).

143. See Gray, *supra* note 43, at 1245.

144. See *In re Laster*, 274 N.W.2d 742, 745 (Mich. 1979) (“One path [appellate review] seeks to correct past prejudice to a particular party; the other [commission discipline] seeks to prevent potential prejudice to future litigants and the judiciary in general.”); see also Gray, *supra* note 43, at 1248.

typically resulting in a determination that the judge misunderstood the law, misapplied the law, made an incorrect finding of fact, or abused their discretion.¹⁴⁵ Courts have acknowledged that these types of errors are not judicial misconduct, as they are not ethical violations.¹⁴⁶ These errors only receive appellate review because they are, after all, mere errors; state judges have very large caseloads, and sometimes they make mistakes.¹⁴⁷ Absent bad faith, there is little reason to discipline judges for these mere mistakes.¹⁴⁸

However, as discussed above, due to the difficulty in distinguishing between misconduct and mere legal error, there is some overlap between the two.¹⁴⁹ Thus, in some cases, both commission discipline and appellate review may be necessary to correct prejudicial errors.¹⁵⁰ For example, an egregious error that results in the deprivation of a defendant's constitutional rights may justify both commission discipline and appellate review.¹⁵¹ Therefore, although appellate review and commission discipline serve different purposes, the appealability of an erroneous decision does not necessarily preclude a commission from investigating that same decision for misconduct.¹⁵²

D. Conceptual Foundations of the Current Judicial Disciplinary Structure

The current judicial disciplinary system relies on the balancing of two interrelated concepts: procedural justice and judicial independence.¹⁵³ Procedural justice theory posits that the public gives judges' decisions greater respect and authority when they perceive those decisions to be fair.¹⁵⁴ Still, maintaining public confidence in the judiciary should not infringe on judicial independence, which requires that judges have the discretion to make honest and fair decisions unencumbered by inappropriate external influences.¹⁵⁵

Part I.D.1 of this section explains procedural justice theory and the importance it places on public confidence in the judiciary. Then, Part I.D.2 covers judicial independence and the importance of maintaining a self-regulating judiciary. Finally, in Part I.D.3, this Note considers the intersection of procedural justice and judicial independence.

145. See Gray, *supra* note 43, at 1245; Swisher, *supra* note 33, at 780.

146. See, e.g., *In re Comm'n on Jud. Tenure & Discipline*, 916 A.2d 746, 754–55 (R.I. 2007); *In re Curda*, 49 P.3d 255, 258 (Alaska 2002); *Oberholzer v. Comm'n on Jud. Performance*, 975 P.2d 663, 680 (Cal. 1999).

147. See Gray, *supra* note 43, at 1246–47. State statutes and codes of conduct also support this notion. See, e.g., COLO. RULES OF JUD. DISCIPLINE r. 5 (2023); MASS. GEN. LAWS, ch. 211C, § 2(4) (2023); RULES OF THE MINN. BD. ON JUD. STANDARDS r. 4(c) (2023); PROC. RULES OF THE NEV. COMM'N ON JUD. DISCIPLINE r. 8 (2018).

148. See *supra* note 147 and accompanying text.

149. See *supra* Part I.C.2.

150. See Gray, *supra* note 43, at 1248.

151. See *id.* at 1270.

152. See *id.* at 1247–48.

153. See *infra* Parts I.D.1–2.

154. See *infra* Part I.D.1.

155. See *infra* Part I.D.2.

1. Procedural Justice

Due to the public's great trust and confidence in the judiciary, judges have heightened ethical obligations—even more so than attorneys.¹⁵⁶ The judicial codes of conduct place great emphasis on the preservation of public confidence in the judiciary and bestow affirmative obligations on judges to maintain this confidence.¹⁵⁷ When judges violate the codes of conduct by committing misconduct, they cause detrimental harm to public confidence in the judiciary.¹⁵⁸

The emphasis that both courts and the judicial codes of conduct place on public confidence is deeply connected to the concept of procedural justice.¹⁵⁹ Procedural justice scholars stipulate that the public is less likely to view legal authorities as legitimate and worthy of respect when they lack confidence that those authorities are treating them fairly.¹⁶⁰ Justice Anthony M. Kennedy echoed these principles when he wrote “[t]he power of a court, the prestige of a court, the primacy of a court stand or fall by one measure and one measure alone: the respect accorded its judgments.”¹⁶¹ Therefore, the conservation of respect for the judiciary depends, in great part, on the procedural fairness of its decisions.¹⁶²

According to scholars of procedural justice theory, the loss of public trust in the judiciary's legitimacy poses two dire consequences for the judiciary. First, when the public no longer views authorities as legitimate, it becomes less likely to comply with their directives.¹⁶³ After all, “[i]f citizens do not trust the system, they will not use it.”¹⁶⁴ This concern has grown in recent years. Research shows that the public has recently been losing trust in the law and legal authorities, which has led to a decline in the desire to obey

156. See *In re Piper*, 534 P.2d 159, 164 (Or. 1975) (holding that judges must be held to higher ethical standards than attorneys because the judiciary commands more trust and confidence); *Hayes v. Ala. Ct. of the Judiciary*, 437 So.2d 1276, 1278 (Ala. 1983) (“Judges are not to be measured by the standards of ordinary men and women. Because of the awesome responsibilities of their office (and corresponding awesome powers), the public expects them to be a cut above the ordinary.”).

157. See CODE OF CONDUCT FOR U.S. JUDGES Canon 1 cmt. (JUD. CONF. OF THE U.S. 2019) (“Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges”); MODEL CODE OF JUDICIAL CONDUCT pmbl. (AM. BAR ASS'N 2010) (“Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must . . . strive to maintain and enhance confidence in the legal system.”).

158. CODE OF CONDUCT FOR U.S. JUDGES Canon 1 cmt. (JUD. CONF. OF THE U.S. 2019) (“[V]iolation of this Code diminishes public confidence in the judiciary and injures our system of government under law.”).

159. See *infra* notes 160–62 and accompanying text.

160. See TYLER & HUO, *supra* note 30, at 49–51; see also Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1069 (1996).

161. See Kennedy, *supra* note 160, at 1067.

162. See *id.*

163. See, e.g., TYLER & HUO, *supra* note 30.

164. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 291 (2003) (quoting Mark H. Moore, *Legitimizing Criminal Justice Policies and Practices*, FBI L. ENF'T BULL., Oct. 1997, at 14).

those authorities.¹⁶⁵ Increases in public noncompliance are concerning; general compliance by the public is necessary for a properly functioning government because authorities cannot imprison or sanction the entire public for disobedience.¹⁶⁶ The judiciary especially requires long-term compliance with its decisions because it can lose the appearance of efficiency if judges must continually restate their decisions.¹⁶⁷

A second consequence of the loss of public trust in the judiciary could be increased limits on judicial discretion in decision-making and greater constraints on judges' decision-making authority.¹⁶⁸ The judiciary has faced this consequence when public trust in it has faltered in the past. For example, after concerns arose that judges were displaying bias in their sentencing decisions, the guidelines that formerly allowed judges to have a degree of discretion in sentencing defendants were changed to increase constraints on judges' decisions.¹⁶⁹

To avoid these consequences, what should judges do to maintain respect and compliance with their decisions? As mentioned earlier, the perception that judicial decisions are procedurally fair is key for maintaining public respect in the judiciary.¹⁷⁰ Studies show that evidence of "even-handedness and objectivity" in decisions helps promote perceptions of judicial fairness.¹⁷¹ This aligns with various judicial codes of conduct that repeatedly echo the importance of judges avoiding any indicia of bias, such as through their words, gestures, and treatment of attorneys in the courtroom.¹⁷² These studies, when read together with the codes' emphases on maintaining the appearance of impartiality and propriety,¹⁷³ reflect the idea that not only must judges make fair decisions, but the public must also view them as making those decisions fairly.

2. Judicial Independence

Although courts, judges, and the codes of conduct acknowledge that the judiciary cannot exist without the public's trust, the methods used to maintain

165. *See id.*

166. *See id.* at 290.

167. *See id.*

168. *See id.* at 292.

169. *See id.* (noting that concerns about judicial bias in sentencing has led to mandatory sentencing laws, such as "three strikes" laws that require harsher sentences for repeat offenders).

170. *See supra* notes 160–62 and accompanying text.

171. *See* Tyler, *supra* note 164, at 294.

172. *See* CODE OF CONDUCT FOR U.S. JUDGES Canon 2(A) (JUD. CONF. OF THE U.S. 2019) ("A judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.4 (AM. BAR ASS'N 2000); MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2010).

