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Shame, Angry Judges, and the Social Media Effect

Maxine D. Goodman

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Cover Page Footnote

Professor of Law, South Texas College of Law; J.D., University of Texas School of Law, 1990; B.A., Brandeis University, 1987. I gratefully acknowledge the help of Professor and Dean Emeritus James J. Alfani for his insights into issues regarding judicial discipline and thank the Executive Directors of Judicial Conduct Commissions who allowed me to interview them for this Article. Thanks also to former Los Angeles Superior Court Judge David Rothman for his ideas about judicial discipline. I also appreciate my two wonderful research assistants, Kelsey Lieper and Amanda Bosley, for their dedication and persistence in researching these issues. Last, but not least, thanks to the editors of the Catholic University Law Review for their thoughtful edits on the piece.

SHAME, ANGRY JUDGES, AND THE SOCIAL MEDIA EFFECT

Maxine D. Goodman⁺

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Most judges display an exemplary demeanor in their courtrooms, behaving with courtesy and civility on the bench.¹ However, some judges exhibit anger

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1. Most state bar associations conduct judicial preference polls that reflect overall satisfaction with judicial demeanor. For example, a recent survey by the Houston Bar Association asked whether certain trial judges are “courteous and attentive toward attorneys and witnesses[.]”

and hostility toward those who appear before them in their courtrooms.² The public has become increasingly dissatisfied by judges' behavior that does not match their obligation to behave with courtesy and civility on the bench.³ As commentators begin to wrestle with the issue of angry judges,⁴ the public and the legal community are calling for greater transparency within the system of judicial discipline, hoping to stem the tide of judicial misbehavior.⁵ Displays of judicial anger toward those in courtrooms appear to be on the rise, though this perception could certainly be skewed due to the ubiquity of the press and social media.⁶

HOUSTON BAR ASS'N, HOUSTON BAR ASSOCIATION JUDICIAL EVALUATION RESULTS (2013), available at http://www.hba.org/folder-poll-results/2011HBA_evaluation.pdf. Overall, the results reflect satisfaction with the demeanor of trial judges. See *id.*

2. Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1208 (2012). See generally Annotation, *Disciplinary Action Against Judge on Ground of Abusive or Intemperate Language or Conduct Toward Attorneys, Court Personnel, or Parties to or Witnesses in Actions, and the Like*, 89 A.L.R. 4th 278 (1991) (providing a comprehensive list of cases, in which judges exhibited angry and abusive behavior).

3. See KEVIN BURKE & STEVE LEBEN, AMERICAN JUDGES ASS'N, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION 6–8 (2007) (noting that citizens expect to be treated respectfully when appearing before a judge). Some perceive judges as celebrities because of how much attention the public devotes to them. See Pierce J. Reed, *Lady Justice: U.S. Magistrate Judge Joyce London Alexander*, 38 NEW ENG. L. REV. 901, 902 (2003-2004) (noting that “[f]or better or worse, [judges] are starring players in the pageantry of modern media. They serve as saviors and sinners; they may be heroic or hated, revered or reviled.”). The American Bar Association (ABA)’s Model Code of Judicial Conduct requires judges to be “patient, dignified, and courteous” to those who appear before them. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (2007). Most states include some version of this rule in their rules of judicial conduct.

4. See *e.g.*, Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 12 (2001); Maroney, *supra* note 2, at 1208. See also Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 330 (2012).

5. See William Glaberson, *A Push to Open Judge-Misconduct Cases*, N.Y. TIMES, Feb. 11, 2011, at A19. See also Eric Dexheimer, *Who’s Policing Texas Judges?*, AUSTIN AM.-STATESMAN, Apr. 15, 2012, at A1 (noting that the Texas Commission on Judicial Conduct’s judicial disciplinary records are confidential); Brian Rogers, *Defense Lawyers Complain Judges Rarely Punished*, HOUS. CHRON., Feb. 4, 2012, at B1 (noting “[t]hat lack of transparency, about complaints and results, is what frustrates those who want to see judges punished. It also runs counter to the public nature of courtrooms, where most information is supposed to be public”).

6. Almost monthly, the press contains examples of judges displaying anger in their courtrooms. To illustrate, in August 2012, the *Daily Mail* reported on a hearing, discussed later in this Article, in which a judge screamed at a pastor. Laura Pullman, “Watch moment judge screams at pastor during divorce hearing because he blames him for negative publicity (oh, the irony),” MAIL ONLINE (Aug. 11, 2012, 9:44 AM), <http://www.dailymail.co.uk/news/article-2186994/Judge-William-Wakins-Judge-screams-pastor-divorce-hearing-blames-bad-publicity.html>. This was also reported by the *Huffington Post*, see David Lohr, *Arthur Hage Yelled At By Judge William Watkins, Says ‘It’s Not Over’*, HUFFINGTON POST (Aug. 10, 2012, 2:53 PM), http://www.huffingtonpost.com/2012/08/10/arthur-hage-william-watkins_n_1764984.html, and the *West Virginia Gazette*, see Kate White, *Online video latest in Putnam judge-pastor feud*, W. VA. GAZETTE (June 27, 2012), <http://www.wvgazette.com/News/201206270260>. In October 2012, the *Houston Chronicle* reported on a similar incident in which a judge yelled at a pregnant woman. Harvey Rice, *Galveston judge accused of screaming at pregnant woman in court*, HOUS. CHRON.

This Article addresses the intersection between judicial anger and attempts by judicial sanctioning tribunals to correct the behavior with public sanctions. Disciplinary tribunals tend to impose public sanctions as harsh discipline for a judge's egregiously hostile behavior or repeated displays of anger.⁷ This Article challenges the notion that public discipline motivates a judge's positive behavioral changes. For some judges, particularly those whose wrongdoing involves anger, this approach is counterproductive, as shame from the publicity of wrongdoing can stigmatize the judge, exacerbating her anger, hostility, and sense of isolation.⁸ Organizations involved in regulating judicial behavior⁹ and legislatures involved in making laws regarding the authority of these organizations should work toward a more deliberate philosophy of judicial corrections.

Adopting such a philosophy will ensure that the consequences flowing from judicial discipline are the intended ones.¹⁰ Commentators provide a rich arsenal of valuable research and insights to guide legislators and judges, particularly with regard to shaming penalties.¹¹ However, legal academia has yet to address the vices and virtues of shaming in the specific context of judicial discipline; literature concerning the effectiveness of public discipline by judicial

(Oct. 25, 2012), <http://www.chron.com/communityblogs/atmosphere/article/tba-3981139.php>. On November 8, 2012, the ABA Journal reported on an Illinois judge who won reelection despite previously being barred from the courthouse for shoving a sheriff's deputy. See Debra Cassens Weiss, *Judge Barred from Courthouse Wins Re-Election, Presses Insanity Defense in Battery Case*, AM. BAR ASS'N J. (Nov. 8, 2012, 9:53 AM), http://www.abajournal.com/news/article/judge_barred_from_courthouse_wins_re-election_presses_insanity_defense_in_b/.

7. If the behavior is particularly egregious and the public sanction (sometimes imposed more than once) did not suffice, the tribunals typically impose a suspension in conjunction with a public reprimand of the judge as a more effective method of discipline. See, e.g., *In re Disciplinary Proceeding Against Eiler*, 236 P.3d 873, 882–83 (Wash. 2010) (demonstrating that the Supreme Court of Washington suspended a judge for five days without pay after noting that the judge had already been censured once by the Washington State Commission on Judicial Conduct).

8. See *infra* note 11.

9. Judicial conduct commissions, state bar associations, and educational organizations such as the National Judicial College should work together towards improving judicial education and discipline to better protect the public from outbursts by angry judges.

10. In the criminal law arena, commentators have similarly reflected on consequences flowing from criminal punishment. See Amanda D. Cary, Comment: *Cocaine Base: Not All It's Cracked Up to Be*, 40 U.C. DAVIS L. REV. 531, 554 (2006) (discussing the utilitarianism and retributivism theories of punishment). See also Brian Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, 74 ALB. L. REV. 1209, 1262 (2010–2011) (analyzing the impact of sentencing policy in past decades); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001) (noting that “during the past several decades, the justice system’s focus has shifted from punishing past crimes to preventing future violations through the incarceration and control of dangerous offenders”).

11. See *infra* Part II.B. Although disciplinary tribunals do not refer to public sanctions imposed on judges as shaming penalties, publicizing a judge's name and wrongdoing is meant to express the tribunal's disapproval of the judge's conduct and thus it should come as no surprise that stigma is likely to flow from the discipline.

sanctioning tribunals at modifying this type of judicial behavior is sparse.¹² This Article is the first to tackle whether disciplining an angry judge with public sanctions—sanctions likely to shame the judge—are effective at modifying the judge’s behavior and thereby protecting the public.

