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## Disparities on Judicial Conduct Commissions

Nino C. Monea

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# DISPARITIES ON JUDICIAL CONDUCT COMMISSIONS

NINO C. MONEA\*

*Every state has a judicial conduct commission responsible for investigating complaints against judges and issuing sanctions where appropriate. But the judicial disciplinary system needs fixing. This Article examines 466 cases of public discipline from five states to illustrate the shortcomings of the present system. The status quo hides judicial misconduct from the public, fails to punish judges who abuse their office, and gives judges greater protections than criminal defendants, even when the stakes are lower.*

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## I. INTRODUCTION

The purpose of this Article is to critically examine the structure and outcomes of judicial disciplinary proceedings and compare them to legal systems that primarily apply to ordinary people. To do so, the author examined every publicly available disciplinary decision issued by five states' judicial disciplinary commissions—Arizona, Indiana, Florida, Massachusetts, and Washington—for a total of 466 public decisions, occasionally augmented by references to other states.<sup>1</sup> The five main states are diverse in terms of geographic location, political ideology, and method of selecting judges.

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1. The author reviewed all publicly available cases on each state judicial conduct commission, starting from whenever records began and continuing through 2020. The cases are available at the following locations. *Search Discipline*, WASH. COMM'N ON JUD. CONDUCT, [https://www.cjc.state.wa.us/index.php?page=activity&section=search\\_discipline](https://www.cjc.state.wa.us/index.php?page=activity&section=search_discipline) [<https://perma.cc/N6EQ-CJEG>]; *Public Decisions*, ARIZ. COMM'N ON JUD. CONDUCT, <https://www.azcourts.gov/azcjc/Public-Decisions> [<https://perma.cc/3ETU-C82C>]; *Public Dispositions*

A thorough examination of the system shows that even though stakes are lower for judges—worst-case scenario, they lose their job—they are entitled to a higher level of due process than poor defendants in the civil or criminal realm. This includes a great many rules that appear to exist solely for the benefit of malfasant judges. What is more, judges receive significantly lighter punishment than a civil or criminal defendant would for the same actions. Arbitrary sentencing also means that well-meaning judges who commit minor lapses can get equal or greater penalties than judges who commit egregious misdeeds. All this even though judges are better educated, wealthier, more powerful, and more legally savvy than just about any other kind of litigant.<sup>2</sup> Unjust outcomes are far too common as a result.

Some of the key takeaways are:

- Of the dataset the author examined, there were only 25 cases of a judge being removed from office out of 466 cases of discipline being imposed, meaning that removal is only used about five percent of the time in cases where discipline is publicly imposed.
- Commissions do not publicly share data about allegations of misconduct against judges, which allegations are dismissed without investigation or sanction, or when confidential sanctions are imposed—which collectively amount to the vast majority of case dispositions.
- Commissions allow judges to resign to avoid any punishment and keep their pensions and bar licenses intact, even when they had engaged in tax fraud, grave corruption, or imposed illegal sentences.
- Judges who have displayed open racism, sexism, or other kinds of bigotry have been allowed to remain on the bench with nothing more than a tongue-lashing.
- Judges have ignored criminal due process rights and wrongfully jailed people—sometimes for years—with hardly any punishment at all.

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(CJC), MASS. COMM’N ON JUD. CONDUCT, <https://www.mass.gov/archive/public-dispositions-cjc> [<https://perma.cc/6WBC-RTGB>]; *Judicial Qualifications Commission Case Archive*, FLA. SUP. CT., <https://supremecourt.flcourts.gov/News-Media/Judicial-Discipline-JQC-Cases/JQC-Case-Archive> [<https://perma.cc/E679-7CN9>]; *Judicial Disciplinary Opinions*, IND. JUD. QUALIFICATIONS COMM’N, <https://www.in.gov/courts/jqc/disciplinary-opinions/> [<https://perma.cc/WCH7-97KJ>].

2. See Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 63–64 n.300 (1980); RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 47 (2003); Sandra D. Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, 5 HOW. SCROLL: SOC. JUST. L. REV. 1, 51 (2002).

- Judges receive significantly less punishment than non-judges charged with similar conduct.

The Article has four Parts. Part II gives a brief overview of the history and features of judicial misconduct panels. After an era of little oversight for judges, the American Bar Association created its first rules of ethics for judges in 1924, and California became the first to create a judicial conduct commission in 1960. Commissions like these quickly proliferated throughout the country. They may employ two main types of punishment: verbal (i.e., public shaming) and concrete (which is anything other than mere words, such as a fine or suspension).

Part III looks at the structures and rules that govern most judicial misconduct commissions. The five studied states are the main focus, but they are representative of most states. The guiding philosophy is that protecting judges from wrongful discipline is valued over protecting the public from wrongful judges. To this end, virtually every rule makes it as difficult as possible to prove a judge guilty and impose sanctions, and many rules apply only to judges, not civil or criminal defendants whose lives, liberty, and livelihood are at stake. Moreover, judges are often given more protections than public employees facing adverse actions or students at public universities facing disciplinary proceedings.

Part IV relies on the database of 466 decisions to highlight disparities in outcomes, both internally and externally. Internally, there is almost no correlation between the misconduct and the sanction imposed. A judge can be a few weeks or a few years late in issuing a decision, and both can receive identical punishment. Conversely, a judge can commit a well-intended, minor, isolated transgression and receive harsher punishment than another who commits a mean-spirited, major, and repeated transgression. Externally, non-judges can expect to receive extremely harsh consequences for doing things judges do with almost no consequences. Judges also routinely receive almost no punishment for violating defendants' due process rights, displaying open racism, sexism, or bigotry, or engaging in corruption.

Part V briefly concludes. It argues that the system is unlikely to reform itself, as the powers-that-be do not see it as broken. The only equitable solutions to the current judicial disciplinary system are to either hold judges to the same standards as everyone else or give everyone else the same standards as judges. Although the vast majority of judges are honorable, and deserve robust due process protections, the same could be said about most professions and classes of defendants. Failing to handle judicial misconduct in an evenhanded manner undermines public confidence in the courts.

## II. THE HISTORY AND NATURE OF JUDICIAL CONDUCT COMMISSIONS

The American Bar Association (ABA) first created rules of professional ethics for lawyers in 1908.<sup>3</sup> It would take the ABA nearly twenty years before it created the first Canons of Judicial Ethics in 1924.<sup>4</sup> Early rules for judges were lax: judges could still maintain a private law practice, for instance.<sup>5</sup> Punishment was almost nonexistent. For example, in New York, from 1875 to 1975, only sixteen state judges “were removed from office, seven were publicly censured, and fourteen were mildly rebuked.”<sup>6</sup>

California became the first state to create a judicial conduct commission in 1960.<sup>7</sup> The federal system did not have any sort of disciplinary system short of congressional impeachment until 1980.<sup>8</sup> Today, every state and the District of Columbia has a judicial conduct commission (generically referred to as commissions) responsible for reviewing complaints and disciplining judges, typically enshrined in their constitutions.<sup>9</sup> This movement has been lauded as “the most widely accepted and heralded achievement” in the realm of court reform over the latter half of the twentieth century.<sup>10</sup> To aid states in fleshing out these commissions, the American Bar Association has Model Rules for Judicial Disciplinary Enforcement.<sup>11</sup>

There is good reason to have high standards for judges. Even seemingly low-level jurists may be critically important. One justice of the peace resolved 250,000 cases over the course of her eighteen-year career, or roughly 14,000

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3. See FINAL REP. OF THE COMM. ON CODE OF PRO. ETHICS (AM. BAR ASS’N 1908), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/1908\\_code.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.pdf) [<https://perma.cc/AXA8-KFVM>].

4. See Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1921 (2010).

5. *Id.* at 1924.

6. Gerald Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 PACE L. REV. 291, 292–94 (1987).

7. Jonathan Abel, Note, *Testing Three Commonsense Intuitions About Judicial Conduct Commissions*, 64 STAN. L. REV. 1021, 1027 (2012).

8. John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 208 (1994).

9. Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence And Accountability*, 32 HOFSTRA L. REV. 1245, 1245 n.1 (2004).

10. Robert W. Galvin, *Regulating Judicial Misconduct in Massachusetts*, 27 NEW ENG. L. REV. 189, 189 (1992).

11. See generally MODEL RULES FOR JUD. DISCIPLINARY ENF’T (AM. BAR ASS’N 1994).

per year.<sup>12</sup> A state district court judge can handle 100,000 cases over eighteen years, or about 5,500 per year.<sup>13</sup>

Judges with law degrees are the most common type of subjects before a judicial conduct commission, but not the only ones. Sometimes, court commissioners act as judges in certain kinds of cases, and they too are subject to discipline.<sup>14</sup> Municipal matters may even be handled by judges who are not lawyers.<sup>15</sup> This Article uses the generic term “judge” to refer to all of them.

Though each state has a slightly different discipline scheme, there are essentially two types of punishment: verbal sanctions and concrete sanctions. Verbal sanctions are stern words criticizing the judge’s actions, and can be administered by either publishing an opinion castigating the judge,<sup>16</sup> or the judge can be called in to be scolded face-to-face.<sup>17</sup> They typically fall into one of three escalating categories: admonishment, reprimand, and censure.<sup>18</sup> Shame is the heart of the punishment for all of them, though, as nothing else happens.

Concrete punishment, on the other hand, has more bite to it. Judges can be ordered to attend training, be assigned mentors, be sent to therapy, get fined, suspended, recused from certain kinds of cases, and removed from office.<sup>19</sup> A

12. See *In re McVay*, No. 06-181, at 5 (Ariz. Comm’n on Jud. Conduct July 30, 2007), <https://www.azcourts.gov/portals/137/reports/2006/06-181.pdf> [<https://perma.cc/9MNL-NGLN>].

13. *In re Eiler*, 236 P.3d 873, 882 (Wash. 2010) (en banc).

14. See, e.g., Public Admonishment of Comm’r Christopher B. Haile (Ind. Comm’n on Jud. Conduct Oct. 17, 2005), <https://www.in.gov/courts/jqc/files/jud-qual-admon-haile-10-05.pdf> [<https://perma.cc/4ZBC-9A6T>].

15. E.g., *In re Mendoza*, No. 5422-F-140, at 1, 2009 WL 1159189, at \*1 (Wash. Comm’n on Jud. Conduct Mar. 17, 2009).

16. See, e.g., Lederman, 292 So. 3d 425, 427 (Fla. 2020).

17. See, e.g., Florida Supreme Court, *SC19-253 Inquiry Concerning a Judge, No. 18-386 Re: Ernest A. Kollra*, YOUTUBE (Oct. 2, 2019), <https://www.youtube.com/watch?v=ffrPFswB6cQ> [<https://perma.cc/WYD2-R2X7>].

18. E.g., *In re Coughenour*, No. 91-1063-F-24, at 2, 1991 WL 757804, at \*1 (Wash. Comm’n on Jud. Conduct Sept. 6, 1991) (admonishment); *In re Junke*, No. 91-1137-F-34, at 7, 1993 WL 839556, at \*4 (Wash. Comm’n on Jud. Conduct June 4, 1993) (reprimand); *In re Monson*, No. 92-1238-F-36, at 2, 1992 WL 778714, at \*1 (Wash. Comm’n on Jud. Conduct Oct. 2, 1992) (admonishment); *In re Andress*, No. 10-099 (Ariz. Comm’n on Jud. Conduct Sept. 20, 2010), <https://www.azcourts.gov/portals/137/reports/2010/10-099.pdf> [<https://perma.cc/3MQ6-GMKE>] (censure).

19. E.g., *In re Holder*, 195 So. 3d 1133, 1134–35 (Fla. 2016) (per curiam) (training); *In re Colodny*, 51 So. 3d 430, 431–32 (Fla. 2010) (per curiam) (fined); *In re Santino*, 257 So. 3d 25, 36 (Fla. 2018) (per curiam) (removed from office); *In re Moilanen*, No. 91-1182-F-29, at 12, 1993 WL 839564, at \*6 (Wash. Comm’n on Jud. Conduct Feb. 5, 1993) (training); *In re Cornelio*, No. 12-177, at 6 (Ariz. Comm’n on Jud. Conduct Apr. 24, 2013), <https://www.azcourts.gov/portals/137/reports/2012/12-177.pdf> [<https://perma.cc/P775-FMPY>] (assigned a mentor).

state supreme court can also exercise its supervisory authority to impose sanctions on judges in their capacity as lawyers, such as by suspending their law license.<sup>20</sup> This supervisory authority also means that if a judge disagreed with a commission decision, they can appeal it to the state supreme court. Some of these punishments can be imposed directly by a commission, and sometimes, the commission can only recommend that the state supreme court impose a sanction.<sup>21</sup>

No matter the jurisdiction, judges have only an infinitesimal chance of being kicked off the bench. In 1999, only thirteen judges were removed from office by judicial conduct commissions across the country.<sup>22</sup> There were nearly 30,000 state, county, and municipal judges in the country in 2020.<sup>23</sup> Assuming the total number of judges was roughly the same number in 1999, that means only 0.07 percent of judges were fired for cause.

### III. STRUCTURAL DISPARITIES

Judges have secure positions. They are entitled to absolute immunity from civil suits for official actions they take, up to and including forced sterilization without a patient's consent.<sup>24</sup> If appointed, they likely enjoy life tenure.<sup>25</sup> If elected, they likely enjoy terrific odds of being reelected.<sup>26</sup> The judicial disciplinary system straps on yet another layer of armor.

The framers of the system granted some of the strongest protections from the criminal and civil justice systems, yet made the stakes lower than either. Gerald Stern, the former administrator for the New York commission on judicial conduct, said that the panel he helmed “errs on the side of leniency.”<sup>27</sup> As Washington State Supreme Court Justice Robert Utter has noted, the court

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20. *E.g.*, *In re Boles*, 555 N.E.2d 1284, 1291–92 (Ind. 1990).

21. *E.g.*, *In re Lorona*, 875 P.2d 795, 796 (Ariz. 1994).

22. *Judicial Conduct Organizations Share Complaint Data*, JUD. CONDUCT REP., Summer 2000, at 1, 4.

23. Michael Berens & John Shiffman, *Thousands of U.S. judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS (June 30, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-judges-misconduct/> [<https://perma.cc/VB8T-U9JR>].

24. *Stump v. Sparkman*, 435 U.S. 349, 359 (1978).

25. *E.g.*, MASS. CONST. pt. 2, ch. III, art. I.

26. *E.g.*, Chris W. Bonneau, *Electoral Verdicts: Incumbent Defeats in State Supreme Court Elections*, 33 AM. POL. RSCH. 818, 822–23 (2005) (noting that state supreme court incumbents have a greater than eighty percent reelection rate).

27. Stern, *supra* note 6, at 387.

has “vest[ed] judges accused of misconduct with the full panoply of rights afforded by the state and federal constitutions to persons accused of a crime,” rights that are “not available to any other citizens similarly situated.”<sup>28</sup>

All this despite the fact that judicial misconduct proceedings are not criminal inquisitions, but essentially job performance boards that ask, “Should this person continue to be trusted wielding immense power as a judge?”<sup>29</sup> It should be self-evident that “[l]oss of judicial office simply cannot be equated with the loss of freedom and rights that threaten a criminal defendant.”<sup>30</sup>

A statute of limitations is one example. Citizens should not fear prosecution for a decade-old offense, except for heinous crimes. But if an old scandal is unearthed about a public official, it is legitimate to declare they are no longer fit for office. The ABA believes that “conduct of a judge, no matter when it has occurred, is always relevant to the question of fitness for office,” and thus advises against any statute of limitations for judicial misconduct.<sup>31</sup>

And yet, Judge Lorenzo Arredondo accepted bribes in exchange for favorable resolutions of traffic cases, but the Indiana Supreme Court dismissed the charges because they were more than six years old.<sup>32</sup> Judge Arredondo continued serving as a judge for nearly twenty-five years after that and had a courthouse named after him.<sup>33</sup> It is puzzling why a judge should be allowed to remain on the bench just because the public learned he took bribes, say, *seven* years ago.

One response might be that judges get more protection than criminal defendants because their misconduct is relatively benign. While it is true that a judge might be facing discipline for something as minor as a rude remark, and a criminal defendant may be tried for something as serious as murder, the reverse is also true. Judges might be responsible for wrongfully keeping a man in prison for years,<sup>34</sup> just as a criminal defendant might be looking at jail time for misappropriating the image of Smoky the Bear.<sup>35</sup> This is to say, many things judges do might be worse than something that would land a criminal defendant

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28. *In re Deming*, 736 P.2d 639, 660 (Wash. 1987) (en banc) (Utter, J., concurring), *amended by* 744 P.2d 340 (Wash. 1987) (mem.).

29. *E.g.*, *id.* at 659.

30. *Id.* at 661.

31. MODEL RULES FOR JUD. DISCIPLINARY ENF'T R. 18 cmt. (AM. BAR ASS'N 2018).

32. *In re Arredondo*, 522 N.E.2d 389, 389–90 (Ind. 1988) (per curiam).

33. *Judge Lorenzo Arredondo*, CLEO JUDGES HALL OF FAME, <https://cleoinc.org/jhof/hof/judge-lorenzo-arredondo/> [<https://perma.cc/KL3G-KUSE>].

34. *E.g.*, *In re Hawkins*, 902 N.E.2d 231, 233, 247 (Ind. 2009) (per curiam).

35. 18 U.S.C. § 711 (repealed 2020).

behind bars. By the same token, judges may commit offenses that are similar to those that might come before a student disciplinary board, like cheating on an exam<sup>36</sup> or sexual assault.<sup>37</sup> Yet as we will see, it is better to be a judge than a student.

### A. Basic Features of Judicial Conduct Commissions

#### i. Composition

All of the states studied mandate that judges are part of the membership, and typically selected by other incumbent judges.<sup>38</sup> In addition to judges, all of the commissions have lawyers selected by other lawyers, and non-lawyers selected by the governor.<sup>39</sup> The ABA recommends this setup in its model rules.<sup>40</sup> Judges and lawyers may present in other ways too. The executive director of Massachusetts's commission must be a lawyer.<sup>41</sup> Indiana's commission may appoint masters to hear and take evidence in a case, but they must all be active or retired judges.<sup>42</sup>

Ordinarily, when a court appoints masters to assist with matters, there is no requirement that the master shares a profession with the defendant.<sup>43</sup> Similarly, there is no requirement that jurors share a defendant's job title or educational pedigree in other settings.<sup>44</sup> Though certain other disciplinary bodies use this feature, such as police oversight boards that are dominated by people with ties to law enforcement.<sup>45</sup>

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36. *In re About*, No. 17-019, at 5, 10 (Ariz. Comm'n on Jud. Conduct Dec. 4, 2017), <https://www.azcourts.gov/portals/137/reports/2017/17-019.pdf> [<https://perma.cc/ZR3C-74HZ>].

37. *In re Wilcox*, No. 94-1693-F-52, at 2, 1995 WL 902261, at \*1-2 (Wash. Comm'n on Jud. Conduct Dec. 1, 1995).

38. WASH. CONST. art. IV, § 31(1); FLA. CONST. art. V, § 12(a)(1); ARIZ. CONST. art. VI, § 1; MASS. GEN. LAWS ch. 211C, § 1 (West Supp. 2016). Indiana's chief justice is the ex officio chair of the commission, and three members must be lawyers selected by other lawyers. *About the Commissions*, IND. JUD. BRANCH, <https://www.in.gov/judiciary/jud-qual/2380.htm> [<https://perma.cc/HC9W-MTUU>].

39. *See About the Commissions*, IND. JUD. BRANCH, <https://www.in.gov/judiciary/jud-qual/2380.htm> [<https://perma.cc/HC9W-MTUU>].

40. MODEL RULES FOR JUD. DISCIPLINARY ENF'T R. 2(3) (AM. BAR ASS'N 2020).

41. MASS. GEN. LAWS ch. 211C, § 3(3) (West 2016).

42. IND. ADMISSION & DISCIPLINE R. 25, § VIII(I).

43. *See* ARIZ. R. CRIM. PROC. 4.3.

44. *See* ARIZ. R. PROC. EVICTION ACTIONS 12; ARIZ. TAX CT. R. PRAC. 13.

45. Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 872 (2016).

The intention behind having so many judges involved is to protect judges against the masses. As one state commission director said, it is “very, very important” to have lawyers and judges who “rein in popular rage against a particular judge.”<sup>46</sup> He did not ponder whether public rage against a particular judge might be quite justified in some instances. In hundreds of decisions studied stretching back decades, the author could not locate a single instance of a judge being punished by a commission based on popular, yet misguided, outrage (such as, say, over a judge voting to legalize same-sex marriage or acquitting an unpopular defendant). Either commissions are highly successful at screening these sorts of complaints out, or the concerns are overblown. Because we cannot see dismissed complaints, we have no idea.

It would seem the framers of the system had a low opinion of non-lawyers. Attorney Jim Murphy said “[t]he public members [of judicial conduct commissions] for the most part are like sheep” to be led by lawyers and judges.<sup>47</sup> Regardless of the truth of these statements, they encapsulate the condescension that some members of the Bar often feel toward the public.<sup>48</sup>

Arizona and Massachusetts do not pay their commissioners, forcing them to work out of the goodness of their hearts.<sup>49</sup> This does not suggest the state views rooting out misuse of judicial power as a high priority. Put another way, Massachusetts pays judicial misconduct commissioners the same as members of the state Bicycle and Pedestrian Advisory Board,<sup>50</sup> Harbormaster Training Council,<sup>51</sup> Underwater Archaeological Resources Board,<sup>52</sup> or the Schooner Ernestina Commission.<sup>53</sup>

## ii. Purpose

Commissions are not designed to be punitive. The primary purpose of judicial disciplinary proceedings is to gauge the competency of judges, not

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46. Abel, *supra* note 7, at 1034–35.

47. *Id.* at 1057.

48. See also Raymond J. McKoski, *Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct*, 2008 MICH. ST. L. REV. 769, 779 n.44 (2008) (statement of Professor Geoffrey Hazard, Jr.) (“[W]e’re living in a world in which ethical standards are being set by what some Joe Six-Pack would think is not right.”) (internal citation omitted).

49. ARIZ. R. COMM’N ON JUD. CONDUCT 3(g); see also MASS. GEN. LAWS ch. 211C, § 1 (West 2016).

50. See MASS. GEN. LAWS ch. 21A, § 11A (West 2016).

51. See *id.* § 116F (West 2016).

52. See *id.* § 179 (West 2016).

53. See *id.* § 182A (West 2016).

punish.<sup>54</sup> After censuring and indefinitely suspending Judge Thomas Estes for having sex in the lobby of the courthouse, the Massachusetts Supreme Judicial Court stated the “sanction we impose is severe not because we seek to punish the Judge severely, but because, . . . we seriously question whether he can command the respect and authority essential to the performance of his judicial function.”<sup>55</sup> Note that this matches up with the self-processed, non-punitive goal of attorney discipline.<sup>56</sup>

This mindset may be a more enlightened view of punishment, but it is not the one criminal defendants get. Under federal law, one of the foundations of sentencing is “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”<sup>57</sup> Imposing “just punishment” is well and good for criminal defendants, but absent from the calculus of judicial misconduct commissions.

### iii. Advisory Ethics Opinions

To help educate judges about sticky situations, commissions can issue advisory ethics opinions. Judges and judicial candidates can request a judicial ethics advisory opinion, and do so confidentially.<sup>58</sup> Indiana’s commission puts out dozens of advisory opinions on judicial ethics.<sup>59</sup> Massachusetts has hundreds.<sup>60</sup> Washington provides thousands.<sup>61</sup> If a judge follows these

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54. James R. Wolf, *Judicial Discipline In Florida: The Cost Of Misconduct*, 30 NOVA L. REV. 349, 357 (2006); *In re Lorona*, 875 P.2d 795, 800 (Ariz. 1994) (“[O]ur goal in imposing sanctions is to protect the public and foster judicial integrity—not to punish.”); *In re Ziegler*, 2008 WI 47, ¶ 35, 309 Wis. 2d 253, 750 N.W.2d 710; *Dodds v. Comm’n on Jud. Performance*, 906 P.2d 1260, 1271 (Cal. 1995).

55. *In re Estes*, No. OE-136, at 5 (Mass. Sup. Jud. Ct. May 24, 2018) (order); cf. *In re Sanders*, No. 96-2173-F-63, 1997 WL 259202, at \*3 (Wash. Comm’n on Jud. Conduct May 12, 1997) (Coleman, J., dissenting) (“To impose a higher level of discipline focuses on punishment rather than deterrence and serves no useful purpose.”).

56. *E.g.*, MICH. CT. R. 9.105 (“Discipline for [attorney] misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession.”).

57. 18 U.S.C. § 3553(a).

58. *E.g.*, ARIZ. SUP. CT. R. 82(d); WASH. SUP. CT. GEN. R. 10; MASS. SUP. JUD. CT. R. 3.11, § 2.

