THREE LIKELY CAUSES OF JUDICIAL MISBEHAVIOR AND HOW THESE CAUSES SHOULD INFORM JUDICIAL DISCIPLINE

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"To offend and judge are distinct offices [a]nd of opposed natures."[1]

I. INTRODUCTION

In November 2003, Texas state court Judge Faith Johnson in Dallas celebrated the recapture of a fugitive by throwing a "recapture party" with balloons and ice cream in her courtroom.[2] She celebrated the recapture just before sentencing the defendant to life in prison.[3] In a similar act of odd and unsuitable judicial behavior, Seattle Superior Judge Beverly Grant ordered those in her courtroom to do a cheer in honor of the Seattle Seahawks football team just before sentencing a defendant for manslaughter, as the defendant's relatives observed.[4] Dismissing criticism

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* Professor, South Texas College of Law. The ideas in this Article come in great measure from my experience clerking for Federal District Court Judge Norman W. Black, who never lost his temper (in public or in front of his court personnel) and always modeled temperate, even-headed judicial conduct. Clerking for Judge Black certainly informs my position that the public should not tolerate, and courts and judicial conduct commissions should sensibly and effectively discipline, judicial misconduct of the kind described in this Article. I want to thank my colleague James Alfini for his wonderful insights into the world of judicial conduct and the editing team at *Capital University Law Review* for their prompt, thoughtful, and competent work. And, I am grateful to my colleague Tobin Sparling for his friendship and help with this Article.

[1] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 2, sc. 9, ll. 60–61 (Jay L. Halio ed., Oxford Univ. Press 2008).

[2] *Judge Apologizes for Throwing Recapture Party*, HOUS. CHRON., May 15, 2005, at B11.

[3] *Id.* After the State Judicial Commission on Judicial Conduct admonished Judge Johnson, she issued the following written statement: "If my celebration of the return of fugitive Billy Wayne Williams offended any member of the community, I deeply apologize." *Id.*

[4] Stipulation, Agreement and Order of Admonishment, *In re* Grant, CJC No. 4952-F-131 (Wash. Comm'n on Judicial Conduct Aug. 4, 2006), *available at* http://www.cjc.state.wa.us/Case%20Material/2006/4952%20Grant%20Stipulation.pdf; *Tacoma Judge Apologizes for Leading Super Bowl Cheer in Court*, SEATTLE TIMES (Feb. 7, 2006, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=20060207&slug=webjudge07.

of her actions, Judge Grant explained she was attempting to ease tension in the courtroom.[5] In South Dakota, Judge Pete Fuller gave a lawyer "the bird" during a court proceeding.[6] In addition, Judge Fuller routinely swore in open court, referring to his court clerk as "the goddamn clerk" and complaining about "the goddamn calendar."[7] These are but a few examples[8] of judges cursing at, demeaning, and berating lawyers, colleagues, and parties in their courtrooms.

This Article is about judges behaving inappropriately and attempts by disciplinary tribunals to correct the behavior. The Article examines possible reasons why judges misbehave, arguing that these reasons should inform the manner in which courts and judicial conduct commissions discipline judges.[9] The objectives underlying judicial discipline are also assessed, showing the lack of clarity of these objectives and the lack of connection between objectives and discipline.[10] Ultimately, the piece posits that the process of judicial discipline is flawed because the typical means of discipline fail to satisfy stated objectives and are in no way informed by the reasons judges misbehave.[11]

Part II describes the rules of judicial conduct that concern judges acting with civility and courtesy to those in their courtrooms.[12] This Article focuses on rude, offensive behavior Judges exhibit from the bench and examines how state judicial conduct organizations and courts discipline this type of conduct.[13] Part II also discusses why disciplining

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[5] *Id.*

[6] *In re* Fuller, 798 N.W.2d 408, 413 (S.D. 2011).

[7] *Id.* The Supreme Court of South Dakota suspended Judge Fuller from serving on the bench and provided certain conditions that if Judge Fuller satisfied would allow him to return to service. *Id.* at 421–22.

[8] The examples in the Article, most of which are described in Part III, are a sampling of the instances where the public became aware of the judge's behavior because of a published court decision, publicly available decision of a sentencing commission, or newspaper article. Other instances of rude, intemperate judicial behavior occur, but do not get publicized because of the confidentiality guidelines for state judicial conduct commissions. *See, e.g.*, TEX. CONST. art. 5, § 1-a(10) (1980) ("All papers filed with and proceedings before the Commission or a Master shall be confidential, unless otherwise provided by law, and the filing of papers with, and the giving of testimony before the Commission or a Master shall be privileged, unless otherwise provided by law.").

[9] *See* discussion *infra* Parts III, V.C.

[10] *See* discussion *infra* Parts II, IV.

[11] *See* discussion *infra* Parts IV–V.

[12] *See* discussion *infra* Part II.

[13] *See* discussion *infra* Part IV.

this type of behavior matters, examining from the procedural justice perspective the public's reaction to poor judicial demeanor.[14]

Part III identifies the following three reasons judges might express hostility and anger toward those in their courtrooms: judges lose sight of the humanity of those appearing before them,[15] they suffer from "decision fatigue,"[16] and judges are unable to regulate their emotions. Part III also illustrates the improper behavior examined in this Article: judges cursing at, ranting at, and demeaning lawyers and parties in their courtrooms, often in violation of the rule of judicial conduct requiring a judge to be "patient, dignified, and courteous" to those with whom the judge deals in an official capacity.[17] While other types of judicial misconduct may result in sanctions, this Article focuses on judicial misbehavior under Model Code of Judicial Conduct Rule 2.8(B).

Part IV describes judicial conduct commissions and examines how these tribunals typically sanction judges for judicial misconduct, identifying the objectives underlying judicial sanctions and the common challenges associated with them.[18] Part IV also examines these objectives, suggesting that courts and sanctioning organizations clarify these goals.[19]

Part V suggests revisions to existing sanctioning schemes—ideas for improving the effectiveness of the sanctions by tying them more closely to both the underlying causes of this type of behavior and to more clearly drawn objectives.[20] This Article differs from existing literature by revisiting disciplinary schemes in light of explanations for why some

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[14] *See* discussion *infra* Part II.

[15] *See* discussion *infra* Part III.

[16] *See* discussion *infra* Part III.C.

[17] MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (2011) ("A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials and others subject to the judge's direction and control."). Most states have adopted some version of this rule of conduct. *See, e.g.*, AR. CODE OF JUDICIAL CONDUCT R. 2.8(B) (2012); WA. CODE OF JUDICIAL CONDUCT R. 2.8(B) (2011).

[18] *See* discussion *infra* Part IV.

[19] *See* discussion *infra* Part IV.B–D.

[20] *See* discussion *infra* Part V.

judges misbehave and emphasizing reasons for concern over the many examples of judicial misconduct.[21]

Intemperate, rude, and explosive behavior from the bench certainly merits as much discussion as judicial decision making. In terms of clarity of judgment and coherent decision making, judicial misbehavior on the bench, especially when it reaches the level of sanctionable conduct, illustrates a lack of control that will surely reflect clouded judgment or impede clear decision making.[22] Thus, judicial temper tantrums on the bench should trouble legal academia and become a primary part of the conversation concerning judicial conduct and decision making.

II. THE IMPORTANCE OF REGULATING JUDICIAL RUDENESS

In 1924, the American Bar Association (ABA) promulgated the Canons of Judicial Ethics to guide proper judicial behavior.[23] Originating in 1972, and amended several times since then, the ABA promulgated a Model Code of Judicial Conduct; rather than aspirational, these rules were meant to be mandatory.[24]

Canon 1 of the Code[25] provides: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[26] Included under Canon 1 is Rule 1.2, which provides: "A judge shall act at all times in a manner that promotes public confidence in the independence,[] integrity,[] and impartiality[] of the judiciary, ..."[27] The rule goes on to prohibit "impropriety and the appearance of impropriety."[28] The first Comment to

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[21] *See, e.g.*, Norman L. Greene, *A Perspective on "Temper in the Court: A Forum on Judicial Civility,"* 23 FORDHAM URB. L.J. 709 (1996) (discussing judicial conduct generally, but not revisiting the various disciplinary schemes created to address judges' misbehavior).

[22] *See infra* notes 51–53.

[23] ABA CANONS OF JUDICIAL ETHICS (1924). *See also* JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03, at 1-5 (4th ed. 2007) ("The 1924 Canons . . . were intended to be an ideal guide of behavior, rather than an enforceable set of rules.").

[24] ALFINI ET AL., *supra* note 23, at 1-6. These rules have no effect until enacted into law by a state legislature or court rule. *Id.*

[25] The canons are meant to provide overarching guidelines for judicial conduct. A judge can be disciplined for violating a rule, not a canon. MODEL CODE OF JUDICIAL CONDUCT Scope (2011).

[26] MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011).

[27] MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2011).

[28] *Id.*

Rule 1.2 emphasizes the toll that judicial misconduct takes on public confidence in the judiciary.[29]

In addition, Rule 2.8(B) of the ABA Model Code of Judicial Conduct specifically concerns judges behaving with civility in their courtrooms, requiring a judge to be "patient, dignified, and courteous" to those "with whom the judge deals in an official capacity."[30] Comment to Rule 2.8 states that judges can perform their work promptly while still behaving with patience and courtesy.[31] This Article focuses on judicial conduct that either violates or arguably violates these rules and that most would deem unacceptable behavior for public officials.[32]

The reasons judges should behave with civility in court go beyond simply maintaining a public perception of professionalism—particularly,

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[29] MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 1 (2011) ("Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.").

[30] MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (2011). This rule, called "Decorum, Demeanor, and Communication with Jurors," provides: "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control." The ABA adopted the Model Code in 1972 and revised it in 1990, 1997, 1999, 2003, 2007, and 2010. *Model Code of Judicial Conduct*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html (last visited May 2, 2013). As of 2004, forty-nine states, the U.S. Judicial Conference, and the District of Columbia have judicial conduct codes based on the ABA model. Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1246 n.4 (2004).

[31] MODEL CODE OF JUDICIAL CONDUCT R. 2.8 cmt. 1 (2011).

[32] For other examples of rude and offensive comments and behavior on the bench see Hon. Carl E. Stewart, *Abuse of Power & Judicial Misconduct: A Reflection on Contemporary Ethical Issues Facing Judges*, 1 U. ST. THOMAS L.J. 464, 468–71 (2003). The Judicial Conduct Reporter, a publication of the American Judicature Society Center for Judicial Ethics, describes many examples of judges' offensive, degrading comments toward plaintiffs (and comments that trivialize crimes) in cases of domestic violence and rape. Cynthia Gray, *Demeanor in Domestic Violence Cases*, JUD. CONDUCT REP., Spring 2010, at 1, 8–10 [hereinafter Gray, *Demeanor in Domestic Violence Cases*]. In addition, the publication illustrates countless examples of judicial ill temperance in cases with pro se litigants. Cynthia Gray, *Pro Se Litigants and Judicial Demeanor*, JUD. CONDUCT REP., Summer 2007, at 3, 9.

those in the legal arena feel embarrassed when judges behave badly.[33] Obviously, the public and the legal community want judges to exhibit a "judicial temperament," which is thought of as civil, thoughtful, and wise.[34] This temperament, when displayed on the bench, creates an atmosphere of respect and dignity among the lawyers and others in the courtroom.[35]

In addition, judicial temperament has real consequences regarding the public's perception of the judiciary as fair, trustworthy, and effective.[36] With public confidence in the judiciary waning,[37] those in the legal community seek any means to improve the judiciary's reputation. Accordingly, although this Article does not want to belabor the obvious—that the legal community and public at large want judges to exhibit courtesy in the courtroom—the point worth emphasizing is that judicial behavior, not just the outcome of judicial proceedings, impacts the public's perception of the judiciary's fairness.[38]

The public perceives judicial fairness based, in large part, on judicial demeanor.[39] In an article concerning the rise of public criticism against the judiciary, a commentator posits that "[t]he simplest reform judges could take to increase confidence in the courts would be to refrain from abusing, denigrating, and insulting people in their writings and speech."[40] Judicial

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[33] *See* Paul L. Friedman, *Taking the High Road: Civility, Judicial Independence, and the Rule of Law*, 58 N.Y.U. ANN. SURV. AM. L. 187, 197 (2001).

[34] *See id.* Judge Paul Friedman of the United States District Court for the District of Columbia described the attributes of a judicial temperament as "courtesy, patience, listening to all sides, treating people fairly and decently, [and] *appearing* to treat people fairly as well as actually doing so." *Id.*

[35] Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 519 (1994) ("Like it or not, judges are role models in our profession. Judges cannot ask lawyers to accept a standard of professional conduct to which they do not abide.").

[36] Tobin A. Sparling, *Through Different Lenses: Using Psychology to Assess Popular Criticism of the Judiciary from the Public's Perspective*, 19 KAN. J.L. & PUB. POL'Y 471, 500 (2010).

[37] Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163, 164 (2010) ("[P]ublic confidence in the court system has greatly diminished and continues to wane, and criticism of the quality of individual judges and the judiciary as a whole is ubiquitous.").

[38] Sparling, *supra* note 36, at 500.

[39] Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233, 1241–42 (2000) ("Litigants typically evaluate the fairness of judicial proceedings at least as much on the basis of their tone and the respect the judge affords the parties as by the actual outcome of the proceeding."); Sparling, *supra* note 36, at 500.