The Article broaches this topic in the context of the “social media effect,”¹³ a recent phenomenon that should inform judicial discipline. This phenomenon is changing the landscape of judicial discipline by altering the consequences a judge suffers as a result of her misbehavior. The Article demonstrates that the consequences a judge experiences because her wrongdoing is broadcast via social media can be minimal or substantial, ranging from mildly disparaging tweets to death threats.¹⁴ This effect is impacting the course of traditional judicial discipline because the public strives to participate, at times pressuring sanctioning bodies to take action against an angry judge.¹⁵

Part I of the Article illustrates the reality facing some litigants and lawyers in courtrooms: angry judges. Relying on social science research involving shaming as discipline and the effect of social media, Part II of the Article suggests that shaming an already angry judge in a public manner that stigmatizes the judge is likely to lead the judge to resist the sanctioning tribunal and become increasingly hostile. Part III of the Article describes the social media effect, explaining that displays of judicial anger are often publicized, regardless of formal disciplinary proceedings.¹⁶

12. In a recent article, Jonathan Abel provides empirical evidence to evaluate three commonly held beliefs about the aggressiveness with which different judicial conduct commissions impose discipline on judges. See Jonathan Abel, Note, *Testing Three Commonsense Intuitions About Judicial Conduct Commissions*, 64 STAN. L. REV. 1021, 1048–49 (2012). The data Abel collected shows substantial disparities among jurisdictions in terms of their aggressiveness in sanctioning judges. *Id.* at 1055–56. Although Abel’s article provides much needed insight and empirical evidence regarding the inconsistencies among sanctioning commissions, nowhere in the existing literature do academics tackle the basic question of whether the type of discipline currently imposed on judges is effective at protecting the public.

13. See Zahera Harb, *Arab Revolutions and the Social Media Effect*, M/C J., <http://journal.media-culture.org.au/index.php/mcjournal/article/view/364> (last visited Mar. 26, 2014) (coining the term “social media effect” and describing the phenomenon’s effect on Middle Eastern politics). In this Article, the term refers to the impact social media has on judges by publicizing their misbehavior, giving the public an opportunity to respond, and, at times, impacting the disciplinary process.

14. See *infra* Part III (describing several instances of strong public reaction to wrongdoing by judges).

15. See *infra* note 157 and accompanying text (describing a situation in which the public pressured a judicial conduct commission to take action regarding a judge’s purported misbehavior; the public’s response was so overwhelming that the commission had to require that no further complaints be filed).

16. Social media provides the public easy access to information concerning angry judges, and the public is often eager to “weigh in” by commenting on judicial misbehavior. Stories of judges displaying “unjudgelike” behavior routinely appear in newspapers, see *supra* note 6 and accompanying text, and bar journals, see, e.g., Martha Neil, *See the Video: Angry Judge Blasts ‘Backseat Driver’ Appellate Counsel in High-Profile Murder Case*, AM. BAR ASS’N J. (Oct. 9.,

Part IV of the Article recommends innovative forms of discipline, including methods of keeping the process of judicial discipline outside the traditional disciplinary system. This section recommends education and mentoring on the subject of preventing or constraining anger as well as early intervention in the form of peer-to-peer counseling and reconciliation meetings to use reintegrative shame, rather than stigmatizing shame, to motivate angry judges' improved behavior.

Procedural fairness¹⁷ and restorative justice¹⁸ shape this discussion. In the criminal law context, these approaches suggest that as sanctions become more punitive and stigmatizing, they become less effective because individuals become less inclined to follow authority.¹⁹ On the other hand, individuals become self-regulating when they respect authority and rules as legitimate.²⁰ This Article suggests that, along the same lines, judicial sanctioning bodies should impose discipline that encourages judges to self-regulate, rather than using corrective methods that stigmatize.

2012, 1:37 PM), http://www.abajournal.com/news/article/jefferson_circuit_kentucky_judge_martin_mcdonald_backseat_driver_video/; Weiss, *supra* note 6. YouTube, Troy from West Virginia, *Putnam County, WV, Family Law Judge, William Watkins, May 23, 2012 MELTDOWN!!!!*, YOUTUBE (June 26, 2012), <http://www.youtube.com/watch?v=APD4a347bPQ> [hereinafter Judge Watkins YOUTUBE Video], and websites devoted to publicizing information about judges, *see* ABOVE THE LAW, <http://abovethelaw.com> (last visited May 9, 2014); CITIZENS FOR JUDICIAL ACCOUNTABILITY, <http://www.judicialaccountability.net> (last visited May 9, 2014); CITIZENS FOR LEGAL RESPONSIBILITY, <http://www.clr.org> (last visited May 9, 2014); ROBEPROBE, <http://www.robepobel.com> (last visited May 9, 2014); VERY BAD JUDGES, <http://verybadjudges.blogspot.com> (last visited May 9, 2014), provide ample coverage of judges displaying hostility in their courtrooms, and also allow the public to react to the judicial behavior.

17. Procedural fairness suggests that “process matters” because “people’s evaluations of the resolution of a dispute (including matters resolved by the judicial system) are influenced more by their perception of the fairness of the process employed than by their belief regarding whether the ‘right’ outcome was reached.” Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 200 (2012). *See also* Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443, 1456–58 (2011) (highlighting the importance of fair judicial procedures).

18. Restorative justice is an approach to resolving disputes that emphasizes “1) deliberation and decision making by a diverse group of stakeholders [in the dispute] and 2) discussion that focuses on repairing the damage caused by the offender.” Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 255 (2012). It typically takes the form of victim/offender mediations, conferencing among stakeholders, and sentencing circles. *Id.* Restorative justice is also described as “a process that brings victims and offenders together to face each other, to inform each other about their crimes and victimization, to learn about each others’ backgrounds, and to collectively reach agreement on a ‘penalty’ or ‘restorative justice sanction.’” Meghan Condon, Note, *Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. ON POVERTY L. & POL’Y 487, 495 (2010).

19. *See* Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307, 308 (2006) (explaining that hostility can result from punitive policies).

20. *Id.* at 308–09.

I. ANGRY JUDGES

What is it about judges and anger? Countless examples exist of judges losing their tempers and lashing out at parties, lawyers, and personnel in their courtrooms.²¹ Sometimes, litigants or lawyers appear to provoke judicial anger;²² in other instances, a difficult or emotional case gives rise to a judicial outburst.²³ Occasionally, judges seem to fly off the handle with no apparent provocation.²⁴

YouTube provides several examples of judges expressing anger in court. West Virginia's Putnam Circuit Judge William Watkins was videotaped screaming at pastor Arthur Hage in court during Hage's divorce proceedings in 2012.²⁵ In the video, which was posted on YouTube on June 26, 2012 and has since received over 250,000 hits, the judge chastises Hage for speaking to a reporter who wrote an article posted on PutnamLive.com, which apparently showed a picture of the judge's home.²⁶ The judge claimed his property was vandalized several times as a result of the photo.²⁷ Judge Watkins started the hearing as follows: "Mr. Hage, if you say one word out of turn, you're going to jail. Do you understand me? . . . Shut up! Don't even speak . . . You disgusting piece of [inaudible]."²⁸ He screamed at Hage during most of their exchange. Judge Watkins later recused himself from any other proceedings in Hage's case, admitting he lost his temper.²⁹

Hage filed several complaints against Watkins with the Judicial Investigation Commission of West Virginia.³⁰ Soon after the hearing, the West Virginia

21. See *supra* note 2 and accompanying text.

22. Richmond, *supra* note 4, at 328–29 (“Even judges who enjoy impressive self-control and gracious bearings may sometimes lose patience with incompetent or uncivil lawyers, or especially difficult or disruptive litigants.”).

23. See *supra* note 16 and accompanying text. See also *infra* notes 26–28 (describing a judge's outburst against a party the judge thought had engaged in inappropriate out of court conduct against the judge and the judge's family).

24. See, e.g., John Council, *Jones Says Dennis Accepted Her Apology After Heated “Shut Up” Exchange*, TEX. LAWYER (Sept. 22, 2011), <http://www.texaslawyer.com/id=1202516573154> (describing an en banc oral argument in which Fifth Circuit Court of Appeals Judge Edith Jones interrupted her colleague's questioning and told him to “shut up”).

25. See Judge Watkins YOUTUBE Video, *supra* note 16. After Watkins granted the divorce petition filed by Hage's wife, Hage sued the judge for \$5 million. White, *supra* note 6. He has also appealed the divorce to West Virginia's Supreme Court. *Id.* Judge Watkins brings his dog, Buddy, to chambers to ease tension in the courtroom. Cheryl Caswell, *Family law judge's pooch provides a soothing presence*, W. VA. GAZETTE (Nov. 16, 2011), <http://charlestdaily.com/News/PutnamCounty/201111150258>.

26. Judge Watkins YOUTUBE Video, *supra* note 16.

27. *Id.*

28. *Id.*

29. Martha Neil, *State Supreme Court Administrator Won't Pile another Complaint on Judge in YouTube Video*, AM. BAR ASS'N J. (July 3, 2012, 11:49 AM), http://www.abajournal.com/news/article/state_supreme_court_administrator_wont_pile_another_complaint_on_judge_in_y/.