59. See *Advisory Opinions*, IND. JUD. BRANCH, <https://www.in.gov/judiciary/jud-qual/2376.htm> [<https://perma.cc/C95S-QXHU>].

60. See *Subject Index of Judicial Ethics Opinions*, COMMONWEALTH MASS., <https://www.mass.gov/info-details/subject-index-of-judicial-ethics-opinions> [<https://perma.cc/KX48-GZ9X>].

61. See *Judicial Ethics Opinions: Alpha List*, WASH. CTS., [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.alpha](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.alpha) [<https://perma.cc/MP93-BSYW>].

opinions, they will likely have a presumption of good faith if suspected of misconduct.<sup>62</sup> Emergency opinions rushed out in response to pressing questions may also be available.<sup>63</sup>

Interestingly, these advisory ethics opinions are often better organized and archived than other types of cases. Washington ethics opinions are alphabetized by category and go back to the year 2000.<sup>64</sup> Washington's Supreme Court's online opinion search feature does not categorize cases in any way and only stretches back to 2012.<sup>65</sup> Likewise, in Florida, judicial ethics opinions are freely posted online going back to 1972 and are helpfully organized by topic to make it easy for judges to find relevant authorities.<sup>66</sup> Citizens hoping to research laws of general applicability, however, will find that Florida courts only post normal appellate opinions online going back to 2004, and make no effort to organize any of them into subjects to make searching easier.<sup>67</sup> The website unhelpfully refers visitors to two paid subscription services to view court opinions as well.<sup>68</sup>

## B. The Complaint Process

### i. Intake

Commissions tend to passively wait for complainants to come to them, like a sea sponge absorbing nutrients that happen to drift by. Florida's rules allow the commission to act "upon receiving factual information" or sworn statements about a judge's misconduct but make no mention of affirmative investigations.<sup>69</sup> Other states are similarly mum on how the commission might proactively sniff out misconduct,<sup>70</sup> with Massachusetts and Arizona suggesting

62. *E.g.*, WASH. SUP. CT. GEN. R. 10(b).

63. MASS. SUP. JUD. CT. R. 3.11, § 2(D)(iii).

64. *See Judicial Ethics Opinions: Alpha List*, WASH. CTS., [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.alpha](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.alpha) [<https://perma.cc/MP93-BSYW>] (opinion number "0001" was published March 10, 2000).

65. *Supreme Court and Court of Appeals Opinions*, WASH. CTS., <http://www.courts.wa.gov/opinions/> [<https://perma.cc/AX3J-84DA>] (by performing various searches, the author could not find anything older than 2012).

66. *See All Opinions*, JUD. ETHICS ADVISORY COMM., <https://jeac.flcourts.gov/> [<https://perma.cc/X7F3-TA44>].

67. *See Opinion Search For All Appellate Courts*, FLA. SUP. CT., <https://www.floridasupremecourt.org/Opinions> [<https://perma.cc/7F9B-AQ3E>].

68. *Id.*

69. FLA. JUD. QUALIFICATIONS COMM'N R. 6.

70. *E.g.*, WASH. COMM'N ON JUD. CONDUCT R. PROC. 17; IND. CODE § 33-38-13-13 (2023).

that the commission simply watch the news to see if anything comes up.<sup>71</sup> Massachusetts specifically forbids the executive director of the commission to perform preliminary investigations based on incomplete complaints.<sup>72</sup> According to statute, only citizens of Indiana may file complaints with the Hoosier State's commission.<sup>73</sup> Certainly, none of these statutes mention funding for proactive investigators.

Virtually all complaints die a quiet death without any public action. Arizona received 551 complaints between 1998 and 1999.<sup>74</sup> Of these, 486 complaints were dismissed, 67 were resolved with private discipline, and only 6 resulted in some kind of public sanction or recommendation.<sup>75</sup> This is a public punishment rate of 1.09 percent. Around the same time, Florida was 1.9 percent, Washington was 4.4 percent, Indiana was 2.1 percent (Massachusetts was not part of the study).<sup>76</sup> As a result, 96–99 percent of the time, public officials are potentially committing misconduct without public oversight.

For comparison, Chicago's top prosecutor dismissed less than a third of felony cases—meaning she sought public punishment in more than two-thirds of cases.<sup>77</sup> Her predecessor sought punishment more than four-fifths of the time.<sup>78</sup> The United States Attorney for the District of Columbia caused an uproar when he prosecuted only a third of his cases, while his counterparts in Detroit and Philadelphia took forward sixty-seven percent and ninety-six

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71. MASS. GEN. LAWS ch. 211C, § 5(1) (West 2016); ARIZ. R. COMM'N ON JUD. CONDUCT 20.

72. *E.g.*, MASS. COMM'N ON JUD. CONDUCT R. PROC. 6(B).

73. IND. CODE § 33-38-13-13(a) (2023).

74. JUD. CONDUCT REP., *supra* note 22, at 2.

75. *See id.*

76. *See id.*

77. David Jackson, Todd Lighty, Gary Marx & Alex Richards, *Kim Foxx Drops More Felony Cases as Cook County State's Attorney Than Her Predecessor, Tribune Analysis Shows*, CHI. TRIB. (Aug. 10, 2020, 5:00 AM), <https://www.chicagotribune.com/investigations/ct-kim-foxx-felony-charges-cook-county-20200810-ldvrmqv6bd3hpsuqha4duehmu-story.html> [<https://perma.cc/2VR4-XMQR>]. And for even dismissing less than ten percent of cases, she was criticized for being soft on crime. *See* Emily Zanotti, *Report: Chicago Prosecutor Dismissed Thousands Of Felony Cases Including Gun Crimes Cases*, DAILY WIRE (Aug. 11, 2020), <https://www.dailywire.com/news/report-chicago-prosecutor-dismissed-thousands-of-felony-cases-including-gun-crimes-cases> [<https://perma.cc/VFR6-RWTT>].

78. Jackson, Lighty, Marx & Richards, *supra* note 77.

percent of cases, respectively.<sup>79</sup> Federal grand juries indict over ninety-nine percent of the time.<sup>80</sup>

If one believes Indiana's commission, years come and go where not a single judge breaks a rule worthy of sanction.<sup>81</sup> According to Massachusetts's commission, in ten of the last twenty-five years, not a single judge in the Bay State violated the canons of conduct.<sup>82</sup> It may well be that few judges are committing misconduct, but there is no way to know for certain without access to all complaints.

More than ninety percent of the complaints that do come in get dismissed without action in part because people misunderstand what kind of matters commissions actually investigate.<sup>83</sup> Yet the most knowledgeable people—lawyers—may be too intimidated to report. Oklahoma Supreme Court Justice Steven Taylor expressed bewilderment that no one reported a judge's decade-long abuse of his contempt powers, but the reason for the silence should be obvious: attorneys fear retribution from judges.<sup>84</sup> When a Florida attorney

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79. Anders Hagstrom, *US Attorney Declined to Prosecute 67% of Arrests in DC as Nation's Capital Suffers Crime Spike*, FOX NEWS (Mar. 29, 2023, 11:10 AM), <https://www.foxnews.com/politics/us-attorney-declined-prosecute-67-arrests-dc-nation-capital-suffers-crime-spike> [https://perma.cc/3TQJ-LTU7].

80. Zachary A. Goldfarb, *The Single Chart that Shows that Federal Grand Juries Indict 99.99 Percent of the Time*, WASH. POST (Nov. 24, 2014, 11:55 PM), <https://www.washingtonpost.com/news/wonk/wp/2014/11/24/the-single-chart-that-shows-that-grand-juries-indict-99-99-percent-of-the-time/> [https://perma.cc/ME4S-JNYJ].

81. *Compare Judicial Disciplinary Opinions*, IND. JUD. BRANCH, <https://www.in.gov/judiciary/jud-qual/2378.htm> [https://perma.cc/4F5T-3MEC], with *Public Commission Admonitions*, IND. JUD. BRANCH, <https://www.in.gov/judiciary/jud-qual/2377.htm> [https://perma.cc/8SKL-F3M7] (showing that in the years of 1994 and 2000, no public commission admonitions or judicial disciplinary opinions were issued).

82. *Public Dispositions (CJC)*, MASS. COMM'N ON JUD. CONDUCT, <https://www.mass.gov/archive/public-dispositions-cjc> [https://perma.cc/6S6J-WGBC]. Archives go back to 1996. There are no cases where a final punishment was issued in 1998–2000, 2009, 2011, 2013–15, 2017, or 2019. *Id.*

83. Gray, *supra* note 9, at 1245.

84. Michael Berens & John Shiffman, *With 'Judges Judging Judges,' Rogues on the Bench Have Little to Fear*, REUTERS (July 9, 2020, 10:00 AM), <https://www.reuters.com/investigates/special-report/usa-judges-deals/> [https://perma.cc/Z8M2-3UF8]; Sahl, *supra* note 8, at 240 (noting “widespread reluctance” of lawyers to file complaints against judges). Even going back in the centuries, people expressed fear of so much as voting against judges whom they had cases pending before. Waukesha Caucus, *Opinion*, DAILY FREE DEMOCRAT, Aug. 14, 1851, at 2, <https://www.newspapers.com/image/47036336> [https://perma.cc/V7F7-XUL2].

reported to his supervisor that a judge was spouting vitriolic racial slurs, for example, nothing was done for fear the judge would take it out on their clients.<sup>85</sup>

Judges, after all, have the power to “do great damage to an attorney’s reputation and career, while the lawyer has almost no recourse.”<sup>86</sup> Compounding the problem, as discussed below, the judge will probably be notified about the complaint immediately, before there is any guarantee the commission is actually going to impose punishment. And yet, it seems lawyers are the only people expected to police judges’ behavior.<sup>87</sup>

Since no one is out looking for bad actors, problems can fester for years without action. In 2008, Municipal Judge Theodore Abrams began a sexual relationship with an attorney who practiced before him and did not disclose this fact.<sup>88</sup> Starting in mid-2009, he tried to coax another attorney into a sexual relationship with him, and when she rebuffed him, he made lewd comments and “slurping noises” at her, groped her, left dozens of voicemails and texts, and asked her for sex.<sup>89</sup> When she still said no, he threatened to get her fired and started treating her worse in court.<sup>90</sup> The commission ultimately recommended the punishment of rendering him ineligible for judgeship, censuring him, and suspending him from the practice of law for two years, but this was only *after* the city attorney sued the judge for sexual harassment and the city council fired him, and the state supreme court did not impose the punishment until 2011.<sup>91</sup>

There is no reason the system has to be this way. None of the states examined directs commissioners to audit courtrooms to see if judges are upholding their oaths. This sets judges apart from many other institutions, public and private, that hold people accountable without specific allegations of misconduct. The Food and Drug Administration goes out and inspects regulated

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85. *In re Millan*, No. 2017-570, at 2 (Fla. Jud. Qualifications Comm’n May 21, 2018), [https://efactssc-public.flcourts.org/casedocuments/2018/775/2018-775\\_notice\\_84109\\_notice2dformal20charges.pdf](https://efactssc-public.flcourts.org/casedocuments/2018/775/2018-775_notice_84109_notice2dformal20charges.pdf) [<https://perma.cc/8GY7-ZPYA>] (notice of formal charges).

86. Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2d 11, 12 (2001).

87. *E.g.*, ARIZ. R. PROF. CONDUCT 8.3(b) (requiring a lawyer who “knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office” to report it).

88. *In re Abrams*, 257 P.3d 167, 168 (Ariz. 2011).

89. *Id.*

90. *Id.* at 169.

91. *Id.*

facilities.<sup>92</sup> Many states expect grand juries to tour and assess prisons.<sup>93</sup> Schools can get audited to see how much their teachers are working,<sup>94</sup> or how their admissions policies operate.<sup>95</sup> California requires prosecutors to inform the state bar about any criminal charges filed against attorneys as soon as the prosecutor learns of the defendant's profession.<sup>96</sup> South Carolina established a system whereby insurance companies notify the government if a person cancels their car insurance, resulting in automatic revocation of driving privileges and the imposition of fines.<sup>97</sup> Expired license plates or broken taillights are hardly a scourge against society, but any motorist knows that police actively look for piddling infractions like these rather than sitting in the station waiting for the phone to ring.

Alternatively, commissions could collect data on judges and use it to determine whether low-performing jurists deserve a closer inspection. Information like the number of times a judge has been reversed or the number of times a lawyer has objected to appearing before a judge could provide

92. *Inspection Basics*, U.S. FOOD & DRUG ADMIN. (May 15, 2023), <https://www.fda.gov/about-fda/fda-basics/what-does-fda-inspect> [<https://perma.cc/78B9-8BGU>].

93. E.g., Mike Hendricks, *Grand Jury Reports a Filthy, Crowded Jackson County Jail. Where's the Money Going?*, KAN. CITY STAR (May 11, 2018, 6:26 PM), <https://www.kansascity.com/news/local/crime/article210766714.html> [<https://perma.cc/7UUB-R2CJ>]; Julia Nguyen, *Ventura County Grand Jury Releases Report on Detention Facilities*, KEYT NEWS (June 25, 2020, 1:22 PM), <https://keyt.com/news/ventura-county/2020/06/25/ventura-county-release-report-on-detention-facilities/> [<https://perma.cc/X5AM-47LD>]; David Reutter, *Grand Jury Report: Prisoners in Charge at Mississippi County Jail*, PRISON LEGAL NEWS (Sept. 25, 2015), <https://www.prisonlegalnews.org/news/2015/sep/25/grand-jury-report-prisoners-charge-mississippi-county-jail/> [<https://perma.cc/YM2D-AMA2>]; Tom Giambroni, *Grand Jury Report Critical of Jail, Warden Critical of Inspection*, MORNING J. (Sept. 3, 2019), <https://www.morningjournalnews.com/news/local-news/2019/09/grand-jury-report-critical-of-jail-warden-critical-of-inspection/> [<https://perma.cc/59UD-N2D4>].

94. E.g., Yoav Gonen, *Audit Finds Teachers Regularly Work Less than Their Contract Requires*, N.Y. POST (May 3, 2012, 4:00 AM), <https://nypost.com/2012/05/03/audit-finds-teachers-regularly-work-less-than-their-contract-requires/> [<https://perma.cc/JW89-ZLFX>].

95. E.g., Reese Oxner, *Audit: University Of California Admitted 64 Students Over More Qualified Applicants*, NPR (Sept. 23, 2020, 8:16 PM), <https://www.npr.org/2020/09/23/916305081/audit-university-of-california-admitted-64-students-over-more-qualified-applican> [<https://perma.cc/78JU-KBY9>].

96. CAL. BUS. & PROF. CODE § 6101 (West 2020).

97. *Facts About Driving Uninsured*, S.C. DEP'T MOTOR VEHICLES, <http://www.scdmnonline.com/Driver-Services/Drivers-License/Insurance-Requirements/Facts-About-Driving-Uninsured> [<https://perma.cc/L3BA-4PW8>].

valuable insights, but that information is not readily available.<sup>98</sup> The *Las Vegas Review-Journal* does an annual, anonymous survey of thousands of lawyers asking them to give feedback on judges' bias, behavior, courtesy, and knowledge of the law.<sup>99</sup> This could be replicated across the country by state bar associations. Of course, poor marks on a survey should not itself cause discipline, but it should cause commissions to start asking questions about whether the judge is violating professional codes.

## ii. Confidentiality

The entire process is shrouded in secrecy. Rules make it clear that the process up until formal charges is kept under wraps in Massachusetts, and the investigation must be "discreet and confidential,"<sup>100</sup> similar to Washington.<sup>101</sup> Even if the matter becomes public, the Massachusetts commission is allowed to state that the judge has the right to a fair hearing or that the judge denies the allegations, but not share their evidence or explain why it believes its charges will be vindicated.<sup>102</sup> Washington's commission may only comment with the written permission of the judge<sup>103</sup> and forbids private parties from disclosing anything.<sup>104</sup> And Indiana's commission is allowed to publicly respond to complainants on its own, but may only disclose other information with the permission of the judge before the institution of formal proceedings.<sup>105</sup>

After imposing sanctions, if the Washington commission believes a judge is not complying with their discipline order, that must be investigated confidentially as well.<sup>106</sup> Arizona withholds public access to most parts of the

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98. See Rachel Crosby, *Clark County Lawyers Think 11 Judges Should be Voted Out of Office*, L.V. REV. J. (Nov. 15, 2019, 5:42 PM), <https://www.reviewjournal.com/news/politics-and-government/clark-county-lawyers-think-11-judges-should-be-voted-out-of-office-1893927/> [<https://perma.cc/G9VM-NU3K>].

99. *Id.*

100. MASS. COMM'N ON JUD. CONDUCT R. PROC. 5.

101. WASH. COMM'N ON JUD. CONDUCT R. PROC. 17(c) (requiring a "prompt, discreet, preliminary investigation").

102. MASS. COMM'N ON JUD. CONDUCT R. PROC. 5(B)(3), 6(H).

103. WASH. COMM'N ON JUD. CONDUCT R. PROC. 11(a)(1)(C).

104. *Id.* at 11(a)(3).

105. IND. CODE § 33-38-13-10 (2023). Sweeping confidentiality rules are present in other state systems too. Maxine Goodman, *Three Likely Causes Of Judicial Misbehavior And How These Causes Should Inform Judicial Discipline*, 41 CAP. U. L. REV. 949, 982 (2013) (noting that in "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").

106. WASH. COMM'N ON JUD. CONDUCT R. PROC. 29.

process or else redacts them so there is no way to tell which judge is being accused.<sup>107</sup> Even after probable cause is established for a Massachusetts judge's misconduct, they may agree with the commission to keep it private anyway.<sup>108</sup> All these rules go even further than the confidentiality provisions recommended by the ABA.<sup>109</sup> And breaching confidentiality might open someone up to contempt proceedings.<sup>110</sup> Incidentally, contempt is not something judges have to worry about even if they violate these rules.<sup>111</sup>

When notice of the judicial discipline process is mailed to a judge in Indiana, it must be clearly marked "Personal and Confidential."<sup>112</sup> Indiana's rule-makers did not believe that the threat of a federal felony was sufficient protection.<sup>113</sup> Washington guarantees that the process is confidential.<sup>114</sup>

In the criminal realm, there is nothing unusual about prosecutors making public statements about investigations that do not result in formal charges.<sup>115</sup> And prosecutors are more than able to detail alleged crimes and disparage defendants before trial.<sup>116</sup> Presumption of innocence notwithstanding, Arizona

107. ARIZ. R. COMM'N ON JUD. CONDUCT 9.

108. MASS. COMM'N ON JUD. CONDUCT R. PROC. 5(D).

109. *See generally* MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 11 (AM. BAR ASS'N 2018).

110. WASH. REV. CODE § 2.64.113 (1989).

111. Conduct commissions have disciplined judges who breach the veil of secrecy, but none have been held in contempt. Paul Cavanaugh obtained commission materials relating to another judge's misconduct, and gave the materials to that judge. Press Release, The Commonwealth of Mass. Comm'n on Jud. Conduct, Judge Paul J. Cavanaugh Retires From The Bench (Mar. 15, 2002), <https://www.mass.gov/doc/march-15-2002-press-release-judge-paul-j-cavanaugh-retires-from-the-bench/download> [<https://perma.cc/9P7X-8FMR>]. Ditto for Judge David Harrison, who was accidentally given a confidential document from the commission concerning an investigation into himself, and read it. Press Release, The Commonwealth of Mass. Comm'n on Jud. Conduct, Judge David E. Harrison Retires From Bench (Feb. 15, 2002), <https://www.mass.gov/doc/february-15-2002-press-release-judge-david-e-harrison-retires-from-bench/download> [<https://perma.cc/5T99-SETM>].

112. IND. ADMISSION & DISCIPLINE R. 25, §§ VIII(E)(3), VIII(F)(3).

113. *See* 18 U.S.C. § 1702.

114. WASH. COMM'N ON JUD. CONDUCT R. PROC. 11.

115. *E.g., Massachusetts Prosecutors Say State Senator Marzilli Will Not Be Charged With Indecent Assault and Battery*, ALTMAN & ALTMAN LLP (May 13, 2008), [https://www.bostoncriminallawyerblog.com/massachusetts\\_prosecutors\\_say/](https://www.bostoncriminallawyerblog.com/massachusetts_prosecutors_say/) [<https://perma.cc/7UTS-MXP4>]; Gregg Bell, *Florida Prosecutors Decline to File Any Charges Against Seahawks' Quinton Dunbar*, DAILY WORLD (Aug. 7, 2020, 5:00 PM), <https://www.thedailyworld.com/sports/florida-prosecutors-decline-to-file-any-charges-against-seahawks-quinton-dunbar/> [<https://perma.cc/FHG5-M7PR>].

116. *E.g., Man Accused in Store Clerk's Murder Arraigned*, SUFFOLK CNTY. DIST. ATT'Y (Aug. 24, 2020), <https://www.suffolkdistrictattorney.com/press-releases/items/2020/8/24/man-accused-in->

defendants who have merely been accused of wrongdoing may be fingerprinted and photographed,<sup>117</sup> have their DNA taken,<sup>118</sup> and Arizona's rules of procedure of evictions contain no rules safeguarding the privacy of tenants facing eviction.<sup>119</sup>

### iii. Notification

Although the system goes to great length to keep accused judges anonymous, victims who fear retribution are not as fortunate. The ABA recommends that judges be notified within ten days of a full investigation being commenced against them, presumes that the victim-complainants should be outed unless there is good cause not to, and that the judge should be given a chance to respond before charges are filed.<sup>120</sup> States have taken these principles to heart. Washington's constitution guarantees that judges shall be notified if a confidential initial proceeding is opened against them and when it is closed—a courtesy not extended to any other kind of defendant in the state charter.<sup>121</sup> Arizona, Indiana, and Massachusetts cannot move forward with a case until the judge has been notified and allowed to respond.<sup>122</sup> Before Massachusetts's commission can even make a probable cause determination, it must both allow for a written defense from the judge and give the judge the opportunity to appear at the meeting where probable cause is determined.<sup>123</sup> If a complaint is dismissed as baseless, the judge may get notified too.<sup>124</sup>

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store-clerks-murder-arraigned [<https://perma.cc/V4ZY-3GNV>] (calling the defendant's alleged actions "shameful and cowardly"). Prosecutors have also leaked damaging information about defendants in the past. Mary Costello, *Grand Juries*, CQ RESEARCHER (Nov. 7, 1973), <https://library.cqpress.com/cqresearcher/document.php?id=cqresre1973110700> [<https://perma.cc/QY7A-33LJ>].

117. ARIZ. R. CRIM. PROC. 3.2(b)(2).

118. *Id.* at 4.1(e).

119. *See generally* ARIZ. R. PROC. EVICTION ACTIONS.

120. MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 17(3) (AM. BAR ASS'N 2018).

121. WASH. CONST. art. IV, § 31(2)(3); *see also* WASH. COMM'N ON JUD. CONDUCT R. PROC. 11.

122. ARIZ. R. COMM'N ON JUD. CONDUCT 22(b); IND. CODE § 33-38-13-13 (2023); MASS. GEN. LAWS ch. 211C, § 5(2) (West 2016); MASS. COMM'N ON JUD. CONDUCT R. PROC. 6(C)(3).

123. MASS. COMM'N ON JUD. CONDUCT R. PROC. 7(A).

124. IND. CODE § 33-38-13-13 (2023); MASS. COMM'N ON JUD. CONDUCT R. PROC. R. 6(D)–(E). In the rare circumstances where delayed notification is allowed, the commission is still obligated to notify the judge as soon as feasible. MASS. COMM'N ON JUD. CONDUCT R. PROC. R. 6(G)(4). Arizona's commission may choose to give confidential comments to a judge after a complaint is dismissed. ARIZ. R. COMM'N ON JUD. CONDUCT 16.

Florida's commission rules mandate that the judge be notified about the general nature of an investigation, and be allowed to respond before there is even a finding of probable cause.<sup>125</sup> The commission may accept affidavits and other documentary evidence from the judge at this stage.<sup>126</sup> Should the charges be unfounded, the judge is to be notified at once.<sup>127</sup> So too in Indiana, where judges are told not only about the nature and existence of an investigation, but the name of the complainant.<sup>128</sup> Judges need not fear protracted investigations hanging over their heads in Indiana, as they may demand at any time that the commission file charges or enter a formal finding of exoneration, and the commission must comply within sixty days.<sup>129</sup>

Doubtless other litigants would like to have the chance to know when they are being investigated and submit an answer before charges are filed. But outside of judges, extensive notification of people under investigation is "extremely rare" in the justice system.<sup>130</sup> Arizona's rules of criminal procedure contain no provision to notify defendants who are being investigated or giving them a chance to respond before the process gets underway.<sup>131</sup> If an Indiana landlord wants to evict a tenant, they need only give service to someone residing at the home—not necessarily the tenant—or post notice on the building.<sup>132</sup> Students at public universities are typically notified about misconduct allegations only after some level of probable cause has been established or charges have been filed.<sup>133</sup>

Twenty days before a formal proceeding, the Indiana commission must provide the names and addresses of all witnesses that the commission intends to offer, along with copies of all written statements and transcripts.<sup>134</sup> Failure to provide this renders testimony inadmissible.<sup>135</sup> Once charges have been filed,

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125. FLA. JUD. QUALIFICATIONS COMM'N R. 6(b).