[40] Sparling, *supra* note 36, at 500.

rudeness and intemperance substantially impact the public's perception of the judiciary[41] and erode public trust in the fairness of judicial proceedings.[42]

Studies reflect that people decide procedural fairness of all authorities—namely, police and courts—based largely on how these legal authorities treat them, not necessarily on the outcome of a particular experience.[43] According to this "procedural justice" scholarship, the public's primary concern about the judiciary involves "whether these authorities treat people fairly, recognize citizen rights, treat people with dignity, and care about people's concerns."[44] Thus, poor judicial behavior leads the public to doubt the fairness of the judge's decision making: "Intemperate comments and intemperate conduct by judges are among those things that breed a lack of respect for the decisions judges ultimately render and for the judicial system itself."[45]

In addition, parties seek the legal system's protection, and judges play an integral role in providing this cloak of protection. Thus, when judges misbehave, the judicial system fails to provide protection and the affected parties may lose trust.[46] For instance, during a hearing on a temporary restraining order brought by a pro se plaintiff against her husband, Judge Timothy Ellender belittled the plaintiff for taking her children to Subway and gave encouraging words to the husband after hearing evidence that the husband intended to beat one of the children.[47] Judge Ellender also

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[41] *Id.*

[42] Sankar, *supra* note 39, at 1241–42.

[43] Thomas L. Hafemeister et al., *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 200 (2012) ("[P]rocedural justice proponents believe that 'process matters,' such that 'when the people affected by a decisionmaking process perceive the process to be just, they are much more likely to accept the outcomes of the process, even when the outcomes are adverse.'" (quoting Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 478 (2009))); Tom R. Tyler et al., *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215, 233 (2001).

[44] Tyler et al., *supra* note 43, at 216.

[45] Friedman, *supra* note 33, at 198.

[46] *See* Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 1–2 (1988) (discussing how judges must hold themselves to a higher standard by being ethical, encouraging respect of the judiciary, and treating those before them with courtesy and respect in an effort to inspire trust and confidence in the judiciary).

[47] *In re* Ellender, 16 So. 3d 351, 353 (La. 2009).

summarily dismissed the complaint without hearing all of the plaintiff's evidence, saying, "Heat, big smoke, but no fire. Dismissed. . . . You're not getting a TRO."[48] The plaintiff responded to the judge's conduct, saying, "I understand now why women don't go to the courts for help/protection because that judge treated me just like my husband does."[49]

When one member of the judiciary fails, this conduct reflects on the whole judiciary. In an order on a disciplinary action, the South Dakota court dealing with the judge who flipped "the bird" emphasized this idea, saying, "Judge Fuller's misconduct makes it more difficult for every judge in this state to maintain that respect for our courts and thus our ability to effectively resolve society's legal disputes."[50]

Finally, rash and intemperate judicial behavior on the bench surely impacts and reflects on a judge's ability to "think straight" and make sound, well-reasoned decisions. Feelings and behavior affect "the quality of our thinking."[51] As discussed by Professor Joshua Rosenberg in his article about lawyers' behavior, "emotions precipitate changes in the autonomic nervous system."[52] Rosenberg goes on to explain that "[t]hese changes . . . change not only our ability to think, but also our ability to act and perceive."[53] Thus, this discussion reflects on judges' decision making. Identifying the causes of misbehavior, and strengthening commissions' ability to prevent and correct behavior, will also strengthen judges' ability to serve the public by making sound, well-reasoned decisions.[54]

III. THREE REASONS WHY JUDGES MISBEHAVE AND ILLUSTRATIONS OF RESULTING MISBEHAVIOR

The reasons for judicial misbehavior may be exceedingly complex or strikingly simple. As one commentator notes, some judges might simply

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[48] *Id.*

[49] *Id.*

[50] *In re* Fuller, 798 N.W.2d 408, 420 (S.D. 2011).

[51] Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1236 (2004).

[52] *Id.* at 1237.

[53] *Id.*

[54] *See* Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1550 (2011) (discussing the complex mental processes that go into judicial reasoning).

be "the bully, the 100 percent pure-beef black-robed jackass."[55] For this judge, the possibility exists that no sanction, admonition, or education—nothing shy of removal—will protect the public. However, this commentator goes on to say, "More often, problems with judicial conduct occur with an ordinarily decent judge who is just having a bad day . . . ."[56] This discussion is primarily aimed at the judge who loses it once or twice (or three or four times) when having a bad day or stretch of days.

Judges may act badly for any number of reasons. This Article discusses three potential reasons judges might throw temper tantrums or engage in rude behavior on the bench. First, some judges may behave rudely to parties because they become attached to the roles that judges, lawyers, and parties play within the legal system and lose sight of the humanity of the "players."[57] Rather than seeing a plaintiff or defendant as an individual with substantial concerns and feelings, some judges view the parties merely as part of a proceeding requiring a prompt resolution.[58] These judges take "dispassionate judging" to the extreme and may lose their temper as a result of disregarding the humanity of those who appear before them.[59]

In addition, judges may throw temper tantrums because they lack strategies to effectively control and regulate their emotions.[60] They may lack the emotional intelligence to cope with the emotional strain of difficult cases.[61] Some coping strategies—like suppressing an emotional response—may exacerbate judges' feelings and lead to strong, negative reactions.[62]

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[55] Charles Sevilla, *Protecting the Client, the Case and Yourself from an Unruly Jurist*, CHAMPION, Aug. 2004, at 28, 28–29.

[56] *Id.*

[57] *See* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 19–20 (1976).

[58] *See id.*

[59] *See* Maroney, *supra* note 54, at 1499–1500 (describing how the "ideal of dispassionate judging" left one magistrate feeling "trapped between the Scylla of too much emotion and the Charybdis of no 'feeling for humanity' at all").

[60] *See id.* at 1491–92.

[61] *Id.* at 1491 ("Because our legal culture alternates between round denial that judges experience emotion and blithe insistence that any emotion can simply be put aside, it does nothing to promote intelligent emotion regulation in judges.").

[62] *E.g.*, *id.* at 1553–54.

Third, judges may "lose it" as a symptom of serving as "the decider."[63] At times, judges might lash out and throw temper tantrums because they are mentally taxed to such a degree that they can no longer keep their emotions in check.[64] This Article does not present decision fatigue as an *excuse* for poor behavior, but rather as a possible explanation that could help judicial conduct commissions impose proper education or discipline to alleviate or prevent the misbehavior.

Understanding these possible forces may help explain why some judges rant and curse at pro se litigants or throw "recapture parties" in their courtrooms.[65] It may also explain why an appellate court judge would tell her colleague to "shut up" during an oral argument.[66] If so, these explanations should help guide efforts to make sanctions and judicial education more meaningful and effective at curbing the behavior described herein.

Each of the three parts describes a possible reason for misbehavior followed by examples of actual behavior that might have resulted from the conditions. Matching each condition to specific examples is not scientific; most instances of bad behavior likely resulted from a combination of the conditions. This part illustrates how certain conditions could certainly cause judges to behave rudely to parties and lawyers in the courtroom.

A. Judges Dehumanize the Parties

Some judges misbehave, acting offensively toward parties because they lose sight of the parties' humanity. In John Noonan's *Persons & Masks of the Law*,[67] Noonan describes the masks worn by litigants, judges, and lawyers in the legal system.[68] If the players internalize their masks, the masks, which Noonan also calls "classifications," become an integral part of that judge, lawyer, or party.[69] To Noonan, these constructs and legal classifications strip the humanity from the legal system: "[T]he presence of

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[63] George W. Bush coined this term to refer to the person responsible for making countless, difficult decisions and he emphasized the challenges and hardships of serving in that role. ROY F. BAUMEISTER & JOHN TIERNEY, WILLPOWER 90 (2011).

[64] Maroney, *supra* note 54, at 1550–51 (discussing how judges operate under "conditions of cognitive load" and that judges who are consciously disengaged from their emotions may "blow up over a lawyer's small infraction").

[65] *See supra* notes 2–3.

[66] *See infra* notes 173–80.

[67] *See* NOONAN, *supra* note 57.

[68] *Id.* at 19–20.

[69] *Id.* at 19.

masks, formed by rules,"[70] conceals the people at the heart of the legal system.[71] To Noonan, this phenomenon raises a substantial danger: "Abandonment of the rules produces monsters; so does neglect of persons."[72]

Along these lines, commentators contend the criminal justice system requires empathy from judges because otherwise the system is "impersonal and bureaucratic."[73] To some, the system's primary trait is "disconnectedness" among victim, offender, and community.[74]

In advocating for forgiveness in the criminal law arena, commentators make clear that the underlying objective of incorporating forgiveness is to humanize the system, putting the "human face" back into the arena involving victim and perpetrator.[75] According to these commentators, the criminal law system is currently "an assembly line, a plea-bargaining factory that speeds up cases and reduces costs by sacrificing the offender's and victim's day in court."[76]

Thus, to the extent judges are behaving offensively because they lose sight of the humanity of those appearing before them, effective discipline should restore—or establish—the judge's perspective concerning those in

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[70] *Id.*

[71] *Id.* Noonan's mask idea relates to the judge as umpire metaphor. The "judge as umpire" metaphor, like the blindfolded Lady Justice metaphor, arose again during the confirmation hearings for now Chief Justice John Roberts. *See* Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 11, 2009, at WK1, 5. Justice Roberts began his remarks at his confirmation hearing, saying "Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role." *Id.* "Some use the judge as umpire metaphor to suggest that judges should remain objective—applying the existing rules without regard to their personal tastes, biases, political interests, and sympathies." Maxine D. Goodman, *Removing the Umpire's Mask: The Propriety and Impact of Judicial Apologies*, 2011 UTAH L. REV. 1529, 1529 (2011).

[72] NOONAN, *supra* note 57, at 18. Noonan's reference to monsters brings to mind William Shakespeare's quote from *Measure for Measure*: "O, it is excellent [t]o have a giant's strength; but it is tyrannous [t]o use it like a giant." WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2, ll. 106–108 (Bigelow, Smith & Co. 1909).

[73] Walter J. Dickey, *Forgiveness and Crime: The Possibilities of Restorative Justice*, *in* EXPLORING FORGIVENESS 106, 118 (Robert D. Enright & Joanna North eds., 1998).

[74] *Id.*

[75] Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 337 (2007) ("Crime has a human face, and that face deserves standing and a say in the matter.").

[76] *Id.* at 329 (citing Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 95–97 (2004)).

the courtroom, requiring the judge to treat with dignity and courtesy all those whom he serves.[77]

In 1999, Judge Eugene Hammermaster, a municipal judge in Pierce County, Washington, was censured and suspended for six months without pay for a host of offenses, including threatening life imprisonment to defendants who had not paid their fines and chastising a defendant about his girlfriend.[78] When the defendant said he was unable to pay his fine, the judge said of the defendant's girlfriend, "I'd suggest you get rid of her. So you're just throwing away money there. Why is she not working?"[79] In a different case, after a defendant described his bipolar disorder during a hearing, Judge Hammermaster said, "If you're bored it's your own fault. It sounds to me like a bunch of pity pot, feeling sorry for yourself, which as far as I'm concerned is garbage."[80]

The Supreme Court of Washington agreed with the Commission on Judicial Conduct that Judge Hammermaster had violated various canons, including Canon 3(A)(3) through his pattern of undignified and disrespectful conduct toward defendants.[81] In disciplining the judge by suspending him for six months without pay, the court rejected the notion that Judge Hammermaster could engage in this conduct as a matter of judicial independence, stating, "[H]is remarks are consistent with his tendency to bully and intimidate defendants. His repeated conduct shows that Judge Hammermaster fails to take seriously his duty to act patiently, and in a dignified and professional manner toward defendants."[82]

In another example of extreme callousness toward the feelings of those involved in a legal proceeding, in October 2004, Texas state-court judge of Dallas, Faith Johnson, threw a "recapture party" to celebrate recapture of a defendant who had disappeared during his aggravated assault trial nearly a year earlier.[83] The judge served ice cream, invited a Dallas news reporter

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[77] This is the crux of Rule 2.8, which requires the judge be "patient, dignified, and courteous" to those "with whom the judge deals in an official capacity." MODEL CODE OF JUDICIAL CONDUCT R. 2.8 (2011).

[78] *In re* Hammermaster, 985 P.2d 924, 926–27 (Wash. 1999).

[79] *Id.* at 933.

[80] *Id.* at 932.

[81] *Id.* at 926.

[82] *Id.* at 940. The court also adopted the Commission's recommendation that Judge Hammermaster take a judicial education course, though the court rejected the idea that the judge should have to pay for the course. *Id.* at 943.

[83] Public Admonition, CJC No. 05-201-DI (Tex. Comm'n on Judicial Conduct Apr. 29, 2005), *available at* www.scjc.state.tx.us/pdf/actions/FY2005PUB-SANC.pdf.

to film the party and proceedings, and decorated the courtroom with balloons for the proceeding in which she sentenced the defendant to life in prison.[84]

After the State Commission on Judicial Conduct publicly admonished Johnson, she issued the following apology in a written statement: "If my celebration of the return of fugitive Billy Wayne Williams offended any member of the community, I deeply apologize."[85]

Similarly, Washington state-court judge from Seattle, Beverly Grant, led a Super Bowl cheer in court, just before a sentencing hearing in a manslaughter case.[86] Relatives of the victim were present in the courtroom.[87] Later that afternoon, Judge Grant claimed she was trying to ease tensions in the courtroom and dismissed the criticism of the cheer.[88] A few days later, after significant media attention, she offered the following apology: "I sincerely and humbly apologize if any of my actions caused any hurt or dismay . . . . When you've done something that offended someone, you apologize."[89]

Louisiana state-court judge Timothy Ellender was suspended for thirty days without pay after asking a pro se litigant in a domestic abuse case whether she could take her children to a better place to eat than Subway and saying, "Good for you"[90] after hearing testimony about the abusive husband-father threatening to "bloody" his daughter's bottom for misbehaving.[91] At the end of the brief hearing, after failing to address several of the plaintiff's allegations, Judge Ellender dismissed the complaint.[92] Prior to this incident, the Louisiana Commission had sanctioned Judge Ellender twice before, once for attending "a Halloween party dressed in a costume consisting of an Afro wig, black face makeup,

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[84] *Id.*

[85] *Judge Apologizes for Throwing Recapture Party*, *supra* note 2.