173. CODE OF CONDUCT FOR U.S. JUDGES Canon 2 (JUD. CONF. OF THE U.S. 2019); STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.6 (AM. BAR ASS'N 2000); MODEL CODE OF JUD. CONDUCT rs. 1.1–1.3, 2.3 (AM. BAR ASS'N 2010).

this trust must not encroach on the judiciary's independence.¹⁷⁴ The principle of judicial independence requires that judges be able to apply the law that they believe to be applicable to a particular case "free from extraneous considerations of punishment or reward."¹⁷⁵ They must have the discretion to make these decisions.¹⁷⁶ Both the ABA's code of conduct and the ethics code for federal judges specifically instruct that these codes must not be construed as to impinge on judicial independence.¹⁷⁷

Although judicial independence is not mentioned in the U.S. Constitution, it is deeply rooted in American history.¹⁷⁸ In a democracy, an independent judiciary is necessary to provide checks and balances on the powers of other branches of government.¹⁷⁹ However, the ability to hold public officials who rule over the citizenry accountable is also necessary in democratic government.¹⁸⁰ The purpose of democracy is to ensure that people can make their voices heard and, in doing so, hold accountable those who are corrupt and abuse their power—judges are subject to these principles, as are any other officials.¹⁸¹ Therefore, there is a perpetual conflict between the maintenance of an independent judiciary and the ability of the public to hold the judiciary accountable for its misgivings.¹⁸²

This conflict mainly arises from those who seek to intervene in the judiciary's independence with ulterior motives.¹⁸³ This includes those whose purpose is not solely to hold corrupt judges accountable, but instead to prevent them from handing down unpopular, yet correct, decisions.¹⁸⁴ If judges feel pressured to alter their decisions in order to avoid punishment, this encroaches on judicial independence.¹⁸⁵

3. The Intersection of Judicial Independence and Procedural Justice

Although judicial independence is important, if left entirely unchecked it has the potential to become a shield for protecting and enabling judicial misconduct.¹⁸⁶ Therefore, judicial independence is deeply interconnected with procedural justice theory—as Justice Kennedy warned, there can be no

174. See David J. Sachar, *Judicial Misconduct and Public Confidence in the Rule of Law*, UNITED NATIONS OFF. ON DRUGS & CRIME, [https://www.unodc.org/dohadeclaration/en/news/2019/08/judicial-misconduct-and-public-confidence-in-the-rule-of-law.html](https://www.unodc.org/dohadecclaration/en/news/2019/08/judicial-misconduct-and-public-confidence-in-the-rule-of-law.html) [https://perma.cc/59KP-56TD] (last visited Oct. 6, 2023).

175. See *In re Curda*, 49 P.3d 255, 261 (Alaska 2002).

176. See *id.*

177. CODE OF CONDUCT FOR U.S. JUDGES Canon 1 cmt. (JUD. CONF. OF THE U.S. 2019); MODEL CODE OF JUDICIAL CONDUCT Scope ¶ 5 (AM. BAR ASS'N 2010).

178. See WARREN, *supra* note 31.

179. See *id.*

180. See *id.*

181. See *id.*

182. See *id.*

183. See *id.*

184. See Sachar, *supra* note 174.

185. See Swisher, *supra* note 33, at 791.

186. See *id.* at 795.

judicial independence without the public perception that judges adhere to their ethical obligations.¹⁸⁷

Judicial misconduct thus poses a great threat to judicial independence, as perceptions of judicial unfairness cause more damage to public confidence than even those of incompetence.¹⁸⁸ This is because “[e]ven isolated acts of judicial misconduct may both tarnish the high idealism [the judiciary’s] self-regulating profession aspires toward and may cause citizens to lose respect for the rule of law.”¹⁸⁹ And when the public loses respect, according to procedural justice theory, the loss of public compliance will follow.¹⁹⁰

Thus, these two concepts can be viewed as an exchange—in exchange for judicial discretion and the right to unimpeded decision making, the judiciary should ensure that the public receives fair and just results.¹⁹¹ Otherwise, in response to misconduct, the public or other branches of government may begin to hold the judiciary accountable by whatever standards they choose.¹⁹² Judicial independence, after all, is only a means to the end of upholding the rule of law and ensuring impartial, just executions of the law.¹⁹³ When it no longer serves the purpose of achieving those ends, it no longer serves the key function of democracy: public accountability.¹⁹⁴

E. Fragmentation Within the Judicial Disciplinary Regime

As discussed above, each state has created its own judicial conduct commission for the purpose of investigating judicial misconduct and promoting public confidence in the judiciary.¹⁹⁵ Despite the ABA’s structural recommendations for these commissions,¹⁹⁶ there is little uniformity across state commissions in their grants of disciplinary authority, frequency of disciplinary action, and confidentiality requirements, as discussed in Parts E.1–3.¹⁹⁷

These differences make it difficult to gauge the effectiveness of commission discipline in deterring judges from committing misconduct, which may pose a threat to procedural justice and raise judicial independence concerns.¹⁹⁸

187. See Kennedy, *supra* note 160, at 1067.

188. See WARREN, *supra* note 31.

189. See Stewart, *supra* note 9, at 477.

190. See *supra* Part I.D.1.

191. See WARREN, *supra* note 31.

192. See *id.*

193. See *id.*

194. See *supra* notes 180–81 and accompanying text.

195. See Gray, *supra* note 119.

196. See *supra* Part I.C.1.

197. See Abel, *supra* note 4, at 1029 (“All [commissions] are administrative agencies, operating according to their own regulations and their states’ rules of administrative procedure . . . [T]here are a number of significant differences among the commissions.”).

198. See *infra* Part II.

1. Range of Disciplinary Abilities

States vary greatly in the types of disciplinary action that they authorize their judicial conduct commissions to impose. For example, California's commission is the only state commission with removal authority.¹⁹⁹ Meanwhile, some states authorize their commissions to administer low-grade private or public discipline, but they may only recommend censure or removal to the highest state court, who will then make the final decision.²⁰⁰ A few other states do not allow their commissions to take any disciplinary action; they must go to the state supreme court for permission, regardless of the severity of the punishment.²⁰¹

When commissions do have the authority to impose public or private discipline, they are usually limited to issuing warnings, reprimands, admonitions, or censures.²⁰² Commissions also vary in their determinations of which forms of discipline to impose, as they typically have individual discretion to choose based on a host of factors.²⁰³ These factors include the frequency of the misconduct, the judge's acknowledgement of their misconduct and attempts to change their behavior, and the effect of the misconduct on the judiciary's integrity.²⁰⁴

2. Frequency of Disciplinary Action

Significant variations in the frequency with which commissions discipline judges not only further demonstrate the fragmented nature of the judicial disciplinary regime, but also belie the efficacy of commission oversight.²⁰⁵ Possibly in connection to this,²⁰⁶ commissions also vary greatly in the amount of funding that they receive from their respective state governments.²⁰⁷ A study of commission discipline rates from 2000 to 2010

199. CAL. CONST. art. VI, § 18(d)(2); *see also* Abel, *supra* note 4, at 1030–31 (noting that it is unusual that California's commission has removal authority because most other states only allow their commissions to impose low-grade discipline).

200. Abel, *supra* note 4, at 1030–31; *see, e.g.*, COLO. R. JUD. DISCIPLINE 37(a) (2023) (requiring the commission to recommend dismissal, sanctions, private disposition, or stipulated resolution to the Colorado Supreme Court); CONN. GEN. STAT. § 51-51n(a) (2023) (allowing a commission to publicly censure a judge, suspend a judge for less than a year, and recommend removal of a judge to the Connecticut Supreme Court after conducting a hearing).

201. *See, e.g., Alabama Appellate Courts: Judicial Inquiry Commission*, ALA. JUD. SYS., <https://judicial.alabama.gov/appellate/jic> [<https://perma.cc/MYH8-9PVN>] (last visited Oct. 6, 2023) (“The Commission does not adjudicate complaints. The Commission does not hold formal hearings, and it cannot impose discipline on judges.”); LA. CONST. art. 5, § 25(C); VA. CODE ANN. § 17.1-902 (2023).

202. *See, e.g.*, ALASKA STAT. § 22.30.011(b) (2023) (“After preliminary informal consideration of an allegation, the commission may . . . informally and privately admonish the judge, or recommend counseling.”); MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 6(2) (AM. BAR ASS'N 2018).

203. *See* Gray, *supra* note 1, at 416.

204. *See In re Deming*, 736 P.2d at 659.

205. *See* Abel, *supra* note 4, at 1029–31.

206. *See generally id.* (finding a correlation between the amount of funding that a commission received with the amount of disciplinary action taken by the commission).

207. *See id.* at 1076.

showed that states who spend more on their commissions tend to have “sophisticated, active judicial conduct commissions” compared to those who spend less.²⁰⁸ Additional data supported this finding by showing a correlation between the number of staff and the frequency of discipline, as a higher number of employees typically requires a higher budget and enables more comprehensive investigations.²⁰⁹

Investigations into judicial misconduct are expensive for commissions and require many staff members.²¹⁰ There are notable examples of commissions having to cease investigations due to a lack of funding. In 1991, Florida’s conduct commission had to put an investigation on pause because it ran out of money and could not restart its investigation until the start of the next fiscal year.²¹¹ Other states have refrained from bringing charges against judges or postponed the initiation of formal proceedings due to insufficient funding.²¹²

This data suggests that there are dangerous consequences of insufficient commission funding. As in Florida, indefinitely paused investigations enable corrupt judges to continue their misconduct for indefinite amounts of time. And in general, fewer investigations can lead to weaker oversight of judicial misconduct.²¹³ Further, it becomes impossible to discern any general trend regarding the frequency of judicial misconduct and the harm it has caused when instances of such misconduct go uninvestigated and thus undisciplined in some states.²¹⁴

3. Lengths of Investigations and Confidentiality Requirements

Finally, commissions lack uniformity in the length of time that they typically require to investigate complaints and the extent to which they keep their disciplinary proceedings confidential. Despite recommendations that commissions provide data on the average timeframe between the filing of a complaint and the disposition of the case, commissions have not done so.²¹⁵ Instead, many commission websites explain that they cannot offer

208. *See id.* at 1066, 1076.