126. *Id.*

127. *Id.* at 6(d).

128. IND. ADMISSION & DISCIPLINE R. 25, § VIII(E)(3).

129. *Id.* § VIII(E)(6).

130. Berens & Shiffman, *supra* note 23.

131. *See generally* ARIZ. R. CRIM. PROC. 2.

132. IND. CODE § 32-31-1-9 (2023).

133. *E.g.*, *Disciplinary Process for Alleged Infractions*, UNIV. WASH., <https://hub.washington.edu/sao/rso-policy-guide/conduct-discipline/> [<https://perma.cc/A8LV-D944>]; UNIV. FLA., ORANGE BOOK 20 (2018), <https://sccr.dso.ufl.edu/wp-content/uploads/sites/4/2018/08/The-Orange-Book-Web.pdf> [<https://perma.cc/9K9M-NXB2>].

134. IND. ADMISSION & DISCIPLINE R. 25, § VIII(J)(2).

135. *Id.*

the commission has a continuing obligation to promptly disclose any witnesses who have any information “which may be relevant” to any charge or defense.<sup>136</sup> So too in Massachusetts and Arizona, where the judge is entitled to all relevant evidence the commission has.<sup>137</sup>

Comparatively, Indiana prosecutors have “no affirmative duty to provide inculpatory evidence” and the rule that governs discovery “does not provide for mandatory disclosures.”<sup>138</sup> Defense attorneys must specifically request inculpatory statements to receive them.<sup>139</sup> Federal law also does not mandate disclosure of inculpatory evidence.<sup>140</sup>

### C. Disciplinary Hearings

#### i. Non-Appearance

Ask any poor defendant what happens if they fail to show up to court, and the answer will be disaster. If they are lucky, they will merely lose. Drones of consumers, for example, lose debt collection suits merely because they did not show up to court and had a default judgment entered,<sup>141</sup> perhaps as much as ninety percent of all debt cases.<sup>142</sup> It matters not that the evidence against them would have been inadmissible.<sup>143</sup> Tenants facing eviction will likely lose their home automatically if they fail to appear at court, even if the summons contains the wrong name.<sup>144</sup> Defendants in Arizona small claims court who do not show may have the case decided on the plaintiff’s evidence alone<sup>145</sup> and must file a

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136. *Id.*

137. MASS. COMM’N ON JUD. CONDUCT R. PROC. 9(A); ARIZ. R. COMM’N ON JUD. CONDUCT 26; *cf.* MODEL RULES FOR JUD. DISCIPLINARY ENF’T r. 22 (AM. BAR ASS’N 2018) (directing the exchange of contact information for all witnesses who have knowledge of relevant facts and all relevant documents).

138. *Booker v. State*, 903 N.E.2d 502, 505 (Ind. Ct. App. 2009).

139. *Id.*

140. *See Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009).

141. LEGAL AID SOC’Y, NEIGHBORHOOD ECON. DEV. ADVOC. PROJECT, MFY LEGAL SERVS. & URB. JUST. CTR., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 8 (2010), [https://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT\\_DECEPTION\\_FINAL\\_WEB-new-logo.pdf](https://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf) [<https://perma.cc/7Z2F-CDZV>].

142. ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 22 (2018), [https://www.aclu.org/sites/default/files/field\\_document/022318-debtreport\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/022318-debtreport_0.pdf) [<https://perma.cc/9SVJ-YPTH>].

143. *Id.* at 22–23.

144. ARIZ. R. PROC. EVICTION ACTIONS 5(a).

145. ARIZ. R. SMALL CLAIMS PROC. 12(c)(2).

response within twenty days or else risk default judgment.<sup>146</sup> Ditto for Arizona family court.<sup>147</sup>

If the poor debtors are unlucky, they can be held in contempt and jailed.<sup>148</sup> Criminal defendants too may have arrest warrants issued against them if they do not show up to court or if the government cannot locate them, even for traffic tickets.<sup>149</sup> Perhaps recognizing this, the ABA proposes that judges who fail to respond to allegations or appear at hearings shall be deemed to have admitted their guilt.<sup>150</sup>

Some states, however, spare judges this indignity. If a Washington judge fails to respond to allegations, a general denial will be entered on their behalf.<sup>151</sup> Indiana does not require judges to attend disciplinary hearings, and the fact that they do not show up may not be used as evidence against them.<sup>152</sup> Students at Indiana University who are charged with misconduct, however, are required to attend their hearings.<sup>153</sup>

## ii. Public Counsel

If you are a child facing deportation, you have no right to an attorney.<sup>154</sup> If you are a tenant facing eviction, you probably have no right to an attorney.<sup>155</sup> But the law looks more charitably on judges facing discipline. Massachusetts

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146. *Id.* at 7.

147. ARIZ. R. FAM. L. PROC. 44.

148. Eli Hager, *Debtor's Prisons, Then and Now: FAQ*, MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq> [<https://perma.cc/K9FR-JSY7>].

149. ARIZ. R. CRIM. PROC. 3.1(c)–(e).

150. MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 21 (AM. BAR ASS'N 2018).

151. *E.g.*, *In re Day*, No. 83-259-F-6, at 7–8 (Wash. Jud. Qualifications Comm'n Aug. 23, 1984), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/1985/259%20Formal%20Complaint.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/1985/259%20Formal%20Complaint.pdf) [<https://perma.cc/A2EC-RDMC>] (formal complaint); *In re Jorgensen*, No. 95-2016-F-60, at 2, 1996 WL 744408, at \*2 (Wash. Comm'n on Jud. Conduct Dec. 6, 1996) (stipulation).

152. IND. ADMISSION & DISCIPLINE R. 25, § VIII(K)(2).

153. *See Code of Student Rights, Responsibilities, & Conduct*, IND. UNIV., <https://studentcode.iu.edu/about/index.html> [<https://perma.cc/88KX-AXQF>].

154. Karen Houppert, *Without Parents or Lawyers, Thousands of Children Brave Chaos of Immigration Courts Alone*, NATION (Aug. 25, 2014), <https://www.thenation.com/article/without-parents-or-lawyers-thousands-children-brave-chaos-immigration-courts-alone/> [<https://perma.cc/Q865-MU98>].

155. Amanda Scott, Opinion, *We Have a Right to Counsel in Criminal Cases. Why Not in Evictions?*, WASH. POST (Nov. 6, 2018, 7:38 PM), [https://www.washingtonpost.com/opinions/we-have-a-right-to-counsel-in-criminal-cases-why-not-in-evictions/2018/11/06/bbdb8600-d879-11e8-83a2-d1c3da28d6b6\\_story.html](https://www.washingtonpost.com/opinions/we-have-a-right-to-counsel-in-criminal-cases-why-not-in-evictions/2018/11/06/bbdb8600-d879-11e8-83a2-d1c3da28d6b6_story.html) [<https://perma.cc/U4VP-F2BK>].

judges facing removal due to a physical or mental disability are entitled to attorneys paid for by the commission,<sup>156</sup> as well as witness costs and attorneys' fees if they prevail.<sup>157</sup> Washington directs that a guardian ad litem be appointed for a judge who is not competent.<sup>158</sup>

### iii. Rules of Evidence

The existence of strict rules of evidence is a powerful tool for a defendant in almost any context. Since the plaintiff or prosecution will typically bear the burden of proof, the more evidence that can be excluded, the harder it will be to meet that burden. When President Franklin Roosevelt wanted to ensure a swift, certain prosecution of Nazi saboteurs, he ordered them tried by a military tribunal where all evidence "having probative value to a reasonable man would be admitted."<sup>159</sup>

Student disciplinary hearings typically do not have formal rules of evidence, giving wide leeway to school officials to introduce evidence.<sup>160</sup> Judicial disciplinary hearings, on the other hand, do. Judges enjoy the full suite of their state's rules of evidence.<sup>161</sup> The ABA recommends that dismissed charges should be excluded from future misconduct hearings,<sup>162</sup> even though rules of evidence might allow this sort of evidence in some circumstances.<sup>163</sup>

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156. MASS. COMM'N ON JUD. CONDUCT R. PROC. 12(A); *see also* MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 27(2) (AM. BAR ASS'N 2020).

157. MASS. GEN. LAWS ch. 211C, § 7(13) (West 2016).

158. WASH. COMM'N ON JUD. CONDUCT R. PROC. 27(b)(3).

159. Morris D. Davis, *The Influence of Ex Parte Quirin and Courts-Martial on Military Commissions*, 103 NW. L. REV. COLLOQUY 121, 123 (2008).

160. UNIV. ARIZ., STUDENT DISCIPLINARY PROCEDURES, at 5-403(D)(4)(b), <https://deanofstudents.arizona.edu/sites/default/files/2022-05/5-403StudentDisciplinaryProcedures.pdf> [<https://perma.cc/7DSN-WNUE>]; UNIV. FLA., *supra* note 133, at 31; UNIV. MASS. AMHERST, CODE STUDENT CONDUCT 5 (2019), [https://www.umass.edu/dean\\_students/sites/default/files/documents/07.01.2019%20Code%20of%20Student%20Conduct.pdf](https://www.umass.edu/dean_students/sites/default/files/documents/07.01.2019%20Code%20of%20Student%20Conduct.pdf) [<https://perma.cc/379E-4BRL>]; *Disciplinary Process for Alleged Infractions*, *supra* note 133 ("Hearings before the Board will be informal."); *Code of Student Rights, Responsibilities, & Conduct*, IND. UNIV., <https://studentcode.iu.edu/about/index.html> [<https://perma.cc/88KX-AXQF>] (providing no standard by which evidence may be kept out).

161. *E.g.*, IND. CODE § 33-38-13-18 (2023).

162. MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 18 (AM. BAR ASS'N 2018). This rule has been put into practice in some jurisdictions. *E.g.*, *In re Cohen*, No. 12-285, at 8 (Fla. Jud. Qualifications Comm'n Apr. 1, 2013), [https://supremecourt.flcourts.gov/content/download/385865/file/Filed\\_04-01-2013\\_Stipulation.pdf](https://supremecourt.flcourts.gov/content/download/385865/file/Filed_04-01-2013_Stipulation.pdf) [<https://perma.cc/WL2T-Y8L8>] (stipulation).

163. *E.g.*, FED. R. EVID. 404(b).

Some jurisdictions have special rules regarding plea agreements. If an Arizona judge engages in plea agreement talks, and ultimately rejects the agreement, it cannot be used in any proceeding for any purpose.<sup>164</sup> Normal civil litigants in Arizona cannot exclude plea negotiations if they are being used to prove “a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”<sup>165</sup>

#### iv. Burden

Indiana requires clear and convincing evidence to prove judicial misconduct,<sup>166</sup> as do Arizona<sup>167</sup> and Massachusetts.<sup>168</sup> Washington goes even further by requiring “clear, cogent, and convincing” evidence, defined as “highly likely.”<sup>169</sup> This is patterned after the recommendation of the ABA.<sup>170</sup>

Criminal defendants may have to be proven guilty beyond a reasonable doubt at trial, but they may face many consequences far more severe than a reprimand, with a lower burden of proof. They can be detained before trial by a preponderance of the evidence, for instance.<sup>171</sup> Students at the flagship public universities of these states can be held responsible for misconduct on a showing of a preponderance of the evidence.<sup>172</sup> In Washington, this is even enshrined in the state administrative code.<sup>173</sup>

A federal agency that takes an adverse action against an employee for incompetence need only show that its decision is supported by “substantial evidence.”<sup>174</sup> Regulation defines this as the amount of evidence a reasonable person “might accept as adequate,” and is less than a preponderance.<sup>175</sup> This sort of adverse action can include termination.<sup>176</sup> Many states apply this same

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164. ARIZ. R. COMM’N ON JUD. CONDUCT 30.

165. ARIZ. R. EVID. 408(b).

166. IND. ADMISSION & DISCIPLINE R. 25, § VIII(K)(6).

167. ARIZ. R. COMM’N ON JUD. CONDUCT 27(f)(1).

168. MASS. COMM’N ON JUD. CONDUCT R. PROC. 10(B).

169. WASH. COMM’N ON JUD. CONDUCT R. PROC. 7.

170. MODEL RULES FOR JUD. DISCIPLINARY ENF’T r. 7 (AM. BAR ASS’N 2018).

171. ARIZ. R. CRIM. PROC. 7.2(d).

172. *Code of Student Rights, Responsibilities, & Conduct*, *supra* note 160; *Disciplinary Process for Alleged Infractions*, *supra* note 133; UNIV. ARIZ., *supra* note 160, at 5-403(C)(6); UNIV. FLA., *supra* note 133, at 31; UNIV. MASS. AMHERST, *supra* note 160.

173. WASH. ADMIN. CODE. § 504-26-040 (2022).

174. 5 U.S.C. § 7701(c)(1)(A).

175. 5 C.F.R. § 1201.4(p).

176. 5 U.S.C. § 4303(a).

wafer-thin standard to justify the discharges of public employees.<sup>177</sup> Janitors therefore get less due process than judges. Inmates challenging adverse decisions by prisons must often overcome this extraordinarily deferential standard as well.<sup>178</sup>

#### D. Post-Hearing

##### i. Fringe Benefits Protected

Even when harsh punishment is imposed, judges may continue receiving pensions, meaning taxpayers are on the hook for the rest of the judge's life. Judge John Ritchie filed a slew of false travel vouchers, vacationing on the public dime.<sup>179</sup> He became the first sitting judge in Washington to be removed from office but still got to collect a \$41,000 pension in perpetuity.<sup>180</sup> Judge Joan Kouros was chronically late in issuing decisions and was so disorganized with her files that the Indiana Supreme Court removed her from office—but delayed the removal to ensure she remained eligible for her pension.<sup>181</sup> Judge Brian Coughenour drove drunk and received a deferred prosecution agreement and escaped with an admonishment from Washington's commission,<sup>182</sup> kept serving for years, and then lied to the public and resigned the moment his pension vested.<sup>183</sup> Although the impact on a pension is not normally mentioned,

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177. *Viculin v. Dep't of Civ. Serv.*, 192 N.W.2d 449, 458 (Mich. 1971); *Bowie v. Jackson Police Dep't*, 816 So. 2d 1012, 1017–18 (Miss. Ct. App. 2002); *Benjamin v. State Civ. Serv. Comm'n*, 332 A.2d 585, 586 (Pa. Commw. Ct. 1975); *Bexar Cnty. Civ. Serv. Comm'n v. Guerrero*, No. 04-15-00341-CV, 2016 WL 4376629, at \*2 (Tex. Ct. App. Aug. 17, 2016).

178. *E.g.*, *Witmer v. Neb. Dep't of Corr. Servs.*, 691 N.W.2d 185, 188 (Neb. Ct. App. 2005); *Blanchard v. N.J. Dep't of Corr.*, 220 A.3d 488, 492 (N.J. Super. Ct. App. Div. 2019); *State ex rel. Silva v. Farrey*, No. 2008AP486, 2010 WL 2403099, at \*2 (Wis. Ct. App. June 17, 2010).

179. *In re Ritchie*, No. 91-1110-F-33, at 3–6, 1993 WL 839554, at \*3–6 (Wash. Comm'n on Jud. Conduct Aug. 6, 1993).

180. Duff Wilson, *Judge's Removal a First For State—Criminal Probe Of John Ritchie Still Pending*, SEATTLE TIMES (Apr. 7, 1994), <https://archive.seattletimes.com/archive/?date=19940407&slug=1904295> [<https://perma.cc/5DL8-FKJN>].

181. *See In re Kouros*, 816 N.E.2d 21 (Ind. 2004) (per curiam). Relatedly, Arizona's commission attempted to avoid suspending a judge so as to not hurt her retirement benefits, but the state supreme court said this was an improper consideration. *In re McVay*, 158 P.3d 198, 200 (Ariz. 2007).

182. *In re Coughenour*, No. 91-1063-F-24, at 1, 1991 WL 757804, at \*1 (Wash. Comm'n on Jud. Conduct Sept. 6, 1991).

183. Paul Gottlieb, *Superior Court Judge to Resign in Clallam County*, PENINSULA DAILY NEWS (Oct. 25, 2019, 1:30 AM), <https://www.peninsuladailynews.com/news/superior-court-judge-to-resign-in-clallam-county/> [<https://perma.cc/G2VF-8TR7>].

the author was unable to locate *any* instance of a commission or state supreme court order divesting a judge of their pension.

Judge Michael Livingston filed false affidavits to avoid appearing as a witness in a lawsuit, threatened to illegally evict a personal tenant in a property he owned, transferred his law practice to a new attorney without telling clients, committed tax fraud, and continued an active role in the business after becoming a judge.<sup>184</sup> Although he was dishonest in so many of his interactions with others, the commission was kind toward him: they allowed him to use his forty days of accrued leave before retiring, milking every last penny out of taxpayers.<sup>185</sup>

And if a judge engages in criminal conduct, they may get off easy there too. Judge John Junke was reprimanded in 1993 for holding a prosecutor in contempt and arresting them after the prosecutor refused to issue an arrest warrant for a witness, along with lesser charges.<sup>186</sup> In 2006, he resigned in lieu of disbarment for having sex with a client.<sup>187</sup> In 2013, he was charged with possession of child porn.<sup>188</sup> And in 2014, he was convicted and given a 120-day jail term, even though six to eight years was the more common punishment for

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184. Press Release, The Commonwealth of Mass. Comm'n on Jud. Conduct, Commission on Judicial Conduct Files Formal Charges Against Judge Michael J. Livingston, at 1 (Oct. 22, 2007), <https://www.mass.gov/doc/cjc-files-formal-charges-against-judge-michael-j-livingstone-with-judge-livingstones-response/download> [<https://perma.cc/6PNN-M28R>] (formal charges).

185. Press Release, The Commonwealth of Mass. Comm'n on Jud. Conduct, Commission on Judicial Conduct Resolves Judge Livingston Matter by Agreement, Retirement, at 1–2 (Apr. 16, 2008), <https://www.mass.gov/doc/cjc-resolves-judge-livingstone-matter-by-agreement/download> [<https://perma.cc/4LT4-NDPZ>].

186. *In re Junke*, No. 91-1137-F-34, at 3, 1993 WL 839556, at \*3 (Wash. Comm'n on Jud. Conduct June 4, 1993).

187. *Discipline Notice - John P. Junke*, WASH. ST. BAR ASS'N, <https://www.mywsba.org/PersonifyEbusiness/DisciplineNoticeDirectory/DisciplineNoticeDetail.aspx?dID=803> [<https://perma.cc/RH6Z-P8NM>].

188. Terry McConn, *Former Judge Accused of Possessing Child Porn*, WALLA WALLA UNION-BULL. (Dec. 27, 2013), <http://www.courts.wa.gov/content/PublicUpload/eclips/2013%2012%2030%20Former%20judge%20accused%20of%20possessing%20child%20porn.pdf> [<https://perma.cc/V7R9-UKP4>].

his crime.<sup>189</sup> His jail time was served in blocks so that he could continue collecting Social Security payments.<sup>190</sup>

## ii. Appeals

Judges who wish to appeal an adverse commission decision may plead their case in the state supreme court. Review by the state supreme court tends to be done *de novo*, meaning without deference to the lower tribunal.<sup>191</sup> Criminal appeals are frequently subjected to the much harsher abuse of discretion standard.<sup>192</sup> Washington gives judges thirty days to appeal a disciplinary action in its constitution.<sup>193</sup> Criminal defendants are not given any specific appeal rights in the state constitution,<sup>194</sup> and civil litigants are not given any constitutional right to appeal at all.<sup>195</sup> The ABA recommends that judicial discipline cases on appeal be given expedited consideration, presumably because they are deemed more important than, say, determining whether a criminal conviction was valid.<sup>196</sup>

Normal rules of appeal can also be ignored for judges. Appellant J.R.E. was given a ninety-day suspension from office by Washington's commission after more than a dozen instances of her mistreating self-represented litigants, and failure to improve after prior sanctions from the commission.<sup>197</sup> She successfully appealed this to the Washington Supreme Court—an endeavor that took her ten months to adjudicate and mootness was never even mentioned.<sup>198</sup> Appellant J.M.Z. was also given a ninety-day sentence and took several months to appeal it.<sup>199</sup> His appeal was dismissed as moot and the court found no need

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189. Terry McConn, *Ex-Walla Walla Judge, Former Minister Sentenced in Child Porn Case*, TRI-CITY HERALD (Feb. 27, 2014, 4:18 PM), <https://www.tricityherald.com/news/local/crime/article32168667.html> [<https://perma.cc/38DM-RC22>].

190. *Id.*; see also *In re Ryan*, No. 7150-F-156, at 1, 2013 WL 2350891, at \*1 (Wash. Comm'n on Jud. Conduct May 10, 2013) (discussing how the judge was stopped for drunk driving, identified himself as a judge, and no charges were ever filed).

191. *E.g.*, IND. ADMISSION & DISCIPLINE R. 25, § VIII(P)(3); WASH. COMM'N ON JUD. CONDUCT R. PROC. 25(a).

192. *E.g.*, IND. R. CRIM. PROC. 12.

193. WASH. CONST. art. IV, § 31(6).

194. See *id.* art. I, § 22.

195. See *id.* art. IV, § 4.

196. MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 25 (AM. BAR ASS'N 2018).

197. *In re Eiler*, 236 P.3d 873, 885 (Wash. 2010) (en banc) (disciplinary proceeding).

198. See *id.* at 875.

199. See *In re Detention of J.M.Z.*, No. 30332-9-II, 2004 WL 569284, at \*1 (Wash. Ct. App. Mar. 23, 2004).

to decide whether the sentence was proper.<sup>200</sup> What explains the different outcomes? The first appellant was a judge appealing *suspension from office*,<sup>201</sup> and the second was a mentally disabled defendant appealing *imprisonment*.<sup>202</sup> Potential wrongful incarceration of a mentally disabled person was not a matter of “substantial public interest” that justified overlooking mootness rules, according to the court.<sup>203</sup>

#### IV. DISPARITIES IN OUTCOME

To start with the conclusion, the judicial disciplinary system has double standards for judges. Time and time again this plays out in the results of disciplinary hearings. Nothing sums it up better than Judge Charles Hunter. A disabled defendant neglected to display a handicap placard while parking in a handicap spot and was found guilty by Hunter.<sup>204</sup> The judge, too, was wheelchair-bound and parked in a handicap spot without a placard displayed. When a journalist asked about this, the judge said the difference between them was “I didn’t get a ticket, did I?”<sup>205</sup> The reporter then asked, “So, it’s just their bad luck for having gotten a ticket?” Judge Hunter responded, “I guess so, yeah.”<sup>206</sup> Bad luck indeed.

A second vignette involves Court Commissioner Tony Parise, who presided over traffic cases in Whatcom County District Court, Washington. A defendant was charged with a traffic offense.<sup>207</sup> Upset, the defendant said that it was not a “real” crime, like “breaking into somebody’s house and stealing shit.”<sup>208</sup> The commissioner upon hearing the curse word said, “Oh, I wish you hadn’t sworn there. Yeah. That just made it a lot worse.”<sup>209</sup> In the exchange that followed,

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200. *Id.* at \*4.

201. *In re Eiler*, No. 5198-F-136, at 1 (Wash. Comm’n on Jud. Conduct Apr. 24, 2009), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/2009/5198%20Eiler%20Reconsideration.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/2009/5198%20Eiler%20Reconsideration.pdf) [<https://perma.cc/MVW3-VCFG>] (motion to reconsider majority decision).

202. *See In re Detention of J.M.Z.*, 2004 WL 569284, at \*1.

203. *Id.* at \*3–4.

204. Public Admonition of The Honorable Charles W. Hunter Beech Grove City Court (Ind. Comm’n on Jud. Qualifications May 5, 2011), <https://www.in.gov/courts/jqc/files/jud-qual-admon-hunter-05-05-11.pdf> [<https://perma.cc/3FBW-N5XD>].

205. *Id.*

206. *Id.*

207. *See In re Parise*, No. 7292-F-155, at 1–2, 2013 WL 5853967, at \*1 (Wash. Comm’n on Jud. Conduct Oct. 4, 2013).

208. *Id.* at 2.