[86] Stipulation, Agreement and Order of Admonishment, *supra* note 4.

[87] *Id.*

[88] *Id.*

[89] *Tacoma Judge Apologizes for Leading Super Bowl Cheer in Court*, *supra* note 4. The Washington Judicial Conduct commission publicly admonished Judge Grant for her conduct. Stipulation, Agreement and Order of Admonishment, *supra* note 4.

[90] *In re* Ellender, 16 So. 3d 351, 353 (La. 2009). The Louisiana Supreme Court actually acknowledged that the Judge did not lose his temper: "It is clear from the recording [of the Warren proceeding] that Judge Ellender was not out of control; he did not lose hi[s] temper." *Id.* at 358.

[91] *Id.* at 353.

[92] *See id.*

and orange prison jumpsuit with handcuffs."[93] The commission suspended Judge Ellender for six months and required the judge to take a racial sensitivity training course for the Halloween costume incident.[94]

These examples show judges acting with complete disregard for the feelings and humanity of those who appear before them, often displaying the worst behavior toward pro se litigants.[95] Applying Noonan's mask metaphor, these judges behaved more like monsters than concerned public officials.[96] The typical corrective measures, such as brief suspensions and even public censures, do little to restore the judges' perspective regarding the humanity of those whom they serve. In the case of Judge Ellender, for example, the first suspension did little to modify his behavior.[97]

B. Judges May Not Sufficiently Regulate Their Emotions

Judicial misbehavior may also occur when judges attempt to suppress strong emotions stemming from emotionally difficult cases or courtroom situations.[98] Judges' attempts to suppress their natural emotional response

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[93] *Id.* at 356.

[94] *Id.*

[95] King County District Judge Judith Eiler became notorious for her rude and offensive behavior toward pro se litigants and attorneys. She was reprimanded twice, once in February 2005 for rudely interrupting and intimidating litigants in her courtroom and again in April 2009. *See In re* Eiler, 236 P.3d 873, 875 (Wash. 2010). The Supreme Court of Washington again reprimanded Judge Eiler in August 2010, stating: "Aside from deriding the intelligence of these pro se litigants who appeared before her, Judge Eiler also interrupted them on occasion in a rude, impatient, and undignified manner." *Id.* at 878. The court suspended Judge Eiler without pay for five days. *Id.* at 882.

Similarly, the Supreme Court of Pennsylvania affirmed removing Pennsylvania Judge Maryesther Merlo from the bench for very poor attendance (she missed more than 116 days of work during two years) and for berating defendants and lawyers in her court. *In re* Merlo, 58 A.3d 1, 3, 5–7 (Pa. 2012). Specifically, the judge called a juvenile defendant "a dog [who] needs to be retrained," and she ordered another defendant to refer to himself as a "scum bag." *Id.* at 6–7. *See also* Debra Cassens Weiss, *Pennsylvania Judge Banned from Bench for Absenteeism*, A.B.A. J. (Oct. 19, 2011, 2:42 PM), http://www.abajournal.com/news/article/pennsylvania_judge_banned_from_bench_for_absenteeism_rude_remarks/.

[96] *See* NOONAN, *supra* note 57, at 18.

[97] *See Ellender*, 16 So. 3d at 356.

[98] Maroney, *supra* note 54, at 1496–97. Expressive suppression of emotions "requires tremendous cognitive efforts, . . . is costly as it disrupts multiple aspects of social exchange . . . and has been found to merely decrease the emotional expression while the experience of the negative emotion tends to linger." Silje Marie Haga et al., *Emotion Regulation: Antecedents and Well-Being Outcomes of Cognitive Reappraisal and*

(*continued*)

may "increase the chances of emotional rebound."[99] Specifically, judges who disengage from their emotions but experience physical symptoms of anxiety or stress may react impulsively instead of staying cool and calm.[100] Additionally, social science research suggests these types of judges may be prone to impulsive decision making.[101]

A recent voice concerning the role of emotion in judicial decision making illustrates the need for judges to learn to regulate their emotions through techniques, including cognitive reappraisal and other engagement strategies.[102] Professor Terry Maroney begins with the premise that judges' work is particularly challenging because it requires a good degree of dispassion: "For judges, the ideal of judicial dispassion supplies the workplace norm; they are expected both to feel and project affective neutrality."[103] Specifically, according to Maroney, "expressions of judicial emotion are heavily stigmatized."[104]

Other commentators agree, suggesting that emotions should play little to no role in judges' work.[105] Generally speaking, judges are supposed to decide cases and conduct proceedings in their courtrooms based on law, reason, and logic, not emotion.[106] Lynn Henderson, who has written extensively on the role of emotion in judging, posits that "the 'normal' discourse of law" does not allow for expressions of emotion.[107] Commentators consider compassion and sympathy improper emotions for

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Expressive Suppression in Cross-Cultural Samples, 10 J. HAPPINESS STUD. 271, 275 (2009) (internal citations omitted).

[99] Haga et al., *supra* note 98, at 275; Maroney, *supra* note 54, at 1550.

[100] *See* Haga et al., *supra* note 98, at 275–76 ("[P]eople who typically do not express their emotions are physiologically more reactive.").

[101] Maroney, *supra* note 54, at 1551. According to Maroney, social science suggests that mixing conscious suppression with physical symptoms of anxiety, such as increased sweating and heart rate from anxiety and stress, can lead to impulsive decision making. *Id.*

[102] *Id.* at 1508.

[103] *Id.* at 1496.

[104] *Id.*

[105] See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987), and Richard A. Posner, *Emotion Versus Emotionalism in Law*, *in* THE PASSIONS OF LAW 309 (Susan A. Bandes ed., 1999), for discussions regarding the proper role of emotions in judicial decision making.

[106] *See* Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 13 (1997); Henderson, *supra* note 105, at 1574–75; Posner, *supra* note 105, at 309.

[107] Henderson, *supra* note 105, at 1575.

judicial decision making.[108] Judge Richard Posner posits the "strongest emotions, such as anger, disgust, indignation, and love" have no role in the judicial arena, as these emotions "would interfere with the problem-solving process rather than provide an efficient shortcut."[109]

Yet, for some judges, wearing their metaphoric masks to shut out the "strong emotions," like anger, may actually cause them to lose their temper on the bench.[110] Some aspects of judging—both the rigors of the schedule many judges follow in resolving cases[111] as well as the challenges of dispassionate decision making—may lead to judges losing their temper and lashing out at parties and litigants**.**

Maroney opines, "Judges are best able to manage their emotions by turning toward them."[112] She suggests several engagement strategies, including that judges reframe a parties' behavior that angers the judge or recast themselves as more of a neutral-observer.[113] According to Maroney, this strategy is particularly effective when the judge can anticipate the potentially aggravating stimuli.[114] Judges use "the power of thought to either redirect or dampen emotional experience at relatively low cost."[115]

A downside exists to judges simply suppressing their emotions rather than reframing the stimuli; specifically, behavioral suppression could cause significant harm to judges and those around them.[116] First, this type of emotional regulation can substantially impair judges' cognitive function

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[108] Feigenson, *supra* note 106, at 13–14; Neal R. Feigenson, *Merciful Damages: Some Remarks on Forgiveness, Mercy, and Tort Law*, 27 FORDHAM URB. L.J. 1633, 1637 (1999).

[109] Posner, *supra* note 105, at 321.

[110] *See* Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1209 (2012).

[111] Professor James Alfini describes how the increased bureaucratization of judicial roles—specifically, increases in judges' managerial and administrative tasks—may lead to pathologies. *See* James J. Alfini, *Doing Justice in a Bureaucracy: The Need to Reconcile Contemporary Judicial Roles in Light of Ethical and Administrative Imperatives*, 54 MO. L. REV. 323, 323–24, 355 (1989). "Among the role problems and pathologies that social scientists have identified in other organizational contexts are role ambiguity, role conflict, and role strain." *Id.* at 355. This ambiguity and conflict may result in the judge experiencing increased anxiety and stress. *Id.* at 356.

[112] Maroney, *supra* note 54, at 1531.

[113] *See id.* at 1508–10.

[114] *See id.* at 1508.

[115] *Id.* at 1516.

[116] *Id.* at 1533–39.

and impair memory.[117] At the same time, it can cause an emotional rebound from the physiological effects of stress, like increased heart rate and sweating.[118] When judges are "consciously disengaged from [their] emotions" but experience these stress-related physiological effects, they "may blow up over a lawyer's small infraction."[119]

Maroney urges those in legal academia and practice who study judicial behavior to include the study of emotion regulation in the endeavor.[120] This Article applauds Maroney's suggestion and posits that any education imposed as part of judicial discipline for this type of offense should include information regarding emotional regulation in the context of judging.

Many examples of angry outbursts by judges in courtrooms exist. On May 23, 2012, Judge William Watkins, who described himself as having "the most stressful job in the world,"[121] was caught on tape screaming at Arthur Hage, a pastor who was in the judge's court for a divorce proceeding.[122] Judge Watkins is a family court judge in Putnam County, West Virginia, who brings his dog, Buddy, to chambers to ease tension and stress in the courtroom.[123] In the video, which was posted on YouTube,[124] the judge chastises Hage over speaking to a reporter who wrote an article posted on PutmanLive.com, which apparently showed a picture of the judge's home.[125] The judge claimed his property had been vandalized

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[117] *Id.* at 1550 ("The cognitive and memory costs of suppression therefore are particularly likely to be consequential, and the importance of judicial decision making magnifies concern about such costs.").

[118] *Id.* at 1550–51.

[119] *Id.* at 1551.

[120] *Id.* at 1486.

[121] Cheryl Caswell, *He Gives Canine Counsel*, CHARLESTON DAILY MAIL, Nov. 16, 2011, at 1A.

[122] Kate White, *Online Video Latest in Putnam Judge-Pastor Feud*, CHARLESTON GAZETTE, June 28, 2012, at 1A. After Judge Watkins granted the divorce petition filed by Hage's wife, Hage sued the judge for $5 million. *Id.* Hage has also appealed the divorce to the state Supreme Court. *Id.*

[123] Caswell, *supra* note 121. In another video posted on YouTube showing Judge Watkins yelling at a party, Buddy is pictured walking around the courtroom. PutnamCounty IsaJoke, *Family Law Judge William Watkins 3/8/12*, YOUTUBE (Nov. 14, 2012), http://www.youtube.com/watch?v=AijUCBy45TU.

[124] Troyfromwestvirginia, *Putnam County, WV, Family Law Judge, William Watkins, May 23, 2012 MELTDOWN!!!!!*, YOUTUBE (Jun. 26, 2012), http://www.youtube.com/watch?v=APD4a347bPQ. As of May 2, 2013, the YouTube video tallied 241,674 views.

[125] White, *supra* note 122.

several times as a result of the photo.[126] During the hearing, Judge Watkins exclaimed:

> Mr. Hage, if you say one word out of turn, you're going to jail. Do you understand me? . . . Shut up! Don't even speak . . . . You disgusting piece of . . . (inaudible).[127]

After the May hearing, Judge Watkins recused himself from any other proceedings in Hage's case.[128]

Hage filed complaints against Watkins with the West Virginia Judicial Investigation Commission.[129] Soon after the hearing, the West Virginia Supreme Court announced "it was no longer looking into the incident. The court said Watkins admitted he overreacted and recused himself from the case."[130] However, the Judicial Investigation Commission filed charges against Watkins in August 2012 for failing to rule on motions in a timely manner and failing to enter domestic-violence orders into West Virginia's tracking system.[131] Then, in September 2012, the commission filed additional charges against him involving allegations of shouting at litigants and using profanity in court.[132]

Similarly, Judge Pete Fuller repeatedly made degrading comments and swore in anger at his court personnel, sometimes during court

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[126] *Id.*

[127] Troyfromwestvirginia, *supra* note 124.

[128] White, *supra* note 122; Martha Neil, *State Supreme Court Administrator Won't Pile Another Complaint on Judge in YouTube Video*, A.B.A. J. (July 3, 2012, 12:49 PM), http://www.abajournal.com/news/article/state_supreme_court_administrator_wont_pile_another_complaint_on_judge_in_y/.

[129] *Arthur Hage, Yelled at by Judge William Watkins, Says "It's Not Over,"* HUFFINGTON POST (Aug. 10, 2012, 2:33 PM), http://www.huffingtonpost.com/2012/08/10/arthur-hage-william-watkins_n_1764984.html.