209. *See id.* at 1069.

210. *See id.* at 1071. However, it is important to note that an increase in funding does not always lead to an increase in disciplinary action. *Id.* at 1071–72.

211. Bob Port & Kathleen Ovack, *Judges’ Sealing of Records Could Be Reviewed*, TAMPA BAY TIMES (Feb. 4, 1992), <https://www.tampabay.com/archive/1992/02/04/judges-sealing-of-records-could-be-reviewed/> [<https://perma.cc/9SH2-APN7>].

212. *See* Abel, *supra* note 4, at 1074–75 (“Cost is ‘always’ a motivation for Massachusetts’s Commission to settle cases rather than to take them to formal proceedings; the budget is simply too small to sustain expensive, formal proceedings. In 2010, Georgia’s Commission was ‘poised to bring charges against several judges’ but was unsure if it would ‘be able to do so because its budget [was] running dry,’ according to a news report.” (alteration in original) (quoting Bill Rankin, *Judicial Probes Stalled*, ATLANTA J.-CONST., Dec. 29, 2010, at A1)).

213. *See id.* at 1076.

214. *See generally* Ortiz, *supra* note 34.

215. *See* REBECCA KOURLIS, KEITH SWISHER & RUSSELL WHEELER, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., RECOMMENDATIONS FOR JUDICIAL DISCIPLINE SYSTEMS 17 (2018), https://iaals.du.edu/sites/default/files/documents/publications/recommendations_for_judicial_discipline_systems.pdf [<https://perma.cc/H559-CD4J>].

complainants such a timeline, as some complaints take longer to investigate than others.²¹⁶ However, because confidentiality begins immediately upon the filing of a complaint, the complainant cannot inquire into the status of the complaint or whether an investigation has even begun.²¹⁷

Not only are the investigatory proceedings kept largely confidential, but states also vary in the stages at which confidentiality ends in the disciplinary process.²¹⁸ For example, thirty-five state conduct commissions keep their proceedings confidential until either a filing of formal charges or when the judge's answer to such charges is due.²¹⁹ The remaining fifteen, as well as Washington, D.C., keep proceedings confidential even longer: until the commission files their recommendation for discipline with the highest state court or when the court orders discipline.²²⁰

Despite the great extent of confidentiality required, the commissions are still tasked with maintaining public confidence in the judiciary by providing accountability for judicial misconduct.²²¹ In reality, due to their stringent confidentiality requirements, it is unlikely that the public will ever know that commissions are holding judges accountable unless their misconduct results in formal charges.²²²

II. ARGUMENTS FOR AND AGAINST MAINTAINING COMMISSION SECRECY

As discussed in the previous section, the lack of uniformity among commissions can make the effectiveness of commission discipline difficult to gauge.²²³ Moreover, not only are instances of judicial misconduct rarely reported,²²⁴ but it is also hard to know when commissions discipline judges

216. See, e.g., *Filing a Complaint*, STATE CAL. COMM'N ON JUD. PERFORMANCE, https://cjp.ca.gov/file_a_complaint/ [<https://perma.cc/86N7-BPR8>] (last visited Oct. 6, 2023); *FAQ*, N.Y. STATE COMM'N ON JUD. CONDUCT, <https://cjc.ny.gov/FAQ.html#HowLong> [<https://perma.cc/653C-29JE>] (last visited Oct. 6, 2023); *Frequently Asked Questions*, OFF. STATE COMM'N ON JUD. CONDUCT, <http://www.scjc.texas.gov/faq/> [<https://perma.cc/3KUR-5SJ3>] (last visited Oct. 6, 2023).

217. See, e.g., *Overview of Commission Proceedings*, STATE CAL. COMM'N ON JUD. PERFORMANCE, https://cjp.ca.gov/complaint_process/ [<https://perma.cc/GD26-E6Q2>] (last visited Oct. 6, 2023); *FAQ*, *supra* note 216.

218. See *infra* notes 219–20.

219. These states are Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin. NAT'L CTR. FOR STATE CTS., *WHEN CONFIDENTIALITY CEASES IN FORMAL JUDICIAL DISCIPLINE PROCEEDINGS* (2020), https://www.ncsc.org/_data/assets/pdf_file/0022/37633/Confidentiality_table.pdf [<https://perma.cc/T3KN-FVB8>].

220. These states are Colorado, Delaware, Hawaii, Idaho, Iowa, Maine, Mississippi, Missouri, New Mexico, New York, North Carolina, South Dakota, Utah, Virginia, and Wyoming. *Id.*

221. See Abel, *supra* note 4, at 1024–25.

222. See *id.* at 1025.

223. See *id.* at 1031.

224. See Cicchini, *supra* note 35, at 1266.

if they choose to do so privately.²²⁵ Thus, the public usually does not know when judges are committing misconduct, nor if they are staying on the bench and continuing to engage in even more misconduct.²²⁶ In fact, studies suggest that many judges are not learning from their mistakes.²²⁷

Currently, commissions have no obligation to disclose judicial misconduct to the public unless their investigation results in formal charges, a recommendation for discipline, or court-ordered discipline.²²⁸ However, when the public finds out about instances of misconduct that have been swept under the rug for years, many ask whether judicial misconduct should still be entitled to confidentiality.²²⁹ These concerns become even more pronounced when judicial misconduct results in unfair trials or the deprivation of an individual's fundamental rights.²³⁰ Although some argue that keeping the public in the dark about judicial misconduct is better for maintaining its trust,²³¹ others worry that this poses a risk to the independence of the judiciary.²³² After all, in recent years, the public has desired to become more informed about government functions and official misconduct.²³³ Too much transparency may have its own deleterious consequences on judicial independence and public confidence.²³⁴

This section explores arguments for and against maintaining commission confidentiality. Part II.A analyzes claims that confidentiality preserves judicial independence, judges' reputations, and public confidence, as well as the claim that it is supported by court precedent. Part II.B follows, which

225. See generally Ortiz, *supra* note 34 (“It’s highly unlikely that any state would have a judiciary that is so above reproach that year after year no one gets disciplined.” (quoting Robert Tembeckjian, the administrator and counsel of the New York State Commission on Judicial Conduct)).

226. See Berens & Shiffman, *supra* note 11.

227. See RUSSELL GANZI, ERICA KANG & DAVID RIZK, STATE OF CAL. COMM’N ON JUD. PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS: 1990–2009, at 16 (2012), https://cjp.ca.gov/wp-content/uploads/sites/40/2016/09/Statistical_Report_1990-2009.pdf [<https://perma.cc/WLC2-T6HX>] (finding, in an examination of disciplinary actions between 1990 and 2009, that more than half of the proceedings involved second-time offenders); see also Berens & Shiffman, *supra* note 11.

228. See *supra* Part I.E.3.

229. See Stewart, *supra* note 9, at 477 (explaining that mere public perception that judicial misconduct is occurring can hurt the judiciary’s effectiveness); see also Berens & Shiffman, *supra* note 11 (quoting Professor Stephen Giller’s statement that the public would be appalled at how leniently judges are treated for significant misconduct).

230. See generally Klein, *supra* note 45; see also Cicchini, *supra* note 35, at 1267 (“[J]udicial misconduct often violates several of the criminal defendant’s important statutory and constitutional rights. This is true even when the judge’s misconduct is not directed at the defense in particular The bigger problem, however, is that judicial misconduct often is directed at the defense.”).

231. See *infra* Part II.A.1.

232. See *infra* Part II.B.1.

233. See Kennedy, *supra* note 160, at 1067; see also GROSS ET AL., *supra* note 39, at 3 (discussing the increased public focus on police misconduct in the wake of the Black Lives Matter movement); Ortiz, *supra* note 34 (discussing arguments by judicial ethics experts that it is necessary for the public to be able to scrutinize judicial conduct, especially in light of recent calls for policing and prosecutorial overhauls).

234. See *infra* Parts II.A.1–3.

reviews claims that transparency of commission proceedings is supported by the desire for increased public accountability and justifications for a constitutional right of access.

A. For Maintaining Confidentiality

The main arguments in support of commission confidentiality emphasize the importance of protecting judicial independence and judges' reputations.²³⁵ Part II.A.1 and Part II.A.2 discuss each of these arguments in turn. Part II.A.3 introduces an additional argument that confidentiality actually maintains public confidence by preventing the public from learning about frivolous accusations against judges. Finally, Part II.A.4 analyzes the argument that confidentiality is further supported by the fact that there is no constitutional right of access to commission proceedings.

1. Confidentiality Preserves Judicial Independence

Many features of the current judicial conduct commission system are designed to promote a self-regulating judiciary, which is necessary to preserve judicial independence.²³⁶ An example of this can be seen in the limited disciplinary authority given to commissions.²³⁷ As discussed in Part I.E.1, commissions usually only have authority to impose low-level discipline and must recommend other disciplinary action to the state's highest court.²³⁸ Such limits on commission disciplinary authority promote judicial independence by allowing the highest state courts to have the final say in disciplinary decisions.²³⁹

Commission confidentiality requirements are also in place to preserve the judiciary's ability to self-regulate and stay independent.²⁴⁰ Many justifications for commission confidentiality center around judicial self-regulation: keeping proceedings confidential until a filing of formal charges allows judges to fix their mistakes or resign from their positions without public embarrassment.²⁴¹ Courts, too, have explicitly stated that the confidentiality of judicial disciplinary proceedings serves the purpose of maintaining judicial independence.²⁴²

235. See Bryan E. Keyt, *Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment: A Justification Based Analysis*, 7 GEO. J. LEGAL ETHICS 959, 966 (1994) (explaining that the primary arguments in support of confidentiality are the desires to protect the reputation and independence of the judiciary).