209. *Id.*

Commissioner Parise used the similar curse word “bullshit.”<sup>210</sup> When the defendant pointed out the hypocrisy, the commissioner said, “You’re right. I’ll say it again if you want!” and set bail at \$500,000 for a misdemeanor traffic offense (he was later admonished for this, but not imprisoned).<sup>211</sup>

Point being, there are two sets of rules: one for judges, and one for everybody else.

### A. Unequal Outcomes

#### i. Disparities Between Different Judges

When a criminal defendant is convicted of a federal crime, their fate is largely sealed by the United States Sentencing Guidelines. The Guidelines were created by a prosecution-heavy committee,<sup>212</sup> and Congress stuffed it full of mandatory minimums.<sup>213</sup> Sentencing guidelines are not mandatory, but must still be considered by courts,<sup>214</sup> and are presumed to be reasonable.<sup>215</sup> States have their own sentencing guidelines, though not exactly the same as the federal system.<sup>216</sup> Judicial conduct commissions are unencumbered by any such prescriptive rulebook, meaning they can impose any sanction for any offense. Arbitrary sentencing abounds.

In Arizona, Judge Keith Barth submitted a character reference letter on behalf of an attorney seeking reinstatement.<sup>217</sup> He was reprimanded for improperly lending the prestige of his office to a private party.<sup>218</sup> Compare him

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210. *Id.*

211. *Id.* at 2, 5.

212. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 763–64 (2005).

213. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 700 (2010).

214. *United States v. Booker*, 543 U.S. 220, 245 (2005).

215. *E.g.*, *United States v. Gibbs*, 897 F.3d 199, 204 (4th Cir. 2018).

216. Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, 81 FED. PROB. J. 28, 28 (2017).

217. *In re Barth*, No. 12-218 (Ariz. Comm’n on Jud. Conduct Sept. 7, 2012), <https://www.azcourts.gov/portals/137/reports/2012/12-218.pdf> [https://perma.cc/TGG4-DBQ5] (order). Victor Wilkins invoked Arizona Revised Statute section 12-502 to dismiss a lawsuit against a minor defendant, when the law is supposed to be used to dismiss lawsuits filed by minor plaintiffs. *In re Wilkins*, No. 06-059 (Ariz. Comm’n on Jud. Conduct July 11, 2006), <https://www.azcourts.gov/portals/137/reports/2006/06-059.pdf> [https://perma.cc/NNQ7-V4BQ] (order).

218. *See In re Barth*, No. 12-218 (Ariz. Comm’n on Jud. Conduct Sept. 7, 2012), <https://www.azcourts.gov/portals/137/reports/2012/12-218.pdf> [https://perma.cc/TGG4-DBQ5].

to Douglas LaSota, another Arizona judge. LaSota used his work computer to view pornographic images, took home his computer and wiped the hard drive clean, told his employees, “If you get me fired, I will kill myself,” and retaliated against employees, told creditors, financial institutions, and his cell phone provider that he was a judge in an attempt to get better treatment, and bullied a litigant to drop a case, among other things.<sup>219</sup> He, too, was reprimanded.<sup>220</sup> If one is curious how these two cases could yield the same level of discipline, bad news: the commission did not explain its reasoning.<sup>221</sup>

Other acts that also merited the identical (and the lowest possible in Arizona) punishment of “reprimand” include: telling the board of supervisors that police needed to write more tickets,<sup>222</sup> presiding over court cases while drunk,<sup>223</sup> giving prosecutors explicit preferential treatment,<sup>224</sup> hearing a case where a judge had a direct financial interest and ruling in his own favor,<sup>225</sup> summarily ruling against a tenant without hearing evidence and when a trial was required,<sup>226</sup> making up court rules arbitrarily,<sup>227</sup> failing to advise criminal defendants of their rights,<sup>228</sup> having defendants donate to a judge’s preferred

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219. *In re* LaSota, No. 09-293 (Ariz. Comm’n on Jud. Conduct Mar. 18, 2010), <https://www.azcourts.gov/portals/137/reports/2009/09-293.pdf> [<https://perma.cc/BEB7-D6YR>] (order).

220. *Id.*

221. *In re* McMurry, No. 10-221 (Ariz. Comm’n on Jud. Conduct Dec. 20, 2010), <https://www.azcourts.gov/portals/137/reports/2010/10-221.pdf> [<https://perma.cc/9ZF6-RXXP>] (order) (discussing a judge reprimanded for making verbally abusive comments and threatening physical violence against an unrepresented party).

222. *In re* Basteen, No. 12-255 (Ariz. Comm’n on Jud. Conduct Dec. 4, 2012), <https://www.azcourts.gov/portals/137/reports/2012/12-255.pdf> [<https://perma.cc/HZ9Q-V798>] (order).

223. *In re* Lodge, No. 12-176 (Ariz. Comm’n on Jud. Conduct Aug. 21, 2012), <https://www.azcourts.gov/portals/137/reports/2012/12-176.pdf> [<https://perma.cc/7X2F-ZRM8>] (order).

224. *In re* Chiles, No. 12-012 (Ariz. Comm’n on Jud. Conduct Apr. 9, 2012), <https://www.azcourts.gov/portals/137/reports/2012/12-012.pdf> [<https://perma.cc/D4QT-TMS5>] (order).

225. *In re* Wilson, No. 14-331 (Ariz. Comm’n on Jud. Conduct Feb. 6, 2015), <https://www.azcourts.gov/portals/137/reports/2014/14-331.pdf> [<https://perma.cc/9WKR-2UKH>] (order).

226. *In re* Carillo, No. 15-189 (Ariz. Comm’n on Jud. Conduct Nov. 13, 2015), <https://www.azcourts.gov/portals/137/reports/2015/15-189.pdf> [<https://perma.cc/NS7J-7Y75>] (order).

227. *In re* Newell, No. 13-211 (Ariz. Comm’n on Jud. Conduct Dec. 11, 2013), <https://www.azcourts.gov/portals/137/reports/2013/13-211.pdf> [<https://perma.cc/679N-7JJN>] (order).

228. *In re* Quezada, No. 13-210 (Ariz. Comm’n on Jud. Conduct Dec. 12, 2013), <https://www.azcourts.gov/portals/137/reports/2013/13-210.pdf> [<https://perma.cc/LE49-36X4>] (order).

charity in exchange for dismissing cases,<sup>229</sup> calling a defendant “dumb-a-,”<sup>230</sup> requiring parties to use a company the judge owned as part of a settlement agreement,<sup>231</sup> providing a false statement to law enforcement,<sup>232</sup> running for political office without resigning as judge,<sup>233</sup> illegally sentencing a defendant to thirty days imprisonment,<sup>234</sup> and telling a woman she could “sit on my lap if you want” while she waited for her case.<sup>235</sup> And that’s just Arizona. One can find many examples in other states of wildly divergent conduct all receiving the identical penalty of “reprimand.”<sup>236</sup>

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229. *In re* Yellowhorse, No. 17-227 (Ariz. Comm’n on Jud. Conduct Mar. 29, 2019), <https://www.azcourts.gov/portals/137/reports/2017/17-227.pdf> [https://perma.cc/V27D-EWRS] (order).

230. *In re* Ditsworth, No. 17-197 (Ariz. Comm’n on Jud. Conduct Nov. 13, 2017), <https://www.azcourts.gov/portals/137/reports/2017/17-197.pdf> [https://perma.cc/CTR9-3M7F] (order).

231. *In re* Jones-Sheldon, No. 17-008 (Ariz. Comm’n on Jud. Conduct May 17, 2017), <https://www.azcourts.gov/portals/137/reports/2017/17-008.pdf> [https://perma.cc/3PWP-37GZ] (order).

232. *In re* Gillis, No. 18-328 (Ariz. Comm’n on Jud. Conduct Jan. 31, 2020), <https://www.azcourts.gov/portals/137/reports/2018/18-328.pdf> [https://perma.cc/3TB3-QQP5] (order).

233. *In re* Barth, No. 18-260 (Ariz. Comm’n on Jud. Conduct Feb. 14, 2019), <https://www.azcourts.gov/portals/137/reports/2018/18-260.pdf> [https://perma.cc/SSL5-LWV3] (order).

234. *See In re* Riggs, No. 19-310 (Ariz. Comm’n on Jud. Conduct Mar. 17, 2020), <https://www.azcourts.gov/portals/137/reports/2019/19-310.pdf> [https://perma.cc/UXP3-S5PK] (order).

235. *In re* Fell, No. 19-098 (Ariz. Comm’n on Jud. Conduct June 10, 2019), <https://www.azcourts.gov/portals/137/reports/2019/19-098.pdf> [https://perma.cc/B22H-DJHE] (order).

236. Florida, for instance, gave reprimands to judges in a variety of contexts. *See, e.g., In re* Cope, 848 So. 2d 301, 302 (Fla. 2003) (per curiam) (discussing a judge who went to a taxpayer-funded conference, got drunk, stole a hotel key from two women and tried to have sex with them, attempted to forcibly enter their room, lied to police, failed to disclose his misconduct); *In re* Schapiro, 845 So. 2d 170, 172 (Fla. 2003) (per curiam) (discussing a judge who played a toilet flushing sound effect in open court to insult a defense attorney and told him to “try this mother fu\_\_ing case”); *In re* Maloney, 916 So. 2d 786, 786 (Fla. 2005) (per curiam) (discussing a judge who intervened when a family friend got arrested by immediately ordering his release over the objection of the police and in violation of state law); *In re* Cohen, 99 So. 3d 926, 930–931 (Fla. 2012) (per curiam) (discussing a judge who called his own wife as a witness in a matter he presided over, and threatened an attorney if they tried to recuse him); *In re* Singbush, 93 So. 3d 188, 190 (Fla. 2012) (per curiam) (discussing a judge who was habitually late for court, held court at extremely inconvenient times for parties, took excessively long lunch breaks and smoke breaks); *In re* Flood, 150 So. 3d 1097, 1097 (Fla. 2014) (per curiam) (discussing a judge who developed an improper “friendship” with a bailiff who the judge served as a

Divergent sentences for tardiness give a crystalline example. Punctuality is important for judges, of course, as parties should expect to have their cases decided in a reasonable amount of time. What is odd, however, is that the severity of the delay does not affect the punishment. Judge Andrew Monson was a few weeks late in rendering a decision—he got an admonishment.<sup>237</sup> Judge John Feutz was a few months late in rendering multiple decisions—he got an admonishment.<sup>238</sup> Judge Ellen Clark took nearly a year to render a decision in a case—she got an admonishment.<sup>239</sup> Judge John Linde lost a case file and was a year late in issuing a decision—he got an admonishment.<sup>240</sup> Judge Toni Sheldon took over a year to render a decision—she got an admonishment.<sup>241</sup> Judge Heather Van Nuys took five years to render a decision in one matter—she got an admonishment.<sup>242</sup> All of them are from Washington. How is it fair if being five weeks or five years late gets the same punishment?

Part of the problem seems to be the commission's priorities. All of the above-listed transgressions got verbal sanctions. But Judge Kelly Seidlitz was permanently removed from office for the high crime of failing to pay his Bar dues.<sup>243</sup> It is hard to see why this was so much worse.

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supervisor over); *In re Bailey*, 267 So. 3d 992, 994 (Fla. 2019) (per curiam) (discussing a judge who threatened physical violence against a defense attorney for trying to help a colleague argue a point); *In re Lemonidis*, 283 So. 3d 799, 801 (Fla. 2019) (per curiam) (discussing a judge who told a defendant she wished he was dead). For a few more examples elsewhere, see, for instance, *In re Johanningsmeier*, 103 N.E.3d 633, 634 (Ind. 2018) (per curiam), which reprimanded a judge who asked the prosecution to dismiss a case against a friend of the judge's.

237. *In re Monson*, No. 92-1238-F-36, at 1–2, 1992 WL 778714, at \*1 (Wash. Comm'n on Jud. Conduct Oct. 2, 1992).

238. *In re Feutz*, No. 92-1248-F-35, at 3, 1992 WL 778715, at \*2 (Wash. Comm'n on Jud. Conduct Oct. 2, 1992).

239. *In re Clark*, No. 3892-F-103, at 1, 2003 WL 394773, at \*1 (Wash. Comm'n on Jud. Conduct Feb. 7, 2003).

240. *In re Linde*, No. 94-1845-F-51, at 1, 1995 WL 902258, at \*1 (Wash. Comm'n on Jud. Conduct June 2, 1995).

241. *In re Sheldon*, No. 3654-F-97, at 1, 2002 WL 549396, at \*1 (Wash. Comm'n on Jud. Conduct Apr. 5, 2002); see also *In re Rawson*, No. 8345-F-173, at 1, 2017 WL 3215414, at \*1 (Wash. Comm'n on Jud. Conduct July 14, 2017) (admonishing for a 15-month delay in a ruling); *In re Fennessy*, No. 9014-F-184, at 1, 2019 WL 2296513, at \*1 (Wash. Comm'n on Jud. Conduct Apr. 26, 2019) (admonishing for a 13-month delay in ruling).

242. *In re Van Nuys*, No. 3754-F-99, at 1, 2002 WL 1336348, at \*1 (Wash. Comm'n on Jud. Conduct June 7, 2002).

243. *In re Seidlitz*, No. 97-2646-F-68, at 1–2, 1998 WL 311986, at \*1 (Wash. Comm'n on Jud. Conduct June 5, 1998).

Another part of the problem is that commissions have few punishment options, so a single category of sanction is forced to cover an extraordinarily wide range of misconduct. In Washington, “admonishment” has been used to address everything from smoking in chambers<sup>244</sup> to a judge angrily telling a female intern he would “rip her head off.”<sup>245</sup> But this is a self-imposed constraint, as commissions impose or recommend other sanctions if they are so inclined.

Judge Jerry Moberg was both a judge and a professor.<sup>246</sup> However, by accepting paid outside employment, he violated a rule of his judgeship.<sup>247</sup> The commission worked out an agreement where Moberg was not only admonished, but refunded the university any money he received, and agreed to not seek a judicial position for four years.<sup>248</sup> The latter two conditions are not standard, but they show how, if it is inclined to, a commission can tailor its punishment to fit the offense.<sup>249</sup> Most of the time, they simply choose not to.

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244. *In re Leverette*, No. 91-1118-F-26, at 1, 1991 WL 757805, at \*1 (Wash. Comm’n on Jud. Conduct Oct. 10, 1991). There are plenty other examples of ultra-minor misconduct resulting in formal sanctions. *See, e.g., In re Slusher*, No. 93-1518-F-43, at 1, 1999 WL 1814621, at \*1 (Wash. Comm’n on Jud. Conduct Apr. 1, 1994) (having a social relationship with court assigned therapist); *In re Kato*, No. 5577-F-143, at 1, 2009 WL 1159190, at \*1 (Wash. Comm’n on Jud. Conduct Apr. 10, 2009) (conducting weddings without two witnesses); *In re Heavey*, No. 5975-F-145, at 1, 2010 WL 3777283, at \*1 (Wash. Comm’n on Jud. Conduct Sept. 24, 2010) (using court stationary to write to the Italian justice about the Amanda Knox case).

245. *In re LaSalata*, No. 6279-F-149, at 1, 2010 WL 3777284, at \*1 (Wash. Comm’n on Jud. Conduct Sept. 24, 2010). For an additional oddity, compare *In re Monson*, No. 93-1568-F-50, at 1–2, 1995 WL 902257, at \*1 (Wash. Comm’n on Jud. Conduct Oct. 2, 1992), which imposed admonishment where the judge presided over multiple cases where the defendant was also his full-time client, against *In re O’Rourke*, No. 8521-F-175, at 1, 2018 WL 1547620, at \*1 (Wash. Comm’n on Jud. Conduct Mar. 9, 2018), which imposed an identical punishment where judge presided over a single case where the defendant was briefly a client during an “attorney for the day” program.

246. *In re Moberg*, No. 92-1260-F-39, at 1–2, 1993 WL 839539, at \*1 (Wash. Comm’n on Jud. Conduct Aug. 6, 1993).

247. *Id.*

248. *Id.* at 2–3.

249. Another example is *In re Moilanen*, No. 91-1182-F-29, at 12–13, 1993 WL 839564, at \*6 (Wash. Comm’n on Jud. Conduct Feb. 5, 1993), which required a judge to attend training, apologize to victims, reimburse county for wrongful expenses, subjecting judge to monitoring by commission, and ordering judge to propose rules to improve judicial accountability.

ii. Disparities Between Judges and Everyone Else

*a. Ordinary People Get Much Harsher Punishment for Similar Conduct*

One of the best examples is false imprisonment. Take Judge Donald Johnson. A defense attorney asked for a hearing to be rescheduled, and the judge complied.<sup>250</sup> Ten days later, the prosecutor made an ex parte request to set the date back to the original date, and the judge agreed.<sup>251</sup> The defense attorney was told about the reversion only two days before the hearing.<sup>252</sup> He promptly filed a motion to continue, Johnson denied it, and when the defense attorney could not attend the hearing, Johnson had him arrested and jailed.<sup>253</sup> Adding insult to injury, the judge had the defense attorney appear in court in prison garb to handle matters for a client.<sup>254</sup> For all this, the judge received the punishment of reprimand.<sup>255</sup>

Johnson is one of many. There are countless examples of judges abusing their power and ordering people arrested for no good reason and without

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250. *In re Johnson*, 658 N.E.2d 589, 590 (Ind. 1995).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

following proper procedures.<sup>256</sup> Removal from office is an extreme rarity,<sup>257</sup> most got only verbal sanctions.

Now suppose that these same people did not have black robes on when they improperly jailed people. In any of the applicable states, these judges would have committed the tort of false imprisonment.<sup>258</sup> Alternatively, they could be charged with a crime. In Arizona, unlawful imprisonment is a class six felony,<sup>259</sup> meaning up to two years in prison.<sup>260</sup> Florida makes false

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256. See *In re Albritton*, 940 So. 2d 1083, 1086–87 (Fla. 2006) (per curiam) (discussing a judge who jailed a mother for not knowing what her address was, and other defendants for failing on-the-spot drug tests); *In re Bennington*, 24 N.E.3d 958, 961 (Ind. 2015) (per curiam) (discussing a judge who illegally sent a person to jail for an infraction); *In re Malka*, No. 06-079, at 2 (Ariz. Comm’n on Jud. Conduct Dec. 21, 2006), <https://www.azcourts.gov/portals/137/reports/2006/06-079.pdf> [<https://perma.cc/LC7X-ACJL>] (amended agreement for discipline by consent) (discussing a judge who jailed people in the courtroom for talking about threatening someone); *In re Colby*, No. 2511-F-85, at 2, 2000 WL 33172995, at \*1 (Wash. Comm’n on Jud. Conduct Nov. 30, 2000) (discussing a judge who imposed a jail sentence on a defendant without a finding of guilty); *In re Eriksson*, No. 09-629, at 3–5 (Fla. Jud. Qualifications Comm’n June 2, 2010), [https://supremecourt.flcourts.gov/content/download/424253/file/Filed\\_06-02-2010\\_Notice\\_Formal\\_Charges.pdf](https://supremecourt.flcourts.gov/content/download/424253/file/Filed_06-02-2010_Notice_Formal_Charges.pdf) [<https://perma.cc/Q82L-Y3U2>] (notice of formal charges) (discussing a judge who illegally sentenced numerous people to jail); *In re Reid*, No. 3713-F-105, at 5–6 (Wash. Comm’n on Jud. Conduct May 23, 2003), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/2003/3713%20Statement%20of%20Charges.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/2003/3713%20Statement%20of%20Charges.pdf) [<https://perma.cc/P824-J82T>] (statement of charges) (discussing judge who sentenced dozens of people to jail without required hearings); *In re Wulle*, No. 6707-F-154, at 7 (Wash. Comm’n on Jud. Conduct Jan. 9, 2013), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/2012/6707\\_Wulle\\_Amended\\_Decision.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/2012/6707_Wulle_Amended_Decision.pdf) [<https://perma.cc/CH6X-7RUS>] (amended commission decision and order) (discussing a judge who sentenced a man to two day days of jail for failure to “shut up”); cf. *In re Brown*, 4 N.E.3d 619, 624 (Ind. 2014) (per curiam) (discussing a judge failing to promptly release 10 defendants from jail when she was supposed to).

257. One judge resigned from office, but charges against him were dropped “in the interest of justice” so there was no formal determination he had done anything wrong. *In re Reid*, No. 3713-F-105, at 2 (Wash. Comm’n on Jud. Conduct Nov. 3, 2003), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/2003/3713%20Dismissal.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/2003/3713%20Dismissal.pdf) [<https://perma.cc/2LD8-TC4U>] (corrected order of dismissal). John R. Sloop was removed from office after wrongfully arresting and strip searching a dozen defendants, though he also had three prior admonishments, so it is hard to say exactly why he was removed. *In re Sloop*, 946 So. 2d 1046, 1049–51, 1060 (Fla. 2006) (per curiam).

258. RESTATEMENT (SECOND) OF TORTS § 35 (AM. L. INST. 1965); *Gutierrez v. Mass. Bay Transp. Auth.*, 772 N.E.2d 552, 556 (Mass. 2002); *Hart v. Seven Resorts*, 947 P.2d 846, 855 (Ariz. Ct. App. 1997); *Harder v. Edwards*, 174 So. 3d 524, 530 (Fla. Dist. Ct. App. 2015); *Johnson v. Blackwell*, 885 N.E.2d 25, 30 (Ind. Ct. App. 2008).

259. ARIZ. REV. STAT. ANN. § 13-1303 (2023).

260. *Id.* § 13-702.

imprisonment a third-degree felony,<sup>261</sup> resulting in up to five years imprisonment.<sup>262</sup> Criminal confinement is at least a level six felony in Indiana,<sup>263</sup> carrying up to a two and a half year sentence.<sup>264</sup> And false arrest can mean a year behind bars in Massachusetts.<sup>265</sup> But all judges get is a sternly worded letter.

Drunk driving is another good example. The author located twenty-seven examples of judges in the five states being disciplined for drunk driving.<sup>266</sup>

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261. FLA. STAT. § 787.02 (2023).

262. *Id.* § 775.082.

263. IND. CODE § 35-42-3-3 (2023).

264. *Id.* § 35-50-2-1.

265. MASS. GEN. LAWS ch. 263, § 2 (2023).

266. *In re Alsip*, 499 N.E.2d 1102, 1103 (Ind. 1986) (per curiam); *In re Cruz*, 851 N.E.2d 960 (Ind. 2006) (per curiam) (mem.); *In re Hanley*, 867 N.E.2d 157, 158 (Ind. 2007) (per curiam); *In re Felts*, 902 N.E.2d 255, 255–56 (Ind. 2009) (per curiam); *In re Hughes*, 947 N.E.2d 418, 419 (Ind. 2011) (mem.); *In re Weber*, 21 N.E.3d 92, 92–93 (Ind. 2014) (per curiam); *In re Page*, 69 N.E.3d 470, 470–71 (Ind. 2017) (per curiam); *In re Garrad*, 56 N.E.3d 24, 24 (Ind. 2016) (mem.); *In re Howell*, No. 49S00-9409-JD-834 (Ind. Mar. 3, 1995), <https://www.in.gov/courts/jqc/files/jud-qual-opin-howell-william.pdf> [<https://perma.cc/R2H3-MGAC>]; *In re Murphy*, No. 89-878-F-16, at 1, 1990 WL 678962, at \*1 (Wash. Comm'n on Jud. Conduct Aug. 3, 1990); *In re Mackin*, No. 94-1677-F-49, at 1, 1995 WL 902255, at \*1 (Wash. Comm'n on Jud. Conduct Apr. 7, 1995); *In re Fitterer*, No. 4286-F-113, at 1, 2004 WL 2334724, at \*1 (Wash. Comm'n on Jud. Conduct Oct. 1, 2004); *In re Lyman*, No. 6527-F-152, at 1, 2011 WL 3305387, at \*1 (Wash. Comm'n on Jud. Conduct July 8, 2011); *In re Ryan*, No. 7150-F-156, at 1, 2013 WL 2350891, at \*1 (Wash. Comm'n on Jud. Conduct May 10, 2013); *In re Hitchcock*, No. 7377-F-160, at 1, 2014 WL 5493213, at \*1 (Wash. Comm'n on Jud. Conduct Oct. 3, 2014); *In re Dingley*, No. 8710-F-176, at 1, 2017 WL 6615057, at \*1 (Wash. Comm'n on Jud. Conduct Dec. 8, 2017); *In re Tanner*, No. 8889-F-180, at 1, 2018 WL 6823149, at \*1 (Wash. Comm'n on Jud. Conduct Dec. 7, 2018); *In re Coughenour*, No. 91-1063-F-24, at 1, 1991 WL 757804, at \*1 (Wash. Comm'n on Jud. Conduct Sept. 6, 1991); *In re Lake*, No. 3365-F-98, at 1, 2002 WL 1336345, at \*1 (Wash. Comm'n on Jud. Conduct June 7, 2002); *In re Bridge*, No. 4050-F-106, at 1, 2003 WL 2202079, at \*1 (Wash. Comm'n on Jud. Conduct Aug. 15, 2003); *In re Imperato*, No. 13-545 (Fla. Jud. Qualifications Comm'n Oct. 10, 2015), [https://efacts-public.flcourts.org/casedocuments/2015/355/2015-355\\_miscdoc\\_323191.pdf](https://efacts-public.flcourts.org/casedocuments/2015/355/2015-355_miscdoc_323191.pdf) [<https://perma.cc/LS3P-6J9A>]; *In re Rosenthal*, No. 14-229 (Fla. Jud. Qualifications Comm'n Aug. 14, 2015), [https://efacts-public.flcourts.org/casedocuments/2015/1498/2015-1498\\_motion\\_108497.pdf](https://efacts-public.flcourts.org/casedocuments/2015/1498/2015-1498_motion_108497.pdf) [<https://perma.cc/VE4F-CW3D>]; *In re Madden*, No. 12-300 (Ariz. Comm'n on Jud. Conduct Feb. 12, 2014), <https://www.azcourts.gov/portals/137/reports/2012/12-300.pdf> [<https://perma.cc/JM7K-7LE8>] (order); Public Admonition of The Honorable Donald Currie Carroll Circuit Court (Ind. Comm'n on Jud. Qualifications May 27, 2008), <https://www.in.gov/courts/jqc/files/jud-qual-admon-currie-2-27-08.pdf> [<https://perma.cc/JC2B-QEZG>]; Press Release, The Commonwealth of Mass. Comm'n on Jud. Conduct, Superior Court Judge Reprimanded by Commission on Judicial Conduct (June 9, 2010), <https://www.mass.gov/news/superior-court-judge-reprimanded-by-commission-on-judicial-conduct> [<https://perma.cc/3YKG-ANTC>]; Press Release, The Commonwealth of Mass. Comm'n on Jud.