[130] *Id.*

[131] Kate White, *Family Judge Still on Job*, CHARLESTON GAZETTE, Sept. 8, 2012, at 1A. *See also* Martha Neil, *Angry Judge in YouTube Video Calls Unrelated Ethics Case re "Overwhelming" Caseload "Infuriating*," A.B.A. J. (Aug. 13, 2012, 11:37 AM), http://www.abajournal.com/news/article/angry_judge_in_youtube_video_calls_unrelated. Watkins defended his failure to act timely on the motion on grounds he conducts 2,500 hearings a year. Judge Watkins expressed anger about the disciplinary matters, stating the problem was "really about caseloads . . . I do over 2,500 hearings a year. In 2011, I had 430 divorces—the highest in West Virginia." *Id.*

[132] White, *supra* note 131. The state supreme court voted not to suspend Watkins without pay during the pendency of the judicial misconduct proceedings. *Id.*

proceedings.[133] Judge Fuller swore at attorneys, telling one attorney during a hearing "to shut the damn statutes, he had already made his decision and he didn't need to be told what the law was."[134] In another instance, Judge Fuller gave a lawyer "the bird" during a court proceeding.[135] The judge also referred to juvenile defendants as "my little peckerheads."[136]

Following a Judicial Qualifications Commission hearing and recommendation, the Supreme Court of South Dakota involuntarily retired Judge Pete Fuller, providing conditions that, if satisfied by Judge Fuller, would stay the retirement.[137] These conditions included indefinite supervisory probation; six months suspension without pay, during which time he would participate in behavioral therapy; and reimbursement for expenses incurred in connection with his case.[138]

On December 14, 2010, Alabama state-court judge John Steensland, from Houston County, received a public censure for violating several of the Alabama Canons of Judicial Ethics.[139] Specifically, Judge Steensland yelled and cursed at litigants from the bench to such an extent that one litigant testified that her son pled guilty to a traffic charge, rather than seeking youthful offender status, to avoid further dealings with the angry judge.[140] Another litigant testified that the judge yelled at her for not being able to remember certain incidents of her daughter's case and told the mother she "needed to get her d--n memory back."[141] The mother, though not charged with a crime, was handcuffed and sent to jail for her failure to remember certain details of her daughter's case.[142] The Alabama Court of the Judiciary determined that the judge "would demean, mock, and humiliate the litigants, both defendants and complaining witnesses who

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[133] *In re* Fuller, 798 N.W.2d 408, 413 (S.D. 2011).

[134] *Id.*

[135] *Id.*

[136] *Id.* at 415.

[137] *Id.* at 421.

[138] *Id.*

[139] Steensland v. Ala. Judicial Inquiry Comm'n, 87 So. 3d 535, 536–37 (Ala. 2012); *In re* Steensland, No. 39, slip op. at 7–8 (Ala. Ct. Judiciary May 2, 2011), *available at* http://judicial.alabama.gov/judiciary/COJ39FINALJUDG.pdf.

[140] *Steensland*, 87 So. 3d at 537.

[141] *Id.* at 538.

[142] *Id.*

appeared before him, especially when the litigants were appearing pro se."[143]

In these examples, judges appointed or elected to protect the public did just the opposite by reacting angrily to litigants and lawyers in their courtrooms. By either trying to suppress strong emotions, disregarding the humanity of those who stood before them, or some combination of the two, these judges let anger get the best of them.

C. Judges May Suffer from Decision Fatigue and Ego Depletion—The Strain of Being "The Decider"

"The hungry Judges soon the sentence sign, [a]nd wretches hang that jury-men may dine."[144]

The third reason judges may behave rudely is decision fatigue: the weakened ability to make well-reasoned decisions after a prolonged period of decision making.[145] As shown in this part, decision fatigue may tax judges' abilities to regulate their emotions. This may help explain why a judge who typically maintains a courteous demeanor suddenly "flies off the handle" during a particular court proceeding.

Most would agree that the work that judges perform taxes their cognitive abilities.[146] In addition, commentators have addressed how timing and the court's calendar may affect judges' decision making.[147] In fact, Justice Brandeis said this about the Court's schedule and calendar: "[W]rong decisions . . . often [are] due to haste and fatigue of the end of term."[148] Brandeis viewed the end of the Court's term as a "factor that undermined effective and comprehensive analysis of complex legal issues."[149] Legal commentary has yet to address the impact of decision

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[143] *In re* Steensland, No. 39, slip op. at 7–8 (Ala. Ct. Judiciary May 2, 2011), *available at* http://judicial.alabama.gov/judiciary/COJ39FINALJUDG.pdf.

[144] ALEXANDER POPE, *Canto II*, *in* THE RAPE OF THE LOCK AND OTHER POEMS 44, 44 (Thomas Marc Parrott ed., BiblioBazaar, LLC 2008).

[145] BAUMEISTER & TIERNEY, *supra* note 63, at 90, 98.

[146] Maroney, *supra* note 54, at 1550.

[147] Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 211 (2004) ("It is clear that the rhythms of the Court's calendar, and the spacing of its workload, do have a tangible effect on the Court's treatment of petitions for certiorari.").

[148] *Id.* at 213–14 (quoting Dennis J. Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946–O.T. 1961*, 1980 SUP. CT. REV. 143, 148 (1980)).

[149] *Id.* at 214 (quoting Hutchinson, *supra* note 148, at 148).

fatigue on judicial behavior and how that correlation should influence discipline against misbehaving judges.

Generally speaking, decision fatigue refers to the reduced quality of decisions made by an individual after a long session of decision making.[150] Decision fatigue relates to willpower in that if willpower is an exhaustible resource, as current research suggests,[151] decision fatigue depletes willpower due to mental strain from making too many decisions.[152] In a nonlegal context, this strain deprives decision makers of the will to resist desserts or to refrain from yelling at their spouses.[153] In the advertising industry, decision fatigue is a phenomenon used to describe why consumers, at times, make poor choices with their purchases, particularly where trade-offs exist.[154] Decision fatigue is a form of ego depletion, which social psychologist Roy Baumeister describes as a person's "diminished capacity to regulate [the person's] thoughts, feelings, and actions."[155]

Some "deciders" modify their behavior to cope with the effects of decision fatigue. For example, President Obama wears only blue and gray suits to avoid making decisions on trivial matters and to reserve mental resources for significant decisions.[156] Commentators explain how decision fatigue may lead politicians to make thoughtless, rash decisions, like engaging in extra-marital affairs and other injudicious conduct:

> When Spitzer hired a hooker, when the governor of South Carolina snuck off to Buenos Aires to see his girlfriend, when Bill Clinton took up with an intern, they were all

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[150] *See* BAUMEISTER & TIERNEY, *supra* note 63, at 90, 98.

[151] *See id.* at 98; Binyamin Appelbaum, *Up for Parole? Better Hope You're First on the Docket*, ECONOMIX (Apr. 14, 2011, 10:00 AM), http:economix.blogs.nytimes.com/2011/04/14/time-and-judgment/?pagemode=print.

[152] *See* BAUMEISTER & TIERNEY, *supra* note 63, at 98; Appelbaum, *supra* note 151.

[153] John Tierney, *To Choose Is To Lose*, N.Y. TIMES, Aug. 21, 2011, § 6 (Magazine), at 32, 34.

[154] *Id.* at 36.

[155] BAUMEISTER & TIERNEY, *supra* note 63, at 28. *See also* Tierney, *supra* note 153, at 34.

[156] *Inside Obama's Decisions: From Libya to Lunch*, NPR (Sept. 11, 2012, 3:30 AM), http://www.npr.org/2012/09/11/160898373/inside-obamas-decisions-from-libya-to-lunch. Michael Lewis interviewed Obama and learned that he eliminated all decisions concerning what he eats and what he wears to better handle the important decisions. *Id.* According to Lewis, the President did this based on "research that showed the mere act of making a decision, however trivial it was, degraded your ability to make a subsequent decision." *Id.*

> subject to the occupational hazard that comes with being, as President George W. Bush once described himself, "the decider."[157]

According to these commentators, decision fatigue affects not just politicians' actions but everyone's behavior, all the time.[158] According to researchers, ego depletion can have disastrous effects for the frequent decider: "This sort of decision fatigue can make quarterbacks prone to dubious choices late in the game and C.F.O.'s prone to disastrous dalliances late in the evening. It routinely warps the judgment of everyone . . . ."[159]

In the judicial arena, a group of researchers concluded that decision fatigue impacted Israeli judges' decision making when considering whether to grant parole to prisoners.[160] Specifically, the researchers studied a group of judges conducting over 1,000 parole decisions during a ten-month period.[161] The researchers concluded that the time of day when the judge heard the case significantly impacted the likelihood of the court granting parole.[162] Specifically, prisoners who appeared for a hearing early in the morning or after a break for food received parole about 65% of the time, as opposed to those who appeared late in the afternoon who were granted parole less than 10% of the time.[163]

The researchers concluded that the judges opted for the "easier" decision of denying parole when the judges' mental resources were depleted.[164] Specifically, as their mental resources became depleted, the judges chose the "default" option of denying parole to avoid the tougher decision of granting parole.[165] Eating a sugary snack could possibly have replenished the mental resources necessary to make more difficult decisions:

> We have presented evidence suggesting that when judges make repeated rulings, they show an increased

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[157] BAUMEISTER & TIERNEY, *supra* note 63, at 90.

[158] *Id.*

[159] Tierney, *supra* note 153, at 34.

[160] Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S.A. 6889, 6890 (2011).

[161] *Id.* at 6889.

[162] *Id.* at 6890.

[163] *Id.*; Tierney, *supra* note 153, at 34.

[164] *See* Danziger et al., *supra* note 160, at 6892; Tierney, *supra* note 153, at 34.

[165] Danziger et al., *supra* note 160, at 6892; Tierney, *supra* note 153, at 34.

> tendency to rule in favor of the status quo. This tendency can be overcome by taking a break to eat a meal, consistent with previous research demonstrating the effects of a short rest, positive mood, and glucose on mental resource replenishment.[166]

While this research raises important questions about judicial decision making—these decisions are often without an easy, default option[167]—the research also bears on judicial behavior. As self-control or willpower diminishes,[168] "sensible people get angry at their colleagues and families, splurge on clothes, buy junk food at the supermarket, and can't resist the car dealer's offer to rustproof their new sedan."[169] "[T]he process of choosing may itself drain some of the self's precious resources, thereby leaving the executive function less capable of carrying out its other activities. Decision fatigue can therefore impair self-regulation."[170]

The toll of frequent decision making, particularly in emotionally-taxing cases, should come as no surprise to the public or to the judges themselves. As one commentator noted when describing a rash of poor judicial behavior in domestic violence cases: "The conflict and intense emotions inherent in court proceedings involving allegations of domestic violence can challenge a judge's ability to demonstrate judicial temperament and convey impartiality."[171] As this research suggests, the difficulty, frequency, and timing of decisions actually change a judge's mental functions, thereby altering the judge's self-control. In addition, some judges may be much more adept at controlling or regulating their emotional responses to an overloaded docket or a difficult case.[172]

During an en banc oral argument last year, Fifth Circuit Court of Appeals Judge Edith Jones told her colleague, Judge Dennis, to "shut up"

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[166] Danziger et al., *supra* note 160, at 6892.

[167] BAUMEISTER & TIERNEY, *supra* note 63, at 103–04 (explaining that the more tough choices a decision maker has to make early in the process, the quicker the decision maker will fatigue and settle for the easiest, default option toward the end of the decision making period).

[168] *See* Roy F. Baumeister et al., *Ego Depletion: Is the Active Self a Limited Resource?*, 74 J. PERSONALITY & SOC. PSYCHOL. 1252, 1261–64 (1998).

[169] BAUMEISTER & TIERNEY, *supra* note 63, at 90.

[170] Kathleen D. Vohs et al., Decision Fatigue Exhausts Self-Regulatory Resources 1, 4 (2005) (unpublished manuscript), *available at* http://www.chicagobooth.edu/research/workshops/marketing/archive/WorkshopPapers/vohs.pdf.

[171] Gray, *Demeanor in Domestic Violence Cases*, *supra* note 32.

[172] Maroney, *supra* note 54, at 1512.

as he was asking tough questions of the government's lawyer.[173] As Judge Dennis questioned the lawyer during the argument, Judge Jones interrupted him, saying he had "monopolized . . . seven minutes."[174] When Judge Dennis asked if he could continue with his questioning, Judge Jones asked if he would like to leave.[175] When Dennis asked her to clarify what she had just said, Jones replied, "I want you to shut up long enough for me to suggest that perhaps . . . ."[176] Dennis interrupted Jones: "Don't tell me to shut up."[177]

Pennsylvania state-court judge Richard Zoller was disciplined for using profanity during an arraignment in night court.[178] During the proceeding, the judge said, "This is absolutely fucking bullshit. This paperwork is all screwed up. This whole thing is fucking ridiculous. I haven't even gotten a chance to eat my fucking dinner yet. This is absolute bullshit."[179] Judge Zoller was sanctioned for failing to be patient, dignified, and courteous to litigants, witnesses, lawyers, and others with whom he dealt; engaging in activity prohibited by law; violating a canon of judicial ethics; and bringing the judicial office into disrepute.[180]

New Jersey state appellate court Judge Max Baker shouted at a pro se litigant while presiding over a family law case, behaving in a manner the ethics tribunal referred to as "disrespectful and insulting."[181] While presiding over the case in which the two pro se petitioners had sought restraining orders against the other, Judge Baker "became irate, screamed

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[173] John Council, *Jones Says Dennis Accepted Her Apology After Heated "Shut Up" Exchange*, TEX. LAW. (Sept. 22, 2012), www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1202516573154. A blog concerning law and politics reported the following: "Judicial Diva Gone Wild? Chief Judge Jones Tells Judge Dennis to 'Shut Up.'" David Lat, *Judicial Diva Gone Wild? Chief Judge Jones Tells Judge Dennis to 'Shut Up,'"* ABOVE THE LAW (Sept. 21, 2011, 7:43 PM), http://abovethelaw.com/2011/09/benchslap-of-the-day-chief-judge-jones-tells-judge-dennis.

[174] Council, *supra* note 173.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *In re* Zoller, 792 A.2d 34, 34–35, 39 (Pa. Ct. Jud. Discipline 2001).

[179] *Id.* at 35.

[180] *Id.* at 35–39 (explaining that no matter the judges' "idiosyncratic predispositions," while carrying out "judicial duties there is no place for discourtesy").