236. See Randy J. Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability*, 5 WIDENER L. SYMP. J. 117, 132–33 (2000); Kennedy, *supra* note 160, at 1067–68 (explaining that, in order to preserve judicial independence, it is important for the judiciary to set its own standards and regulate claims of judicial misconduct itself).

237. See Holland & Gray, *supra* note 236, at 132–33.

238. See *supra* Part I.E.1.

239. See Holland & Gray, *supra* note 236, at 132–33; see also Kennedy, *supra* note 160, at 1067–68.

240. See *infra* note 242 and accompanying text; see also Keyt, *supra* note 235, at 966.

241. See Keyt, *supra* note 235, at 966.

242. See *Garner v. Cherberg*, 765 P.2d 1284, 1288 (Wash. 1988); *Pangerl v. Ehrlich*, No. CV 06-1464, 2007 WL 1317261, at *1 (D. Ariz. May 4, 2007).

Confidentiality also satisfies judicial independence concerns by insulating the judiciary from any “improper influence” that might accompany more extensive disclosure.²⁴³ However, judicial independence does not shield the judiciary from all forms of influence;²⁴⁴ in fact, the judicial codes of conduct actually encourage judges to expect criticism and negative publicity.²⁴⁵ The public’s behavior only risks improperly influencing the judiciary when they go beyond mere criticism, such as when they attempt to intimidate judges or retaliate against them.²⁴⁶

Therefore, supporters of confidentiality worry that if commission proceedings are public and elicit negative publicity, the public may retaliate against the judiciary and attempt to take judicial discipline into their own hands.²⁴⁷ This risks improperly influencing judges to make decisions in line with their perceptions of the public’s expectations rather than what they believe to be correct.²⁴⁸ For this reason, opening up commission disciplinary proceedings could result in an improper influence that would directly contravene judicial independence.²⁴⁹

In sum, any standards used to govern the judiciary must give deference to their independence and enable them to “craft justice” in a particular case.²⁵⁰ Disclosing commission records prematurely, however, risks violating these standards by provoking public intervention in judges’ decisions and inhibiting the judiciary’s independence.²⁵¹

2. Confidentiality Protects Judges’ Reputations

Another justification for maintaining confidentiality of commission proceedings is the protection it provides to judges’ reputations.

243. See *Garner*, 765 P.2d at 1288 (listing the protection of commissions from outside influence on their decision-making processes as one justification for confidentiality of proceedings).

244. See WARREN, *supra* note 31.

245. See CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(1) (JUD. CONF. OF THE U.S. 2019); STANDARDS FOR CRIM. JUST.: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.6(e) (AM. BAR ASS’N 2000); MODEL CODE OF JUD. CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS’N 2010).

246. See WARREN, *supra* note 31.

247. See MODEL RULES FOR JUD. DISCIPLINARY ENF’T r. 11 cmt. (AM. BAR ASS’N 2018) (“Disclosing the existence of complaints that were considered and dismissed is unfair to the judge and undermines the work of the commission. It is unfair to allow any adverse inferences to be drawn from the mere existence of a complaint”); see also WARREN, *supra* note 31 (explaining that if judicial power is not exercised fairly or effectively, others may attempt to check judicial authority and interfere in judicial processes).

248. See WARREN, *supra* note 31 (explaining that when judges are held accountable by the standards chosen by those outside of the judicial branch, this “assaults” judicial independence).

249. See *supra* notes 243–46 and accompanying text.

250. Swisher, *supra* note 33, at 801.

251. See Keyt, *supra* note 235, at 961 (“At the forefront of the disciplinary rules are confidentiality provisions which are designed to protect the proceedings from an invasion of the press and the public into specific stages of the disciplinary process. Presumably these confidentiality rules are designed for the purpose of maintaining an independent and honorable judiciary.”).

First, this justification finds support in the ABA's Model Rules for Judicial Disciplinary Enforcement.²⁵² The ABA claims that the confidentiality requirements carefully balance a judge's interest in the confidentiality of complaints against the public's interest in ensuring that commissions take allegations of misconduct seriously.²⁵³ More specifically, Rule 11 states that confidentiality of commission investigations is necessary in the event that complaints are frivolous or unfounded.²⁵⁴ If the investigation results in formal charges, only then does the balance shift in favor of the public's "right to know" about the misconduct; there is no longer any risk of frivolity.²⁵⁵

Court precedent provides further support that the protection of the reputation of judges is a justification for confidentiality.²⁵⁶ The explanation is rooted in the concern that judges, unable to satisfy all parties before them, will be subjected to "unexamined and unwarranted complaints by disgruntled litigants or their attorneys, or by political adversaries"²⁵⁷ The disclosure of these frivolous complaints allegedly violates the constitutional right of privacy that a judge has in their reputation.²⁵⁸ Additionally, the U.S. Supreme Court has stated that there is a legitimate state interest in maintaining the confidentiality of commission proceedings and that states also have an interest in protecting judges' reputations.²⁵⁹

The protection of judges from frivolous and malicious complaints is a prominent justification for keeping commission proceedings confidential, but this justification raises a question regarding the frequency of frivolous complaints. Proponents of confidentiality argue that, because a large number of complaints are dismissed early on in the investigative process, many of those complaints must be frivolous.²⁶⁰ These supporters further point to the fact that many complainants misunderstand the role of the conduct commissions and file complaints over which commissions have no jurisdiction.²⁶¹ For example, many file complaints alleging that a judge made a legal error, which is only correctable by an appellate court²⁶²—commissions have no authority to overturn rulings.²⁶³

252. See MODEL RULES OF JUD. DISCIPLINARY ENF'T pmbl. (AM. BAR ASS'N 2018); see also *id.* r. 11 cmt.

253. *Id.* pmbl.

254. See *id.* r. 11 cmt.

255. See *id.*

256. See *infra* notes 257–59 and accompanying text.

257. Comm'n on Jud. Performance v. Superior Ct., 67 Cal. Rptr. 3d 434, 436 (Ct. App. 2007); see also *Landmark Comm'ns, Inc. v. Virginia*, 435 U.S. 829, 835 (1978) ("[C]onfidence in the judiciary . . . is maintained by avoiding premature announcement of groundless claims of judicial misconduct . . . since it can be assumed that some frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants.").

258. See Keyt, *supra* note 235, at 967.

259. See *Landmark*, 435 U.S. at 841. However, the Court ultimately held that these interests do not outweigh the First Amendment right to free speech. See *id.* at 829.

260. Keyt, *supra* note 235, at 967.

261. See Gray, *supra* note 43, at 1245.

262. See *id.*

263. See *id.* at 1245–46; Berens & Shiffman, *supra* note 11.

If it is true that complainants sometimes file frivolous complaints, proponents of confidentiality argue that commissions need to weed them out privately before judges' reputations are harmed.²⁶⁴ Thus, confidential commission proceedings uphold the goal of protecting judges' reputations by keeping these complaints secret until the commissions have had a chance to determine their merit.

3. Confidentiality Maintains Public Confidence in the Judiciary

Not only does confidentiality protect the judiciary by preserving its independence and reputation, but, according to its supporters, it is also beneficial for maintaining public confidence in the judiciary.²⁶⁵ Both the ABA and court precedent support this argument.²⁶⁶

Just as premature disclosure of frivolous complaints can harm judges' reputations, it can also harm public confidence in the judiciary. When proceedings or complaints are disclosed too early in the process, there may be a flood of negative media attention to the accusations.²⁶⁷ This, in turn, may cause the public to catastrophize the situation, creating a widespread belief that judicial misconduct is more prevalent than it actually is.²⁶⁸ In reality, as proponents argue, many of these complaints are supposedly frivolous or unfounded, so they are not cause for public concern.²⁶⁹ Nonetheless, prematurely disclosed complaints may end up throwing the propriety of the entire judiciary into doubt.²⁷⁰

Therefore, hasty disclosure in the name of promoting public confidence could ultimately be counterproductive to that goal.²⁷¹ When the judiciary's dignity is undermined, public confidence in the rule of law will be shaken as well.²⁷² The consequences of this public misunderstanding could be catastrophic for the judiciary: if the public no longer views the rule of law as legitimate, they will no longer follow it.²⁷³ Thus, proponents of

264. See *supra* notes 260–62 and accompanying text.

265. See *infra* notes 267–69 and accompanying text.

266. See, e.g., *In re Bennett*, 871 S.E.2d 445, 447 (Va. 2022) (listing maintenance of public confidence in the judiciary as one justification for confidentiality); *Forbes v. Earle*, 298 So.2d 1, 4 (Fla. 1974) (quoting the ABA Commission on Standards of Judicial Administration).

267. See Keyt, *supra* note 235, at 967; Tom Montgomery, *Towards Greater Openness in Judicial Conduct Commission Proceedings: Temporary Confidentiality as an Alternative to Inviolate Confidentiality*—*Garner v. Cherberg*, 111 Wash. 2d 811, 765 P.2d 1284 (1988), 64 WASH. L. REV. 955, 965 (1989).