Most received reprimands or admonishments, one received a censure, and none received removal or suspension.<sup>267</sup>

Apart from criminal sanctions, other people can expect serious career ramifications if they drive drunk. Soldiers will frequently get kicked out of the Army for driving drunk.<sup>268</sup> Even if they remain in, their record may receive a black mark that serves as a “career killer.”<sup>269</sup> They may also receive non-judicial punishment, which can mean having their rank slashed, pay cut, extra duties assigned, or personal liberty restricted.<sup>270</sup>

Conflicts of interest provide a third telling example. Under federal law, conflicts of interest are criminalized. Government employees cannot directly or indirectly solicit bribes<sup>271</sup> or participate in a judicial proceeding in which they or a family member has a financial interest.<sup>272</sup> Judges routinely engage in behavior that, at the very least, skirts the lines of these statutes, yet face no prosecution.

Judges have frequently gotten merely reprimanded for accepting what were essentially bribes from lawyers or parties who appear before them.<sup>273</sup> As for

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Conduct, Appeals Court Judge Reprimanded by Commission on Judicial Conduct (Mar. 19, 2004), [https://www.mass.gov/news/\[https://perma.cc/4C4T-ZBYR\]](https://www.mass.gov/news/[https://perma.cc/4C4T-ZBYR]).

267. The commission recommended suspension for Lynn Rosenthal, but the state supreme court remanded the case and it was unceremoniously dismissed. *In re Rosenthal*, No. 14-229 (Fla. Jud. Qualifications Comm’n Aug. 14, 2015), [https://efactssc-public.flcourts.org/casedocuments/2015/1498/2015-1498\\_motion\\_108497.pdf](https://efactssc-public.flcourts.org/casedocuments/2015/1498/2015-1498_motion_108497.pdf) [<https://perma.cc/VE4F-CW3D>] (changing findings and recommendation of discipline); *In re Rosenthal*, No. SC15-1498, 2015 WL 5224340, at \*1 (Fla. 2015); *In re Rosenthal*, 182 So. 3d 633 (Fla. 2015) (unpublished table decision).

268. Philip Jankowski, *Drunken Discharge: Army Moves Fast in DWI Case*, KILLEEN DAILY HERALD (Mar. 31, 2013), [https://kdhnews.com/military/drunken-discharge-army-moves-fast-in-dwi-case/article\\_957a6f68-99b8-11e2-986c-0019bb30f31a.html](https://kdhnews.com/military/drunken-discharge-army-moves-fast-in-dwi-case/article_957a6f68-99b8-11e2-986c-0019bb30f31a.html) [<https://perma.cc/3Q4L-Z6PL>].

269. Nathan Pfau, *DUI Consequences Far-Reaching*, U.S. ARMY (Dec. 6, 2012), [https://www.army.mil/article/92499/DUI\\_consequences\\_far\\_reaching/](https://www.army.mil/article/92499/DUI_consequences_far_reaching/) [<https://perma.cc/58JN-SKQN>].

270. USAG Stuttgart Law Center, *How a DUI Forever Changed a Local Soldier’s Career*, U.S. ARMY (Apr. 11, 2016), [https://www.army.mil/article/165772/how\\_a\\_dui\\_forever\\_changed\\_a\\_local\\_soldiers\\_career](https://www.army.mil/article/165772/how_a_dui_forever_changed_a_local_soldiers_career) [<https://perma.cc/ZGU5-NCJW>].

271. 18 U.S.C. § 201.

272. *Id.* § 208.

273. Office of Disciplinary Counsel v. Lisotto, 761 N.E.2d 1037, 1038 (Ohio 2002) (per curiam) (reprimanding judge for accepting football tickets from lawyers who practiced before him); *In re Luzzo*, 756 So. 2d 76, 77, 79 (Fla. 2000) (per curiam) (reprimanding judge for accepting baseball tickets from lawyers who practiced before him); *In re Chananau*, 1982 WL 196854, at \*3 (N.Y.

more general conflicts of interest, Clifford Wilson was a property management agent and a judge.<sup>274</sup> A tenant damaged the property Wilson managed.<sup>275</sup> The property owner sued for damages, and Wilson not only presided over the case, he also ordered the tenant to make a payment to the property he managed.<sup>276</sup> Judge Steven deLaroche dismissed charges in a case involving a daughter of a former client, at the client's behest, and the judge's father-in-law.<sup>277</sup> Martha Hagerty assumed the role of the prosecutor to negotiate.<sup>278</sup> And those are only the most obvious conflicts of interest.<sup>279</sup>

*b. Judges Who Offend Repeatedly Often Escape Harsh Punishment*

Those who violate criminal laws multiple times may be subjected to ghastly punishments. Under federal law, for example, a person who possesses marijuana, no matter how small the amount, can face a year in jail, and must be fined at least \$1,000.<sup>280</sup> If a person possesses marijuana again, no matter how far in the future, they must receive fifteen days in jail and be fined \$2,500, and if they do it a third time, the minimums go up to ninety days confinement and \$5,000 in fines.<sup>281</sup> Under state law, getting multiple drunk driving convictions tends to automatically up the penalty.<sup>282</sup>

Comm'n on Jud. Conduct Sept. 10, 1982) (changed determination) (admonishing judge for receiving discounts on vacation lodging from parties coming before him); *In re Gaddis*, No. 3855-F-114, at 2, 8, 2004 WL 2968600, at \*1, \*4 (Wash. Comm'n on Jud. Conduct Dec. 10, 2004) (reprimanding court commissioner for accepting baseball tickets from lawyers who practiced before him).

274. *In re Wilson*, No. 14-331 (Ariz. Comm'n on Jud. Conduct Feb. 6, 2015), <https://www.azcourts.gov/portals/137/reports/2014/14-331.pdf> [<https://perma.cc/9FH3-JLV4>] (order).

275. *Id.*

276. *Id.*

277. *In re deLaroche*, No. 06-22, at 2–3 (Fla. Jud. Qualifications Comm'n July 19, 2006), [https://efactssc-public.flcourts.org/casedocuments/2006/1376/2006-1376\\_notice\\_50019\\_e82.pdf](https://efactssc-public.flcourts.org/casedocuments/2006/1376/2006-1376_notice_50019_e82.pdf) [<https://perma.cc/BMP3-ED74>].

278. Public Admonition of The Honorable Martha C. Hagerty Fremont Town Court (Ind. Comm'n on Jud. Qualifications Feb. 9, 2015), <https://www.in.gov/courts/jqc/files/jud-qual-admon-hagerty-2015-02-09.pdf> [<https://perma.cc/42TU-VNRD>].

279. *In re Lorona*, No. 14-096 (Ariz. Comm'n on Jud. Conduct May 19, 2014), <https://www.azcourts.gov/portals/137/reports/2014/14-096.pdf> [<https://perma.cc/7FHY-KDEU>] (order) (discussing a judge who was an officer on an organization that the court would refer people to for various services); *In re Mendoza*, No. 5422-F-140, at 3, 2009 WL 1159189, at \*2 (Wash. Comm'n on Jud. Conduct Mar. 17, 2009) (reprimanded) (creating a conflict of interest by having jail staff serve as interpreters for inmates).

280. 21 U.S.C. § 844(a).

281. *Id.*

282. *E.g.*, WASH. REV. CODE § 46.61.502(6)(b)(iv) (2022); IND. CODE § 9-30-5-3(a)(1) (2023).

Repeat judicial misconduct does not carry with it, stiff, inflexible, and escalating penalties. Just ask Judge Clyde Address. In 2002, he engaged in forbidden ex parte communications and was given a private warning.<sup>283</sup> Four years later, he lost his temper and threatened a defendant who was trying to get copies of records, receiving a private advisory.<sup>284</sup> Next year, he got angry with and threatened an attorney who was trying to make a record; he got a reprimand.<sup>285</sup> In 2010, he presided over a dispute between a girls softball league and a father of a player who had been kicked off the team.<sup>286</sup> Over the course of the case, the judge ordered that the player be put back on the team (even though no one asked for that relief), engaged in more ex parte communications, and abruptly canceled hearings.<sup>287</sup> He was censured.<sup>288</sup> A year later, he was charged with two separate offenses: one for demeaning a defendant and setting bail higher because he was crying,<sup>289</sup> and another for threatening to take someone's house away and give it to the city because their fence was an improper height.<sup>290</sup> Both resulted in reprimands, less than his previous sanction.

There are more examples. Judge Anne Segal had to receive five reprimands before the commission finally decided to up the sanction.<sup>291</sup> Arizona's commission said it was "deeply troubled" by Judge Gerald Williams repeat offenses of mocking debtors and violating the law, but went no higher than a reprimand.<sup>292</sup> Judge Rachel Torres Carrillo had a practice of summarily ruling against tenants in eviction proceeding without hearing evidence "due to the

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283. *In re* Address, No. 10-099, at 2 (Ariz. Comm'n on Jud. Conduct Sept. 2, 2010), <https://www.azcourts.gov/portals/137/reports/2010/10-099.pdf> [https://perma.cc/BKX2-A4PG] (statement of charges).

284. *Id.*

285. *Id.* at 3.

286. *Id.*

287. *Id.* at 3–5.

288. *Id.*

289. *In re* Address, No. 10-209 (Ariz. Comm'n on Jud. Conduct Mar. 18, 2011), <https://www.azcourts.gov/portals/137/reports/2010/10-209.pdf> [https://perma.cc/472K-GVQV] (order).

290. *In re* Address, No. 10-218 (Ariz. Comm'n on Jud. Conduct Mar. 18, 2011), <https://www.azcourts.gov/portals/137/reports/2010/10-218.pdf> [https://perma.cc/2KMF-ZGQN] (order).

291. *In re* Segal, No. 14-219 (Ariz. Comm'n on Jud. Conduct Dec. 11, 2014), <https://www.azcourts.gov/portals/137/reports/2014/14-219.pdf> [https://perma.cc/53LD-PKTZ] (order).

292. *In re* Williams, No. 15-085, at 1 (Ariz. Comm'n on Jud. Conduct June 22, 2015), <https://www.azcourts.gov/portals/137/reports/2015/15-085.pdf> [https://perma.cc/JCH4-NKB5] (order).

interest of trying to be efficient,” in her own words.<sup>293</sup> On her second time doing this, she was reprimanded, the same as the first time she did it.<sup>294</sup> There are no laws, rules, or precedents setting any kind of mandatory minimums or automatic enhancers for judges—those sorts of rules are saved for criminal defendants.

### B. Main Types of Misconduct

The full spectrum of misconduct committed by judges is too broad to list comprehensively, but a few major areas predominate. The four topics of severe misconduct are inappropriate behavior (like rudeness), mistreatment of defendants (like needlessly threatening contempt power or ignoring due process rights), election misconduct, and sexual harassment. There are a few other common types—such as being late or engaging in benign *ex parte* communications—but these typically do not involve systemic or severe abuses of power, and purely verbal sanctions are often more than adequate.

#### i. Inappropriate Behavior

Judges are free to get away with childish remarks towards lawyers, free of meaningful consequences.<sup>295</sup> Behavior ranges from rude<sup>296</sup> to downright stupefying. Judge Beverly Grant made the audience of a first-degree manslaughter sentencing cheer “Go Seahawks” multiple times before she sentenced the defendant to thirteen years in front of his family and that of the victim.<sup>297</sup> Judge Leonid Ponomarchuk made a person write his next court date on his arm with a pen so that he would not forget it.<sup>298</sup>

Two citizens came to Pierce County District Court in the state of Washington with the hope of changing their names as they were going through

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293. *In re Carrillo*, No. 16-319, at 1–2 (Ariz. Comm’n on Jud. Conduct Feb. 6, 2017), <https://www.azcourts.gov/portals/137/reports/2016/16-319.pdf> [https://perma.cc/KTZ6-EPGP] (order).

294. *Id.* at 2.

295. *E.g.*, *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 672 (S.D. Tex. 2001).

296. *E.g.*, *In re Parks*, No. 06-253 (Ariz. Comm’n on Jud. Conduct Feb. 20, 2007), <https://www.azcourts.gov/portals/137/reports/2006/06-253.pdf> [https://perma.cc/4BYS-3Q6Q] (order) (discussing a judge who argued with a party in a condescending manner).

297. *In re Grant*, No. 4952-F-131, at 2, 2006 WL 6084806, at \*1 (Wash. Comm’n on Jud. Conduct Aug. 4, 2006).

298. *In re Ponomarchuk*, No. 8838-F-179, at 1 (Wash. Comm’n on Jud. Conduct July 20, 2018), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/2018/8838FinalStip.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/2018/8838FinalStip.pdf) [https://perma.cc/F7ZL-DHCF] (stipulation, agreement, and order of admonishment).

gender “reassignment therapy.”<sup>299</sup> Unfortunately, the judge they had was A’lan Hutchinson.<sup>300</sup> The judge refused to grant the name change until the procedure was complete, conducted ex parte research on the matter, and announced to the courtroom that the surgery was illegal “maiming” and that the judiciary should discourage it.<sup>301</sup> Hutchinson also told the petitioners that they would pose a risk to parents who “send their daughters into the ladies’ restroom,” and opined, “Although I personally feel that this whole procedure is immoral. It evidences a mentally ill and diseased mind.”<sup>302</sup> Washington’s commission determined that Hutchinson’s misconduct “was an isolated event” despite the fact that the judge said he would do the same thing if faced with the issue in the future.<sup>303</sup> He was neither removed nor suspended.<sup>304</sup>

Strangely, judges who are attempting to help people get similar or worse punishment than those who were trying to demean or abuse. Judge Barry Cohen was reprimanded for criticizing the failures of the criminal justice system.<sup>305</sup> He condemned the local prosecutor’s office for using criminal offenses to deal with mental illness, said the justice system discriminates on the basis of race and poverty, noted defendants could be imprisoned for inability to post a \$250 bond, and accused law enforcement of using racial profiling.<sup>306</sup> This means *calling out* racism is potentially worse than *engaging in* racism.<sup>307</sup>

Judge Gregory Holder convicted a defendant, but later wrote a letter of recommendation for that defendant to get into college, and tried to get prosecutors to withhold adjudication.<sup>308</sup> Although he did intercede on behalf of a particular defendant, there was no allegation this was anything other than a

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299. *In re* Hutchinson, No. 93-1652-F-47, at 2, 1995 WL 902265, at \*1 (Wash. Comm’n on Jud. Conduct Feb. 3, 1995).

300. *Id.* at 2.

301. *Id.*

302. *Id.*

303. *Id.* at 7.

304. *Id.* at 9.

305. *In re* Cohen, No. 12-285, at 2 (Fla. Apr. 1, 2013), [https://supremecourt.flcourts.gov/content/download/385865/file/Filed\\_04-01-2013\\_Stipulation.pdf](https://supremecourt.flcourts.gov/content/download/385865/file/Filed_04-01-2013_Stipulation.pdf) [<https://perma.cc/WL2T-Y8L8>] (stipulation).

306. *Id.* at 2–6.

307. Fellow Florida judge Mark Hulsey said black people “should go get back on a ship and go back to Africa.” *In re* Hulsey, No. 16-056, at 3 (Fla. Jud. Qualifications Comm’n July 19, 2016), [https://efactssc-public.flcourts.org/casedocuments/2016/1278/2016-1278\\_notice\\_79144.pdf](https://efactssc-public.flcourts.org/casedocuments/2016/1278/2016-1278_notice_79144.pdf) [<https://perma.cc/ZCQ2-3HU5>] (notice of formal charges). He was allowed to resign without any punishment imposed. *Id.*

308. *In re* Holder, 195 So. 3d 1133, 1134–35 (Fla. 2016) (per curiam).

heartfelt attempt to help a defendant get their life back on track. Yet he received a reprimand and six hours of continuing legal education.<sup>309</sup> That six-hour training requirement means his penalty was harsher than judges from the same state who did much worse.<sup>310</sup>

Judge Charlotte DuBois improperly granted a single anti-harassment order against a defendant by waiving fees on her own motion.<sup>311</sup> She was censured and had to attend an ethics course.<sup>312</sup> This means she got a stricter punishment than a man who actually harassed people: Judge William Aronow. Aronow sexually harassed women for years, in addition to anger issues, performing military reserve business while on the clock, and tardiness.<sup>313</sup> He was only admonished.<sup>314</sup> Both judges were from the same state, and their decisions came out on the exact same day. No one on Washington's commission saw any cause for concern from the disparate outcomes.

Judge Jeffrey Harkin's principal offense was that he allowed people with traffic infractions to agree to plead guilty and attend traffic school classes instead of ordinary punishment.<sup>315</sup> The problem was that he did not have legal authority to do so without the prosecutor.<sup>316</sup> Still, he was trying to give people an alternative, less-punitive means to resolve traffic cases and got a sixty-day suspension for it.<sup>317</sup> That means he got twice as much as fellow Judge William Young, who displayed a flagrant disregard for the rights of defendants. Young sentenced someone to a year in prison for having a suspended license, had a practice of lowering penalties for defendants who waived jury rights, incorrectly told defendants that burden of proof was "very slim" or that he "just sort of had to believe" the prosecution, and speculated to defendants about what

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309. *Id.* at 1136.

310. *See* cases cited *supra* note 236.

311. *In re* DuBois, No. 98-2816-F-73, at 1, 1999 WL 521273, at \*1 (Wash. Comm'n on Jud. Conduct June 4, 1999).

312. *Id.* at 2.

313. *In re* Aronow, No. 97-2632-F-74, at 1, 1999 WL 521276, at \*1 (Wash. Comm'n on Jud. Conduct June 4, 1999). Another judge who got the admonishment was Ramon Reid, who had a pattern of accepting guilty pleas without obtaining mandatory written plea agreements, and a pattern of illegally imposing banishment as a punishment for defendants. *In re* Reid, No. 2705-F-91, at 1, 2001 WL 1222545, at \*1 (Wash. Comm'n on Jud. Conduct Oct. 5, 2001).

314. *In re* Aronow, No. 97-2632-F-74, at 5, 1999 WL 521276, at \*3 (Wash. Comm'n on Jud. Conduct June 4, 1999).

315. *In re* Harkin, 958 N.E.2d 788, 790 (Ind. 2011) (per curiam).

316. *Id.*

317. *Id.* at 792.

kind of evidence the prosecution might have against them.<sup>318</sup> He only got a thirty-day suspension.<sup>319</sup> These actions are even more bizarre when one considers that judges who improperly intervene to help friends and relatives routinely get lesser punishments than judges who were trying to help strangers.<sup>320</sup>

## ii. Mistreatment of Defendants

Being a judge is a difficult job. No doubt many make honest mistakes when trying to apply complex laws and wade through crushingly large dockets teeming with unhappy litigants. But sometimes, judges violate the law so flagrantly it is hard to imagine they were even trying to follow it.

Judge Robert Miller loved telling sexually explicit jokes around court employees, but his worst misconduct was on the bench.<sup>321</sup> He denied defendants trials and adjudged them guilty, did not allow a self-represented defendant to question his accusers, and did not allow another defendant to represent himself.<sup>322</sup> He falsely told people he had the power to imprison them in situations where he did not, falsely said he could impose costs even if a person was not guilty, and convicted someone on written testimony alone.<sup>323</sup> Plus he discussed pending cases with police and failed to recuse himself in a case where *he* was the accuser.<sup>324</sup> He was reprimanded.<sup>325</sup>

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318. *In re Young*, 943 N.E.2d 1276, 1278–80 (Ind. 2011) (per curiam).

319. *Id.* at 1280.

320. *E.g.*, Public Admonition of The Honorable Kenneth Scheibenberger Judge of the Allen Superior Court (Ind. Comm’n on Jud. Conduct Dec. 17, 2002), <https://www.in.gov/courts/jqc/files/jud-qual-admon-scheibenberger.pdf> [<https://perma.cc/V8SN-THQB>] (admonishing a judge for improperly granting a continuance for his son’s criminal case, and he was not even the judge assigned to the case); Public Admonition of The Honorable Veronica M. Roby Judge of Elwood City Court (Ind. Comm’n on Jud. Conduct Aug. 11, 2003), <https://www.in.gov/courts/jqc/files/jud-qual-admon-roby.pdf> [<https://perma.cc/E77X-A6J5>] (discussing a judge who started dating a defendant and then got the prosecution to dismiss the case); *In re Stoker*, No. 89-769, at 1, 1989 WL 584141, at \*1 (Wash. Comm’n on Jud. Conduct Nov. 8, 1989) (admonishing a judge for engaging in ex parte communications with the prosecution of a relative).

321. *In re Miller*, No. 88-689-F-13, at 2 (Wash. Comm’n on Jud. Conduct June 13, 1989), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/1989/689%20SOC.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/1989/689%20SOC.pdf) [<https://perma.cc/XTZ5-ZLXW>] (statement of charges).

322. *Id.* at 2–3.

323. *Id.* at 3.

324. *Id.*

325. *In re Miller*, No. 88-689-F-13 (Wash. Comm’n on Jud. Conduct Oct. 23, 1989), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/1989/689%20Ltr%20of%20Reprimand.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/1989/689%20Ltr%20of%20Reprimand.pdf) [<https://perma.cc/SV4F-DKUV>] (letter of reprimand).

No abuse is worse than contempt. Short-tempered judges swing around the contempt power like a cudgel. Judges have threatened to lock people up for, among other things, trying to make a record for appeal,<sup>326</sup> correcting the judge about the type of trial that would be held,<sup>327</sup> being twenty minutes late,<sup>328</sup> speaking out of turn,<sup>329</sup> telling a client they did not need to be physically present for a hearing,<sup>330</sup> a self-represented litigant trying to challenge a traffic ticket,<sup>331</sup> a police officer refusing to arrest a political foe,<sup>332</sup> a criminal defendant demanding an attorney,<sup>333</sup> and a grandmother for not showing up to a custody hearing she was not told to attend.<sup>334</sup> Each of these judges wielded the ultimate coercive power to enforce their own petty grievances, and most of them received nothing higher than a reprimand for it. Courts have intervened to rein in contempt power to protect other judges,<sup>335</sup> but not, it seems, to protect ordinary people.

### iii. Election Misconduct

Most states elect at least some of their judges, whether through partisan or nonpartisan elections, or through initial elections or retention elections.<sup>336</sup> This

326. *In re* Address, No. 07-082 (Ariz. Comm'n on Jud. Conduct July 11, 2007), <https://www.azcourts.gov/portals/137/reports/2007/07-082.pdf> [https://perma.cc/988A-5FUT] (order).

327. *In re* Brown, 4 N.E.3d 619, 626 (Ind. 2014) (per curiam).

328. *In re* Chiles, No. 10-275, at 2 (Ariz. Comm'n on Jud. Conduct Mar. 24, 2011), <https://www.azcourts.gov/portals/137/reports/2010/10-275.pdf> [https://perma.cc/AYN4-NXSL] (statement of charges).

329. *In re* Poyfair, No. 6691-F-153, at 2, 2012 WL 1952384, at \*2 (Wash. Comm'n on Jud. Conduct May 4, 2012).