[181] Charles Toutant, *Judge Apologizes for Courtroom Rant, Says He Meant Well*, N.J. L.J. (Sept. 7, 2010, 12:00 AM), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202471695935.

at [the mother], accused her of being a bad parent[,] and threatened her with incarceration if she disobeyed his order concerning visitation."[182]

In response to the ethics complaint against Judge Baker for violating New Jersey Code of Judicial Conduct Canons 1,[183] 2A,[184] and 3A(3),[185] he explained that "[w]hile the message should have been imparted more cordially and patiently, it was a heartfelt message with the hope of doing justice to the family, not to demean either of the litigants."[186] The New Jersey Supreme Court adopted the findings and recommendations of the Advisory Committee on Judicial Conduct and publicly reprimanded Judge Baker.[187]

An Iowa trial court judge repeatedly bickered with a defendant during trial.[188] During the trial of defendant Brandon Brooks for allegedly assaulting a deputy sheriff, Judge Hobart Darbyshire of the Iowa District Court said to the defendant, in front of the jury, "You don't listen," and commented that the defendant had a bad habit of giving too much information when asked a question.[189] After a lot of bickering between judge and defendant, the court declared a mistrial and apologized to the jury:

> There is no way that I could expect you after watching this . . . to render a fair and impartial verdict because I'm not acting appropriately either and I apologize for that. . . . I apologize for my conduct to you because I've let him control that agenda, ... I apologize for Mr. Brooks' conduct in this fashion. He knows better, but he's insistent on telling the story his way without regard to what the

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[182] *Id.*

[183] N.J. CODE OF JUDICIAL CONDUCT Canon 1 (2012) ("A judge should . . . observe[] high standards of conduct so that the integrity and independence of the judiciary may be preserved.").

[184] N.J. CODE OF JUDICIAL CONDUCT Canon 2A (2012) ("A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

[185] N.J. CODE OF JUDICIAL CONDUCT Canon 3A(3) (2012) ("A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . .").

[186] Toutant, *supra* note 181.

[187] *In re* Baker, 21 A.3d 1141, 1142 (N.J. 2011).

[188] Iowa v. Brooks, No. 8-086/07-1057, 2008 Iowa App. LEXIS 124, at *2 (Iowa Ct. App. Feb. 27, 2008).

[189] *Id.* at *2, *5.

> rules of procedure are, and it's simply not going to happen that way, so I very much apologize for it.[190]

The court declared a mistrial sua sponte, and Judge Darbyshire ordered a new trial because of his intemperate bickering with Brooks.[191]

These examples illustrate the effects that decision fatigue, losing sight of the parties' humanity, or an inability to regulate emotions might have on a judge's courtroom demeanor. Presently, these conditions play no role in sanctioning tribunals' decisions concerning how to properly and effectively sanction judicial wrongdoing.[192]

IV. DISCIPLINING JUDICIAL MISBEHAVIOR: STATE JUDICIAL CONDUCT ORGANIZATIONS

All the states, the District of Columbia, and the federal judiciary have tribunals for investigating complaints against judges and imposing sanctions when warranted.[193] These bodies are established by constitution, court rule, or statute.[194] In the federal system, each of the thirteen federal circuits has a federal judicial council authorized to review complaints and sanction misconduct.[195]

This part focuses on four aspects of existing sanctioning schemes, starting with the process these agencies use when confronted with purported judicial misconduct and proceeding to describe the objectives underlying judicial discipline. After outlining the factors and principles tribunals presently use to determine appropriate sanctions, this part concludes with a brief discussion of typical complaints concerning the work of judicial conduct tribunals.

A. Process

State judicial conduct organizations regulate judicial conduct by investigating complaints, and when warranted, sanctioning judges for misbehavior.[196] Most judicial conduct agencies investigate and sanction

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[190] *Id.* at *6–7.

[191] *See id.* at *7

[192] *See* discussion *infra* Part IV.

[193] Gray, *supra* note 30, at 1245 n.1.

[194] *Id.*

[195] ALFINI ET AL., *supra* note 23, § 1.05, at 1-12.

[196] *Id.* § 1.04, at 1-10 ("By 1981, all 50 states and the District of Columbia had established judicial conduct organizations vested with authority to investigate, prosecute, and adjudicate cases of judicial misbehavior . . . .").

wrongdoing as part of the state court system (agency decisions are reviewable by the highest court).[197] However, as of 1990, eight state agencies used a two-tiered system: a judicial conduct commission investigates and prosecutes misconduct charges, while a court determines culpability.[198] For more severe sanctions, such as public censure,[199] the typical sanctioning scheme authorizes the commission to investigate and make a recommendation to the state's highest court[200] or to conduct formal proceedings.[201] Depending on the jurisdiction, typical means of discipline for judicial misbehavior include the following: orders of education, private or public warnings, admonitions or reprimands, suspensions, public censures,[202] mandatory retirement, and removal.[203] Some states permit sanctioning organizations to assess costs or fines.[204]

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[197] Jeffrey M. Shaman, *Regulation of the Judiciary: The State Commission System*, *in* ETHICS IN THE COURTS: POLICING BEHAVIOR IN THE FEDERAL JUDICIARY 47, 47 (1990). State judicial conduct commissions are typically governed by state constitutions, government codes, and codes of judicial conduct. Gray, *supra* note 30, at 1245 n.1. Pursuant to these authorities, the commissions are made up of lawyers, judges, and laypeople. *See id.* at 1247. For example, the Texas Judicial Conduct Commission includes two attorneys appointed by the Texas Bar, five members of the public, who are neither attorneys nor judges, appointed by the governor, and six judges appointed by the Texas Supreme Court. *Commissioner Information*, TEX. COMMISSION ON JUD. CONDUCT, http://www.scjc.state.tx.us/commissioners.asp (last updated Jan. 30, 2012). These thirteen members serve staggered six-year terms. *Id.*

[198] Shaman, *supra* note 197, at 48.

[199] In this Article, "sanction" refers to any of the types of discipline imposed by a sanctioning tribunal. However, technically, some agencies refer to "sanction" as admonitions, warnings, or reprimands, and identify censure and removal as more severe discipline imposed only after formal hearings. *See, e.g.*, TEXAS CONST. art. V, § 1-a (8).

[200] *See, e.g.*, *id.*

[201] *See, e.g.*, *id.* The Texas Constitution provides that the commission may issue an admonition, warning, reprimand, or order for more education. For more severe sanctions, the tribunal can conduct a formal hearing concerning whether to publicly censure a judge or recommend removal or retirement. *Id.* The commission's recommendation of censure, removal, or retirement goes to a review tribunal, consisting of Texas court of appeals judges, that reviews the commission's recommendation and can order sanctions or reject the commission's recommendation. *Id.* at art. V, § 1-a (9).

[202] This is the most severe action available to the Texas commission and serves as a public denunciation of the judge's conduct. TEX. P.R. REMOVAL OR RETIREMENT OF JUDGES 1(f). For censure, the Texas process requires a public fact finding trial during which the commission determines the allegations against the judge are true but removal from office is not warranted. TEXAS CONST. art. V, § 1-a (6), (8).

The federal judicial disciplinary scheme differs in that each circuit has a judicial council authorized under the direction of the chief circuit judge to investigate and impose punishment.[205] Unlike the state commissions, these federal councils are composed entirely of judges; thus, in the federal scheme, judges are "self-regulated."[206] The Judicial Conduct and Disability Act of 1980[207] authorized judicial councils in each federal circuit to review complaints and order sanctions; the statute also defines the process for handling complaints against federal judges.[208] The Act authorizes the judicial councils to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."[209]

B. Objectives of Judicial Discipline

Courts frequently begin by clarifying the "non-goal" of judicial discipline—punishment—and then refer to the objectives:

> Discipline is not imposed to punish the individual judge. Rather, the purpose of judicial discipline, like the purpose of the Code of Judicial Conduct, is to protect our court system and the public from misconduct. Discipline is designed to restore and maintain the dignity, honor, and impartiality of the judicial office.[210]

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[203] ALFINI ET AL., *supra* note 23, § 13.04, at 13-6 (listing the types of sanctions that judicial conduct commissions may order or recommend). The commissions may recommend removal or retirement. *Id.* Under some schemes, the state's highest court would hold a hearing and decide whether to adopt the commission's recommendation. *Id.* § 13.10D, at 13-37.

[204] *Id.*

[205] *Id.* § 1.05, at 1-12.

[206] *Id.*

[207] 28 U.S.C. §§ 351–364 (2006). The Judicial Conference of the United States promulgated the rules pursuant to 28 U.S.C. §§ 331, 358.

[208] The various standards and procedures are at *id.* §§ 351–364.

[209] *Id.* § 332(d)(1).

[210] *In re* Ziegler, 750 N.W.2d 710, 721 (Wis. 2008). According to the Supreme Court of California, "The purpose of [disciplinary] proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield." Dodds v. Comm'n on Judicial Performance, 906 P.2d 1260, 1271 (Cal. 1995). The Louisiana Supreme Court describes the non-goal a bit differently: "The purpose of a judicial disciplinary proceeding is *not simply to punish* an individual but to purge the judiciary of any taint." *In re* Chaisson, 549 So. 2d 259, 267 (La. 1989) (emphasis added).

In terms of the "non-goal" of discipline, courts have often noted the need to "carefully maintain the distinction between protection and punishment."[211] When describing disciplinary objectives, courts also emphasize the need to maintain judicial independence,[212] while concurrently ensuring judicial conduct "does not blemish the fair administration of justice."[213]

Courts often identify deterrence as an objective, without specifying whether it is general or specific.[214] At least a few courts identify rehabilitating a particular judge as a goal. One example of rehabilitation is the reprimand issued to Judge Fuller: the court suspended him only conditionally, providing that he could return to service after complying with the terms of his sanction.[215] According to a study of state judicial discipline sanctions by the State Justice Institute, specific reasons for imposing discipline include: "Impressing upon the judge the severity and significance of the misconduct";[216] "[d]eterring similar conduct by the judge and others";[217] "[r]eassuring the public that judicial misconduct is not tolerated or condoned";[218] and "[f]ostering public confidence in the self-policing system."[219]

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[211] *In re* Hocking, 546 N.W.2d 234, 245 (Mich. 1996).

[212] *See* ALFINI ET AL., *supra* note 23, § 1.04, at 1-10 to 1-11. Because judicial disciplinary schemes are designed to respect judicial independence, the commissions dismiss many complaints (generally more than 90% of complaints) for the absence of jurisdiction. Gray, *supra* note 30, at 1245. The disciplinary commissions are not meant to supplant the role of appellate courts, and commissions strive to maintain the distinction in roles and objectives: "Appellate review 'seeks to correct past prejudice to a particular party' while judicial discipline 'seeks to prevent potential prejudice to future litigants and the judiciary in general.'" *Id.* at 1248 (quoting *In re* Laster, 274 N.W.2d 742, 745 (Mich. 1979)).

[213] *Hocking*, 546 N.W.2d at 245.

[214] *See, e.g.*, *id.* ("In assessing the appropriate sanction in judicial disciplinary proceedings, our primary charge is to fashion a penalty that maintains the honor and the integrity of the judiciary, deters similar conduct, and furthers the administration of justice.").

[215] *In re* Fuller, 798 N.W.2d 408, 421–22 (S.D. 2011) ("History is replete with those who have overcome a weakness or character flaw and risen to what Attorney at Law Abraham Lincoln declared to be the 'better angels of our nature.'").

[216] CYNTHIA GRAY, AM. JUDICATURE SOC'Y., STATE JUDICIAL INST., A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 3 (2002).

[217] *Id.*

[218] *Id.*

[219] *Id.*

As discussed more fully in Part V, the "protect the public" goal suffers from a lack of clarity that makes it difficult to ascertain the effectiveness of sanctions.[220] Therefore, for purposes of this Article, the "protect the public" goal is renamed as "prevent judicial misconduct," which includes general and specific deterrence, rehabilitation for offending judges, and efforts to instill public confidence in the judiciary. The only remaining objective is to express disapproval of offending judges.[221]

C. Factors and Guiding Principles

This part identifies the factors and principles guiding sanctioning tribunals' decisions concerning proper discipline. The factors and principles bear virtually no relation to the reasons why judges misbehave. By failing to factor in the reasons explaining misbehavior when deciding sanctions, disciplinary tribunals have little hope of imposing sanctions that will prevent future misconduct.

Sanctioning bodies[222] use varying tests and factors for deciding whether to issue sanctions. In Louisiana, Texas, and other states,[223] tribunals use the following nonexclusive *Deming*[224] factors to decide the appropriate sanction:

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[220] In a sense, these objectives suffer from the same failings as those described by Professor Fred Zacharias in his article about lawyer discipline. The goal of lawyer discipline is also "to protect the public." Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 677 (2003). Zacharias challenges this goal as follows: "First, the characterization is simplistic and, as a result, masks a variety of functions that discipline might actually serve. Second, identifying the purposes of discipline more precisely would help rulemakers and disciplinary agencies achieve more consistent, and better, results." *Id.* at 677–78.

[221] *See, e.g.*, *In re* Spruance, 532 P.2d 1209, 1225 (Cal. 1975) ("Mere censure of petitioner would woefully fail to convey our utter reproval of any judge who allows malice or other improper personal motivations to infect the administration of justice.").

[222] This can be a judicial conduct commission, the state's highest court, or a review tribunal. Shaman, *supra* note 197, at 48; Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1062 n.32 (2002).

[223] Many states consider several or all of the *Deming* factors in determining appropriate sanctions. *See, e.g.*, *In re* Chaisson, 549 So. 2d 259, 266 (La. 1989); *In re* Moore, 626 N.W.2d 374, 386 n.20 (Mich. 2001); *In re* Seaman, 627 A2d 106, 122 (N.J. 1993); *In re* Sharp, No. 12–0003, 2013 WL 979361, at *7, *10 (Tex. Special Ct. Rev. Mar. 13, 2013); *In re* Eiler, 236 P.3d 873, 880 (Wash. 2010).

[224] *In re* Deming, 736 P.2d 639 (Wash. 1987).