268. See Keyt, *supra* note 235, at 967; Montgomery, *supra* note 267, at 968.

269. See *supra* notes 260–62 and accompanying text; see also Ortiz, *supra* note 34 (expressing doubt that the high number of allegedly frivolous complaints submitted to commissions explain why so few public sanctions are imposed on judges).

270. *Comm'n on Jud. Performance v. Superior Ct.*, 67 Cal. Rptr. 3d 434, 436 (Ct. App. 2007); see also *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 835 (1978).

271. Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 469 (2004).

272. See *id.*

273. See, e.g., WARREN, *supra* note 31; Ortiz, *supra* note 34 (“If there’s no sense that you can get a fair shake by going into a court of law and have confidence that the judge is going to be neutral and fair and apply the law honestly and responsibly, it’s ultimately going to lead to anarchy” (quoting Robert Tembeckjian)).

confidentiality suggest that the current requirements are the best possible balance between the judiciary's interests and the public's interests.²⁷⁴

4. There Is No Right of Access to Commission Proceeding Records

Finally—in addition to the importance of maintaining judicial independence, judges' reputations, and public confidence—there are constitutional grounds that support an argument against increased disclosure of commission proceedings.

In 1980, the Supreme Court recognized a First Amendment right of access to information from criminal trials.²⁷⁵ States can deny this right by demonstrating a compelling government interest and narrowly tailoring the statute that infringes on the right to that information.²⁷⁶ Courts have subsequently expanded this right of access beyond criminal trials to other types of hearings, such as pretrial suppression hearings and due process hearings.²⁷⁷

Some have therefore argued that judicial disciplinary proceedings are just another type of hearing to which the public has a right of access.²⁷⁸ This argument has not succeeded. Courts have repeatedly refused to establish a constitutional right of the public to access information from confidential commission proceedings.²⁷⁹ They reason that the right of access to information does not receive the same heightened protection that the right to publish and the right to free speech receive.²⁸⁰ Further, the U.S. Court of Appeals for the Third Circuit explained that even if a constitutional right of access to commission proceedings did exist, it would not be as expansive as that of criminal trials.²⁸¹ This is because judicial disciplinary proceedings do not have the same longstanding presumption of openness as do criminal trials.²⁸² State courts are also unwavering on this; they have consistently rejected subpoenas for unpublicized judicial conduct commission investigation records in the name of confidentiality.²⁸³

274. See Miller, *supra* note 271, at 469.

275. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 555 (1980).

276. See *Globe Newspapers Co. v. Superior Ct.*, 457 U.S. 596, 607–08 (1982).

277. See Keyt, *supra* note 235, at 979.

278. See generally Comment, *First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. PA. L. REV. 1163 (1984).

279. See *First Amend. Coal. v. Jud. Inquiry & Rev. Bd.*, 784 F.2d 467, 477 (3d Cir. 1986); *Adams v. Comm. on Jud. Conduct & Disability*, 165 F. Supp. 3d 911, 930 (N.D. Cal. 2016); *Bradbury v. Idaho Jud. Council*, 28 P.3d 1006, 1014–15 (Idaho 2001).

280. *First Amend. Coal.*, 784 F.2d at 472 (“In general, the right of publication is the broader of the two, and in most instances, publication may not be constitutionally prohibited even though access to the particular information may be properly denied.”).

281. See *id.*

282. *In re Bennett*, 871 S.E.2d 445, 449 (Va. 2022) (quoting *First Amend. Coal.*, 784 F.2d at 473).

283. See, e.g., *Stern v. Morgenthau*, 465 N.E.2d 349, 353 (N.Y. 1984) (reversing the appellate court's denial of a motion to quash discovery of commission files on two judges in response to grand jury subpoena, explaining that confidentiality was required for effective commission investigation); *Garner v. Cherberg*, 765 P.2d 1284, 1288 (Wash. 1988) (quashing a subpoena duces tecum issued to the Commission on Judicial Conduct, stating that

In sum, proponents of confidentiality rely on courts' refusals to establish a right of access to commission proceedings as a justification for maintaining confidentiality. The next section will shift to the other side of the debate and examine the arguments in support of increasing transparency in commission proceedings.

B. For Increasing Transparency

This section will discuss the arguments in favor of shortening the lengthy confidentiality requirements of judicial conduct commission proceedings and increasing disclosure. Part II.B.1 reviews the argument that increased transparency of commission proceedings would improve public confidence in the judiciary by guaranteeing judicial accountability through discipline. Part II.B.2 analyzes the argument that, although there is no established right of access to commission proceedings, many justifications for a right of access to criminal trials support the expansion of this right to commission proceedings.

1. Increased Disclosure Would Bolster Public Confidence Through Public Accountability and Increased Discipline

Public accountability is one of the cornerstones of democracy, and democratic governments aim to provide people with methods of holding government officials accountable when they fail to meet the people's needs.²⁸⁴ As discussed in Part I.D.1, public accountability of government officials improves public confidence in those officials, which leads to public perceptions of government legitimacy and increased compliance with officials' orders.²⁸⁵ Both the ABA and courts have recognized the importance of maintaining public confidence in the judiciary and have explained that confidentiality of commission proceedings fulfills this purpose.²⁸⁶ However, it is unclear whether confidentiality of commission proceedings maintains public trust or creates distrust in the judiciary instead.²⁸⁷ In part, this is because the secrecy of proceedings makes it unclear that commissions are effectively holding judges accountable.²⁸⁸ But it is important that commissions are effective because the public has almost no way to hold judges accountable otherwise.²⁸⁹

confidentiality is necessary to preserve judicial independence); Comm'n on Jud. Performance v. Superior Ct., 67 Cal. Rptr. 3d 434, 438–39 (Ct. App. 2007) (concluding that commission records are confidential and therefore not subject to discovery by means of Pitchess motion or subpoena duces tecum).

284. See WARREN, *supra* note 31.

285. See *supra* Part I.D.1.

286. See *supra* Part II.A.3.

287. See Keyt, *supra* note 235, at 985.

288. See Ortiz, *supra* note 34.

289. See *id.* (“Ultimately, ensuring that judges are being rightfully held accountable [by commissions] is essential, because guidance from the U.S. Supreme Court allows them to be largely immune from lawsuits for acts done in their official capacity” (quoting Robert Tembeckjian)).

Proponents of confidentiality argue that commission secrecy is necessary to protect public confidence because it prevents the public from an exaggerated perception of the frequency of judicial misconduct.²⁹⁰ However, this justification relies on the assumption that the public's perception of the judiciary improves when they know less about its regulatory methods.²⁹¹ Opponents of confidentiality argue that public confidence improves when the public is more informed, because then the public can see for themselves that commissions are effectively disciplining judges who commit misconduct.²⁹²

Proponents and opponents of confidentiality thus disagree about the effect that confidentiality has on public trust in the judiciary. Still, it is clear that public trust in the judiciary can, in fact, be harmed by the public's perception of unfairness in judicial decision-making processes.²⁹³ Commission secrecy risks creating a public perception of judicial unfairness because the public, shut out of commission proceedings and unaware of their efficacy, may begin to believe that corrupt judges are going undisciplined.²⁹⁴ The perception that judges can make unfair decisions without facing accountability, therefore, poses a threat to public confidence.²⁹⁵ “[A]n enforced silence . . . solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.”²⁹⁶

This threat is heightened by the fact that, in recent years, the public has become more interested in government functions that go on behind closed doors.²⁹⁷ Some commentators have already voiced concerns that discipline for judicial misconduct, much like police and prosecutorial misconduct, is too slow and too uncommon.²⁹⁸ These critics point to the facts that commissions throw out a majority of the complaints that they receive,²⁹⁹ take

290. See *supra* notes 267–70 and accompanying text.

291. See Keyt, *supra* note 235, at 969.

292. See *id.*; see also Ortiz, *supra* note 34 (noting that the ability to scrutinize judicial misconduct is necessary “for transparency’s sake” and that misconduct undermines confidence in the judiciary).

293. See *supra* notes 160–62 and accompanying text.

294. See Montgomery, *supra* note 267 (describing a Washington case in which the public lost confidence in the commission when they believed that, behind closed doors, it had improperly handled accusations and failed to hold a judge accountable for his misconduct).

295. See *id.* (“So long as any aspect of [commission] proceedings occurs in secrecy, public mistrust will persist.”).

296. *Bridges v. California*, 314 U.S. 252, 270–71 (1941).

297. See *supra* note 233 and accompanying text.

298. Maura Dolan, *43 California Judges Were Reprimanded for Misconduct Last Year*, L.A. TIMES (Apr. 4, 2015, 7:37 PM), <https://www.latimes.com/local/california/la-me-judges-discipline-20150404-story.html> [<https://perma.cc/BKD7-MZ26>] (“The report showed the number of complaints has been generally rising since 2005, and the percentage of those disciplined has been relatively flat.”); see also Emily Hoerner & Zoe Rosenbaum, *In Illinois, Punishment Is Slow and Lenient for Errant Judges*, INJUSTICE WATCH (Dec. 4, 2015), <https://www.injusticewatch.org/projects/2015/illinois-court-commission-judge-punishment/> [<https://perma.cc/7LHJ-GLMG>]; GROSS ET AL., *supra* note 39, at 153–54.