330. *In re* Chiles, No. 10-275, at 3 (Ariz. Comm'n on Jud. Conduct Mar. 24, 2011), <https://www.azcourts.gov/portals/137/reports/2010/10-275.pdf> [https://perma.cc/AYN4-NXSL] (statement of charges).

331. *In re* Forshey, No. 16-011, at 1 (Ariz. Comm'n on Jud. Conduct May 12, 2016), <https://www.azcourts.gov/portals/137/reports/2016/16-011.pdf> [https://perma.cc/N76A-MC5U] (order).

332. *In re* Guerrero, No. 18-298 (Ariz. Comm'n on Jud. Conduct Mar. 29, 2019), <https://www.azcourts.gov/portals/137/reports/2018/18-298.pdf> [https://perma.cc/F585-8873] (order).

333. *In re* Cox, 680 N.E.2d 528, 530 (Ind. 1997) (per curiam).

334. *In re* Jorgensen, No. 4780-F-126, at 2–3, 2006 WL 6084803, at \*2 (Wash. Comm'n on Jud. Conduct Oct. 3, 2006).

335. *In re* Kendall, 712 F.3d 814, 826 (3d Cir. 2013).

336. *State-By-State Summary Of Judicial Selection*, USLEGAL, <https://courts.uslegal.com/selection-of-judges/state-by-state-summary-of-judicial-selection/> [https://perma.cc/3S75-LULZ].

creates tension between the candidates' desire to campaign fervently, and for the judiciary's desire to maintain the illusion of being above the political fray.

Matthew E. McMillan, while campaigning for a judgeship, took firm positions in favor of the police. He said he would "go to bat" for police, "always have the heart of a prosecutor," and would not suppress evidence, overturn convictions, reduce bail bonds, or give lenient sentences to criminals.<sup>337</sup> For these and other transgressions, the judge was removed from office.<sup>338</sup> Commissions would have a harder time punishing a judge for something like that today, thanks to the United Supreme Court. It has limited states' authority to bar a judicial candidate from staking out positions on the issues.<sup>339</sup>

But other regulations, like prohibiting a candidate from raising money, are permitted.<sup>340</sup> So commissions do still play a role. Judges can be reprimanded for campaign tactics that are obnoxious, but not necessarily untrue.<sup>341</sup> Giving the impression of partisanship may be punishable.<sup>342</sup> Each of these election misconduct cases, however, only resulted in a reprimand. This is problematic because it gives candidates the incentive to fight dirty. If a candidate believes that an underhanded tactic will help them win an election, they can do so comfortable in the knowledge that the mild sanction they receive is worth it.

Florida, to its credit, has taken a harder track than most in dealing with election misconduct. It has imposed extremely large fines in an attempt to dissuade candidates from violating campaign finance laws. Yvonne Colodny violated election laws and was fined \$5,000 for it.<sup>343</sup> Jacqueline Schwartz earned a \$10,000 fine for swearing at and threatening a storeowner who put up

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337. *In re McMillan*, 797 So. 2d 560, 562–63 (Fla. 2001) (per curiam).

338. *Id.* at 573.

339. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002); *see also Buckley v. Ill. Jud. Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993).

340. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 455–56 (2015).

341. *In re Gastelum*, No. 06-250, at 3 (Ariz. Comm'n on Jud. Conduct Apr. 27, 2007), <https://www.azcourts.gov/portals/137/reports/2006/06-250.pdf> [<https://perma.cc/AW6J-G7U6>] (stipulated agreement for public reprimand) (reprimanding judge for accusing his opponent of being a "FALSE DEMOCRAT" and using excessive exclamation points); *In re Segal*, No. 09-234, at 1 (Ariz. Comm'n on Jud. Conduct Nov. 30, 2010), <https://www.azcourts.gov/portals/137/reports/2009/09-234.pdf> [<https://perma.cc/3JUN-XRPJ>] (amended order) (reprimanding judge for using a fictitious identity to criticize her opponent).

342. *In re Angel*, 867 So. 2d 379, 381–83 (Fla. 2004) (per curiam) (reprimand); *In re Jayne*, No. 11-155 (Ariz. Comm'n on Jud. Conduct Nov. 16, 2011), <https://www.azcourts.gov/portals/137/reports/2011/11-155.pdf> [<https://perma.cc/G4R8-W7N9>] (order) (reprimand).

343. *In re Colodny*, 51 So. 3d 430, 431–32 (Fla. 2010) (per curiam).

her opponent's yard sign.<sup>344</sup> Michelle Baker ran an ad that noted eighty-two percent of her opponent's donors were criminal defense attorneys, and ominously asked, "What are they trying to buy?"<sup>345</sup> She was fined \$25,000.<sup>346</sup> Rosa Rodriguez was fined \$40,000 for misreporting a contribution as a loan and lying about who gave it.<sup>347</sup> Patricia Kinsey was hit with a \$50,000 penalty for falsely stating she was the "unanimous choice of law enforcement," slandering her opponent, and insulting criminal defendants in an ad.<sup>348</sup> All of these judges received reprimands for their actions, notwithstanding the giant variance in fines.

Fines this big are no laughing matter, but as Justice Fred Lewis noted, they raise a separate concern. In response to the record-setting \$50,000 fine, he said "if the actions are so reprehensible that the majority believes the imposition of a \$50,000 fine is justified, those actions must certainly justify removal from the office so tainted."<sup>349</sup>

Another problematic area of election misconduct is that judges typically can get away with demonizing criminal defendants. Defendants may have a presumption of innocence in the courtroom, but on the campaign trail, all bets are off. Theoretically, the judicial branch exists to protect disenfranchised minorities, but judges love bragging about how they will send more people to prison than their opponent. Particularly troubling, however, is how it appears that commissions are keener to punish attacks on *other judges and candidates* rather than the *defendants themselves*.

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344. *In re Schwartz*, 174 So. 3d 987, 988 (Fla. 2015) (per curiam).

345. *In re Baker*, No. 08-466 (Fla. Jud. Qualifications Comm'n Oct. 16, 2009), [https://supremecourt.flcourts.gov/content/download/424240/file/Filed\\_10-15-2009\\_Stipulation.pdf](https://supremecourt.flcourts.gov/content/download/424240/file/Filed_10-15-2009_Stipulation.pdf) [<https://perma.cc/BLL2-HNLP>] (stipulation).

346. *In re Baker*, No. 08-466 (Fla. Jud. Qualifications Comm'n Oct. 16, 2009), [https://efacts-public.flcourts.gov/casedocuments/2009/1922/2009-1922\\_miscdoc\\_259952\\_e99d.pdf](https://efacts-public.flcourts.gov/casedocuments/2009/1922/2009-1922_miscdoc_259952_e99d.pdf) [<https://perma.cc/HJ9J-7FQL>] (findings and recommendation of discipline). Debra Krause was also fined \$25,000 for speaking at a Republican Party fundraiser and falsely reporting contributions as loans. *In re Krause*, 141 So. 3d 1197, 1200 (Fla. 2014) (per curiam).

347. *In re Rodriguez*, 829 So. 2d 857, 858–59 (Fla. 2002) (per curiam); see also *In re Renke*, 933 So. 2d 482, 486, 495 (Fla. 2006) (per curiam) (recommending \$40,000 fine to judge for falsely implying he was an incumbent, inflating his resume, lying about endorsements, and misreporting contributions as loans).

348. *In re Kinsey*, 842 So. 2d 77, 80–83, 92 (Fla. 2003) (per curiam).

349. *Id.* at 99 (Lewis, J., concurring in part and dissenting in part); see also *In re Krause*, 141 So. 3d at 1201 (Lewis, J., dissenting); *In re Pando*, 903 So. 2d 902, 905 (Fla. 2005) (Lewis, J., concurring) (per curiam).

Frederick Spencer boasted that he lived up to his promise to “send more child molesters to jail . . . burglars to jail . . . drug dealers to jail.”<sup>350</sup> This purely attacked defendants, not his opponent, and he got a reprimand. James Kaiser bragged about being the “toughest on drunk driving,” and said defense attorneys “do not want a tough, no-nonsense judge like [him],” but also insinuated that his opponent was in cahoots with defense attorneys.<sup>351</sup> He was censured. Patricia Kinsey promised she would help cops “put[] criminals where they belong . . . behind bars” and would “deny[] bond to potentially dangerous offenders,” and claimed her opponent would be soft on crime.<sup>352</sup> She was fined \$50,000. Dana Marie Santino knocked her opponent as only having experience “limited to criminal defense—representing murderers, rapists, child molesters and other criminals.”<sup>353</sup> She was removed from office. Tammy Davis was barred from seeking office for five years after making false statements about an incumbent judge.<sup>354</sup> Who, exactly, is the commission trying to protect?

#### iv. Sexual Harassment

Sexual harassment is an endemic problem in the legal profession. A global survey of 7,000 lawyers from 135 countries found one-in-three women reported being sexually harassed, as had one-in-fourteen men.<sup>355</sup> The vast majority do

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350. *In re* Spencer, 759 N.E.2d 1064, 1065 (Ind. 2001) (per curiam) (reprimanded).

351. *In re* Kaiser, No. 86-515-F-10, at 3, 12 (Wash. Jud. Qualifications Comm’n June 5, 1987), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/1987/515%20Report%20and%20Recommendation.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/1987/515%20Report%20and%20Recommendation.pdf) [<https://perma.cc/CPT2-69S8>] (censured).

352. *In re* Kinsey, 842 So. 2d at 80–82.

353. *In re* Santino, 257 So. 3d 25, 27 (Fla. 2018) (per curiam).

354. *In re* Davis, No. 24S00-1210-JD-610 (Ind. May 7, 2013), <https://www.in.gov/courts/jqc/files/jud-qual-opin-davis-tammy.pdf> [<https://perma.cc/6U63-94ZZ>] (order). Relatedly, judges have been let off easy for mistreating other marginalized groups. *E.g.*, Admonition The Honorable Myron Barnard, Judge of the Marion County Small Claims Court Perry Township Division (Ind. Comm’n on Jud. Qualifications July 10, 1996), <https://www.in.gov/courts/jqc/files/jud-qual-admon-barnard-7-10-96.pdf> [<https://perma.cc/6ALP-K2DW>] (admonishing judge for giving debt collectors “run of the court” and ignore legal protections for poor consumers); *In re* Carrillo, No. 15-189 (Ariz. Comm’n on Jud. Conduct Nov. 13, 2015), <https://www.azcourts.gov/portals/137/reports/2015/15-189.pdf> [<https://perma.cc/K8PL-UVG4>] (reprimanding for railroading an eviction tenant and ignoring the law); *In re* Fletcher, No. 15-125 (Ariz. Comm’n on Jud. Conduct Aug. 14, 2015), <https://www.azcourts.gov/portals/137/reports/2015/15-125.pdf> [<https://perma.cc/6UFB-H5XS>] (order) (similar).

355. INT’L BAR ASS’N, US TOO? BULLYING & SEXUAL HARASSMENT IN THE LEGAL PROFESSION 8 (2019), <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>. [<https://perma.cc/WU8V-ATXU>].

not report their harassment, as they fear the repercussions.<sup>356</sup> Unfortunately, rooting out sexual harassment from the bench does not seem to be a high priority for disciplinary commissions.

Look at the case of Judge Robert Moilanen. He was tyrannical and misogynistic towards his employees. When interviewing a female clerk, he asked about women's libido, exploded in anger at his clerks, called female court employees "slut," "b---h," and "c--t" multiple times despite being told to stop, mocked employees to the point of tears, including terrorizing one with spiders after he learned she was deathly afraid of spiders, and used obscene gestures toward them.<sup>357</sup> After one clerk got invited to a Rotary Club luncheon, the judge told her, "You can't go, you have to be a doctor or a lawyer or a judge or a somebody, you can't be a nothing. You have to be a somebody. If they let you go, next they'd have to [l]et a goddamn waitress [go]."<sup>358</sup>

Female attorneys fared no better. Moilanen told one, "God, those nipples. I just love summertime, because you can see those nipples when the air conditioning is on," to always wear a bra, and that she should "get laid."<sup>359</sup> The commission recommended several sanctions, but not removal,<sup>360</sup> meaning the commission heard all this and did not see any reason why Moilanen should not continue passing judgment on his fellow citizens.

Judge Downey was accused of using a court computer to view pornography and sexually harass two female prosecutors.<sup>361</sup> The commission had him plead guilty to the pornography charge and did not bother to verify whether he harassed anyone.<sup>362</sup> Judge Mark Hulsey called female staff attorneys "b---h" and "c--t," said black people "should go get back on a ship and go back to Africa," used his court staff for personal tasks, and tried to obstruct a

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356. *Id.*

357. *In re Moilanen*, No. 91-1182-F-29, at 3-5, 1993 WL 839564, at \*2-3 (Wash. Comm'n on Jud. Conduct Feb. 5, 1993).

358. *Id.* at 5-6.

359. *Id.* at 5.

360. *Id.* at 12-14.

361. *In re Downey*, 937 So. 2d 643, 645-47 (Fla. 2006) (per curiam).

362. *Id.* at 647-48.

commission investigation.<sup>363</sup> He was permitted to resign without a formal declaration of wrongdoing.<sup>364</sup>

Judge Sheldon Schapiro told a female prosecutor she needed to emulate the style of male attorneys who did not get as emotional as women, and denied her requested continuance while she was giving birth—forcing her to leave the hospital against her doctor’s orders to appear in court.<sup>365</sup> Judge John Henry told one female attorney who said she did not like camping, “Oh, if I got you stripped naked in the lake and soaped you down, you’d like it,” and groped a second.<sup>366</sup> Both judges were reprimanded.<sup>367</sup>

Between 1994 and 2000, Howard Berman engaged in a torrent of sexual harassment, threatening victims if they reported him.<sup>368</sup> He asked out a public defender, and when she rebuffed him, he insisted she no longer practice in his courtroom because “I have the hots for you. Everyone knows I have the hots for you.”<sup>369</sup> She continued to appear in his courtroom, so he started asking her what kind of underwear she had on, said, “I could be screwing you right now,” and he could help her if she would go to bed with him.<sup>370</sup> The public defender told him to stop, but he not only continued making sexual comments, he threatened her if she reported him, lied to her supervisor about it, and started mistreating her in court.<sup>371</sup> That was merely one victim. The judge had others, including blocking one in his chambers, forcibly kissing her, and groping her.<sup>372</sup>

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363. *In re Hulsey*, No. 16-056, at 2–3, 5 (Fla. Jud. Qualifications Comm’n July 19, 2016), [https://efactssc-public.flcourts.org/casedocuments/2016/1278/2016-1278\\_notice\\_79144.pdf](https://efactssc-public.flcourts.org/casedocuments/2016/1278/2016-1278_notice_79144.pdf) [<https://perma.cc/ZCQ2-3HU5>] (notice of formal charges).

364. *In re Hulsey*, No. 16-056 (Fla. Jud. Qualifications Comm’n Feb. 1, 2017), [https://efactssc-public.flcourts.org/casedocuments/2016/1278/2016-1278\\_motion\\_112756.pdf](https://efactssc-public.flcourts.org/casedocuments/2016/1278/2016-1278_motion_112756.pdf) [<https://perma.cc/XA23-BAPK>] (notice of voluntary dismissal).

365. *In re Schapiro*, 845 So. 2d 170, 172–73 (Fla. 2003) (per curiam).

366. *In re Henry*, No. 5850-F-147, at 1, 2010 WL 2589763, at \*1 (Wash. Comm’n on Jud. Conduct May 14, 2010).

367. *In re Schapiro*, 845 So. 2d at 172; *In re Henry*, No. 5850-F-147, at 5, 2010 WL 2589763, at \*3 (Wash. Comm’n on Jud. Conduct May 14, 2010).

368. *See In re Berman*, No. 00-211 (Fla. Jud. Qualifications Comm’n Nov. 30, 2000), [https://efactssc-public.flcourts.org/casedocuments/2000/2491/2000-2491\\_notice\\_33591\\_e82.pdf](https://efactssc-public.flcourts.org/casedocuments/2000/2491/2000-2491_notice_33591_e82.pdf) [<https://perma.cc/NN74-TKR4>].

369. *Id.* at 2.

370. *Id.*

371. *Id.*

372. *Id.* at 5.

After more than a year of motion practice in the case, the commission requested that the case be dismissed, sans explanation.<sup>373</sup> Only by reading the newspaper would anyone know the judge resigned, though he claimed it was all merely “a witch hunt,” and was ready to present evidence of the victims’ past sexual history and drug habits in his defense.<sup>374</sup> If the state supreme court had any qualms about Berman’s actions, it did not show it, for it approved the dismissal unquestioningly.<sup>375</sup> Nor, evidently, did the Florida Bar, as Berman is still listed as a member in good standing and eligible to practice law.<sup>376</sup>

Misogyny is also deemed a low-level offense. Commissions typically do not believe it is enough to remove a judge from office.<sup>377</sup> In 2007, Judge Timothy Shea recommended that attorneys emulate his style of marital conflict resolution: whenever he argued with his wife, he just let her talk and then did whatever he wanted anyway.<sup>378</sup> He kept on serving until 2020.<sup>379</sup>

Relatedly, judges are free to abuse and humiliate victims of domestic violence. A victim in a criminal case recanted her allegations against a defendant<sup>380</sup>—hardly a rare occurrence. Judge Stephen Shelton, however, had the victim held in contempt and arrested on the spot for “lying” in the initial report.<sup>381</sup> Jerri Collins berated and belittled a victim of domestic violence for

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373. See *In re Berman*, No. 00-211, No. SC00-2491 (Fla. Feb. 19, 2002), [https://efactscc-public.flcourts.org/casedocuments/2000/2491/2000-2491\\_d25f\\_85446.pdf](https://efactscc-public.flcourts.org/casedocuments/2000/2491/2000-2491_d25f_85446.pdf) [<https://perma.cc/2CRG-NQ5Q>].

374. Jon Burnstein, *Judge Stepping Down Amid Sex Harassment Claims*, SUN SENTINEL (Sept. 8, 2001, 4:00 AM), <https://www.sun-sentinel.com/news/fl-xpm-2001-09-08-0109080218-story.html> [<https://perma.cc/DU5P-Y9NA>].

375. *In re Berman*, 814 So. 2d 439 (Fla. 2002) (unpublished table decision).

376. *Howard C Berman*, FLA. BAR, <https://www.floridabar.org/directories/find-mbr/profile/?num=258601> [<https://perma.cc/WS75-B3XQ>].

377. E.g., *In re Morales, Jr.*, No. 06-154 (Ariz. Comm’n on Jud. Conduct Jan. 24, 2007), <https://www.azcourts.gov/portals/137/reports/2006/06-154.pdf> [<https://perma.cc/EH62-VUMF>] (amended agreement for discipline by consent) (suspending for sexual harassment, among other crimes); *In re Aronow*, No. 97-2632-F-74, at 5, 1999 WL 521276, at \*3 (Wash. Comm’n on Jud. Conduct June 4, 1999) (admonishing for sexual harassment, among other things); *In re Kathren*, No. 8895-F-181, at 1, 6 2018 WL 6823150, at \*1, \*3 (Wash. Comm’n on Jud. Conduct Dec. 7, 2018) (admonishing for sexual harassment).

378. *In re Shea*, 110 So. 3d 414, 416 (Fla. 2013) (per curiam).

379. Letter from Judge Timothy R. Shea to Governor Ron DeSantis (Jan. 23, 2020), <https://www.flgov.com/wp-content/uploads/judicial/Judge%20Resignation-Retirement%20Timothy%20R.%20Shea%20ADA.pdf> [<https://perma.cc/7KHQ-7L26>].

380. *In re Shelton*, No. 6284-F-148, at 5, 2011 WL 3305386, at \*2 (Wash. Comm’n on Jud. Conduct July 8, 2011).

381. *Id.*

failing to respond to a subpoena for a trial against her abuser, the father of her child.<sup>382</sup> The victim explained she did not show up due to anxiety and wanting to move past the incident.<sup>383</sup> Not content with this explanation, the judge held her in contempt without counsel or due process, and sentenced her to three days in jail, even though she had an infant to take care of.<sup>384</sup> Judge David Meyer criticized a domestic violence victim for her choice of relationship, part of a pattern of inappropriate behavior by him.<sup>385</sup>

Judge Ralph Turco told a domestic violence abuser, “you didn’t need to bite her. Maybe you needed to boot her in the rear end, but you didn’t need to bite her.”<sup>386</sup> In a separate domestic violence bench trial, where the husband forcibly removed his wife because she was using illegal drugs, the judge said “fifty years ago I suppose they would have given you an award rather than . . . what we’re doing now.”<sup>387</sup> And in a third domestic violence case, the judge said that in ninety-five percent of domestic violence situations, police solve the problem, so there is no need to get the court system involved.<sup>388</sup> Judge Theresa Ratliff was *charged* with domestic violence and tried to prevent police from investigating.<sup>389</sup>

Every one of these malfeasant judges received a reprimand or admonishment.

Other forms of bigotry are not deal-breakers either. Judge Marvin Buchanan referred to one attorney as a “rich, rotten, spoiled Jew” and told staff to not give that attorney the same respect as others, asked a clerk to wear a certain pair of white pants because “they looked sexy on her,” groped a clerk, and much more.<sup>390</sup> Judge Edwin Poyfair threatened to have a man deported for

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382. *In re Collins*, 195 So. 3d 1129, 1130 (Fla. 2016) (per curiam).

383. *Id.*

384. *Id.*

385. *In re Meyer*, No. 9126-F-185, at 3, 2019 WL 2296514, at \*1 (Wash. Comm’n on Jud. Conduct Apr. 29, 2019).

386. *In re Turco*, No. 94-1853-F-54, at 2, 1995 WL 902259, at \*1 (Wash. Comm’n on Jud. Conduct Dec. 4, 1995).

387. *Id.*

388. *Id.*

389. *In re Ratliff*, No. 11-127 (Ariz. Comm’n on Jud. Conduct Dec. 20, 2011), <https://www.azcourts.gov/portals/137/reports/2011/11-127.pdf> [<https://perma.cc/X2FT-GSBF>] (order).

390. *In re Buchanan*, No. 81-26-F, at 3–7, 1982 WL 203846, at \*1–3 (Wash. Jud. Qualifications Comm’n Oct. 27, 1982).

being an illegal immigrant for no other reason than because he spoke Spanish.<sup>391</sup> And Judge John Wulle attended a conference where he yelled “F--- the feds” during group discussion, called San Francisco “very gay,” referred to the facilitator as “the black gay guy,” said the facilitator would not be welcome in Vancouver because it was “awfully white,” and in response to the facilitator handing out stars for good answers, said, “I don’t need a star, I’m not a Jew.”<sup>392</sup>

These three judges were censured, but not suspended or removed.

At least the punishment of being *censured* is the highest form of verbal sanction. That is more than most get. For example, judges have merely been *reprimanded* (or less) for disparaging people with disabilities,<sup>393</sup> forcing a woman in the audience to remove her religious headscarf,<sup>394</sup> or saying that they did not want to officiate same-sex marriages.<sup>395</sup> Judges have also been reprimanded uttering the following: “Some of the most profane, manipulative and backstabbing people I’ve worked with have been women;”<sup>396</sup> that “[w]e ought to send them right back to the Killing Fields” in reference to Cambodian defendants;<sup>397</sup> “we don’t know whether he’s some white guy like me making a threat or somebody who’s actually, you know, more likely to be a gangster”;<sup>398</sup>

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391. See *In re Poyfair*, No. 6691-F-153, at 2, 2012 WL 1952384, at \*1–2 (Wash. Comm’n on Jud. Conduct May 4, 2012).

392. *In re Wulle*, No. 6707-F-154, at 7, 2012 WL 664773, at \*4–5 (Wash. Comm’n on Jud. Conduct Feb. 10, 2012).

393. *In re Forshey*, No. 16-160 (Ariz. Comm’n on Jud. Conduct Sept. 22, 2016), <https://www.azcourts.gov/portals/137/reports/2016/16-160.pdf> [<https://perma.cc/3RGL-ZSGE>] (order).

394. *In re Ladenburg*, No. 4939-F-130, at 2, 2006 WL 6084805, at \*1 (Wash. Comm’n on Jud. Conduct Aug. 4, 2006); see also *In re Ladenburg*, No. 7599-F-163, at 2, 2015 WL 876495, at \*1 (Wash. Comm’n on Jud. Conduct Feb. 20, 2015) (noting the same judge was reprimanded for telling a Jewish man to remove religious headgear); *In re Stolz*, No. 5456-F-138, at 1, 2008 WL 4845208, at \*1–3 (Wash. Comm’n on Jud. Conduct Aug. 1, 2008) (admonishing for requiring a man to remove his religious head garb).

395. *In re Tabor*, No. 7251-F-158, at 1–2, 2013 WL 5853965, at \*1 (Wash. Comm’n on Jud. Conduct Oct. 4, 2013).