> (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent and frequency of occurrence of the acts of misconduct; (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires.[225]

Some states refer to these as aggravating and mitigating circumstances, considering facts such as the judge's history of service on the bench into the sanctioning decision.[226]

For example, in disciplining Judge Timothy Ellender, who demeaned a petitioner seeking a restraining order against her allegedly abusive spouse, the court balanced the judge's misbehavior against "Judge Ellender's many years of judicial service with but one private admonition for his action in a judicial capacity."[227] The court also considered that Judge Ellender acknowledged the impact of his behavior on the injured party.[228] The court ultimately rejected the commission's recommendation of a public censure; instead, the court ordered a thirty-day unpaid suspension and required

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[225] *Id.* at 659.

[226] *See, e.g.*, Dodds v. Comm'n on Judicial Performance, 906 P.2d 1260, 1270–71 (Cal. 1995). The court rejected the commission's recommendation for public censure stating, "The record in this case is replete with evidence that petitioner is a talented judge who is often sought for his ability to settle difficult cases." *Id.* at 1271. According to the American Judicature Society, courts use the following factors to determine appropriate sanctions: (1) the nature of misconduct—whether the conduct occurred in the judge's private life or in connection with official duties and whether it involved dishonest acts or moral turpitude; (2) the extent of misconduct—whether the misconduct occurred over a long period of time; (3) the judge's culpability; (4) the judge's conduct in response to the commission's proceeding—including whether the judge acknowledged the misconduct or expressed remorse; and (5) the judge's record of service and behavior. GRAY, *supra* note 216, at 81–82.

[227] *In re Ellender*, 16 So. 3d 351, 359 (La. 2009).

[228] *Id.*

Judge Ellender to enroll in "training designed to assist judges in addressing domestic violence cases."[229]

Some states, including California and South Dakota, provide for certain types of discipline—such as censure, removal, or retirement—only for "willful misconduct" in office.[230] These states distinguish willful misconduct from "prejudicial conduct"[231] in deciding discipline. According to these guidelines, willful misconduct refers to conduct committed in bad faith, suggesting an interested or sinister motive, while prejudicial conduct "occurs when a judge, though acting in good faith, engages in conduct which adversely affects public opinions of the judiciary."[232] In the federal judicial disciplinary scheme, all complaints of misconduct against federal judges require "conduct prejudicial to the effective and expeditious administration of the business of the courts."[233]

Courts emphasize the need for proportionality when deciding the proper sanction.[234] The corrective measure is meant to fit the seriousness of the offense.[235] Courts and commissions also describe the need for consistency as a governing principle, using precedent cases to determine proper sanctions.[236] In deciding punishment, the Supreme Court of Arizona said, "We may consider the sanctions imposed in similar cases 'to

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[229] *Id.* at 360.

[230] S.D. CONST. art. V, § 9; CAL. CONST. art. VI, § 18(d).

[231] The South Dakota Constitution refers to "conduct prejudicial to the administration of justice which brings a judicial office into disrepute." S.D. CONST. art. V, § 9.

[232] *In re* Fuller, 798 N.W.2d 408, 417 (S.D. 2011) (quoting Kloepfer v. Comm'n on Judicial Performance, 782 P.2d 239, 241 (Cal. 1989)).

[233] 28 U.S.C. § 351(a) (2006). *See also* FILING A COMPLAINT OF JUDICIAL MISCONDUCT OR JUDICIAL DISABILITY AGAINST A FEDERAL JUDGE, JUDICIAL CONFERENCE OF THE U.S. COMM. ON JUDICIAL CONDUCT & DISABILITY (2010), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/jud_conduct_and_disability_procedure.pdf.

[234] *See, e.g.*, *In re* Abrams, 257 P.3d 167, 173 (Ariz. 2011).

[235] *Id.*

[236] For example, the Supreme Court of Louisiana compared Judge Ellender's conduct to judicial misconduct in two prior cases: "Unlike the *Bowers* and *Best* cases, which involved numerous charges, but only one appearance before the Judiciary Commission, the instant decision represents Judge Ellender's third disciplinary sanction." *In re* Ellender, 16 So. 3d 351, 359 (La. 2009). The Court's sanction of Judge Ellender was similar to, but slightly less severe in light of the differing conduct, to the defendants' discipline in the precedent cases cited by the court. *See id.* at 355, 359. Judge Ellender was suspended for thirty days, ordered to pay costs of the disciplinary proceeding, and required to enroll in domestic violence education. *Id.* at 360.

preserve some degree of proportionality, ensure that the sanction fits the offense, and avoid discipline by whim or caprice.'"[237]

Given the typical set of mitigating and aggravating factors, most sanctions are imposed based on proportionality, seeking to match the severity of the sanction to the severity of the wrongdoing.[238] Thus, judges are disciplined according to how severely they breach the ethical rules.[239] As such, this system effectively imposes punishment, the purported non-goal of judicial discipline.[240] Instead, to be most effective, the factors should focus on the goal of *prevention* by taking into account the likely reasons for the misbehavior.

D. Typical Challenges to Existing Scheme

The judicial conduct commissions are often criticized as being too lenient—for failing to impose adequate discipline for a judge's misbehavior.[241] Lawyers familiar with the state judicial conduct commissions complain the discipline lacks teeth.[242] According to the Harris County Criminal Lawyers Association, the Texas Judicial Conduct Commission only imparts a "wrist slap" for bad behavior, failing to order meaningful sanctions: "Nothing ever happens, no one is ever disciplined and there's no accountability back to anyone for anything."[243]

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[237] *Abrams*, 257 P.3d at 173 (quoting *In re* Phillips, 244 P.3d 549, 555–56 (Ariz. 2010)).

[238] *See, e.g.*, *Phillips*, 244 P.3d at 555.

[239] *See id.*

[240] *See In re* Ziegler, 750 N.W.2d 710 (Wis. 2008). According to the Supreme Court of California, the purpose of disciplinary proceedings "is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield." Dodds v. Comm'n on Judicial Performance, 906 P.2d 1260, 1271 (Cal. 1995) (quoting Furey v. Comm'n on Judicial Performance, 743 P.2d 919, 931 (Cal. 1987)).

[241] Brian Rogers, *Defense Lawyers Complain Judges Rarely Punished*, CHRON (Feb. 3, 2012, 10:07 PM), http://www.chron.com/news/houston-texas/article/Disciplining-Texas-judges-can-be-a-balancing-act-3004058.php.

[242] *Id.* In part, certain purported failings may arise because of financial constraints facing these agencies. Commission members' service is primarily voluntary, and the agencies "typically operate with restricted budgets, have limited staffs, and often do not employ full-time investigators." Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 467–68 (2004). The revisions described in this Article are meant to enhance the effectiveness of the sanctioning bodies, without increasing the need for financial resources.

[243] Rogers, *supra* note 241.

The commissions' work is also criticized for its lack of transparency, about which much has been written.[244] With most state judicial conduct commissions, records of commission investigations and proceedings are not subject to public disclosure under the Public Information Act or the Freedom of Information Act.[245] Unless the commission issues a public sanction, the complainant receives notice that the commission has taken action, but does not learn what action is taken.[246] The Harris County Trial Lawyers Association challenged the Texas disciplinary scheme because many proceedings are private; therefore, the public cannot learn of the allegations or resulting disciplinary action.[247] This lack of transparency[248] "frustrates those who want to see judges punished. It also runs counter to the public nature of courtrooms, where most information is supposed to be public."[249]

Judges also challenge the work of judicial conduct commissions because of the absence of transparency.[250] A lawyer who represents judges before the New York State Commission on Judicial Conduct explained that

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[244] *See, e.g.*, ALFINI ET AL., *supra* note 23, § 13.12, at 13-43; Miller, *supra* note 242, at 468 ("Exacerbating the perception that judicial conduct commissions are too cozy with judges is the suspicion of the secrecy in which they operate."); John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 200–06 (1994).

[245] The lack of transparency raises First Amendment concerns regarding the public's right to know about its public officials. ALFINI ET AL., *supra* note 23, §§ 13.12A, 13.12D.

[246] *See* David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 931 (2009).

[247] Rogers, *supra* note 241.

[248] Commissions counter this criticism by pointing out the tension between the public's eagerness to know judges have been punished for poor behavior and the conduct commissions' need to maintain judicial independence and protect judicial privacy. Miller, *supra* note 242, at 469. Privacy protects the reputation of innocent judges against whom meritless complaints are filed. ALFINI ET AL., *supra* note 23, § 13.12, at 13-41. Where judges are elected, confidentiality protects a judge against whom a complaint is filed from political attacks based on the complaint. Miller, *supra* note 242, at 469 n.327. Some scholars suggest the confidentiality rules should be re-examined, as confidentiality often does not satisfy its intended purposes and objectives and runs counter to "the contemporary trend toward openness in government, manifested by the expansion of the First Amendment right of access to information and the adoption of freedom of information acts throughout the nation." ALFINI ET AL., *supra* note 23, § 13.12H, at 13-63.

[249] Rogers, *supra* note 241.

[250] ALFINI ET AL., *supra* note 23, § 13.12F, at 13-59.

"[j]udges think it is a kangaroo court."[251] A recent article about possible reform to the New York commission's work, including possible changes to make prosecuting judges more difficult, described the commission as "a feared but little-understood agency."[252]

In addition, commentators posit that judicial commissions should be cautious about sanctioning judicial behavior that lacks courtesy because to do so may conflict with judicial independence by stifling judges' individual styles and personalities.[253] These commentators suggest that unless the conduct undermines the fairness of the proceeding, judges should be allowed to express their anger and frustration in court.[254]

This Article disagrees with this premise because of the substantial toll judicial rudeness takes on the public's perceptions of the judiciary. The author agrees that "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline."[255] However, the behavior described in the cases herein does not reflect judges' misguided attempts to explain decisions. Rather, gratuitous, rude, and offensive comments are often only marginally related to the legal issues at hand. The Pennsylvania Court of Discipline recognized that not all judges share the same disposition on the bench, but asserted that offensive behavior by judges should not be tolerated:

> [S]ome are, by nature, sharp—others, smooth, some entirely comfortable that their level of intellectual grasp equips them to deal with all matters—others, wary in that regard, and some have a lower threshold of intolerance than others; but, whatever their idiosyncratic predispositions, in the conduct of their judicial duties there is no place for discourtesy.[256]

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[251] William Glaberson, *Proposal to Revamp Judicial-Conduct Agency Draws Fire*, N.Y. TIMES, Jan. 25, 2011, at A21.

[252] *Id.*

[253] Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 542 (2008) ("[A] judge's occasional rudeness or discourtesy may be a reaction to the generally stressful conditions in which some judges operate."). The commentators praised court decisions for acknowledging that "the judge's personality, including expressions of temper or impatience, is an important asset in managing the courtroom." *Id.*

[254] *See id.* at 542–43.

[255] *In re* Hocking, 546 N.W.2d 234, 240 (Mich. 1996).

[256] *In re* Zoller, 792 A.2d 34, 36 (Pa. 2001).

While acknowledging transparency and leniency challenges, this Article highlights the misalignment in judicial discipline between imposing sanctions based on clear objectives and understanding reasons for judicial misbehavior. The recommendations in the subsequent part seek to correct the alignment, which would make judicial discipline more effective at preventing judicial misconduct.

V. MEANS OF IMPROVING EXISTING DISCIPLINARY SCHEMES

Generally, judicial sanctions should fulfill two primary goals: prevent judicial misconduct and constructively express disapproval[257] of judicial wrongdoing. Disciplinary tribunals should not impose a sanction that will not serve these goals. As described more fully later in this Article, tribunals should avoid sanctions that might generate hostility and potentially recidivism by an offending judge.

With these general principles in mind, this part offers five ideas for improving the effectiveness of judicial conduct commissions. These recommendations are meant to function within the existing framework of sanctioning schemes such that the changes will not require amending a state's constitution or increasing the financial resources needed by disciplinary agencies.[258]

A. Evaluate Effectiveness of Sanctions with a Hard Look at Stated Objectives

State judicial conduct commissions, state legislatures, the ABA, and other organizations or agencies involved in judicial discipline must first assess the extent to which the existing disciplinary schemes are effectively preventing judicial misconduct and expressing disapproval. At the same time, these organizations should review their stated objectives with an eye toward providing greater clarity.[259]

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[257] See discussion *infra* Part V.E related to disciplinary tribunals using care when imposing sanctions that shame judges.

[258] In Texas, the State Judicial Conduct Commission's work is governed by Article 5 of the Texas Constitution and Chapter 33 of the Government Code. These governing authorities already permit data collection and education. TEX. CONST. art. 5, § 1-a(8) (1980); TEX. GOV'T CODE ANN. § 33.005 (2011). The fourth recommendation—meetings to allow an offending judge the opportunity to apologize to the offended party—may require statutory or constitutional authority, depending on when the meeting occurs within the disciplinary process.

[259] In advancing the argument that the disciplinary organizations clarify the goals of lawyer discipline, Fred Zacharias provides the following nine possible goals:

(*continued*)

These organizations should also assess whether existing sanctions achieve the desired results by examining whether imposed sanctions rehabilitate offending judges. In California, the Commission on Judicial Performance examined its disciplinary actions between 1990 and 2009 and found that more than half the proceedings involved second time offenders.[260] Additionally, the commission found that elected judges were more likely to be disciplined than appointed ones.[261] This study, "which examine[d] the types of judges who have been disciplined and how they were sanctioned," was the first of its kind.[262]

All the agencies should undertake this type of comprehensive review of their effectiveness. Researching the effectiveness of judicial sanctions and judicial misconduct commissions should also include assessing possible reasons judges misbehave. Such an analysis may include considering the impact of phenomena like decision fatigue and judges' inability to regulate their emotions. Guided by experts familiar with these phenomena, the disciplinary commissions should question offending judges to determine what forces were at play when the judge engaged in the improper behavior. The judges' answers to the survey could serve to assist an agency in understanding why the judge misbehaved for purposes of administering effective discipline.