30. *Id.*

Supreme Court announced that it decided not to look into the incident after Judge Watkins admitted to overreacting and recused himself.³¹ However, in August 2012 an unrelated West Virginia Supreme Court action charged that Judge Watkins failed to enter orders into the state's tracking system.³² In September 2012, the Judicial Investigation Commission filed five additional charges against Judge Watkins involving allegations of shouting at litigants and using profanity in court.³³ Judge Watkins was apparently outraged by the allegations, blaming the alleged backlog on his caseload.³⁴ Judge Watkins claimed the number of divorce proceedings he oversaw was "the highest in West Virginia."³⁵ Even before the incident with Hage, Judge Watkins had begun taking his dog Buddy to court with him each day to ease stress.³⁶

Another example of a judge caught on tape yelling at lawyers or parties in a courtroom is retired Kentucky Circuit Judge Martin McDonald.³⁷ On the tape, Judge McDonald can be heard admonishing an appellate lawyer during a hearing for a new trial in a death penalty case.³⁸ Judge McDonald told the lawyer that if the lawyer ever called him on his cellphone again, Judge McDonald would "strangle" him.³⁹ When the lawyer tried to explain that the court system provided the phone number and opposing counsel was aware he was making the call, the judge repeatedly cut him off, calling him unethical and a "backseat driver," and further threatened to have the lawyer disbarred.⁴⁰

According to some, judges and anger go hand in hand.⁴¹ Judging is stressful, and some parties and lawyers certainly push judges' buttons.⁴² Judges preside over litigants who are disputatious; the environment is adversarial and often the judge adopts the stress.⁴³ Furthermore, judges vary in terms of their ability to regulate their emotions.⁴⁴ In addition, the legal system arguably encourages

31. Lohr, *supra* note 6.

32. Martha Neil, *Angry Judge in YouTube Video Calls Unrelated Ethics Case re 'Overwhelming' Caseload 'Infuriating'*, AM. BAR ASS'N J. (Aug. 13, 2012, 10:37 AM), http://www.abajournal.com/news/article/angry_judge_in_youtube_video_calls_unrelated_ethics_case_re_overwhelmi1/.

33. Kate White, *Supreme Court votes not to suspend Putnam family judge*, W. VA. GAZETTE (Sept. 7, 2012), <http://wvgazette.com/News/201209070064>.

34. *See* Neil, *supra* note 32.

35. *Id.*

36. Caswell, *supra* note 25.

37. Neil, *supra* note 16.

38. *Id.*

39. Andrew Wolfson, *Judge threatens to 'strangle' attorney in "ridiculous" case*, THE COURIER-JOURNAL (Dec. 18, 2012), <http://www.courier-journal.com/comments/article/20121003/NEWS01/310030101/judge-threatens-strangle-attorney-ridiculous-case>; Neil, *supra* note 16.

40. Neil, *supra* note 16.

41. *See* Maroney, *supra* note 2, at 1208; Richmond, *supra* note 4, at 328–39.

42. *See* Maroney, *supra* note 2, at 1232, 1238.

43. *See id.* at 1238–44 (describing behavior by litigants that causes judicial anger).

44. *Id.* at 1227–28.

judges to abuse their authority by putting them on thrones and requiring that they wear special robes to demonstrate power.⁴⁵

Case law,⁴⁶ newspapers,⁴⁷ magazine articles,⁴⁸ orders of sanctioning commissions,⁴⁹ and the Internet⁵⁰ are rife with examples of angry judges. In October 2012, the *Houston Chronicle* reported that Galveston County District Judge Lonnie Cox yelled and cursed at a pregnant defendant appearing in his court on a drug related charge, screaming at the woman: “This is s—. This kind of b—— is not what the drug court should be doing and is costing the taxpayers money.”⁵¹ Judge Cox called the defendant “worthless” and tore up paperwork concerning her plea arrangement before storming out of the courtroom.⁵² The defendant’s attorney told the *Houston Chronicle* that he planned to file a complaint about Judge Cox’s behavior with the Texas Commission on Judicial Conduct.⁵³

Litigants frequently file motions for recusal in response to displays of judicial anger.⁵⁴ Sometimes, courts will transfer cases to a different judge on remand or grant a new trial because of the original trial judge’s anger.⁵⁵ Additionally,

45. See Norman L. Greene, *A Perspective on “Temper in the Court: A Forum on Judicial Civility”*, 23 *FORDHAM URB. L.J.* 709, 715 (1996) (citing Mark A. Neubauer, *Things You Have Wanted To Tell a Judge (But Didn’t Dare)*, 21 *LITIG.* 17, 17 (1994)).

46. See, e.g., *In re Ellender*, 16 So. 3d 351, 352–53 (La. 2009) (describing a judge’s demeaning behavior towards a party during a show cause hearing); *In re Fuller*, 798 N.W.2d 408, 413 (S.D. 2011) (discussing a judge who regularly used profanity in front of staff and attorneys); *In re Hammermaster*, 985 P.2d 924, 927 (Wash. 1999) (en banc) (describing several allegations of misconduct against a judge, including abusing authority and raising an appearance of impropriety).

47. See, e.g., White, *supra* note 25; Wolfson, *supra* note 37.

48. See, e.g., Adam Cohen, *A Real-Life Judge Judy Gets Smacked Down*, *TIME* (Aug. 18, 2010), www.time.com/time/printout/0,8816,2011494,00.html.

49. See, e.g., *In re Steensland*, No. 39, 2011 WL 9367406, at *1 (Ala. Jud. Inquiry Comm’n May 2, 2011), available at <http://judicial.alabama.gov/judiciary/COJ39FINALJUDG.pdf>; *In re Grant*, CJC No. 4952-F-131, 2006 WL 6084806, at *1, *2 (Wash. Comm’n Jud. Conduct Aug. 4, 2006), available at <http://www.cjc.state.wa.us/Case%20Material/2006/4952%20Grant%20Stipulation.pdf>; *Public Admonition: Honorable W. Jeanne Meurer*, ST. TEX. COMMISSION JUD. CONDUCT 3 (Mar. 30, 2010), <http://www.scjc.state.tx.us/pdf/actions/FY2010-PUBSANC.pdf> [hereinafter *Public Admonition*].

50. See *supra* notes 15–16 and accompanying text.

51. Rice, *supra* note 6.

52. *Id.* According to the article, the description of the event largely comes from the recusal motion filed by the defendant’s attorney. *Id.* Judge Cox refused to recuse himself from the case and referred the recusal decision to the presiding judge of the Montgomery County District Court. *Id.*

53. *Id.*

54. See, e.g., *State v. Hasan*, No. A-4395-07T4, 2009 WL 2475304, at *15–20 (N.J. Super. Ct. App. Div. Aug. 14, 2009) (affirming a lower judge’s denial of the defendant’s motion requesting that the judge recuse himself for comments he made during a pretrial conference).

55. See, e.g., *In re United States*, 614 F.3d 661, 662, 665–66 (7th Cir. 2010) (denying rehearing of an order directing the district court to admit certain exhibits into evidence and reassign the case to a different judge, explaining that the district court judge displayed “a degree of anger and hostility toward the government that is in excess of any provocation that we can find in the

disciplinary tribunals, including both judicial conduct commissions and reviewing courts, frequently sanction judges whose anger crosses the line, as all judges are required to act in a “patient, dignified, and courteous” manner towards all of the persons with whom the judge interacts in an official capacity.⁵⁶

Judges accused of angry outbursts often defend their behavior on grounds of judicial independence, which presumably permits a judge to adopt whatever style leads to effective results.⁵⁷ A good deal of firm, no-nonsense judicial behavior is defensible on these grounds.⁵⁸ As Justice Scalia explained in *Liteky v. United States*,⁵⁹ federal judges are not immune from feelings of anger, annoyance, and impatience.⁶⁰ In fact, justified and well-regulated judicial anger can be a productive force that “does not detract unduly from the work at hand, nor does its expression unduly disrupt either the mechanisms or image of justice.”⁶¹

Meanwhile, striking the correct balance between disciplining improper behavior and permitting judges to choose an effective style is critical. The public appears to abhor judges who scream at parties in court.⁶² Furthermore, litigants’ perception of judicial fairness is generally based in large part on the judge’s temperament.⁶³ In an article concerning the rise of public criticism against the judiciary, one commentator posits that “the simplest reform judges could take to increase confidence in the courts would be to refrain from abusing, denigrating,

record.”); *Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273–74 (2d Cir. 1996) (vacating the judgment and ordering a new trial before a different judge when the original judge “displayed an antipathy to Santa Maria’s claim that went beyond judicial skepticism,” cross-examined plaintiff’s expert witnesses sarcastically, and generally behaved unfairly towards the plaintiff’s original counsel).

56. MODEL CODE OF JUD. CONDUCT R. 2.8(B) (2011). Most states have adopted some version of this rule of conduct.

57. See, e.g., *Public Admonition*, *supra* note 49. Judge Jeanne Meurer ordered her bailiff to lock all of the participants of a juvenile detention hearing (including the juvenile’s mother) in a holding cell so they could experience the feeling of being “locked up.” *Id.* Judge Meurer defended her conduct before the State Commission on Judicial Conduct by admitting that she got angry, but arguing that her actions were valid because they were “within her authority” and she was attempting to achieve a settlement in the matter. *Id.* The Commission disagreed and publicly admonished Judge Meurer. *Id.*

58. See *In re Hocking*, 546 N.W.2d 234, 240–41 (Mich. 1996) (explaining that not every tasteless comment or angry outburst is considered judicial misconduct).