396. *In re Goettelman*, No. 12-315, at 1 (Ariz. Comm’n on Jud. Conduct Feb. 27, 2013), <https://www.azcourts.gov/portals/137/reports/2012/12-315.pdf> [<https://perma.cc/SW2J-MKMD>] (order).

397. Press Release, The Commonwealth of Mass. Comm’n on Jud. Conduct, District Court Judge Richard A. Mori Disciplined by Commission on Judicial Conduct (Dec. 26, 1996), <https://www.mass.gov/news/district-court-judge-richard-a-mori-disciplined-by-commission-on-judicial-conduct> [<https://perma.cc/SB44-FUGA>].

398. *In re North*, No. 8583-F-174, at 1, 2017 WL 6615056, at \*1 (Wash. Comm’n on Jud. Conduct Dec. 8, 2017).

“as far as I’m concerned all African-Americans in Hinds County can go to hell”;<sup>399</sup> and, “Nuke the sand n-----s” in reference to the Gulf War.<sup>400</sup>

### C. Lack of Consequences

#### i. Light Sanctions

Judge Jessica Reckiedler engaged in a pattern of dishonesty. She was an incumbent trial judge who was applying to an appellate judge position.<sup>401</sup> On her way to the interview, she was pulled over for speeding and ticketed.<sup>402</sup> At the interview, she was asked about her driving record, and failed to mention the ticket from a few minutes prior.<sup>403</sup> Other than that, she apparently did well, as she received a call-back interview.<sup>404</sup> That time, she was asked point-blank if she had any traffic stops this time, she said “no.”<sup>405</sup> She did not get the appellate job, but the commission allowed her to remain as a trial judge with nothing more than a reprimand.<sup>406</sup>

Sometimes, a censure—the highest form of verbal punishment—is not enough. Judge Merle Wilcox sexually molested his young stepdaughters over the course of six years starting in 1977.<sup>407</sup> He would enter the girls’ bathroom without permission as the girls were coming out of the shower, licked one of the girl’s ears, straddled one on the couch until she told him to stop, and kissed one while they were sleeping.<sup>408</sup> In 1983, Wilcox divorced the girls’ mother, but three years later, married a new woman and started sexually molesting his new, young stepdaughters, and assaulted his new wife while drunk.<sup>409</sup> He was censured and sent to counseling, but allowed to continue serving as a judge.<sup>410</sup> The commission justified this by saying that while there was a “pattern of

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399. Miss. Comm’n on Jud. Performance v. Boland, 975 So. 2d 882, 886, 898 (Miss. 2008) (en banc).

400. *In re Velie*, No. 90-946-F-25, at 4, 1992 WL 778716, at \*2 (Wash. Comm’n. on Jud. Conduct Feb. 7, 1992).

401. *In re Recksiedler*, 161 So. 3d 398, 399 (Fla. 2015) (per curiam).

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *In re Wilcox*, No. 94-1693-F-52, at 2–3, 1995 WL 902261, at \*1 (Wash. Comm’n on Jud. Conduct Dec. 1, 1995).

408. *Id.*

409. *Id.* at 7–8.

410. *Id.* at 7.

misconduct,” his actions were somehow also “isolated incidents.”<sup>411</sup> His conduct could have easily justified prison time.

Sometimes, even suspension can be an inadequate punishment. Judith Hawkins used court office space, time, utilities, and equipment, and had her staff run a private business from which she derived substantial income.<sup>412</sup> She pitched her goods to lawyers who appeared before her and appeared in judicial robes to promote her products, one time doing a book signing during a plea hearing.<sup>413</sup> She also read magazines during trials, flouted tax laws, recommended particular defense counsel to defendants, did not show up to court, and went off the record to hide her inappropriate remarks.<sup>414</sup> Florida’s commission decided that three months of unpaid leave and a \$17,000 fine would be enough of a balm for the judiciary’s wound.<sup>415</sup> This was a rare instance where the punishment was so woefully inadequate that the state supreme court overruled it and removed the judge from office.<sup>416</sup>

Judge Richard Albritton was fined \$5,000 and suspended for thirty days, but the punishment still falls short of an appropriate response for his offenses.<sup>417</sup> He threatened a court administrator; required a defendant to attend church and remarked, “I know that’s wrong, but the defendant doesn’t know it”; told an 18-year-old female defendant how attractive she was and gave her a lighter sentence; was chronically late; asked mothers in court what drugs they used without any reason; jailed mothers for not knowing their addresses or not saying who the father of their child was; used honorifics “Mr.” or “Ms.” for all attorneys except a black one and told that same black attorney “your people helped me get elected”; told mothers that “[w]omen should be at home with their kids” and told a woman she needed to close her legs and stop having babies; ordered drug tests on the spot based on hunches; told attorneys to buy him lunch; and threatened to revoke bail if a defendant did not plea guilty—

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411. *Id.*

412. *In re Hawkins*, 151 So. 3d 1200, 1203 (Fla. 2014) (per curiam).

413. *Id.*

414. *Id.* at 1203–04.

415. *Id.* at 1211.

416. *Id.* Another example of the court rejecting a proposed suspension for removal is John Murphy. He threatened physical violence against a public defender and proceeded with cases against defendants who did not yet have counsel. *In re Murphy*, 181 So. 3d 1169, 1170–71 (Fla. 2015) (per curiam).

417. *In re Albritton*, 940 So. 2d 1083, 1083–88 (Fla. 2006) (per curiam).

along with many other things.<sup>418</sup> If someone did that in any other workplace, they would lose their job. But Albritton only lost a month's pay.

Judge Grant Hawkins was so slow in ruling on post-conviction motions, one defendant spent two years wrongfully incarcerated as a result.<sup>419</sup> His underling, Court Commissioner Nancy Broyles, was fired and permanently barred from serving as a commission or judge pro tem, but Judge Hawkins escaped with a sixty-day suspension.<sup>420</sup> In that case, the buck stopped at the bottom.

ii. Many Types of Sanctions are not Attempted

Technically, removal is on the table for every case, but it is rarely used. Of the dataset the author examined, there were only 25 cases of a judge being removed from office out of 466 cases of public discipline being imposed, meaning that removal is only used about five percent of the time.<sup>421</sup> There are probably hundreds or thousands of cases that are not made public, and if they were included in the denominator, the percentage of cases where removal was used would be far lower. Ralph Turco shows just how hard it is to get a judge removed. He was previously disciplined for deciding a case based on a coin flip, and then again for making “injudicious comments” about domestic violence.<sup>422</sup> Seven days after his previous admonishment, he went to a church dinner with his wife.<sup>423</sup> While there, he began arguing with her, snapped at her, “No one speaks to me like that and gets by with it,” and shoved her to the floor in public.<sup>424</sup> He walked away without apologizing or helping her up.<sup>425</sup> Two witnesses said the shoving was intentional, but he claimed it was an accident.<sup>426</sup> Two eyewitnesses are enough to convict a man of treason under the Constitution,<sup>427</sup> but not, apparently, to remove him from a judgeship, since the state supreme court opted to merely suspend him until this term was up.<sup>428</sup>

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418. *Id.*

419. *In re Hawkins*, 902 N.E.2d 231, 236 (Ind. 2009) (per curiam).

420. *Id.* at 243, 247.

421. See sources cited *supra* note 1.

422. *In re Turco*, No. 97-2451-F-66, at 1, 1998 WL 101560, at \*1 (Wash. Comm'n on Jud. Conduct Mar. 5, 1998).

423. *Id.* at 2.

424. *Id.* at 5.

425. *Id.*

426. *Id.* at 6.

427. U.S. CONST. art. III, § 3, cl. 1.

428. *In re Turco*, 970 P.2d 731, 733 (Wash. 1999) (en banc).

As one commentator has written, “in theory, a bar association can discipline a judge since a judge is also an attorney,” but in practice “there is resistance to this.”<sup>429</sup> So too is there reluctance for state supreme courts to impose sanctions that affect a judge’s law license. Every state supreme court has direct authority over lawyers practicing in their state.<sup>430</sup> Yet they almost never invoke this power directly when imposing sanctions on judges, even when the conduct is bad enough to warrant removal from office. Of the hundreds of opinions spanning decades throughout the five states, the author could only locate five cases where a judge was suspended from the practice of law directly by a disciplinary opinion, about one percent of the time.<sup>431</sup>

Even when the court suspends a law license, the terms can be odd. Benjamin Pfaff was a judge whose daughter went missing.<sup>432</sup> Launching into action, he forcibly entered a man’s home, held him up at gunpoint, and told him, “This Mother F----- better talk or he’s going to die.”<sup>433</sup> Then he lied about doing it, and it is not clear that the man had anything to do with his daughter going missing.<sup>434</sup> Pfaff was removed from office and had his law license suspended, but only until the costs of the disciplinary action were paid.<sup>435</sup> In other words, the fact that he violently took the law into his own hands did not bear on his fitness to practice it.

It is also highly unlikely that victims of judicial misconduct will get any sort of recompense. A judge prodded a public defender with a dildo at a hearing and referred to the incident twice in open court to interfere with the defense attorney’s cross-examination in a trial, yet there was no mention of reversing

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429. Joshua E. Kastenberg, *Evaluating Judicial Standards of Conduct in the Current Political and Social Climate: The Need to Strengthen Impropriety Standards and Removal Remedies to Include Procedural Justice and Community Harm*, 82 ALB. L. REV. 1495, 1512 (2018).

430. ARIZ. SUP. CT. R. 31; FLA. CONST. art. V, § 15; IND. CONST. art. VII, § 4; MASS. SUP. JUD. CT. R. 4.01; *In re Cramer*, 225 P.3d 881, 885 (Wash. 2010) (en banc).

431. *In re McClain*, 662 N.E.2d 935, 944 (Ind. 1996) (per curiam); *In re Edwards*, 694 N.E.2d 701, 719 (Ind. 1998) (per curiam); *In re Boles*, 555 N.E.2d 1284, 1292 (Ind. 1990); *In re Pfaff*, 838 N.E.2d 1022, 1025–26 (Ind. 2005) (per curiam); *In re Traylor-Wolff*, No. 09S00-1302-JD-148 (Ind. Apr. 9, 2013), <https://www.in.gov/courts/jqc/files/jud-qual-opin-traylor-wolff-lisa.pdf> [<https://perma.cc/3LRA-M4XC>].

432. *In re Pfaff*, 838 N.E.2d 1022, 1023 (Ind. 2005) (per curiam).

433. *Id.* at 1022.

434. *Id.* at 1024.

435. *Id.* at 1025.

the verdict.<sup>436</sup> The author only located two instances of a commission imposing restitution as a penalty.<sup>437</sup>

Forced recusal is one of the rarest forms of punishment imposed. An example comes from Judge Jennifer Koethe. While this judge was arguing with her husband, she got a gun to make him think she was contemplating suicide, but accidentally shot herself.<sup>438</sup> Compounding her misconduct, she asked police to destroy a note she wrote that might have been evidence of the crime.<sup>439</sup> For her misdeeds, she got sixty days without pay and had to recuse herself from cases involving the police officers who came to the scene for a year.<sup>440</sup>

Judges who commit assault do not get barred from hearing assault cases.<sup>441</sup> Judge Timothy Day brought a gun to an argument with his estranged wife multiple times and was admonished without being recused from any kind of case.<sup>442</sup> Judges who drive drunk rarely have to recuse themselves from drunk driving cases.<sup>443</sup>

A juror with a vivid life experience that could reasonably affect their ability to weigh issues fairly may be struck from a jury.<sup>444</sup> A police officer who is disciplined for lying may have to disclose that fact even twenty years later—

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436. *Geiler v. Comm'n on Jud. Qualifications*, 515 P.2d 1, 5 (Cal. 1973).

437. *See In re Bonner*, No. 7716-F-165, at 3, 2015 WL 5098240, at \*2 (Wash. Comm'n on Jud. Conduct July 17, 2015); *In re Moberg*, No. 92-1260-F-39, at 3, 1993 WL 839539, at \*1 (Wash. Comm'n on Jud. Conduct Aug. 6, 1993).

438. *In re Koethe*, 922 N.E.2d 613, 614 (Ind. 2010) (per curiam).

439. *Id.* at 615.

440. *Id.* at 616.

441. *See In re Phillips II*, 72 N.E.3d 917, 919 (Ind. 2017) (per curiam); *In re Adams*, 134 N.E.3d 50, 54–56 (Ind. 2019) (per curiam); Public Admonition of The Honorable Timothy B. Day Decatur Circuit Court (Ind. Comm'n on Jud. Qualifications Dec. 29, 2017), <https://www.in.gov/courts/jqc/files/jud-qual-admon-day-2017-12-29.pdf> [<https://perma.cc/R8GN-DJEF>].

442. *See Public Admonition of The Honorable Timothy B. Day Decatur Circuit Court* (Ind. Comm'n on Jud. Qualifications Dec. 29, 2017), <https://www.in.gov/courts/jqc/files/jud-qual-admon-day-2017-12-29.pdf> [<https://perma.cc/R8GN-DJEF>].

443. *But see In re Bridge*, No. 4050-F-106, at 8–9, 2003 WL 2202079, at \*5 (Wash. Comm'n on Jud. Conduct Aug. 15, 2003).

444. *See, e.g., Bell v. Greissman*, 902 So. 2d 846, 848 (Fla. Dist. Ct. App. 2005); *Goldenberg v. Reg'l Imp. & Exp. Trucking Co.*, 674 So. 2d 761, 764 (Fla. Dist. Ct. App. 1996); *State v. Arias*, No. 1 CA-CR 15-0302, 2020 WL 5653242, at \*4 (Ariz. Ct. App. Apr. 21, 2020).

there is no automatic assumption that the discipline cures the error.<sup>445</sup> Yet these presumptions seem not to apply to judges.

### iii. Gravity of the Wrong Matters Little

The stakes for the judges' victims have little to no influence on the punishment judges receive. Indiana's commission haughtily declared "there is perhaps no greater injustice than to strip a parent of custodial rights without an opportunity to be heard and in the absence of an emergency," yet imposed the lowest possible form of punishment on a judge who did exactly that.<sup>446</sup>

Judge Ralph Turco was in a pickle. In a traffic case he was presiding over, the defendant showed up, but the officer did not. But instead of dismissing the case where the government could not meet its burden, he devised a novel solution: flip a coin. The defendant called the coin flip wrong, was adjudged guilty, and fined \$20.<sup>447</sup> Left unmentioned in the commission opinion, the defendant lost his good standing with his insurance company because of the guilty verdict.<sup>448</sup> Who knows how much that ended up costing the defendant over the years, and what opportunities he was denied because of a conviction on his record. All Judge Turco got was a verbal sanction and a promise not to do it again.<sup>449</sup>

Anytime someone is wrongfully sentenced to jail, it is a tragedy. But some cases are particularly galling. Judge Matthew Destry sentenced a defendant to a sixty-year prison term.<sup>450</sup> A campaign supporter, who was actively campaigning for the judge, arranged a meeting with the judge to discuss the case.<sup>451</sup> In the meeting, the judge committed to reopening the case and

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445. E.g., Bridget Murphy, *Verdict Tossed After Prosecutors Failed to Disclose Cop Faced Discipline for Lying*, NEWSDAY (Oct. 4, 2019), <https://www.newsday.com/long-island/nassau/verdict-dismissed-nassau-police-c90489> [<https://perma.cc/QU6Q-XETC>].

446. Public Admonition of The Honorable Daniel C. Banina Miami Superior Court (Ind. Comm'n on Jud. Qualifications Jan. 20, 2009).

447. *In re Turco*, No. 92-1259-F-30, at 1–2, 1992 WL 778710, at \*1 (Wash. Comm'n on Jud. Conduct Oct. 2, 1992).

448. Knight-Ridder/Tribune, *With The Toss of a Coin, Speeding Ticket is Quickly Decided*, CHI. TRIB. (Mar. 15, 1992, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-1992-03-15-9201240256-story.html> [<https://perma.cc/UMJ2-YCCB>].

449. *In re Turco*, No. 92-1259-F-30, at 2, 1992 WL 778710, at \*1 (Wash. Comm'n on Jud. Conduct Oct. 2, 1992).

450. *In re Destry*, No. 16-238, at 2 (Fla. Jud. Qualifications Comm'n Sept. 29, 2016), [https://efactssc-public.flcourts.org/casedocuments/2016/1757/2016-1757\\_notice\\_79710.pdf](https://efactssc-public.flcourts.org/casedocuments/2016/1757/2016-1757_notice_79710.pdf) [<https://perma.cc/URY5-3QEG>] (notice of formal charges).

451. *Id.* at 3.

suspended the sixty-year sentence to replace it with probation.<sup>452</sup> This created the “appearance,” in the words of the commission, of quid pro quo corruption of exchanging political support for the new sentence, something most defendants could not hope for.<sup>453</sup> Destry resigned, so no charges were ever adjudicated.<sup>454</sup>

Judge Thomas Newman sentenced a man to prison for a probation violation.<sup>455</sup> The defendant had his sentence overturned on appeal, but Newman failed to promptly order the defendant’s release.<sup>456</sup> As a result of the judge’s failure, the defendant wrongfully spent a year in prison and a year on supervised release.<sup>457</sup> He will never get that time back, and all the judge got was a reprimand.<sup>458</sup>

Lawrence Braynen was on trial for first-degree murder, and his life was on the line at trial. Cheryl Aleman was his judge. During the voir dire, the judge employed aggressive and intimidating questions of the jurors.<sup>459</sup> Defense attorneys moved to disqualify the judge and asked for time to prepare a formal motion—the judge denied both the motion and the extension.<sup>460</sup> Next, the judge showed preferential treatment to the prosecutor, so the defense again asked for disqualification and the time to write up a formal motion.<sup>461</sup> They were given fifteen minutes.<sup>462</sup> Defense attorneys rushed out to prepare the written motion, and when court resumed, they were late, and the judge threatened to hold them in contempt.<sup>463</sup> Based on the judge’s antics, the defense attorneys tried once more to disqualify her, and they were again only given a handful of minutes to knock it out.<sup>464</sup> For all this, the judge received a reprimand.<sup>465</sup> It was of no moment that the judge was playing games with the defense while the death penalty was being sought.

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452. *Id.* at 3–5.

453. *Id.* at 6.

454. *See In re Destry*, No. SC16-1757, 2016 WL 6584732, at \*1 (Fla. Nov. 7, 2016).

455. *In re Newman*, 858 N.E.2d 632, 633–34 (Ind. 2006) (per curiam).

456. *Id.* at 634.

457. *Id.* at 635.

458. *Id.*

459. *In re Aleman*, 995 So. 2d 395, 396 (Fla. 2008) (per curiam).

460. *Id.*

461. *Id.*

462. *Id.* at 396–97.

463. *Id.* at 397.

464. *Id.*

465. *Id.* at 401.

#### iv. Dignified Treatment

Even when punished, judges are put on a pedestal. Judge Carmine Cornelio had a track record of mistreating attorneys and parties at conferences, at one point driving a plaintiff to tears.<sup>466</sup> His conduct was so bad that that commission imposed a censure, assigned mentors, and mandated training, rather than a run-of-the-mill reprimand.<sup>467</sup> But the opinion gave the impression that it was a reluctant sanction.<sup>468</sup> It went to great lengths to praise how he had long “served with distinction” and recounted his professional accolades.<sup>469</sup>

Don’t expect courts to give the same courtesy to criminal defendants. Sentencing in Arizona is ordinarily a dull affair. Superior court transcripts show judges mechanically going through the charges, dispositions, and punishments.<sup>470</sup> If the defendants ever did anything good in their lives, it won’t be found here. The only bit of a defendant’s humanity present is the permanent fingerprint they are required to leave on the sentencing order.<sup>471</sup>

#### v. Resignations

According to the ABA, judicial conduct commissions should have continuing jurisdiction over former judges to ensure the judge cannot escape discipline by resigning and then seek office with no record of misconduct.<sup>472</sup> Massachusetts, for example, recognizes this, saying in its case against Judge Maria Lopez, “judicial resignation does not terminate disciplinary proceedings before the Commission.”<sup>473</sup>

A noble goal, but one that is seldom fulfilled. For judges routinely resign only to have the commissions dismiss charges and decline to impose any sanction whatsoever, leaving the judge’s record unbesmirched. Judge Lopez

466. *In re* Cornelio, No. 12-177, at 3–4 (Ariz. Comm’n on Jud. Conduct Apr. 24, 2013), <https://www.azcourts.gov/portals/137/reports/2012/12-177.pdf> [<https://perma.cc/P775-FMPY>].

467. *Id.* at 6.

468. *See id.* at 3.

469. *Id.* at 2.

470. *E.g.*, *Case v. Carter*, No. CR201500022, 2017 Ariz. Super. LEXIS 690 (Ariz. Super. Ct. Apr. 6, 2017); *State v. Morris*, No. CR20123936-001, 2015 Ariz. Super. LEXIS 788 (Ariz. Super. Ct. July 6, 2015); *State v. Cortez*, No. CR20083649, 2009 Ariz. Super. LEXIS 1498 (Ariz. Super. Ct. May 13, 2009).

471. *E.g.*, *State v. Corral*, No. CR20081114, 2010 Ariz. Super. LEXIS 982 (Ariz. Super. Ct. June 1, 2010).

472. MODEL RULES FOR JUD. DISCIPLINARY ENF’T r. 2 cmt. (AM. BAR ASS’N 2020).

473. Press Release, The Commonwealth of Mass. Comm’n on Jud. Conduct, Judge Maria I. Lopez Resigns (May 19, 2003), <https://www.mass.gov/news/> [<https://perma.cc/WTN5-GHJZ>].

herself ended up resigning after a series of rude remarks against attorneys, and the commission dropped the charges.<sup>474</sup> She is not unique.

In so doing, judges can effectively barter away their office—a public trust—in exchange for an enforcement agency to stop prosecuting them. This is a luxury few others have. Good luck finding an au pair who can convince a prosecutor not to charge them with child abuse so long as they stop working. For this reason, treating “political rights as economic commodities corrupts the political process” and has been forbidden in other contexts.<sup>475</sup>

Whatever else may be said of these judges, they do not sell their offices for cheap. No conduct is too vile to be ignored and unadjudicated so long as the judge resigns. While on the bench, Judge Thomas Stringer engaged in a deep personal and financial relationship with an exotic dancer named Christy Yamanaka that included helping her commit tax fraud and him receiving unreported Rolex watches.<sup>476</sup> He left office, and the commission dismissed the case.<sup>477</sup> Judge Stephen Millan called a black defendant a “moolie,” a Sicilian slur for dark-skinned people, and when the defendant’s family came to the hearing, the judge instructed the bailiff to retrieve the judge’s wallet from the courtroom because he did not “trust it in there with those thugs.”<sup>478</sup> As a judge, Claudia Robinson appointed her campaign advisor as a mediator over eighty

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474. *Id.*; *In re Lopez*, Nos. 2000-110, et seq., at 3–5 (Mass. Comm’n on Jud. Conduct Apr. 22, 2022), <https://www.mass.gov/doc/formal-charges-judge-lopez/> [<https://perma.cc/QML6-2W8U>].

475. *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1398 (9th Cir. 1991) (refusing to enforce a contract provision restricting a person’s right to run for public office); *see also* *Basket v. Moss*, 20 S.E. 733, 733 (N.C. 1894) (noting that treating a political office as an assets erodes the character of the office).

476. *In re Stringer*, No. 08-110 (Fla. Jud. Qualifications Comm’n Jan. 13, 2009), [https://efactssc-public.flcourts.org/casedocuments/2009/32/2009-32\\_notice\\_56288\\_e82.pdf](https://efactssc-public.flcourts.org/casedocuments/2009/32/2009-32_notice_56288_e82.pdf) [<https://perma.cc/54G9-MVTA>] (notice of formal charges).

477. *In re Stringer*, No. 08-110 (Fla. Jud. Qualifications Comm’n Mar. 19, 2009), [https://efactssc-public.flcourts.org/casedocuments/2009/32/2009-32\\_motion\\_86272\\_m05b.pdf](https://efactssc-public.flcourts.org/casedocuments/2009/32/2009-32_motion_86272_m05b.pdf) [<https://perma.cc/PY9R-HXMS>] (notice of voluntary dismissal).