> (1) remedying an injured party's or the legal system's injury; (2) punishing a miscreant lawyer for past misconduct; (3) disabling the lawyer from committing future misconduct; (4) deterring future misconduct by the lawyer; (5) encouraging rehabilitation of the lawyer; (6) deterring future misconduct by other lawyers; (7) enhancing the image of the profession and the way the profession practices law; (8) protecting the integrity of the disciplinary process; and (9) balancing client protection and mercy to lawyers.

Zacharias, *supra* note 220, at 698.

[260] RUSSELL GANZI ET AL., CAL. COMM'N ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS, 1990–2009, at 16 (2012), *available at* http://cjp.ca.gov/res/docs/miscellaneous/Statistical_Report_1990-2009.pdf; Debra Cassens Weiss, *California Stats Show Elected Judges Disciplined More Often than Appointed Judges*, A.B.A. J. (July 6, 2012, 8:14 AM), http://www.abajournal.com/news/article/california_stats_show_elected_judges_disciplined_more_often_than_appointed_/.

[261] GANZI ET AL., *supra* note 260, at 16. *See also* Weiss, *supra* note 260; Jennifer Gollan, *Elected, Experienced Judges More Likely to be Disciplined*, BAY CITIZEN (July 5, 2012, 12:01 AM), https://www.baycitizen.org/news/government/nearly-800-state-judges-disciplined-many/.

[262] Gollan, *supra* note 261.

The research should also include insight from judges for whom the process has worked—those judges who continued as well-regarded jurists after one offense and either sanctions or a warning—to find out why the process worked. Did the sanctions serve as a wake-up call, did the severity of the sanctions impact the likelihood of success at deterring a repeat offense, or did education remedy the problem? Before undertaking revisions, judicial conduct agencies should use available resources[263] to determine whether sanctions are currently effective.

B. Prepare, Educate, and Mentor Judges to Prevent Misbehavior

Assuming bad days may occur because of decision fatigue or a lack of strategies for regulating emotions, organizations involved in educating judges[264] should prepare judges for the strain of making countless difficult decisions each day, and more importantly, for how to handle this strain and recognize when the stress is reaching a destructive level. Organizations involved in educating and mentoring judges should borrow lessons from the social sciences and teach judges about emotional intelligence. Terry Maroney suggests that offering programs on emotional intelligence will allow judges to learn how to regulate their emotions effectively.[265] In this

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[263] In 2011, the Texas Judicial Conduct Commission employed fourteen staff people, including an executive director, general counsel, staff attorneys, and investigators. TEX. COMM'N ON JUDICIAL CONDUCT, FISCAL YEAR 2011 ANNUAL REPORT (2011), *available at* http://www.scjc.state.tx.us/pdf/rpts/AR-FY11.pdf. The commission prepares an annual report with statistics regarding discipline. *See* TEX. GOV'T CODE ANN. § 33.005 (2011). These reports could include data concerning repeat offenders and other data concerning whether discipline for this type of offense modifies judicial behavior.

[264] Some jurisdictions offer mentoring opportunities for new judges (or judges who are facing particular challenges) to work with more seasoned judges on dealing with the hardships of judging. For example, the Texas Center for the Judiciary has a "Find a Mentor" program. *Associations, Institutes, & Agencies*, TEX. CENTER FOR THE JUDICIARY, https://www.yourhonor.com/judicial-resources (last visited May 2, 2013). In addition, certain judicial conduct commissions specifically provide for mentoring opportunities as part of the disciplinary process. In New Mexico, for example, the Judicial Standards Commission Rules allow for "[n]on-disciplinary dispositions," including "[p]roposing professional counseling, mentorship, or other assistance for the judge." N.M. JUDICIAL STANDARDS COMM'N R. 33(C) (2010). The Texas Constitution authorizes the Judicial Conduct Commission to require a judge, after investigation, to "obtain additional training or education." TEX. CONST. art. 5, § 1-a(8) (1980).

[265] *See generally* Maroney, *supra* note 54 (proposing a model for judicial emotion regulation that combines legal discourse on judicial emotion with the scientific study of the processes of emotion regulation).

way, judges would be better prepared for the challenges of serving as "the decider."

Further, judicial training organizations can teach a judge's support personnel about the role decision fatigue may play in the judge's behavior and decision making. Support staff can be trained to ensure that judges take breaks throughout the day, knowing that even a short break before the end of a crowded docket may replenish the judge's mental reserves.[266] Ultimately, support personnel may prove valuable in recognizing the signs of increasing strain and in helping judges cope with the strains of decision making.

The ABA has considered the possibility of preventive education, intended to allow those who are considering a judicial career to learn some of the ropes before donning the robe.[267] Specifically, a study group of the ABA's Standing Committee on Judicial Independence recommended "some sort of formal preparation."[268] Programs providing Introductory Judicial Education (IJE), "while neither a prerequisite for judicial office nor a guarantee of selection, will result in a cadre of potential jurists who have exhibited the interest and the commitment to acquire an extra educational credential that potentially could make them better qualified for the judiciary than other lawyers."[269]

Professor Keith Fisher, who prepared papers for a symposium to determine the value of IJE, identifies "declining public confidence in the judiciary"[270] as one of the key reasons for such programs.[271] Before describing a proposed curriculum for aspiring jurists, Fisher identifies "basic themes vital to the ongoing legitimacy of the judiciary," the first of which is the need for judges to treat parties and lawyers in their courtrooms with dignity and respect.[272] In light of the negative perceptions of the

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[266] According to research, decision fatigue may be combatted by "taking a break to eat a meal, [which is] consistent with previous research demonstrating the effects of a short rest, positive mood, and glucose on mental resource replenishment." Danziger et al., *supra* note 160, at 6892.

[267] Fisher, *supra* note 37, at 164.

[268] *Id.* at 169–70.

[269] *Id.* at 170.

[270] *Id.* at 185.

[271] *See id.*

[272] *Id.* at 188.

judiciary based, in large part, on their obnoxious behavior,[273] Fisher proposes the following as valuable short courses in an exploratory IJE curriculum:

> - [D]eveloping listening skills;
> - interpreting body language;
> - judicial demeanor, and the proper treatment of court staff, attorneys, litigants, witnesses, and others; . . .
> - sensitivity training to help identify and cope with stereotyping and latent bias and prejudice, e.g., those based . . . on race, ethnicity, religion, gender, nationality, alienage, [and] socio-economic status, . . .
> - identifying and dealing with personality conflicts . . . [and]
> - public perceptions and the importance of judicial decorum; . . . .[274]

This Article applauds Fisher's ideas about IJE and recommends that such education not "reinvent the wheel," but instead, simply obtain guidance from the social sciences.

Courses for aspiring judges or for mentoring judges already on the bench should include teaching how to recognize signs of decision fatigue and how to regulate emotions effectively. In addition, all educational opportunities for judges should emphasize the lessons of procedural fairness—describing the substantial impact that rude, angry behavior has on the public's view of the judiciary and the resulting need for judges to remain objective without losing sight of the humanity of those appearing before them.

This training, either IJE or on-the-job during a judge's tenure, could prove costly, particularly for higher quality training.[275] However, this cost

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[273] *See id.* at 188–89 (explaining that public survey results reveal that much of the population believes the judiciary fails to live up to reasonable expectations of fairness and impartiality).

[274] *Id.* at 194–99 (internal citations omitted).

[275] *Id.* at 171 ("To the extent that [IJE] involves significant costs, career interruption, or geographic relocation, some otherwise suitable candidates are likely to be discouraged from pursuing judgeships."). *See also* CHERYL THOMAS, REVIEW OF JUDICIAL TRAINING & EDUCATION IN OTHER JURISDICTIONS 110 (2006), http://www.ucl.ac.uk/laws/judicial-

(*continued*)

should be weighed against the ongoing costs incurred by state judicial conduct commissions in investigating and processing complaints, along with the added cost of state courts periodically having to review commissions' rulings.[276]

C. Include Factors Related to Reasons Why Judges Misbehave

In addition to mitigating and aggravating factors that focus on the severity of the wrongdoing, sanctioning tribunals should include factors that focus on the possible reasons for judicial misbehavior. For example, if a judge is being investigated for displaying anger and hostility in the courtroom, sanctioning tribunals should consider whether the proceeding during which the angry outburst occurred was particularly stressful for the judge—as with Judge Watkins, who walked into the proceeding angry about Pastor Hage allegedly posting a picture of his house on a website—or whether the judge had expressed concern over a particularly heavy workload. In either case, a suspension or public sanction might cause greater stress and hostility on the judge's part, rather than restoring the judge's proper courtroom demeanor.[277]

As additional factors, sanctioning tribunals should consider whether the behavior was unusual, whether it occurred at the end of a long period of decision making, or whether it occurred more than once. The offending judge's willingness to acknowledge wrongdoing and offer an authentic apology for the behavior should be considered as well. An unwillingness to acknowledge wrongdoing and offer a meaningful apology might reflect behavior that stems from the judge's disregard for the humanity of those appearing before the court. If so, a brief suspension and public rebuke is unlikely to remedy the judge's behavior.

D. Provide Opportunities for Judges to Make Meaningful Apologies to Offended Parties Through Reconciliation Meetings

Presently, aggrieved parties, whose humanity the judge has demeaned and who presumably have lost faith in the justice system, typically cannot

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institute/docs/Judicial_Training_Report.pdf (discussing funding and time as barriers to judicial training in U.S. jurisdictions).

[276] *See, e.g.*, ARIZ. COMM'N ON JUDICIAL CONDUCT, ANNUAL CASE REPORT (2012), http://www.azcourts.gov/Portals/37/Annual%20Reports/2011.pdf (reporting having received 335 inquiries about judicial conduct between January 1, 2011, and December 31, 2011). *See also* Miller, *supra* note 242, at 467–68.

[277] See discussion *infra* Part V.E examining the possibility that a judge will react with anger and hostility to discipline that shames the judge.

reveal their concerns to the offending judges. Therefore, offending judges cannot learn from aggrieved parties the real impact of the judicial misbehavior. With the type of offenses described in this Article, the current system protects misbehaving judges' feelings above those of the people whose dignity these judges have demeaned.[278] With existing disciplinary schemes, the offended party is often the least involved in the disciplinary process, and in the case of private sanctions, may never learn the outcome of the proceeding.[279] Once the person files a complaint, the complainant may learn nothing more than the mere facts that the commission received the complaint and then either disciplined the judge or dismissed the complaint.[280] In some instances of assessing appropriate discipline, sanctioning courts and commissions acknowledge an offending judge's contrition about the judge's offensive behavior.[281] However, unless ordered by the commission, the victim of a judge's rude, offensive behavior rarely receives an apology.[282]

Discipline should restore an offending judge's perspective such that the judge recognizes the humanity of those who appear before her. An obvious means of accomplishing this goal would be to require the judge to sit with the offended party, listen to how the offensive conduct made the

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[278] *See In re* Abrams, 257 P.3d 167, 172–73 (Ariz. 2011) (emphasizing proportionality of the sanctions in comparison with the judicial conduct, rather than the individual effect on the party pursing the complaint against the judge).

[279] Rogers, *supra* note 241.

[280] *See* Pimentel, *supra* note 246, at 931.

[281] *See In re* Deming, 736 P.2d 639, 659 (Wash. 1987). Although a judge's contriteness is not listed as a "Deming Factor" used to determine proper sanctions, courts often consider whether a judge apologized or took responsibility for his misbehavior. *See, e.g.*, *In re* Abrams, 257 P.3d 167, 172 (Ariz. 2011) (including judicial remorse as a potential mitigating factor); *In re* Ellender, 16 So. 3d 351, 358 (La. 2009) (considering the judge's apology for his misbehavior in determining the appropriate discipline).

[282] In a few instances, commissions have ordered misbehaving judges to apologize to aggrieved parties as part of discipline. *E.g.*, *In re* Assad, 185 P.3d 1044, 1054 (Nev. 2008). The Supreme Court of Nevada ordered Judge Assad to apologize to the girlfriend of a party who failed to appear in court to pay traffic tickets. *Id.* When the girlfriend appeared on the party's behalf (which the clerk had told her she could do), Judge Assad ordered the marshal to throw her in jail until the party appeared and paid his unpaid traffic tickets. *Id.* at 1046–47. The girlfriend remained in jail for most of the day, without permission to call her workplace. *Id.* at 1047. Reversing the commission's decision, the Supreme Court of Nevada deemed a formal apology by the judge and enrollment in the next available judicial ethics class at the judge's expense the appropriate sanction. *Id.* at 1046.

person feel about the judge and the legal system, and offer an authentic apology.[283]

Depending on the jurisdiction,[284] these meetings would occur as part of the disciplinary process, ideally as a substitute for a full hearing before the sanctioning tribunal. In New Mexico, for example, the rules governing the sanctioning tribunal's work allow for "non-disciplinary dispositions," which include "proposing professional counseling, mentorship, or other assistance for the judge."[285] Similarly, the California rules allow the commission to "defer termination of a preliminary investigation for a period not to exceed two years for observation and review of a judge's conduct."[286] During this monitoring period, a reconciliation meeting[287] could occur between judge, offended party, and a trained facilitator.[288] Reconciliation meetings could serve as a tool to help the judge restore a proper demeanor without the commission conducting a full hearing.