59. 510 U.S. 540 (1994).

60. *Id.* at 555–56. See also *People v. Stewart*, No. 287286, 2010 WL 1687756, at *2 (Mich. Ct. App. Apr. 27, 2010) (refusing to disqualify a judge for acting impatient and exasperated during a trial).

61. Maroney, *supra* note 2, at 1261. Maroney claims that judicial anger can actually have behavioral benefits, such as facilitating judgment and motivating responsive action. *Id.* at 1261–62.

62. See *infra* Part III (discussing several examples of the public’s strong reaction to displays of anger by judges).

63. Sambhav N. Sankar, Comment, *Disciplining the Professional Judge*, 88 CALIF. L. REV. 1233, 1241–42 (2000).

and insulting people in their writings and speech.”⁶⁴ Judicial discourtesy reflects poorly not only on the individual judge, but also on the entire judiciary.⁶⁵

Research reflects that people judge procedural fairness on the basis of how police and judges treat them, not necessarily on the outcome of a particular experience.⁶⁶ According to this “procedural justice” scholarship, the public’s primary concerns about the police and courts involve whether they treat citizens with dignity and respect and recognize the public’s rights and concerns.⁶⁷ Therefore, “intemperate conduct by judges” leads the public to doubt the fairness of the judge’s decision, “breed[ing] a lack of respect for . . . the judicial system itself.”⁶⁸

A judge yelling “shut up” at someone in her courtroom appears to be a common expression of judicial anger.⁶⁹ In fact, during an en banc oral argument in 2011, Fifth Circuit Court of Appeals Judge Edith Jones told her colleague, Judge Dennis, to “shut up” as he questioned the government’s lawyer.⁷⁰ Judge Jones interrupted Judge Dennis during his questioning, saying he had “monopolized . . . seven minutes.”⁷¹ When Judge Dennis asked if he could continue with his questioning, Judge Jones asked if he would like to leave, and told him she wanted him to “shut up.”⁷² Judge Dennis responded, saying, “[d]on’t tell me to shut up.”⁷³

Although a judge silencing a party or lawyer by demanding she “shut up” does not necessarily show bias on the judge’s part, it does affect the public’s perception of whether the proceeding is just.⁷⁴ Commentators identify certain factors as impacting perceptions of procedural fairness, such as: “(1) whether the people involved had an opportunity to state their case (“voice”); (2) whether the authorities were seen as unbiased, honest, and principled (“neutrality”); (3)

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

65. *Id.*

66. Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & LAW 215, 215 (2001). *See also* Hafemeister, Garner & Bath, *supra* note 17, at 200.

67. Tyler, *supra* note 66, at 216.

68. Paul L. Friedman, *Taking the High Road: Civility, Judicial Independence, and the Rule of Law*, 58 N.Y.U. ANN. SURV. AM. L. 187, 198 (2001).

69. *See, e.g.*, Council, *supra* note 24. *See also* David Lat, *Judicial Diva Gone Wild? Chief Judge Jones Tells Judge Dennis to ‘Shut Up’*, ABOVE THE LAW (Sept. 21, 2011, 7:43 PM), <http://abovethelaw.com/2011/09/benchslap-of-the-day-chief-judge-jones-tells-judge-dennist-to-shut-up/>; Judge Watkins YOUTUBE Video, *supra* note 16.

70. Council, *supra* note 24.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See* Sankar, *supra* note 63, at 1241–42 (explaining that the public’s perception of the fairness of proceedings stems largely from how people are treated by authorities; authorities’ demeanor plays a substantial role in this perception).

whether the authorities were seen as benevolent and caring (“trustworthiness”); and (4) whether the people involved were treated with dignity and respect.⁷⁵ Accordingly, a judge silencing a party in anger, even if doing so does not impact the judge’s decision, will probably impact the party’s perception of the proceeding’s fairness.

Arguably, the answer to excessive displays of judicial anger is harsher disciplinary action from judicial conduct commissions and courts, the tribunals charged with correcting judicial misbehavior.⁷⁶ One commentator has argued that failure to meaningfully discipline judges who commit serious acts of misconduct discourages litigants from reporting such behavior to the proper authorities.⁷⁷ For example, the commentator states that a public reprimand and \$100.00 fine is clearly an insufficient punishment for a particularly egregious case of judicial bullying and instead recommends suspension without pay or removal.⁷⁸

Currently, judicial sanctioning tribunals discipline the worst judicial demeanor cases with public sanctions or, less frequently, removal.⁷⁹ However, a public reprimand is arguably inadequate to correct a bullying judge’s behavior, but not because of the sanction’s leniency. Rather, the publicity is likely to stigmatize the judge, potentially increasing the judge’s hostility, without providing any real behavioral correction.

II. TO MORE EFFECTIVELY PROTECT THE PUBLIC, DISCIPLINE SHOULD NOT STIGMATIZE THE ANGRY JUDGE

Apart from removal of a judge by involuntary resignation, the harshest forms of discipline are public. Many judicial conduct commissions list on their websites the names and offenses of judges who receive public sanctions.⁸⁰ Public sanctions satisfy those who seek transparency in judicial discipline, but

75. Michael M. O’Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 479 (2009). See also Singer, *supra* note 17, at 1458 (“At the trial court level, where citizens are more likely to experience the courts directly, expectations of procedural justice include fair and dignified treatment, personal participation or control over some aspect of the proceedings, the opportunity to be heard, trustworthiness, and neutrality.”) (citations omitted).

76. See Richmond, *supra* note 4, at 360.

77. *Id.*

78. *Id.*

79. See *In re Fuller*, 798 N.W.2d 408, 421 (S.D. 2011) (noting that states impose various punishments for serious judicial misconduct, ranging from public censure to suspension or removal). In the case of South Dakota Judge Pete Fuller, who gave a lawyer “the finger” during a court proceeding and routinely swore in open court, the Supreme Court of South Dakota ordered that the judge be involuntarily retired. *Id.* at 413–14, 421. However, the court provided that his retirement could be stayed if he met certain conditions. *Id.* at 421–22.

80. See, e.g., *Disciplinary Action*, TEX. ST. COMM’N ON JUD. CONDUCT, <http://www.sejc.state.tx.us/actions.asp> (last updated Jan. 29, 2014). *Public Discipline & Decisions 1961-Present*, ST. CAL. COMM’N ON JUD. PERFORMANCE, http://cjp.ca.gov/pub_discipline_and_decisions.htm (last visited Mar. 31, 2014).

are likely to shame the offending judge.⁸¹ Many consider this result to be the primary virtue of public discipline. However, the social science research suggests that shaming an already angry judge is likely to increase her anger and hostility, rather than motivate positive behavioral changes.⁸² This is especially true today because of the social media effect described in Part IV, which exacerbates the judge's shame by inviting the public's reaction to the judge. Arguably, private sanctions, like removal, may also cause the judge to feel shame, as the discipline is meant to express the commission's disapproval of the offending judge's conduct.⁸³ Therefore, although the disciplinary tribunal's express purpose is not to humiliate the judge, shame is a likely by-product of such sanctions.⁸⁴

Some believe that shaming an angry judge will incentivize her future good behavior and the good behavior of those judges who observe the public shaming.

81. Some judges are not shame-prone and are therefore unlikely to experience shame as a result of a commission or newspaper publicizing their wrongdoing. *Cf. infra* notes 93–100 and accompanying text (discussing the consequences of being shame-prone). Arguably, however, most judges suffer humiliation or shame as a result of public discipline. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 636 (1996) (noting that, generally speaking, “offenders punished by shaming penalties are likely to feel shame.”).

82. See *infra* notes 93–100 and accompanying text (exploring research on the effects of shame).

83. Removal is the most severe form of discipline. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 384 (1997). See also *Spruance v. Comm’n on Judicial Qualifications*, 532 P.2d 1209, 1225 (Cal. 1975) (en banc). In rejecting the lesser discipline of a public censure and mandating removal of a judge who participated in ex parte communications in criminal cases and made improper comments about counsel, the California Supreme Court noted that “[m]ere censure of petitioner would woefully fail to convey our utter reproval of any judge who allows malice or other improper personal motivations to infect the administration of justice.” *Fletcher v. Comm’n on Judicial Performance*, 968 P.2d 958, 991 (Cal. 1998) (quoting *Spruance*, 532 P.2d at 1225).

84. Although public discipline imposed on judges is not typically referred to as a “shaming penalty,” this discipline shares key attributes with shaming penalties. With public discipline, the judge's name, misconduct, and discipline are publicized to express the commission's condemnation of the behavior, as well as to invite some level of public participation in the condemnation. Similarly, shaming penalties are “designed to humiliate and degrade an offender in public while inviting some element of public participation in that humiliation and degradation.” Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1389–90 (2007). In both instances, the discipline's added heft comes from the humiliation the offenders presumably suffer from the public response. Despite the legal community's rejection of shaming penalties as an effective means of correction in the criminal law context (which is meant to be punitive), publicizing misbehavior remains one of the harshest forms of discipline that is imposed on misbehaving judges (which is not meant to be punitive). According to disciplinary tribunals, the purpose of imposing judicial discipline is generally to protect the public and ensure the integrity of the judiciary. See, e.g., *Dodds v. Comm’n on Judicial Performance*, 906 P.2d 1260, 1271 (Cal. 1995) (quoting *Furey v. Comm’n on Judicial Performance*, 743 P.2d 919, 931 (Cal. 1987)) (“The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield.”).