478. *In re Millan*, No. 2017-570, at 2–3 (Fla. Jud. Qualifications Comm’n May 21, 2018), [https://efactssc-public.flcourts.org/casedocuments/2018/775/2018-775\\_notice\\_84109\\_notice2dformal20charges.pdf](https://efactssc-public.flcourts.org/casedocuments/2018/775/2018-775_notice_84109_notice2dformal20charges.pdf) [<https://perma.cc/GE5R-HQH3>] (notice of formal charges). The judge resigned and the charges were dropped. *In re Millan*, No. 2017-570 (Fla. Jud. Qualifications Comm’n Aug. 24, 2018), [https://efactssc-public.flcourts.org/casedocuments/2018/775/2018-775\\_motion\\_117328\\_notice2ddismiss2028voluntary29.pdf](https://efactssc-public.flcourts.org/casedocuments/2018/775/2018-775_motion_117328_notice2ddismiss2028voluntary29.pdf) [<https://perma.cc/CV2L-UJH7>] (notice of voluntary dismissal).

percent of her cases, a lucrative assignment that paid \$250 to \$300 per hour.<sup>479</sup> Judge Walter Chapala suspended a significant portion of a defendant's sentence based on the defendant's father's donation of \$100,000 to the judge's campaign, and held the sheriff in contempt for lawfully arresting a relative of the judge.<sup>480</sup> He resigned, and the commission dismissed.<sup>481</sup> Judge Eugene Hammermaster racked up sixty instances of misconduct in one complaint and was allowed to resign to escape punishment, an outcome Washington's commission determined that adequately promoted "confidence and integrity in the judicial system."<sup>482</sup> Et cetera, et cetera.<sup>483</sup>

Commissions allowed these disgraced judges to slink away without punishment. Frequently, cases will be dismissed without any indication of why, or what happened to the judge, making it appear charges were dropped for lack of evidence.<sup>484</sup> Nothing requires this, as commissions are perfectly capable of punishing judges who depart, or least recommending it to the state supreme

479. *In re* Robinson, No. 2017-266, at 2 (Fla. Jud. Qualifications Comm'n Nov. 30, 2017), [https://efactssc-public.flcourts.org/casedocuments/2017/2093/2017-2093\\_notice\\_83016\\_notice2dformal20charges.pdf](https://efactssc-public.flcourts.org/casedocuments/2017/2093/2017-2093_notice_83016_notice2dformal20charges.pdf) [<https://perma.cc/H6GZ-VV2L>] (notice of formal charges). Charges were dropped after she resigned. *In re* Robinson, No. 2017-266 (Fla. Jud. Qualifications Comm'n Feb. 14, 2018), [https://efactssc-public.flcourts.org/casedocuments/2017/2093/2017-2093\\_motion\\_115829\\_notice2ddismiss2028voluntary29.pdf](https://efactssc-public.flcourts.org/casedocuments/2017/2093/2017-2093_motion_115829_notice2ddismiss2028voluntary29.pdf) [<https://perma.cc/3PHR-ZDH5>] (notice of voluntary dismissal).

480. *In re* Chapala, 902 N.E.2d 218, 218 (Ind. 2009).

481. *Id.* at 219.

482. *In re* Hammermaster, No. 3210-F-94, 2-7 (Wash. Comm'n on Jud. Conduct Oct. 8, 2001), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/2002/3210%20Statement%20of%20Charges.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/2002/3210%20Statement%20of%20Charges.pdf) [<https://perma.cc/HB5E-QAH7>] (statement of charges); *In re* Hammermaster, No. 3210-F-94, at 2, 2002 WL 385211, at \*1 (Wash. Comm'n on Jud. Conduct Mar. 4, 2002).

483. *In re* Moreland, 924 N.E.2d 107, 108 (Ind. 2010) (per curiam) (noting the charges were dropped after judge resigned because he hired his wife as clerk of the court); *In re* Heaton, No. 90-998-F-21, at 2-3 (Wash. Comm'n on Jud. Conduct Jan. 15, 1991), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/1991/998%20SOC.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/1991/998%20SOC.pdf) [<https://perma.cc/EQ48-KWV6>] (statement of charges) (resigning without punishment after finding defendants guilty without trials and failing to provide qualified interpreters for non-English speakers); *In re* Adams, No. 90-991-F-23, at 1-3, 1991 WL 757803, at \*1 (Wash. Comm'n on Jud. Conduct Aug. 26, 1991) (resigning with punishment after committing misdemeanor trespass and masturbating in front of female court employees).

484. *E.g.*, *In re* Hauser, No. 06-425, No. SC07-983 (Fla. Oct. 26, 2007), [https://efactssc-public.flcourts.org/casedocuments/2007/983/2007-983\\_d16\\_135642.pdf](https://efactssc-public.flcourts.org/casedocuments/2007/983/2007-983_d16_135642.pdf) [<https://perma.cc/2AC3-HCAT>].

court.<sup>485</sup> One time, a commission even ordered a judge who resigned to attend a judicial decision-making course.<sup>486</sup>

Before leaving, judges may be able to cash out. Judge Brandt Downey used the court computer to view porn (contracting a computer virus in the process), showed “inordinate interest” in a new female prosecutor, and sent flirtatious emails to a different female prosecutor.<sup>487</sup> He was reprimanded and agreed to retire at the end of his term, which meant he could continue getting paid for months despite being a serial harasser.<sup>488</sup> Judge James Hauser resigned after making unwanted sexual advances towards a student in a class he was teaching—at one point going to her house and masturbating on her bed—but while his investigation was pending, he was on paid, administrative leave for nearly a year, earning roughly \$145,000 as a reward for his abuse.<sup>489</sup>

Though defendants should ordinarily not lose money before they are proven guilty, neither the commission nor the state supreme court made any effort to claw the money back or fine Hauser.<sup>490</sup> He was able to smoothly transition to the practice of law and is in good standing with the Florida Bar.<sup>491</sup> Judge Ralph Eriksson was charged with illegally sentencing people to jail for up to sixty days in 2009.<sup>492</sup> Around the same time charges were filed, he announced he was

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485. *E.g.*, *In re Weber*, 21 N.E.3d 92, 93 (Ind. 2014) (per curiam); *In re Baldwin*, No. 98-2695-F-69, 1998 WL 311985 (Wash. Comm’n on Jud. Conduct June 5, 1998).

486. *In re Lake*, No. 3365-F-98, at 3, 2002 WL 1336345, at \*1–2 (Wash. Comm’n on Jud. Conduct June 7, 2002).

487. *In re Downey*, 937 So. 2d 643, 645–47 (Fla. 2006) (per curiam).

488. *Id.* at 647 n.3.

489. Jim Leusner, *Judge Under Investigation Will Retire*, ORLANDO SENTINEL (Sept. 15, 2007, 4:00 AM), <https://www.orlandosentinel.com/news/os-xpm-2007-09-15-judge15-story.html> [<https://perma.cc/ZGU7-WACH>].

490. *See In re Hauser*, No. 06-425, No. SC07-983 (Fla. Oct. 26, 2007), [https://efactscc-public.flcourts.org/casedocuments/2007/983/2007-983\\_d16\\_135642.pdf](https://efactscc-public.flcourts.org/casedocuments/2007/983/2007-983_d16_135642.pdf) [<https://perma.cc/2AC3-HCAT>].

491. *James Charles Hauser Member Profile*, FLA. BAR <https://www.floridabar.org/directories/find-mbr/profile/?num=168348> [<https://perma.cc/CD6X-FD47>].

492. *In re Eriksson*, No. 09-629, at 2–5 (Fla. Jud. Qualifications Comm’n June 2, 2010), [https://supremecourt.flcourts.gov/content/download/424253/file/Filed\\_06-02-2010\\_Notice\\_Forma\\_Charges.pdf](https://supremecourt.flcourts.gov/content/download/424253/file/Filed_06-02-2010_Notice_Forma_Charges.pdf) [<https://perma.cc/Q82L-Y3U2>].

not running for reelection.<sup>493</sup> The commission dismissed the case,<sup>494</sup> meaning Eriksson could serve out his term honorably.

Sometimes, the commission openly admits it would have gone farther with punishment but for the judge's decision to resign. Judge Melanie DeForest lied on her official judicial biography to fluff up her experience and training, and was only reprimanded because she stepped down.<sup>495</sup> Commissioner Julie Newell was a repeat offender who was rude to victims and attorneys, and would sometimes refuse to listen to them.<sup>496</sup> The commission settled for a reprimand given that she resigned. Judge Paul Hawkes lobbied the legislature for more money for his courthouse, got a vendor for the courthouse to pay for a trip for himself, his son, and his brother while threatening a court staffer into silence about the scandal, manipulated the budget to conceal his misdeeds, and had his law clerk assist his son in writing a brief to the state supreme court.<sup>497</sup> His case was voluntarily dismissed because he resigned.<sup>498</sup> Other times a commission might just dismiss a case as moot once the judge is gone.<sup>499</sup> This sends a clear message: misconduct is fine as long as you're on your way out the door.

Judges can play the same trick with prosecutors. Beth Harlan faced criminal prosecution for approving falsified timecards as a judge. She agreed to retire in exchange for charges being dropped.<sup>500</sup> During the pendency of the criminal

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493. Rene Stutzman, *Judge Ericksson to Retire—40 Other Judges Win New Terms*, ORLANDO SENTINEL (May 1, 2010, 5:22 AM), <https://www.orlandosentinel.com/news/os-xpm-2010-05-01-os-judges-elected-20100430-story.html> [<https://perma.cc/R7QQ-DUUX>].

494. *In re* Eriksson, 47 So. 3d 1288 (Fla. 2010) (unpublished table decision).

495. *In re* DeForest, No. 12-266, 12-275, at 1 (Ariz. Comm'n on Jud. Conduct Dec. 4, 2012), <https://www.azcourts.gov/portals/137/reports/2012/12-275.pdf> [<https://perma.cc/V6ZY-URML>].

496. *In re* Newell, No. 15-192 (Ariz. Comm'n on Jud. Conduct Nov. 13, 2015), <https://www.azcourts.gov/portals/137/reports/2015/15-192.pdf> [<https://perma.cc/9X4F-LBAC>].

497. *In re* Hawkes, No. 10-491, at 4, 6, 8 (Fla. Jud. Qualifications Comm'n May 17, 2011), [https://supremecourt.flcourts.gov/content/download/424393/file/Filed\\_05-17-2011\\_Notice\\_Formal\\_Charges.pdf](https://supremecourt.flcourts.gov/content/download/424393/file/Filed_05-17-2011_Notice_Formal_Charges.pdf) [<https://perma.cc/8AAR-27BB>] (notice of formal charges).

498. *In re* Hawkes, No. 10-491, at 1 (Fla. Jan. 5, 2012), [https://supremecourt.flcourts.gov/content/download/424391/file/Filed\\_01-05-2012\\_Notice\\_Voluntary\\_Dismissal.pdf](https://supremecourt.flcourts.gov/content/download/424391/file/Filed_01-05-2012_Notice_Voluntary_Dismissal.pdf) [<https://perma.cc/CSS4-D2SG>] (notice of voluntary dismissal).

499. *In re* Bonanno, 805 So. 2d 807 (Fla. 2002) (unpublished table decision).

500. Suzie Schottelkotte, *Florida Supreme Court Publicly Reprimands Polk County Judge Susan Barber Flood*, LEDGER (Mar. 5, 2015, 1:28 PM), <https://www.theledger.com/story/news/2015/03/05/florida-supreme-court-publicly-reprimands/8254810007/> [<https://perma.cc/D4US-WE8T>].

investigation, she was paid her full salary,<sup>501</sup> and presumably her resignation allowed her to keep it.

Lack of punishment helps bad judges land on their feet. Judge Ralph Perkins pled guilty to multiple counts of beating his wife.<sup>502</sup> The commission censured him, but closed proceedings after he resigned.<sup>503</sup> There was no recommendation that he lose his law license. As a result, several years later, he got a job as a prosecutor, where he likely got to put people in jail for the same actions that drove him off the bench.<sup>504</sup> The prosecutor's office probably ended up regretting that hire, as Perkins later pled guilty to possessing child pornography (he only lost his law license for two years).<sup>505</sup>

#### vi. Vague or Anonymous Sanctions

Over ninety percent of complaints are dismissed without action. Even among the complaints that warrant discipline, the vast majority of them are handled under the table. Arizona, for instance, provides “dismissals with comments,” which are essentially warning letters with the names, dates, and identifying details redacted.<sup>506</sup> We know how many were issued in a given year and the gist of what happened, but do not know which judge was warned. The commission is far more likely to resolve a case through a private warning letter than a public sanction.<sup>507</sup>

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501. Martha Neil, *Judge, Fired Aide Charged in Time Entry Case; Another Judge's Claimed Sex with Bailiff Unproven*, ABA J. (Sept. 19, 2013, 3:45 PM), [https://www.abajournal.com/news/article/judge\\_and\\_fired\\_assistant\\_are\\_arrested\\_accused\\_of\\_scheming\\_to\\_defraud/](https://www.abajournal.com/news/article/judge_and_fired_assistant_are_arrested_accused_of_scheming_to_defraud/) [<https://perma.cc/BX2C-JVJD>].

502. *In re Perkins*, No. 93-1474-F-42, at 3, 1993 WL 839550, at \*1 (Wash. Comm'n on Jud. Conduct Oct. 21, 1993).

503. *Id.* at 3–4.

504. Associated Press, *Deputy Prosecutor Pleads Guilty to Possessing Child Porn*, SEATTLE PI (Oct. 31, 2003, 3:45 PM), <https://www.seattlepi.com/local/article/Deputy-prosecutor-pleads-guilty-to-possessing-1128605.php> [<https://perma.cc/DQK4-A73F>].

505. *Discipline Notice - Ralph L. Perkins*, WASH. ST. BAR ASS'N, <https://www.mywsba.org/PersonifyEbusiness/DisciplineNoticeDirectory/DisciplineNoticeDetail.aspx?dID=723> [<https://perma.cc/VEB9-RDH2>].

506. *E.g.*, Judgment of a Judge, No. 19-405 (Ariz. Comm'n on Jud. Conduct June 10, 2020), <https://www.azcourts.gov/portals/137/reports/2019/19-405.pdf> [<https://perma.cc/2FFS-5F7K>] (order).

507. For example, in 2015, the Arizona commission removed zero judges from office, suspended zero judges, censured zero judges, reprimanded six judges, and sent anonymized warning letters to thirty-eight judges—alongside 310 cases that were flat-out dismissed. *2015 Public Decisions Summary*, ARIZ. COMM'N ON JUD. CONDUCT <https://www.azcourts.gov/azcjc/PublicDecisions/2015.aspx> [<https://perma.cc/F6ZR-CVTW>].

Sometimes, judicial misconduct may come to light but never be publicly resolved. Judge James Young visited an adult bookstore, and while there, was charged with public indecency and admitted to committing battery on a police officer.<sup>508</sup> The Indiana Supreme Court rejected a motion to dismiss the charges,<sup>509</sup> but the ultimate resolution of the case is a mystery. Nowhere on Indiana's commission website does it say what happened to him.<sup>510</sup> Judge Santo Ruma jailed a spectator in court without giving them any warning first.<sup>511</sup> He agreed to "recognize[] the Commission's concern" and that it is "ordinarily preferable to issue a prior warning," but did not admit to any misconduct or receive any sanction.<sup>512</sup>

Even among public disciplinary actions, descriptions may be so vague that a reader may have no idea what happened. Judge John Lamb was reprimanded, but all the order says is that he "violated Canon 2 of the Code of Judicial Conduct which requires that a judge avoid impropriety and the appearance of impropriety in all of the judge's activities," which could mean anything.<sup>513</sup> Similar story for Judges Stanley Bruhn,<sup>514</sup> William O'Roarty,<sup>515</sup> and Edward Allan.<sup>516</sup> Washington's commission found that Judge Albert Raines violated three canons of judicial conduct but declined to impose any sanction

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508. *In re Young*, 522 N.E.2d 386, 387 (Ind. 1988) (per curiam).

509. *Id.* at 389.

510. Ten years later in a memoriam for Young, it notes he "retired" in 1988, so one may surmise he resigned rather than face charges. See *Hon. James B. Young, Adoption of Resolution of the Court of Appeals of Indiana*, JUSTIA, <https://law.justia.com/cases/indiana/court-of-appeals/1998/110701-jts.html> [<https://perma.cc/2MG3-NXUM>].

511. Press Release, The Commonwealth of Mass. Comm'n on Jud. Conduct, Commission on Judicial Conduct Files Formal Charges Against Judge Santo J. Ruma, at 2 (Jan. 31, 2006), <https://www.mass.gov/doc/> [<https://perma.cc/62HS-XLNH>].

512. *Id.*

513. *In re Lamb*, No. 08-284, at 1 (Ariz. Comm'n on Jud. Conduct June 23, 2009), <https://www.azcourts.gov/portals/137/reports/2008/08-284.pdf> [<https://perma.cc/CM2F-WHDJ>] (order). One hopes it was not too bad, as Lamb went on to be an instructor at the Arizona Judicial College, where he taught newer judges in the state. *John Lamb Seeks Re-election Bid*, WHITE MOUNTAIN INDEP. (July 18, 2012), [https://www.wmicentral.com/news/latest\\_news/john-lamb-seeks-re-election-bid/article\\_7a5a744e-cf9c-11e1-97b0-001a4bcf887a.html](https://www.wmicentral.com/news/latest_news/john-lamb-seeks-re-election-bid/article_7a5a744e-cf9c-11e1-97b0-001a4bcf887a.html) [<https://perma.cc/9BMN-26K5>].

514. *In re Bruhn*, No. 91-1113-F-31, at 1, 1992 WL 778712, at \*1 (Wash. Comm'n on Jud. Conduct Aug. 7, 1992).

515. *In re O'Roarty*, No. 92-1244-F-38, at 2, 1995 WL 902260, at \*1 (Wash. Comm'n on Jud. Conduct Apr. 2, 1995).

516. *In re Allan*, No. 92-1257-F-44, at 2, 1994 WL 907465, at \*1-2 (Wash. Comm'n on Jud. Conduct June 3, 1994).

whatsoever.<sup>517</sup> If these violations were truly harmless, commissions should explain why.

Judge Carmine Cornelio was censured—which would presumably be for a very serious reason—but all we are told is that the judge used “frank language” with a friend.<sup>518</sup> The commission decided that the judge’s behavior was bad enough to warrant its strongest verbal sanction but did not think the public had any need to know what happened. Washington’s commission alleged Judge Merle Wilcox failed to comply with an earlier order of sanction but never specified how.<sup>519</sup> One complaint submitted to the Massachusetts commission was sixty-one pages long and detailed the many ways the judge ignored laws he disagreed with.<sup>520</sup> The commission’s response was a terse, three-paragraph dismissal that failed to explain its reasoning at all.<sup>521</sup> Or perhaps a commission might issue a ruling that the judge committed misconduct, but not state what, precisely, the sanction is.<sup>522</sup>

## V. CONCLUSION

Justice Richard B. Sanders was outraged. As a justice of the Washington Supreme Court, he had to review the case of Judge Steven Michels, and it was not pretty. Michels was a part-time municipal judge in a rural area who maintained a legal practice while on the bench. In over a dozen cases, Michels presided over cases where the criminal defendant was a client of his.<sup>523</sup> He also had a pattern of accepting guilty pleas without obtaining proper written plea statements.<sup>524</sup> His ability to get away with this for so long led the *Seattle Times*

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517. *In re Raines*, No. 98-2810-F-72, at 3, 1999 WL 1190880, at \*2 (Wash. Comm’n on Jud. Conduct Dec. 3, 1999).

518. *In re Cornelio*, No. 10-131, at 2 (Ariz. Comm’n on Jud. Conduct Nov. 4, 2010), <https://www.azcourts.gov/portals/137/reports/2012/12-177.pdf> [<https://perma.cc/P775-FMPY>] (amended stipulation resolution).

519. *In re Wilcox*, No. 94-1693-F, at 1, 1996 WL 688763, at \*1 (Wash. Comm’n on Jud. Conduct Nov. 21, 1996).

520. Andrea Estes, *Complaint That Judge Shows Bias Dismissed*, BOS. GLOBE (Dec. 6, 2012, 1:11 AM), <https://www.bostonglobe.com/metro/2012/12/05/judicial-conduct-panel-dismisses-complaint-against-raymond-dougan/mFFB41BKHsycfKEsf3ZIFL/story.html> [<https://perma.cc/7LPY-W5VC>].

521. *Id.*

522. *In re Raines*, No. 98-2810-F-72, at 3, 1999 WL 1190880, at \*2 (Wash. Comm’n on Jud. Conduct Dec. 3, 1999).

523. *In re Michels*, 75 P.3d 950, 953 (Wash. 2003) (en banc).

524. *Id.* at 952.

to run an article characterizing these small-town judges as running “personal fiefdoms” and acting with a “white heart and an empty head.”<sup>525</sup>

But Justice Sanders was not outraged by what Michels did, only by what the newspapers wrote.<sup>526</sup> He questioned whether the commission was “doing more harm than good to public perceptions of the judiciary through its negative press campaign,” and noted the “anguish” Michels felt, without pausing to consider what anguish the defendants might have felt for being cheated out of their due process rights.<sup>527</sup> Under this mindset, the judiciary’s reputation is best preserved by having low visibility, not high standards.

Unfortunately, that mindset seems embedded in the present judicial disciplinary system. To the extent outside attention is paid, the only concern seems to be that the system is *too harsh* on judges. Professor Raymond J. McKoski (himself a retired judge) argued that misconduct rules for judges should allow for the appearance of impropriety.<sup>528</sup> Another commentator argued commissions should not penalize judges who are “egregiously hostile” or show “repeated displays of anger” because that would “stigmatize the judge, exacerbating her anger, hostility, and sense of isolation.”<sup>529</sup> Some contend that a judge losing their temper or displaying impatience is an “important asset in managing the courtroom.”<sup>530</sup> The American Judicature Society stopped publicly collecting and publishing data on judicial misconduct because journalists dared to report on it.<sup>531</sup> The ABA recommends that commissions maintain statistics for use by the commission or state supreme court, but not the

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525. *Id.* at 960 (Sanders, J., dissenting).

526. *Id.* (questioning whether the commission could uphold the dignity of the judiciary after commenting to the newspaper for the article).

527. *See id.* at 960–61. A few years later, Justice Sanders would end up getting sanctioned by the commission. *In re Sanders*, No. 4072-F-109, at 12–13 (Wash. Comm’n on Jud. Conduct July 13, 2005),

[https://www.cjc.state.wa.us/materials/activity/public\\_actions/2005/4072%20Corrected%20Amended%20Decision.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/2005/4072%20Corrected%20Amended%20Decision.pdf) [<https://perma.cc/V264-ZCYA>].

528. Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 416 (2014); *see also* Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 2 (2007) (criticizing the standard of forbidding the appearance of corruption).

529. Maxine D. Goodman, *Shame, Angry Judges, and the Social Media Effect*, 63 CATH. U. L. REV. 589, 591 (2014).

530. 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).

531. Abel, *supra* note 7, at 1033.

public.<sup>532</sup> Alex Kozinski, a disgraced former judge who left office for pervasive sexual harassment accusations,<sup>533</sup> has argued that there should be fewer judicial ethical rules because “there is no choice but to trust the judges.”<sup>534</sup>

For any system of government to be called fair, however, ultimate trust must be in the people, not merely judges. The current system of judicial discipline falls short of this goal. It hides from public view most of what is happening, allows the public to be terrorized by judges without serious consequence, and privileges judges over and above every other kind of litigant. In effect, it says that ordinary people should be held to a higher standard than judges hold themselves.

The solution is not to permanently expel every judge who errs. Judges are human and deserve to have their conduct given context. But the system appears indifferent to very real suffering that is caused by abuses of power, even when the abuses are extreme or repeated.

What is more, judges demand gold-plated due process protections that they never extend to the lawyers and litigants they punish through contempt. The author has witnessed judges punish lawyers who missed a single session of court. These lawyers were not given private warnings months after the fact or a committee of colleagues who could shield them from sanction; they were promptly ordered to prostrate themselves before the judge and a crowded courtroom and publicly humiliated for a small, innocent transgression that could happen to anyone. If the lawyer so much as silently fumed on their way out, the judge could threaten them with jail on the spot. Until judges surrender this kind of limitless, unilateral, and instantaneous power over litigants, they have no right to claim they need such extensive protections for their own professional missteps.

Good judges should want to reform the system. If the commission can give the same punishment for being five weeks or five years late with a decision, why should anyone trust they will get a fair sanction? When explanations are not given for why a case is being terminated without punishment and gives no explanation for why this was the most just outcome, it could lead to suspicions that the commission was covering up misconduct. And it only takes a small number of awful judges to spoil the reputation for the judiciary writ large. A

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532. See MODEL RULES FOR JUD. DISCIPLINARY ENF'T R. 3(5)(b) (AM. BAR ASS'N 2020).

533. See Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [<https://perma.cc/Y9HW-DCMD>].

534. Alex Kozinski, *The Real Issues Of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1106 (2004).

fairer judicial misconduct system would strengthen the courts, not undermine them.

There may be some wisdom in making the court system more humane by giving some of the due process protections that judges enjoy to everyone. There may be some wisdom in reducing some of the special protections that only judges receive. But there is no wisdom in giving judges a private system that poor defendants can only dream of.