299. Gray, *supra* note 119, at 3 (“Most complaints filed with judicial conduct commissions—generally more than 80%—are dismissed.”); cf. Hans Sherrer, *The Complicity of Judges in the Generation of Wrongful Convictions*, 30 N. KY. L. REV. 539, 550 (2003)

years to adjudicate complaints,³⁰⁰ and rarely implement discipline beyond low-level reprimands.³⁰¹ These facts, taken together without further explanation, could result in the public perception that the judiciary's current self-regulatory system is failing to provide justice, despite the high number of complaints it receives.³⁰²

Therefore, proponents of commission transparency suggest that making proceedings more open and allowing the public to make their own fully informed decisions about these proceedings would prevent misconceptions about the efficacy of these commissions.³⁰³ Assuming that the commissions are appropriately responding to misconduct, the public will remain confident that the judiciary is effectively regulating itself.³⁰⁴ As a result, the public will continue to view the judiciary as legitimate and comply with its decisions.³⁰⁵

Further, increased disclosure may improve public confidence in the commission system because the public can help hold judges accountable by pressuring commissions to take timely action upon receipt of a complaint.³⁰⁶ Recently, public watchdog groups and news investigations have brought attention to commission inaction in cases of judicial misconduct that went undisciplined for years.³⁰⁷ For example, when reporters learned of accusations that a judge had repeatedly committed misconduct on the bench while also serving on the state's conduct commission, the reporters began questioning the judge and the commission.³⁰⁸ Several months later, the judge struck a deal with the commission to retire in exchange for them ending the investigation against him.³⁰⁹ A lawyer involved in the case commented that the commission only started actively investigating the accusations once the

(finding that out of 766 complaints filed against a particular judge, only one resulted in punishment and it was kept private).

300. See Hoerner & Rosenbaum, *supra* note 298; see also Ortiz, *supra* note 34 (“Some [states] allow judges to go months or years before even credible complaints are in the open.”).

301. See Berens & Shiffman, *supra* note 11 (“To remove a judge, all but a handful of states require approval of a panel that includes other judges. And most states seldom exercise the full extent of those disciplinary powers.”).

302. See, e.g., Ortiz, *supra* note 34; Dolan, *supra* note 298; WIS. JUD. COMM'N, ANNUAL REPORT 9 (2018), <https://www.wicourts.gov/courts/committees/judicialcommission/wjcannualreport2021.pdf> [<https://perma.cc/ELE9-EFVU>] (reporting that out of 408 inquiries received by Wisconsin's Judicial Commission in 2018, the commission only authorized eleven new investigations); KOURLIS ET AL., *supra* note 215, at 4.

303. See Keyt, *supra* note 235, at 969; Montgomery, *supra* note 267.

304. Montgomery, *supra* note 267, at 965.

305. See WARREN, *supra* note 31; see also Tyler, *supra* note 164, at 306–07.

306. See *infra* notes 307–10 and accompanying text.

307. See, e.g., Berens & Shiffman, *supra* note 11; Hoerner & Rosenbaum, *supra* note 298 (reporting that it took the Illinois Courts Commission years to adjudicate complaints and that its adjudications rarely ever resulted in discipline); PENNSYLVANIANS FOR MOD. CTS., REPORT AND RECOMMENDATIONS FOR IMPROVING PENNSYLVANIA'S DISCIPLINARY SYSTEM, 6–7 (Phyllis W. Beck, Laura Horton, Lynn A. Marks, W. Thomas McGough, Jr., Maida R. Milone, Paul H. Titus & Zygmunt A. Pines eds., 2017), <https://www.pmconline.org/sites/default/files/2019-07/PMC%20-%20Judicial%20Discipline%20Report%20and%20Recommendations.pdf> [<https://perma.cc/B4YJ-6BGJ>].

308. Berens & Shiffman, *supra* note 11.

309. *Id.*

reporters began asking around, implying that the outside pressure was effective in getting a just outcome.³¹⁰

In conclusion, increased disclosure could bolster public confidence in the judiciary by better informing the public regarding the frequency of judicial misconduct and the efficacy of commissions.³¹¹ Additionally, it may increase public confidence by allowing the public to play a role in holding judges accountable for their misconduct by placing pressure on commissions to take action.³¹² This may also assuage any concerns that the public has about discipline being too slow or uncommon.³¹³ It matters little that the system actually works if the public does not perceive it to be working³¹⁴—allowing the public to be more informed will enable this perception.

2. Recent Trends Toward Greater Government Openness Support Establishing a Right of Access

To date, federal courts have not established a constitutional right of access to judicial conduct commission proceedings.³¹⁵ Until they do, states have the full authority to decide the extent to which their commission proceedings remain confidential.³¹⁶ As discussed in Part II.A.4, courts have only explicitly established a right of access to criminal trials and some lower-level proceedings.³¹⁷ Additionally, this right is not absolute, and states can deny a right of access to government proceedings so long as they can meet a strict scrutiny standard in doing so.³¹⁸

Nonetheless, some scholars still argue that there should be a right of access to judicial disciplinary proceedings. This argument relies on First Amendment principles, asserting that the public has a right to know what transpires in these proceedings.³¹⁹ By prohibiting the disclosure of judicial misconduct allegations until the filing of formal charges, commission confidentiality requirements assume that only verified accusations of misconduct should be disclosed to the public.³²⁰ However, this contravenes the First Amendment's underlying principle of government openness with the public.³²¹ After all, the Supreme Court has noted that the underpinning

310. *See id.*

311. *See Ortiz, supra* note 34.

312. *See Berens & Shiffman, supra* note 11.

313. *See supra* note 298 and accompanying text.

314. *See KOURLIS ET AL., supra* note 302, at 1 (“A wholly effective system with no transparency and no public confidence will not suffice.”).

315. *See First Amendment Right of Access to Judicial Disciplinary Proceedings, supra* note 278, at 1181; Keyt, *supra* note 235, at 985.

316. Keyt, *supra* note 235, at 984.

317. *See supra* Part II.A.4.

318. *See supra* Part II.A.4.

319. *See generally First Amendment Right of Access to Judicial Disciplinary Proceedings, supra* note 278; Keyt, *supra* note 235, at 970.

320. *See Keyt, supra* note 235, at 967.

321. *See id.*

of the right of access is based on the First Amendment's purpose of "protect[ing] the free discussion of governmental affairs."³²²

Many of the justifications for a right of access to criminal trials also support extending the right of access to commission proceedings.³²³ For example, the Supreme Court stated that access to criminal trials improves the accuracy of the factfinding process by ensuring the fairness of proceedings and preventing decisions based on "secret bias or partiality."³²⁴ It is equally important that the factfinding process in commission proceedings is accurate and unbiased,³²⁵ especially when considering the risk that the perception of unfairness poses to public confidence in the judiciary.³²⁶

Another justification is that access to criminal trials promotes the appearance of justice and respect for the law by preventing the public from becoming suspicious about prejudice and arbitrariness in proceedings.³²⁷ This argument suggests that confidentiality of commission proceedings poses an even greater threat to the appearance of justice because it runs counter to "notions of honesty, integrity, and impartiality [that] lie at the heart of the American judicial process."³²⁸ Closed commission proceedings beget public distrust because they shield judges from the criticism that other public servants must face when confronted with accusations.³²⁹ Additionally, the appearance of bias is heightened because judges themselves often serve on commission boards and have some say in disciplinary decisions.³³⁰

A final justification for extending the right of access applicable to criminal trials to commission proceedings is that public access fulfills democratic goals of self-government.³³¹ Public access to criminal trials promotes self-government by allowing the public to participate in and evaluate the efficacy of judicial processes.³³² Access to commission proceedings would allow the same participation, and, as discussed in Part II.B.1, public participation has been effective in holding judges accountable in the past.³³³ Public participation in proceedings is important because it allows the public to check potential abuses of power and ensure that judges are being appropriately punished for misconduct.³³⁴ This would also allow the public

322. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

323. See generally *First Amendment Right of Access to Judicial Disciplinary Proceedings*, *supra* note 278.

324. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

325. See *First Amendment Right of Access to Judicial Disciplinary Proceedings*, *supra* note 278, at 1180.

326. See *supra* Part II.B.1.

327. *Globe*, 457 U.S. at 606.

328. See *First Amendment Right of Access to Judicial Disciplinary Proceedings*, *supra* note 278, at 1181.

329. See *id.*

330. See *id.*; see also *supra* Part I.C.2.

331. See *First Amendment Right of Access to Judicial Disciplinary Proceedings*, *supra* note 278, at 1182.

332. See *Globe*, 457 U.S. at 606.

333. See *supra* notes 308–10 and accompanying text.

334. See *Globe*, 457 U.S. at 606 n.16.

to become better educated about the role of commissions and what constitutes judicial misconduct.³³⁵ Better education of commission functions may improve the efficiency of commissions by lessening the number of improper complaints.³³⁶

III. REQUIRING PUBLIC DISCLOSURE FOR INSTANCES OF EGREGIOUS JUDICIAL MISCONDUCT

To start, there is no panacea for judicial misconduct. Official misconduct, whether committed by police, prosecutors, or judges, is a widespread and complex problem that occurs in a variety of settings and involves a variety of actors.³³⁷ As such, this Note does not attempt to solve judicial misconduct in its entirety—this proposal only intends to give additional protection to the rights of defendants.

Some instances of judicial misconduct are so heinous that they violate the constitutional safeguards afforded to the accused. Although judicial conduct commissions are in the best position to rectify these wrongs, there have been several notable cases in which their failure to do so has shaken public confidence.³³⁸ In light of these revelations, and out of concern that many similar transgressions are going undisciplined, this Note agrees with the rationale of those who advocate for greater transparency in commission investigations. The public should be able to make sure that commissions are properly handling complaints and holding judges accountable after a thorough investigation verifies the claims. If there is ultimately no evidence to support the complaints, the public should be trusted to dispense with the discredited allegations.