However, social science suggests that shame has few benefits.⁸⁵ In fact, shame might actually cause a judge to feel deeper hostility and anger, and prevent empathic responses from the judge.⁸⁶ The once angry judge then becomes the deeply isolated and resentful judge.⁸⁷

A. *What is Shame, and How Does it Impact Judges?*

Shame is defined as “a painful emotion caused by consciousness of guilt, shortcoming, or impropriety.”⁸⁸ It is a self-conscious emotion in that it involves “self evaluating the self.”⁸⁹ The experiences of shame and guilt differ in that shamed individuals feel small and worthless and want to hide or regress, whereas the guilty feel tense and remorseful about their behavior.⁹⁰

Shameful feelings may motivate prosocial behavior by reinforcing group values and thus ensuring that the members of the group conduct themselves appropriately.⁹¹ Shame also stimulates many types of goal-seeking behavior, some of which are socially valuable.⁹²

For those who are shame-prone,⁹³ however, shame can certainly backfire with the offender reacting in anger to discipline that shames.⁹⁴ According to June Tangney, a psychology professor who has researched and written extensively on shame and guilt, those who are shame-prone “appear relatively more likely to blame others (as well as themselves) for negative events, more prone to a

85. See JUNE PRICE TANGNEY & RONDA L. DEARING, SHAME AND GUILT 137 (2002) (noting that their results demonstrated that “no apparent benefit was derived from the pain of shame [and] [t]here was no evidence that shame inhibits problematic behaviors”)

86. See *id.* at 97 (“[S]hame can also motivate defensive feelings of anger and hostility, and a tendency to project blame outward.”).

87. See *id.* at 103 (explaining that shame-prone individuals are also likely to be easily angered).

88. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1073 (10th ed. 2002). Professor Martha Nussbaum defines shame as a feeling of inadequacy, specifically “a painful emotion responding to a sense of failure to attain some ideal state.” MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 184 (2004). Other commentators have explained that shame “is an extremely painful and ugly feeling that has a negative impact on interpersonal behavior.” TANGNEY & DEARING, *supra* note 85, at 3. Embarrassment has been described as a less dramatic and less enduring version of shame. Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL’Y & L. 645, 668 (1997).

89. TANGNEY & DEARING, *supra* note 85, at 2.

90. *Id.* at 18–19.

91. BROCK HANSEN, SHAME AND ANGER: THE CRITICISM CONNECTION 29 (2006). See also Nussbaum, *supra* note 88, at 211 (“[S]hame can at times be a morally valuable emotion, playing a constructive role in development and moral change.”).

92. Nussbaum, *supra* note 88, at 206.

93. See June Price Tangney, Kerstin Youman & Jeffrey Stuewig, *Proneness to Shame and Proneness to Guilt*, in HANDBOOK OF INDIVIDUAL DIFFERENCES IN SOCIAL BEHAVIOR 192, 192 (Mark R. Leary & Rick H. Hoye eds., 2009) (“Shame proneness and guilt proneness are stable personality dispositions representing the propensity to experience these moral emotions across time and situations.”).

94. TANGNEY & DEARING, *supra* note 85, at 3.

seething, bitter, resentful kind of anger and hostility, and less able to empathize with others in general.”⁹⁵ Other social science research also suggests a robust correlation between shame-proneness and anger.⁹⁶ Less shame-prone individuals are more likely to use their anger in a constructive manner than are their shame-prone counterparts.⁹⁷ In addition, Tangney posits that shame can hinder an empathetic response to another’s feelings.⁹⁸ This occurs as a result of the individual’s intense focus on his or her self, which diverts attention from others who may have been hurt by the individual’s behavior.⁹⁹ The shamed are unlikely to accept responsibility for their misbehavior or attempt to regain the trust of those whom they wronged.¹⁰⁰

A person’s response to shame depends in part on whether the shame is delivered in either a stigmatizing or reintegrative way.¹⁰¹ In the criminal context, stigmatizing shame refers to shame that focuses on the person, rather than on the behavior.¹⁰² This type of shaming labels the offender a deviant and makes no effort to de-label or reintegrate the person into his community.¹⁰³ Reintegrative shaming, on the other hand, refers to “expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, [that] are followed by gestures of reacceptance into the community of law-abiding citizens.”¹⁰⁴ Rather than reintegrating an individual, publicizing discipline tends to stigmatize an offender.¹⁰⁵ For example, Tangney explains that in the schoolroom context, methods of discipline such as putting students in the corner or writing their names on the chalkboard lead to public humiliation and

95. *Id.*

96. Jeffrey Stuewig, June P. Tangney, Caron Heigel, Laura Harty & Laura McCloskey, *Shaming, Blaming, and Maiming: Functional Links Among the Moral Emotions, Externalization of Blame, and Aggression*, 44 J. RES. PERSONALITY, 91, 92 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2848360/>.

97. TANGNEY & DEARING, *supra* note 85, at 103–04 (explaining that a shame-prone individual is likely to engage in aggressive behavior and is not typically inclined to engage in a constructive conversation about the behavior with the target of their anger). *See also* Tangney, Youman & Stuewig, *supra* note 93, at 200 (noting that “[p]eople suffering from the pain and self-diminishment of shame may become defensive and angry and attempt to deflect blame outward.”).

98. TANGNEY & DEARING, *supra* note 85, at 81 (stating that “shame can actually interfere with an other-oriented empathetic connection.”).

99. *Id.* at 83.

100. *See* Maxine D. Goodman, *Removing the Umpire’s Mask: The Propriety and Impact of Judicial Apologies*, 2001 UTAH L. REV. 1529, 1555–57 (2011) (providing examples of judges who apologized for wrongdoing by saying some variation of, “If my behavior offended anyone, I apologize.”).

101. *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 55 (1989).

102. *See id.*

103. *Id.*

104. *Id.*

105. *See* TANGNEY & DEARING, *supra* note 85, at 187–88.

stigmatization of the student.¹⁰⁶ Similarly, judicial sanctioning tribunals can stigmatize judges by imposing public reprimands for serious and repeated angry behavior; these tribunals often post the judges' names, offenses committed, and discipline on a "list of shame" on their websites.¹⁰⁷

B. Exploring the Theory Behind Shaming Penalties in the Context of Judicial Discipline

Many write about shaming penalties in the criminal law context.¹⁰⁸ These penalties typically involve broadcasting an offender's crime in order to "provoke communal outrage."¹⁰⁹ Examples of shaming penalties include requiring a defendant convicted of killing a man while driving drunk to stand at the crash scene wearing a sign saying "I killed Aaron Coy Pennywell While Driving Drunk"¹¹⁰ or requiring convicted shoplifters to run advertisements in their local newspapers providing their photographs and the crimes they committed.¹¹¹ A Utah juvenile court judge recently agreed to reduce a thirteen-year-old girl's community service for cutting several inches of hair from a three-year-old's head if the girl agreed to have her ponytail cut off in court.¹¹² Recently, a judge

106. *Id.* at 188.

107. *See supra* note 84 and accompanying text. Often, the same angry judge receives more than one public reprimand. *See* STATE OF CAL. COMM'N ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990-2009 (2009) available at http://cjp.ca.gov/res/docs/Miscellaneous/Statistical_Report_1990-2009.pdf ("Judges who had prior discipline were more likely to be disciplined again than judges who had not been disciplined . . . [F]rom 2000 to 2009, 55.7 percent of all discipline was imposed on previously disciplined judges."). The most common type of misconduct for which the Commission imposed discipline was demeanor/decorum. *Id.* at 14. Judges may need to be reprimanded more than once because of the stigma that results from public discipline; as commentators have suggested, shaming penalties might lead to greater anger and hostility on the part of the angry judge.

108. *See, e.g.,* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1088 n.167 (2009) (noting that prominent scholars have mixed viewpoints on the virtues of shaming penalties).

109. Brian Netter, *Avoiding the Shameful Backlash: Social Repercussions for the Increased Use of Alternative Sanctions*, 96 J. CRIM. L. & CRIMINOLOGY 187, 188 (2005). *See also* Markel, *supra* note 84, at 1389-90 ("Shaming punishments . . . are penalties designed to humiliate and degrade an offender in public while inviting some element of public participation in that humiliation and degradation.").

110. *See* Robert Stanton, *Drunken driver must wear sign about his crime*, HOUS. CHRON., Apr. 21, 2012, at B3; *Texas judge orders convicted drunk driver to public humiliation*, FOX NEWS (Apr. 21, 2012), <http://www.foxnews.com/us/2012/04/21/texas-judge-orders-convicted-drunk-driver-to-public-humiliation>.