For tribunals with some procedural and disciplinary flexibility, particularly where judges have lost sight of the humanity of those in the courtroom, reconciliation meetings could prove extremely beneficial. Commentators describe the profound impact of apology and forgiveness in

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[283] *See* Goodman, *supra* note 71, at 1537–38. The apologies offered by both Judge Johnson (celebrated the recapture of a fugitive with ice cream and balloons) and Judge Grant (led a football cheer just before sentencing a defendant for manslaughter) were not likely to promote forgiveness as they were both qualified by "if my behavior offended anyone" language. *See Judge Apologizes for Throwing Recapture Party*, *supra* note 2; *Tacoma Judge Apologizes for Leading Super Bowl Cheer in Court*, *supra* note 4.

[284] In some jurisdictions, the commissions' rules would not allow such a meeting to occur, as the rules allow only certain specific proceedings and types of discipline. *See, e.g.*, NEV. REV. STAT. § 1.4677 (2010) (providing an exhaustive list of authorized forms of discipline). Other jurisdictions allow for greater flexibility in procedures and types of discipline—or alternatives to discipline. *See, e.g.*, CAL. COMM'N ON JUDICIAL PERFORMANCE R. 112 (2011); N.M. JUDICIAL STANDARDS COMM'N R. 33(C) (2010).

[285] N.M. JUDICIAL STANDARDS COMM'N R. 33(C).

[286] CAL. COMM'N ON JUDICIAL PERFORMANCE R. 112.

[287] I refer to these as reconciliation meetings because they are an opportunity for the aggrieved parties to "reconcile" with the judiciary and for offending judges to acknowledge their wrongdoings, accept responsibility, and "reconcile" their roles as judges with that of public servant.

[288] If the disciplinary tribunal lacks authority to implement such a meeting, judges within that jurisdiction, under the direction of the presiding judge, could conduct such a meeting themselves.

criminal and civil law.[289] In these contexts, both the offender and the offended gain substantial benefits: "Ideally, this interactive process [of apology and forgiveness] teaches moral lessons, brings catharsis, and reconciles and heals offenders, victims, and society."[290] Even though the offended party may choose not to forgive, "[b]y expressing remorse and apologizing, an offender acknowledges the harm he has done."[291]

For these reconciliation meetings, disciplinary tribunals should borrow from the mediation process to develop meaningful opportunities for an offending judge to acknowledge responsibility and seek forgiveness from the offended party, and for the offended party to forgive.[292] Forgiveness could potentially restore the offended party's trust in the judge and the judicial system, certainly a worthwhile goal for sanctioning schemes.

Other procedural hurdles would at times stand in the way of such a meeting. For example, if a case is still pending, a conversation between judge and a party could not occur. Similarly, some offended parties or lawyers may not agree to participate in a reconciliation meeting, depending on the level of distrust for the system and for the offending judge. Yet, if the offended party agrees, and the case is closed or has been referred to a different judge, there is perhaps no better lesson for the judge than to hear from the offended party how the misconduct affected the party. In addition, the reconciliation meeting could occur before any final disposition by the commission. The meeting could occur soon after an aggrieved party files a complaint and the commission conducts the preliminary investigation. The reconciliation meeting may satisfy the aggrieved party[293] and the sanctioning commission may find that the meeting helped restore the judge's sense of the party's humanity.

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[289] Bibas & Bierschbach, *supra* note 76 ("When offenders express genuine remorse in person to those offended, the effects can be profound.").

[290] *Id.* at 89.

[291] Bibas, *supra* note 75, at 332.

[292] In the mediation process, "Remorse and apology are increasingly seen as central elements." Bibas & Bierschbach, *supra* note 76, at 120. This process seeks to highlight the humanity of the players: "This discourse is designed to foster discussion of moral and interpersonal obligations as well as legal ones." *Id.*

[293] In the civil mediation context, parties are often more interested in an apology than in monetary damages. *See id.* at 119–20.

E. Thoughtfully Weigh the Effectiveness of Shaming Judges Who Misbehave

In light of the notion that judicial conduct tribunals do not aim to punish offending judges,[294] these bodies should carefully consider the impact of imposing public sanctions given the likelihood that this discipline will shame offending judges. On the discipline scale, agencies typically order a severe public censure only after a formal hearing.[295] The agencies may also impose, as lesser sanctions, a public admonition, warning, or reprimand.[296] Publishing the commission's findings and sanctions in the newspaper may accompany such public sanctions.

The impact of sanctions that shame is unclear.[297] If public sanctions are meant to generally deter other judicial misbehavior[298] and punish the offending judges by shaming them, then public sanctions align with these goals. Professor Adam Gershowitz describes the benefits of shaming penalties by advancing the argument that courts should name prosecutors who engage in misconduct.[299] Gershowitz contends, "In the absence of such public shaming for their misdeeds, there is little external pressure from the criminal justice system to prevent prosecutorial misconduct. Put simply, other than their own personal moral code, there is little incentive for prosecutors to avoid misconduct."[300] The publicity would serve as a signal to others in the criminal justice system and to young prosecutors to avoid both the offending prosecutor and the offending behavior.[301]

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[294] *See* Dodds v. Comm'n on Judicial Performance, 906 P.2d 1260, 1271 (Cal. 1995); *In re* Ziegler, 750 N.W.2d 710, 721 (Wis. 2008). Black's Law Dictionary defines punishment as "[a] sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law." BLACK'S LAW DICTIONARY 1353 (9th ed. 2009).

[295] *See, e.g.*, TEX. CONST. art. V, § 1-a(8) (1980); TEX. P. R. REMOVAL OR RETIREMENT OF JUDGES 1(f).

[296] *See, e.g.*, TEX. CONST. art. V, § 1-a(8).

[297] *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1062–63 (2009); Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2076 (2006); Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL. PUB. POL'Y & L. 142, 142, 163 (2008).

[298] *See In re* Hocking, 546 N.W.2d 234, 245 (Mich. 1996).

[299] Gershowitz, *supra* note 297, at 1062–63.

[300] *Id.*

[301] *See id.* at 1063–64.

Nevertheless, if sanctions are meant to rehabilitate offending judges to a more civil, even-handed judicial temperament, then a public sanction or censure—and the resulting shame from the publicity—may sabotage this goal by causing judges to experience increased anger from the shame relating to their offending conduct.[302] This shame-and-anger cycle is well-documented in social science literature.[303]

Accordingly, commentators advance compelling arguments against the effectiveness of shaming penalties.[304] Martha Nussbaum outlines the problems with shaming penalties in the criminal law context, describing how these penalties are meant to degrade and humiliate—improper objectives within our criminal law system.[305] Similarly, in the context of disciplining judges, the intent of sanctions should not be to shame and humiliate—this does not advance the goal of preventing judicial misconduct and restoring the public's trust in the judiciary.[306] Nussbaum also describes how unreliable this type of punishment is, primarily because shaming penalties allow the public, rather than the appropriate institutions, to punish the offender.[307] Nussbaum compares shaming penalties to "justice by the mob."[308] Discipline is not meant to be left in the hands of the press and public to decide both how to characterize the behavior and how severely to punish the offending judge (how often to repeat the

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[302] In the context of criminal law and the debate over shaming penalties, commentators posit that shaming penalties "can satisfy the public's need for dramatic moral condemnation," yet they may backfire because those who are "made to feel ashamed can react angrily and blame others." Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES, Jan. 16, 1997, at A1.

[303] *See, e.g.*, MARTHA C. NUSSBAUM, HIDING FROM HUMANITY 209 (2004) ("[T]he link between shame and narcissistic rage has also been amply documented."); JUNE PRICE TANGNEY & RONDA L. DEARING, SHAME AND GUILT 3 (2002) ("Shame is an extremely painful and ugly feeling that has a negative impact on interpersonal behavior."). Individuals experiencing shame—specifically, "shame-prone individuals"—tend to blame themselves and others for negative experiences. *Id.* These individuals are "prone to a seething, bitter, resentful kind of anger and hostility," and are generally "less able to empathize with others." *Id.*

[304] Shaming penalties are "[j]udicially created public humiliations." Hoffman, *supra* note 302. They are named for "punishments like the stocks favored by 17th-century Puritans—they usually take the form of a mea culpa message to the community." *Id.*

[305] *See* NUSSBAUM, *supra* note 303, at 230.

[306] *See* cases cited *supra* note 210.

[307] NUSSBAUM, *supra* note 303, at 234.

[308] *Id.*

story).[309] Accordingly, in the judicial discipline context, arguments also weigh against imposing sanctions that shame the offending judge.

Both as a matter of practice and principle, discipline that serves to humiliate and degrade the offending judge may work against the judicial conduct agencies' goals of preventing judicial misconduct and ensuring the integrity of the judiciary.[310] Yet, shaming a judge may satisfy the public's hunger to know about that judge's misbehavior, and many would argue the public should know about judicial misbehavior and consequences.[311] Additionally, as Professor Gershowitz suggests,[312] it may provide a powerful incentive for judges to behave. Ultimately, shaming begs the objectives question—the judicial conduct agencies and courts should impose penalties with clear objectives in mind and should impose penalties that shame only when doing so deliberately to correct the behavior, not as a harmful, unintended consequence of the penalty.

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[309] Consider Judge William Adams, the Texas state court judge based in Rockport County whose daughter downloaded a video on YouTube of him violently and repeatedly striking her with a belt. *See* Barry Leibowitz, *William Adams, Texas Judge Suspended over "Videotaped Beating," Reinstated*, CBS NEWS (Nov. 7, 2012, 9:08 AM), http://www.cbsnews.com/8301-504083_162-57546118-504083/william-adams-texas-judge-suspended-over-videotaped-beating-reinstated/. In this case, the public had already evaluated his conduct, and in a sense, involved itself in the process of judicial discipline. On November 2, 2011, the Texas State Commission on Judicial Conduct publicly stated that it was aware of the YouTube video. Public Statement No. PS-2012-1, Jorge C. Rangel, Tex. Comm'n on Judicial Conduct (Nov. 2, 2011), *available at* http://www.scjc.state.tx.us/pdf/PublicStatement.pdf. The commission's public statement provided, "As a result of the media attention surrounding the release of this video on the internet, the Commission has been flooded with telephone calls, faxes, and emails from concerned citizens, public officials, and others, calling for an investigation into the videotaped incident." *Id.* On November 22, 2011, the Texas Supreme Court issued an Order of Suspension of Judge Adams pending final disposition of the complaint against him. Order of Suspension, Misc. Docket No. 11-9230 (Tex. Nov. 22, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/11923000.pdf.

[310] *See* Gershowitz, *supra* note 297, at 1094. Professor Gershowitz argues that shaming prosecutors may backfire: it may "drive them to more reclusive behavior or, worse yet, into the arms of others who have been similarly shamed." *Id.* at 1092. For similar reasons, shaming judges could negatively impact the goals of protecting the public and ensuring the integrity of the judiciary.

[311] *See supra* note 245 and accompanying text.

[312] *See* Gershowitz, *supra* note 297, at 1092.

VI. CONCLUSION

During a typical episode of the reality TV show, "Judge Judy,"[313] Judge Judy Sheindlin hears a legal dispute and lambastes one party about that party's conduct—typically calling someone "an idiot,"—often summarily dismissing a case or rendering judgment at the end of the thirty-minute episode.[314] In a nonlegal reality television show, *American Idol*, former-Judge Simon Cowell told contestants that they were awful and pathetic.[315] Cowell became famous for his rude and offensive comments.[316] In both examples, the judges' shtick is to humiliate and demean the party (or contestant). In fact, because of her persona, Judge Judy earned the title, "Television's Toughest Judge."[317]

Today, in some courtrooms, life imitates the judges of reality television. Judges are exhibiting impatience, callousness, and rudeness as they demean litigants and lawyers who appear before them. Yet, this is not shtick. There are examples of judges losing their temper, losing sight of the humanity of those standing before them, and bullying parties and litigants. This is not a new phenomenon,[318] but it is certainly one worth

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[313] *Bios*, JUDGEJUDY, http://www.judgejudy.com/bios (last visited May 2, 2013). Judge Judy's daytime television show is now in its sixteenth season. *Id.* According to biographical information on the judge's website, "Having made a name for herself as a tough but fair judge in New York's Family Court, Judge Sheindlin retired from the bench in 1996 to bring her trademark wit and wisdom to the widely successful series that takes viewers inside a television courtroom where justice is dispensed at lightning speed." *Id.*

[314] Judge Judy routinely tells litigants that if they had a brain in their head they would not be in the predicament. She calls litigants fools and idiots; Judge Judy told one party that she deserved to be harassed. Her bestselling book is called "Keep it Simple Stupid." A journalist compared the television Judge Judy to Judge Judith Eiler (discussed *supra* note 95), saying, "the two Judge Judys have another thing in common: the targets of their wrath seem to be the most powerless members of society . . . . The person [that TV's Judge Judy] is yelling at is almost always one of life's losers—poor, not very well educated and perhaps not altogether there." Adam Cohen, *A Real-Life Judge Judy Gets Smacked Down*, TIME (Aug. 18, 2010), http://www.times.com/time/printout/0,8816,2011494,00.html.

[315] *Simon Cowell's 20 Greatest Insults*, CT.COM, http://www.ct.com/entertainment/photos/wtxx-simon-cowells-20-greatest-insults-20111006,0,3186957.photogallery (last visited May 2, 2013).

[316] *Simon Cowell*, BIO, http://www.biography.com/print/profile/simon-cowell-10073482 (last visited May 2, 2013).

[317] *Bios*, *supra* note 313.

[318] Catherine Therese Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 1007–08 (1991) (describing judges' breaches of courtroom decorum and rude behavior (*continued*)

remedying. Sanctioning tribunals and organizations involved in educating judges should undertake determining why judges are behaving in this manner and how best to prevent this behavior. Otherwise, the public will continue to lack trust and confidence in the judiciary's fairness—a sentiment warranted by improper judicial behavior.

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and noting "the public has an elephantine memory," of judicial misconduct of this type); Greene, *supra* note 21, at 712–13.