But commissions' extensive confidentiality requirements prevent any such assurances, and therefore increased transparency is necessary in certain cases to strengthen public confidence in the judiciary. This Note thus proposes a mandatory disclosure rule that requires public disclosure when commissions are investigating egregious instances of judicial misconduct. First, Part III.A explains the types of conduct to which the rule would apply and the placement of the rule in the ABA's Model Rules for Judicial Disciplinary Enforcement. Then, Part III.B provides two policy justifications for the rule: the promotion of public confidence without treading on judicial independence and the reinvigoration of judges' roles as guarantors of defendants' fundamental rights.

335. See *First Amendment Right of Access to Judicial Disciplinary Proceedings*, *supra* note 278, at 1181–82.

336. For example, as people learn more about the role of judicial conduct commissions in investigating misconduct, they may also begin to understand the nature of the complaints that such commissions handle. Thus, there would likely be fewer complaints based on mere legal error, which, as mentioned above, are suspected to constitute a large percentage of the dismissed complaints that take up so much of the commissions' time. See *supra* notes 261–63 and accompanying text.

337. See GROSS ET AL., *supra* note 39, at 144.

338. See Berens & Shiffman *supra* note 11; Ortiz *supra* note 34; Keyt, *supra* note 235, at 963–65.

A. The Solution: A Mandatory Disclosure Rule in Cases of Egregious Judicial Misconduct Allegations

This Note proposes the addition of a Mandatory Disclosure Rule to the ABA Model Rules for Judicial Disciplinary Enforcement. This rule will provide the public with assurance that the commission is doing its due diligence when it receives a complaint of egregious judicial misconduct. Part III.A.1 will explain the confines of the rule in more detail. Part III.A.2 then defines the potential categories of judicial misconduct that would be subject to disclosure under the proposed rule. Finally, Part III.A.3 discusses the placement of this rule in the ABA's Model Rules for Judicial Disciplinary Enforcement.

1. Disclosure Requirements Under a Mandatory Disclosure Rule

This rule would require judicial conduct commissions to publicly disclose when they have received complaints of egregious judicial misconduct. However, this is not an inflexible disclosure requirement. Commissions may, in the alternative, postpone disclosure so long as they later formally explain their reason for dismissing the complaint or not beginning an investigation immediately. The rule thus recognizes that not all complaints will have merit and gives commissions the leeway to investigate first so long as they are transparent with the public as soon as they assess the merit of the complaint.

Referring back to Judge Hayes, the Alabama commission's inability to tell the public why it had taken so long to bring charges engendered public outrage toward the judiciary.³³⁹ But if the commission had been able to explain why it postponed the investigation for so long, and if it had a valid reason for doing so, this may have prevented much of the outcry. Explaining openly to the public why complaints could not be investigated immediately or why those complaints were frivolous may be instrumental in maintaining both judicial independence and public trust in the judiciary.

2. "Egregious Judicial Misconduct": The Categories of Judicial Misconduct That Would Justify Disclosure

As discussed above, the rule proposed by this Note requires commission disclosure in cases of egregious judicial misconduct. But which particular judicial wrongdoings should fall within the category of "egregious judicial misconduct" that is subject to disclosure under this rule? Others who have written on egregious judicial misconduct, or "egregious errors,"³⁴⁰ have acknowledged the inherent difficulty in defining the term with more

339. See Berens & Shiffman, *supra* note 11.

340. Many authors who have written on this topic refer to "egregious errors" as legal errors by judges that, due to their egregious nature, amount to misconduct. See Shaman, *supra* note 101, at 9; Gray, *supra* note 43, at 1270; Swisher, *supra* note 33, at 787. Because these errors are classified as judicial misconduct warranting discipline, this Note collapses them within the category "egregious judicial misconduct."

specificity.³⁴¹ This Note, too, grapples with some uncertainty in providing a definition. Generally, when scholars have described judicial acts that constitute egregious error, they have referred to acts that deprive a defendant of their fundamental constitutional rights.³⁴² This includes violations of the fundamental protections of the Bill of Rights and the wrongful incarceration of a defendant without due process.³⁴³

The ABA provides further support for these definitions of egregious judicial misconduct through the standards it uses to determine the severity of sanctions for judicial misconduct. When deciding the severity of sanctions, the ABA recommends considering factors such as “the seriousness of the transgression” and “the effect of the improper activity on others or on the judicial system.”³⁴⁴ Deprivation of a defendant’s life, freedom, or constitutional rights is a serious transgression that could befall a defendant.³⁴⁵ And these harms go beyond merely affecting defendants—they pose dangerous consequences to the judiciary as well.³⁴⁶

Therefore, this Note intends for egregious judicial misconduct to cover the violation or deprivation of rights that are especially critical to a defendant during the adjudicative process, from charging to sentencing. This includes violations of a defendant’s Fourteenth Amendment due process guarantees and Bill of Rights protections, such as the right to counsel and right to a trial by jury.

For example, judges violate due process guarantees when they coerce guilty pleas, convict a defendant without a plea or trial, or instruct the jury to find a defendant guilty.³⁴⁷ Due process violations can also occur during sentencing, such as sentencing a defendant to prison when only fines are required (Judge Hayes was a notable example of this),³⁴⁸ or sentencing defendants beyond the statutory maximum.³⁴⁹ Other violations include the failure to advise a defendant of vital constitutional protections, such as their right to counsel or a grand jury indictment.³⁵⁰ Though this is not an exhaustive list of the constitutional deprivations that amount to egregious misconduct, it provides guidance as to what judicial acts would warrant mandatory disclosure by the commission.³⁵¹

341. See Swisher, *supra* note 33, at 787; Gray, *supra* note 43, at 1270.

342. See *supra* Part I.B.3.

343. See Swisher, *supra* note 33, at 787; Gray *supra* note 43, at 1270.

344. MODEL RULES FOR JUD. DISCIPLINARY ENF’T r. 6 cmt. (AM. BAR ASS’N 2018).

345. See Swisher, *supra* note 33, at 779.

346. See *supra* Part II.B.1 and accompanying text.

347. See *supra* Part I.B.3.

348. See Complaint, *supra* note 14, at 1.

349. See Shaman, *supra* note 101, at 5.

350. See *supra* Part I.B.3; Shaman, *supra* note 101, at 5.

351. All of the examples in this paragraph have been classified as egregious errors (misconduct) by commissions and state supreme courts in the past and have warranted some level of judicial discipline. See *supra* Part I.B.3.

These types of judicial misconduct are entitled to greater scrutiny because they pose greater risks to the rights of defendants.³⁵² Therefore, the need for deterrence is at its strongest in such cases; this rule aims to provide that deterrence through greater public accountability of the judges who commit these wrongdoings.

3. The Addition of the Rule to the ABA Model Rules for Disciplinary Enforcement

This Note proposes that the rule be added to the ABA's Model Rules for Judicial Disciplinary Enforcement. These rules are the best place for the proposed rule because they provide clear guidance to the states in drafting their own judicial disciplinary procedures.³⁵³ Although states have discretion in adopting the ABA's rules,³⁵⁴ the promulgation of the proposed rule would put states on notice that the ABA is addressing the problem of egregious judicial misconduct. This may influence state legislatures to enact similar versions of the rule in their respective judicial disciplinary codes, as the ABA suggests.³⁵⁵

Specifically, the proposed rule should be nested within Rule 11, which lays out the confidentiality requirements of commissions before and after formal charges against a judge are filed.³⁵⁶ Notably, Rule 11(B)(1) describes the narrow set of circumstances in which commissions may disclose information relating to an investigation prior to the filing of formal charges.³⁵⁷ Due to the usage of the word "may," Rule 11(B)(1) does not affirmatively require the commission to disclose such information; it merely gives the commission discretion to do so if it chooses.³⁵⁸ As the rule proposed by this Note will mandate disclosure under certain circumstances, it logically should appear in a separate subsection of Rule 11(B). This, in addition to the usage of mandatory language such as "must" or "shall," will make clear to the reader that this rule imposes heightened obligations on commissions.

Furthermore, this Note recommends that the commentary to Rule 11, which discusses the policy justifications of the confidentiality requirements, be updated to accommodate this proposed rule. Currently, the commentary describes that the policy emphasis shifts from protection of the judge's reputation to the public's right to know upon the filing of formal charges.³⁵⁹ If this rule were adopted, the commentary would need to be amended to include the policy justifications for earlier disclosure in cases of egregious judicial misconduct. As this Note will explain in the following Part III.B,

352. See Swisher, *supra* note 33, at 768 ("[I]t seems absolutely appropriate to apply heightened judicial scrutiny whenever rulings impact important rights of criminal defendants.").

353. See MODEL RULES FOR JUD. DISCIPLINARY ENF'T pmb l. (AM. BAR ASS'N 2018).

354. See *id.*

355. See *id.*

356. See *supra* notes 254–55.

357. See MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 11(B)(1) (AM. BAR ASS'N 2018).

358. *Id.*

359. See *supra* note 255 and accompanying text.

this commentary would explain why the public's right to know outweighs the protection of the judge's reputation earlier in proceedings that involve egregious misconduct.³⁶⁰

B. Unveiling the Cloak of Invisibility: Justifications for a Mandatory Disclosure Rule

This section discusses the policy justifications for the addition of a mandatory disclosure rule to the ABA's Model Rules for Judicial Disciplinary Enforcement. Part III.B.1 will explain how the rule does not disrupt the balance between procedural justice and judicial independence. Part III.B.2 will then describe how the rule will help reinforce the role of judges as guarantors of the rights of the accused, thus maintaining public trust in the judiciary.