111. *See* Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES, Jan. 16, 1997, at A1.

112. Lynn DeBruin, *'Shame' punishments like ponytail cutting increase*, SEATTLE TIMES (June 25, 2012, 5:50 AM), <http://seattletimes.com/avantgo/2018522313.html>. The teen's mother filed a complaint against the judge with the Utah Judicial Conduct Commission. *Id.*; Matthew Rosenbaum, *Haircuts to Signs: Public Shaming to Make Kids Straighten Up*, ABC NEWS (June 26, 2012), <http://abcnews.go.com/US/Parenting/haircuts-signs-public-shaming-make-kids-straighten/print?id=16655358>.

ordered a woman who drove on the sidewalk to avoid stopping behind a school bus to stand at the intersection where the bus stopped while wearing a sign saying, “[o]nly an idiot drives on the sidewalk to avoid a school bus.”¹¹³

Obviously, publicizing a judge’s wrongdoing differs from ordering an offender to stand on a street corner with a sign, advertising his offense. In the latter scenario, the offender physically bears the stigma as he publicizes his wrongdoing, whereas judges are removed from the public and thus can bear their stigma in private. In Professor Dan Kahan’s continuum of shaming penalties, publicizing a judge’s wrongdoing constitutes “stigmatizing publicity,” much like identifying sex offenders on websites or in advertisements.¹¹⁴ Stigmatizing publicity seeks “to magnify the humiliation inherent in conviction by communicating the offender’s status to a wider audience.”¹¹⁵ Publicity adds a level of severity to discipline that private corrections lack. Because many judges are elected and thus rely heavily on their professional reputations, bad publicity can certainly affect their standing among their peers and possibly even their livelihoods.

Commentators have outlined the virtues and vices of shaming penalties in the criminal law arena.¹¹⁶ Proponents of shaming penalties for criminal defendants contend that these penalties serve as a valuable alternative to incarceration at a time when prison overcrowding presents challenges for the criminal justice system.¹¹⁷ Thus, in terms of economics, punishment without imprisonment makes sense.¹¹⁸ Others contend that shaming is actually less degrading than imprisonment.¹¹⁹ Shaming punishments are also offered as a viable alternative to jail because they serve an expressive function, displaying the public’s disapproval of the criminal’s conduct, without inflicting physical harm.¹²⁰

113. Philip Caulfield, *Judge orders cleveland woman to wear an ‘idiot’ sign after she was caught driving on a sidewalk to avoid a school bus*, N.Y. DAILY NEWS (Nov. 6, 2012, 10:59 AM), <http://www.nydailynews.com/news/national/woman-wear-idiot-sign-traffic-gaffe-article-1.1197276>.

114. See Kahan, *supra* note 81, at 631–32.

115. *Id.*

116. See Gershowitz, *supra* note 108, at 1089–95; Kahan, *supra* note 81, at 644–46.

117. See Kahan, *supra* note 81, at 635 (“Much of the appeal [of shaming penalties] is simply that they are cheaper than imprisonment.”).

118. See Markel, *supra* note 84, at 1388–89; Aaron S. Book, Note, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653, 680–81 (1999). Commentators agree on this issue, regardless of their position on shaming penalties.

119. Dan M. Kahan, Postscript, *Unthinkable Misrepresentations: A Response to Tonry*, 46 UCLA L. REV. 1933, 1935 (1999).

120. Chad Flanders, Essay, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609, 611–12 (2006). See also Kahan, *supra* note 81, at 635 (explaining that, unlike imprisonment, shaming penalties “express appropriate moral condemnation”); Massaro, *supra* note 88, at 649 (stating that “[s]haming will clearly promote one end: communicating the shamer’s disgust for the offender and offense”).

Yet, commentators also challenge the effectiveness and morality of these penalties.¹²¹ Professor Dan Kahan, once a proponent of shaming penalties, now recognizes that shame “is afflicted with a social meaning handicap that, as a practical matter, makes it an unacceptable alternate sanction.”¹²² Thus, Kahan’s argument goes, the penalties, if meted out, reflect unacceptable partisanship.¹²³ Commentators also object to the effectiveness of these sanctions on psychological and sociological grounds, contending that shaming may not lead to a defendant’s rehabilitation and specific deterrence, but rather to retaliation and anger.¹²⁴ Given this shame-anger cycle, those who advocate shaming penalties do so only for nonviolent criminals because they believe that “[t]o force a violent offender to undergo public humiliation likely would lead to more violence.”¹²⁵

Furthermore, the effectiveness of shaming depends on several variables, including both the personality of the offender and the community in which the penalty is imposed, making the penalties’ value unpredictable.¹²⁶ The “shameless” will not feel the impact, whereas the shame-prone may react with anger to the discipline.¹²⁷ The effectiveness of shaming penalties “depends on an offender having attachments to others in whose eyes he or she can, as a result of those attachments, suffer shame.”¹²⁸ Therefore, an offender without attachments will not feel shamed, despite being admonished for his wrongdoing.¹²⁹ However, Toni Massaro explains that traditional shaming penalties have unpredictable behavioral consequences that “may include anger and a desire to retaliate against the one inflicting shame.”¹³⁰ Massaro also warns against shaming proponents’ “relative indifference” to this unpredictability.¹³¹ In summary, commentators do advocate for shaming to correct behavior in other

121. See Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2216 (2001) (arguing that shaming penalties are misguided as corrections when the goal is retributive because the state, not the public, is meant to impose punishment); NUSSBAUM, *supra* note 88, at 229–30 (noting that one criticism of shaming penalties is that they strip offenders of their dignity).

122. Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2075–76 (2006).

123. *See id.*

124. Massaro, *supra* note 88, at 648. *But see* Book, *supra* note 118, at 675 (stating that shaming has been shown to be psychologically effective).

125. Book, *supra* note 118, at 683–84.

126. *See* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1811 (2001) (explaining that “[s]haming sanctions work best in close-knit communities in which citizens interact frequently and share common values”).

127. *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 748–49 (1998).

128. *Id.* at 748.

129. *Id.* at 784–49.

130. Massaro, *supra* note 88, at 648.

131. *Id.*

areas of the law,¹³² yet, on balance, recent scholarship weighs against shaming penalties in the criminal arena.

The lessons derived from the use of shaming penalties in other contexts suggest that disciplining an angry judge with public sanctions might exacerbate the judge's anger and hostility. The goal of sanctioning judges is not to punish the offending judge, but rather to protect the public, which often includes rehabilitating the judge, and attempting to deter future wrongdoing.¹³³ The consequences of shaming a judge who has engaged in particularly egregious or repeated displays of hostility are unpredictable at best,¹³⁴ and destructive at worst.¹³⁵

Commentators who advocate for using shame in discipline often do so in the context of restorative justice where the shame is reintegrative. Reintegrative shame involves an initial expression of disapproval of the behavior rather than the offender, and focuses on reintegrating the offender into his community.¹³⁶ This approach requires a process that the offender feels is just and one that surrounds the offender with members of his community.¹³⁷ The path to restorative justice is completely unlike the typical judicial disciplinary process in which a judicial conduct commission, typically made up of judges, lawyers, and non-lawyers, prosecutes the dispute in an adversarial setting.¹³⁸ Shame from the judicial disciplinary process, exacerbated by the social media effect, is thus isolating, not reintegrative.

C. Potential Virtues of Shaming Penalties for Judges

Some may contend that public sanctions like shaming are fitting for judges because they are the only type of discipline that will get their attention. In light

132. See, e.g., Gershowitz, *supra* note 108, at 1062–63 (arguing that courts should publicize the names of prosecutors who engage in misconduct because without such public shaming, prosecutors experience little pressure to act appropriately); Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 664 (2011) (arguing that small businesses should use shaming to both punish trademark bullies and deter others from engaging in similar behavior); Skeel, *supra* note 126, at 1812–13 (explaining that the shaming of corporations, both by the courts and private entities, is particularly effective because corporations and their directors have very strong interests in their reputations).

133. See *In re Hocking*, 546 N.W.2d 234, 245 (Mich. 1996) (“[O]ur primary charge is to fashion a penalty that maintains the honor and the integrity of the judiciary, deters similar conduct, and furthers the administration of justice We must carefully maintain the distinction between protection and punishment.”).

134. See Massaro, *supra* note 88, at 648.

135. See Susan Hanley Duncan, *Restorative Justice and Bullying: A Missing Solution in the Anti-Bullying Laws*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 285–86 (2011).

136. BRAITHWAITE, *supra* note 101, at 55.

137. *Id.* (noting that “[t]he nub of this deterrence is not the severity of the sanction but its social embeddedness; shame is more deterring when administered by persons who continue to be of importance to us.”).

138. See Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811, 811–12 (1988) (explaining the basic structure of most judicial conduct systems).

of the heavy emphasis on judge's reputations, the argument goes, public sanctions *should* motivate prosocial behavior by judges. Along the same lines, some may argue that the social media effect, which can produce results ranging from harsh public criticism to death threats, is fitting punishment because the angry judge deserves whatever collateral, unintended consequences flow from the discipline. Additionally, as individuals concerned with their public image, judges may be more impacted by their community's negative perception of them, making rehabilitative justice more appropriate for them than it is for blue-collar criminals.¹³⁹

However, anecdotal evidence does not support the idea that shaming a judge will reform her angry behavior,¹⁴⁰ and empirical evidence is scarce.¹⁴¹ Additionally, if the goal of judicial discipline is as disciplinary tribunals say it is — to protect the public, not punish the offender¹⁴² — this argument fails. For ordinary criminals, discipline is meant to punish, and discipline has well-known objectives including deterrence, rehabilitation, retribution, and incapacitation (for incarceration).¹⁴³ But for judicial discipline to meet its objective of guiding judges and protecting the public, it should not be assessed by the extent of the judge's humiliation as a result of his misconduct but rather by the discipline's effectiveness in correcting the judge's angry behavior.

139. *C.f.* Mirela V. Hristova, *The Case for Insider-Trading Criminalization and Sentencing Reform*, 13 *TRANSACTIONS* 267, 268 (2012).

140. The available anecdotal evidence includes several examples of angry judges who continue to display anger in the courtroom, despite being sanctioned. For instance, King County District Court Judge Judith Eiler became notorious for her hostile behavior, particularly toward pro se litigants. *See In re Eiler*, 236 P.3d 873, 874–75 (Wash. 2010) (en banc). Over the course of about eight years, Judge Eiler was accused of repeatedly addressing litigants in a rude and condescending manner. *Id.* at 875. On August 5, 2010, the Washington Supreme Court of Washington suspended Judge Eiler for five days without pay. *Id.* Five years before her 2010 suspension, Judge Eiler had been reprimanded for exhibiting similarly hostile behavior. *Id.* The judicial conduct commission that investigated the 2010 case censured Judge Eiler and recommended a ninety day unpaid suspension. *Id.* In rejecting the recommendation and instead imposing a five-day suspension, the Washington Supreme Court noted the ineffectiveness of the 2005 discipline in motivating Judge Eiler to adjust her courtroom demeanor, and acknowledged the severity of a ninety-day suspension. *Id.* at 882. In any event, the court ultimately held that “[i]t [was] clear that a second reprimand or censure without any suspension at all would [have been] too lenient.” *Id.*

141. *See Abel*, *supra* note 12, at 1031–33 (noting the lack of empirical data on judicial discipline).

142. *See, e.g., In re Davis*, 82 S.W.3d 140, 150 (Tex. Spec. Ct. Rev. 2002) (“However, we are not charged with punishing but with providing guidance to judges and protection to the public.”).

143. *See Forst*, *supra* note 10, at 1262 (noting that the typical objectives of criminal punishment include deterrence, rehabilitation, retribution, and incapacitation). According to Jeremy Bentham, “[t]he immediate principal end of punishment is to control action.” JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 170 (1963).

III. THE SOCIAL MEDIA EFFECT

Today, transparency is “in,”¹⁴⁴ and commentators, including lawyers and the public, have criticized the secretive nature of judicial discipline proceedings.¹⁴⁵ In a democracy, the argument goes, the public is entitled to know about the behavior of its public figures.¹⁴⁶ This argument is particularly compelling when judges are elected, as most state court judges are.¹⁴⁷

Yet, regardless of what sanction a judicial conduct tribunal imposes (or sometimes even before a sanctioning tribunal gets involved), judges’ angry outbursts will often be publicized via social media because of the public’s fascination with misbehaving judges.¹⁴⁸ The lack of transparency of formal judiciary disciplinary proceedings is often remedied by informal means. Websites such as *RobeProbe*,¹⁴⁹ *Above the Law*,¹⁵⁰ *Citizens for Legal Responsibility*,¹⁵¹ *Citizens for Judicial Accountability*,¹⁵² and *Very Bad Judges*¹⁵³ are devoted to documenting and publicizing judicial behavior.

This phenomenon is changing the disciplinary landscape in terms of not only what the public knows about judges, but also the consequences of judges’ misbehavior. Arguably, as a result of the social media effect, the judge suffers the impact of public criticism in addition to any discipline for wrongdoing. For those judges who are elected officials, the media attention can have very real consequences, including a loss of livelihood.¹⁵⁴ For the shame-prone judge, this

144. See, e.g., MARTY MAKARY, UNACCOUNTABLE 5–6 (2012) (advocating for greater transparency in the health care industry in order to improve hospital practices); DON TAPSCOTT & DAVID TICOLL, THE NAKED CORPORATION: HOW THE AGE OF TRANSPARENCY WILL REVOLUTIONIZE BUSINESS xi–xv (2003) (highlighting the value of corporate transparency).

145. See Glenn Puit, *ACLU Lawsuit: Secrecy of Judicial Complaints Targeted*, LAS VEGAS REV.-J. Nov. 22, 2002, available at 2002 WLNR 440316; *supra* note 5 and accompanying text.

146. See David A. Harris, Essay, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 794–95 (1993) (citing JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 1–3 (1949)).

147. Most states elect at least some of their judges. Sankar, *supra* note 63, at 1250.

148. See The Honorable Dana M. Levitz, *So, You Think You Want to Be a Judge*, 38 U. BALT. L. REV. 57, 57 (2008) (“The American public is fascinated by judges. How else do you explain Judge Wapner, Judge Ed Koch, Judge Judy, Judge Roy Brown, Judge Joe Brown, Judge Hatchett, etc.?”).

149. About, ROBEPROBE, <http://robeprobe.com/about.php> (last visited Apr. 6 2014) referring to itself as the “[w]orld’s most trusted judge rating site.”).

150. About, ABOVE THE LAW, <http://abovethelaw.com/about/> (last visited Apr. 6, 2014).

151. CITIZENS FOR LEGAL RESPONSIBILITY, <http://clr.org> (last visited Apr. 6, 2014).

152. CITIZENS FOR JUDICIAL ACCOUNTABILITY, <http://www.judicialaccountability.net> (last visited Apr. 6, 2014). This website claims to expose “the denial of fundamental rights by judges and lawyers who place themselves not only above the law, but beyond the law” *Id.*

153. VERY BAD JUDGES, <http://verybadjudges.blogspot.com> (last visited Apr. 6, 2014).

154. See, e.g., *Judicial Elections-Alhambra Municipal Court-Michael A. Kanner and Dennis Orfirer-Election Challenger Orfirer Points to Judge Kanner’s Public Reproval*, METROPOLITAN NEWS COMPANY (Jan. 25, 1996), <http://www.lexis.com/research/retrieve?cc=&pushme=1&tmp>

stigmatizing publicity would certainly exacerbate the impact of any shame flowing from the judge's misdeeds, as the public's response often targets the judge himself, not just the judge's misdeeds.¹⁵⁵

A. Case Studies Demonstrating the Impact of the Social Media Effect

In the instances described below, the public not only learned of the judge's behavior through means other than public discipline by a judicial conduct commission, but also appeared to drive the disciplinary process. These three examples illustrate the social media effect: the role social media and the press play in stigmatizing the judge and in affecting the formal disciplinary process.

1. Judge William Adams

In 2011, Aransas County, Texas Court-at-Law Judge William Adams gained notoriety when his twenty-three-year-old daughter posted a video on YouTube showing the judge violently beating her with a belt.¹⁵⁶ After the tape "went viral" on YouTube, getting over 7 million hits,¹⁵⁷ the Texas Supreme Court suspended Judge Adams indefinitely with pay, and the Texas State Commission on Judicial Conduct commenced an investigation into Judge Adams' alleged wrongdoing.¹⁵⁸ The public's reaction was immediate and wide reaching. Judge

FBSel=all&totaldocs (describing a situation in which a lawyer attempted to defeat a judicial election by publicizing a commission's reproof of the judge). *See also Judge Michael Kanner Says He Won't Seek Reelection*, METROPOLITAN NEWS COMPANY (Oct. 22, 2001), <http://www.metnews.com/articles/kann102201.htm> (explaining that the judge ultimately won reelection, but the race was "hotly contested"). *But see infra* notes 170–85 (describing the sanctioning of Judge Sharon Keller and how she came to remain on the bench following the negative findings of a judicial commission).

155. *See* TANGNEY & DEARING, *supra* note 93, at 103–04 (highlighting the link between shame-proneness and anger).

156. *See Ruling Against Judge Seen Beating Daughter*, N.Y. TIMES (Nov. 12, 2011), http://www.nytimes.com/2011/11/13/us/ruling-against-judge-seen-beating-daughter.html?_r=0. The public did not learn of this incident via angry courtroom behavior or a complaint filed against the judge, but rather from the online posting.

157. *See* Shoehedgie, *Judge William Adams beats daughter for using the internet . . .*, YOUTUBE (Oct. 27, 2011), <http://www.youtube.com/watch?v=W19y3SIPt7o>. An Aransas County attorney told the press that when Judge Adams' daughter posted the video, Judge Adams' office was inundated with emails and calls, including some from outside the United States. Joe Sutton & Ed Payne, *Judge In Video Beating Seeks Reinstatement; Ex-Wife Is Opposed*, FOX 2 NOW (Oct. 4, 2012, 11:55 AM), <http://fox2now.com/2012/10/04/judge-in-video-beating-seeks-reinstatement-ex-wife-is-opposed/>.