1. The Rule Satisfies Procedural Justice Concerns Without Excessively Encroaching on Judicial Independence

It is important for any method that holds the judiciary accountable to preserve the delicate balance between procedural justice and judicial independence as much as possible.³⁶¹ As such, this rule maintains that delicate balance while also remedying judicial deprivations of defendants' constitutional rights.

This rule satisfies procedural justice concerns by educating the public about the frequency of judicial misconduct and providing them with transparency regarding how commissions handle these complaints. If the public sees that misbehaving judges are being properly investigated and held accountable, this will strengthen their perception of the judiciary's legitimacy and increase compliance.³⁶² If the judge's conduct is sufficiently egregious in the public's opinion, members of the public can pressure the commission to investigate promptly and recommend the appropriate disciplinary measures. If the public disagrees with the final resolution of the case, they can highlight the judge's conduct through news exposés, which have been a successful alternative when commissions have failed to act in the past.³⁶³

On the other side of the balance, the rule also provides ample opportunity for the judiciary to avoid unnecessary encroachments on judicial independence. This is because the commission only needs to respond appropriately to allegations of judicial misconduct by commencing an investigation and recommending the appropriate discipline. And if the complaint truly is frivolous, the commission will have the opportunity to explain that to the public upon their dismissal of the complaint. The rule is not taking away the judiciary's ability to regulate itself. Rather, it merely provides the public with greater insight into the judicial disciplinary process

360. *See infra* Part III.B.

361. *See supra* Part I.D.3.

362. *See supra* Part II.B.1.

363. *See supra* notes 307–10 and accompanying text.

and the ability to ensure that government officials are held accountable for their wrongs, as democracy requires. The public would only intrude upon judicial independence to make sure that commissions are holding judges accountable when they perceive commission inaction or unjust results.

This Note acknowledges that even when a commission does respond appropriately to misconduct, there is still a possibility that the public's interference will infringe slightly on judicial independence. However, it may be impossible to strike a perfect balance between judicial independence and procedural justice. Currently, the balance weighs in favor of the preservation of judicial independence, as evidenced by commission confidentiality requirements that safeguard judicial self-regulation by shutting out the public entirely.³⁶⁴ But as we learn more about the dangerous effects that judicial misconduct can have on the rights of defendants, it seems necessary that the balance shifts in the other direction.³⁶⁵ In cases in which defendants' rights were violated, judicial independence should give way to procedural justice so that the public knows that commissions have effected repercussions.

Additionally, the rule avoids unnecessarily infringing on judicial independence because it will not require either judges or commissions to act any more than the preexisting codes of conduct already do. The codes of conduct already proscribe the acts that would constitute egregious misconduct,³⁶⁶ and the Model Rules of Judicial Disciplinary Enforcement set forth disciplinary measures for when those codes are violated.³⁶⁷ This rule would merely guarantee that commissions are recommending or imposing discipline for these transgressions, as is already their duty.³⁶⁸ Any deterrence this has on judges, then, should only affect their decision to commit egregious misconduct. After all, the goal of judicial independence is to avoid influencing judges such that they no longer feel free to make decisions that they believe are correct.³⁶⁹ They should be making correct decisions, absent of any misconduct, in the first place.

2. The Proposed Rule Educates Judges and Reinforces Their Role as a Protector of Defendants' Rights

In addition to maintaining the balance between judicial independence and procedural justice, the rule will also remind judges of their role as protectors of defendants' rights and encourage them to act accordingly.³⁷⁰

364. See Berens & Shiffman, *supra* note 11 (“As a result, the system tends to err on the side of protecting the rights and reputations of judges while overlooking the impact courtroom wrongdoing has on those most affected by it.”).

365. See *In re Hammermaster*, 985 P.2d 924, 936 (Wash. 1999) (“Judicial independence does not equate to unbridled discretion to . . . disregard the requirements of the law, or to ignore the constitutional rights of defendants.”).

366. See *supra* Part I.C.1.

367. See *supra* Part I.C.1.

368. See *supra* Part I.C.2.

369. See Swisher, *supra* note 33, at 795.

370. See Klein, *supra* note 45, at 222.

As mentioned in Part I.C.1, the various codes of conduct envision judges as protectors of defendants' rights through the ethical obligations that these codes impose.³⁷¹ This designation can be seen explicitly in Standard 6-1.1 of the ABA's Standards for Criminal Justice: Special Functions of the Trial Judge, which indicates that the trial judge is responsible for protecting the rights of the accused at trial and ensuring a fair outcome.³⁷² This standard requires judges to ensure that the prosecution is using the trial for the purpose of determining whether the prosecution has established a defendant's guilt.³⁷³ Thus, if a prosecutor is conducting a trial in an unjust way that puts the rights of the defendant in danger, the judge must stop this.

The ABA Model Rules of Judicial Conduct also visualize judges as guarantors of defendants' rights by bestowing on them a supervisory role over the trial. For example, Rule 2.6 requires judges to ensure that every person with a legal interest in the proceeding has the right to be heard at trial.³⁷⁴ Additionally, Rule 2.14 imposes an obligation on judges to report other legal officials' misconduct, including other judges' misconduct.³⁷⁵ Lastly, Rule 2.8 requires judges to oversee the conduct of all participants in their courtroom, ensuring that they behave with patience, dignity, and courteousness.³⁷⁶ These rules demonstrate how the judge is in the best position to ensure that the trial is being conducted fairly and defendants' fundamental rights are being vindicated.

Based in part on the rules listed above, judges might think that a mandatory disclosure rule is unnecessary because they already know that they should not commit misconduct. Further, some may believe that they are incorruptible.³⁷⁷ Although research shows that judges are generally unreceptive to claims that they have prejudiced a litigant,³⁷⁸ there have been cases in which defendants were deprived of their rights under a judge's watch.³⁷⁹ Judges are not infallible, and the existence of ethics codes proves that,³⁸⁰ in the words of President James Madison, "[i]f men were angels, no government would be necessary."³⁸¹

Importantly, the appearance of impartiality and fairness is crucial for maintaining public perception of the judiciary's integrity.³⁸² Judges' own

371. See *supra* Part I.C.1; see also Klein, *supra* note 45, at 222.

372. See STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1 (AM. BAR ASS'N 2000).

373. See *id.*

374. See *supra* Part I.C.1.

375. See *supra* Part I.C.1.

376. See *supra* Part I.C.1.

377. See Kennedy, *supra* note 160, at 1070 ("Most judges believe they are incorruptible and that no harm can come from a brief private discussion or by hearing a case where a judge has a remote financial interest, because the judge has sufficient discipline to keep an open mind. But that is beside the point. Judges need rules just as do the citizens whose cases we hear.").

378. See GROSS ET AL., *supra* note 39, at 10.

379. See *supra* Part I.B.

380. See Kennedy, *supra* note 160, at 1070.

381. THE FEDERALIST NO. 51 (James Madison).

382. See *supra* notes 160–62 and accompanying text.

subjective opinions of their decisions' fairness means little when the public believes the opposite, which can have serious consequences for the judiciary.³⁸³ As discussed in Part I.D.1, the frequency of judicial misconduct is not necessarily the issue; rather, the issue is the detrimental effect that each instance of misconduct has on the public perception of the judiciary.³⁸⁴

A mandatory disclosure rule in cases of egregious judicial misconduct will help create an appearance of fairness in the commission disciplinary process. The rule will serve as a reminder to judges that the ethics codes impose on them the duty to protect defendants' rights at trial. It will further enforce this role by ensuring that judges who have abused their judicial authority and caused the deprivation of a defendant's rights are held accountable. Public accountability of corrupt judges will create a public perception of fairness in judicial processes and will ultimately protect the judiciary's legitimacy and compliance with its orders.

CONCLUSION

Judicial conduct commissions have the important function of preventing injustice by investigating allegations of judicial misconduct and holding errant judges accountable through discipline or recommendations of discipline. Due to the severity of the threat that judicial misconduct can pose to defendants' rights, it is necessary for these commissions to be thorough and effective. However, when commission investigations are almost entirely confidential, the public cannot see that these oversight mechanisms are truly working and providing accountability. Recent cases of judicial misconduct that commissions have failed to act on have brought public attention to the issue of commission confidentiality and have shaken public confidence in the judiciary.

Although confidentiality may be in place to bolster the independence and self-regulatory nature of the judiciary, it may be doing more harm than good to these goals. Therefore, this Note has analyzed arguments in favor of continued commission confidentiality and arguments in favor of increased commission transparency. Ultimately, this Note argues that increased transparency best serves the interests of both the judiciary and the public. To provide transparency, this Note has proposed that commissions be subject to mandatory disclosure when they are investigating instances of judicial misconduct that deprived a defendant of their fundamental constitutional rights. Mandatory disclosure will preserve the balance between judicial independence and public accountability, while also protecting judicial integrity by strengthening public confidence in the judiciary.

383. *See supra* Part II.B.1.

384. *See Stewart, supra* note 9, at 465.