158. *See* Sutton & Payne, *supra* note 157.

Adams received death threats,¹⁵⁹ and protestors demanded that he resign.¹⁶⁰ Due in part to the public outcry, the judicial conduct commission released a public statement explaining that it was investigating the matter and asking that no additional complaints be filed.¹⁶¹

Ultimately, the commission disciplined Judge Adams with a public warning because the videotape “cast reasonable doubt on his capacity to act impartially as a judge and interfered with the proper performance of his judicial duties . . .”¹⁶² In addition, the commission referenced the testimony of attorneys who regularly practiced before Judge Adams, describing incidents in which he lost his temper at lawyers in his courtroom, specifically the former Aransas County Attorney.¹⁶³ The commission concluded that Judge Adams violated Canons 3B(4) and 4A of the Texas Code of Judicial Conduct, as well as Article V, § 1-a(6)A of the Texas Constitution.¹⁶⁴

Today, Judge Adams is back on the bench, serving the remainder of his term that will end in 2014;¹⁶⁵ the Texas Supreme Court reinstated him after he agreed not to challenge the public warning.¹⁶⁶ In terms of the public’s response to Judge Adams, a Facebook page titled “Don’t Re-elect Judge William Adams” has attracted more than 31,000 likes¹⁶⁷ and a page titled “Prosecute Judge

159. Jon Bershad, *After Police Investigation Open, Texas Judge Response To Beating Video: 'It's Not As Bad As It Looks On Tape'*, MEDIAITE (Nov. 2, 2011, 3:28 PM), <http://www.mediaite.com/online/after-police-investigation-opens-texas-judge-responds-to-beating-video-its-not-as-bad-as-it-looks-on-tape/>.

160. Daniel Tovrov, *Judge William Adams: Protesters Demand Judge's Resignation*, INTERNATIONAL BUS. TIMES (Nov. 8, 2011, 11:52 AM), <http://www.ibtimes.com/judge-william-adams-protesters-demand-judges-resignation-366896>.

161. Public Statement: No. PS-2012-1, Tex. State Comm’n on Jud. Conduct (Nov. 2, 2011), available at <http://www.scjc.state.tx.us/pdf/PublicStatement.pdf>.

162. Public Warning: Honorable William Adams County Court at Law Judge Rockport, Aransas County, Texas, Tex. State Comm’n on Jud. Conduct (Sept. 4, 2012), available at <http://www.scjc.state.tx.us/>.

163. *Id.*

164. *Id.* The Texas Constitution permits judicial discipline in response to “willful or persistent conduct that is clearly inconsistent with the proper performance of [a judge’s] duties or casts public discredit upon the judiciary or the administration of justice.” TEX. CONST. art. V, § 1-a(6)(A).

165. *Judge suspended in video beating returns to bench*, HOUS. CHRON. (Nov. 11, 2012), <http://www.chron.com/neighborhood/news/houston-texas/article/Suspension-lifted-for-judge-who-beat-daughter-4013671.php>; *Texas judge suspended after video showed him beating his daughter returns to bench*, FOX NEWS (Nov. 14, 2012), <http://www.foxnews.com/us/2012/11/14/texas-judge-suspended-after-video-showed-him-beating-daughter-returns-to-bench>.

166. Approval of Agreed Motion to Lift Order of Suspension of Judge, No. 12-9137 (Tex. Nov. 6, 2012). Judge Adams’ former wife has publicly opposed his returning to the bench, telling the press that she wants to “protect the public from being judged by a person that I feel does not have the capacity to act fairly and effectively as a judge as evidence[d] [by] how he has treated his own family over the years.” Sutton & Payne, *supra* note 157.

167. *Don’t Re-Elect Judge William Adams*, FACEBOOK, <http://www.facebook.com/pages/Dont-Re-Elect-Judge-Wlliam-Adams/217089511694481> (last visited Apr. 7, 2014).

William Adams” has over 700 likes.¹⁶⁸ Because of the threats the judge received after the video was released, the Aransas County courthouse where Judge Adams presides now has additional security, including metal detectors at the building’s entrance.¹⁶⁹

2. Judge Sharon Keller

In another example of a strong public reaction to judicial behavior, on September 25, 2007, Judge Sharon Keller, then the Presiding Judge of the Texas Court of Criminal Appeals, infamously refused to keep her clerk’s office open outside business hours, even though late filings are typical on days when executions are scheduled.¹⁷⁰ As a result of her refusal, lawyers for Michael Richard were unable to file a last-minute appeal and Richard was executed later that night.¹⁷¹

In February 2009, the Texas State Commission on Judicial Conduct sent Judge Keller a notice advising her that the Commission had initiated formal proceedings against her as a result of the incident.¹⁷² The Texas Supreme Court appointed Texas State District Court Judge David Berchermann, Jr. as Special Master to conduct the necessary hearings and make a recommendation to the commission on the matter.¹⁷³ Following a hearing, the Special Master concluded that although Judge Keller’s conduct was not exemplary, she did not engage in conduct so egregious to warrant removal from office.¹⁷⁴ The Special Master also remarked that her actions did not warrant any sanction “beyond the public humiliation she has surely suffered.”¹⁷⁵

In June 2010, the commission disregarded the Special Master’s conclusions and voted to impose a public warning against Judge Keller, finding that she committed several violations of the Texas Constitution and the Texas Code of Judicial Conduct, including “willful or persistent conduct that casts public discredit on the judiciary.”¹⁷⁶ However, a Special Court of Review reversed this decision on the grounds that the commission lacked the authority to impose this

168. *Prosecute Judge William Adams*, FACEBOOK, <http://www.facebook.com/pages/prosecute-Judge-William-Adams/235101293218440> (last visited Apr. 7, 2014).

169. *Texas judge suspended after video showed him beating daughter returns to bench*, *supra* note 165.

170. Gretel C. Kovach, *A Texas Judge, Accused of Misconduct, Draws Mixed Opinions on Her Fairness*, N.Y. TIMES, Mar. 8, 2009, at A14.

171. *Id.*

172. *In re Keller*, No. 10-0001, at 2 (Tex. Spec. Ct. Rev. Oct. 11, 2010), available at http://pdfserver.amlaw.com/tx/20101011_Final_Opinion.pdf.

172. *Id.* at 3.

173. *Id.* at 3.

174. *Id.*

175. *Id.*

176. *Id.* at 5–7.

sanction under the Texas Constitution.¹⁷⁷ Therefore, the Special Court of Review vacated the commission's order and dismissed the commission's charging document against Judge Keller.¹⁷⁸

Judge Keller's actions and the resulting disciplinary action received a substantial amount of press. Not only did individuals weigh in on the case against Judge Keller, but organized groups protested her conduct, her continued tenure on the bench, and the commission's actions and decisions. For example, in a novel type of pleading, a group of twenty-four "judicial ethics experts" submitted an "Ethics Experts' Declaration" to the commission during the pendency of the proceeding,¹⁷⁹ alleging Judge Keller violated judicial ethical rules by "deciding cases despite her lack of impartiality and the appearance of impartiality, which required that she recuse herself . . ."¹⁸⁰ A separate group of individuals from the Texas Moratorium Network created a website, "sharonkiller.com," aimed at notifying the public of Judge Keller's conduct and the commission's response.¹⁸¹

On June 26, 2012, several former presidents of the Texas Criminal Defense Lawyers Association posted an article on the Huffington Riposte blog, urging readers to contribute to the campaign of Judge Keller's opponent, Keith Hampton.¹⁸² The blog states that Judge Keller "brought national embarrassment to the Texas judiciary and legal system" when she refused to keep her clerk's office open late on the date of Richard's execution.¹⁸³ On November 6, 2012, Judge Keller won reelection to the Texas Court of Criminal Appeals.¹⁸⁴

177. *Id.* at 34–35. Pursuant to the Texas Constitution and Code, the only available remedy was to dismiss the charging document; issuing a public warning was not available to the commission as a sanction. *Id.*

178. *Id.* at 35.

179. Mary Alice Robbins, *Ethics Experts Claim CCA Presiding Judge Sharon Keller Should Go*, TEX. LAW., (Apr. 27, 2009, 12:00 AM), <http://www.texaslawyer.com/id=1202430175566>. The commission did not solicit the Declaration and was unfamiliar with this type of submission. *Id.*

180. Ethics Experts' Declaration at 1, Inquiry Concerning a Judge, No. 96 (Tex. State Comm'n Judicial Conduct Apr. 20, 2009), available at <http://pdfserver.amlaw.com/tx/TEXAS.pdf>.

181. *Sharon Keller Gets off on Technicality; Reputation of Texas Judiciary Still Tarnished*, SHARONKILLER.COM, <http://sharonkiller.com/> (last visited May 14, 2014). The home page argues that the Texas Court of Criminal Appeals should impeach Judge Keller and remove her from office. *Id.*

182. *Presiding Judge Sharon Keller Must Go!*, HUFFINGTON RIPOSTE (June 26, 2012), huffingtonriposte.blogspot.com/2012/06/presiding-judge-sharon-keller-must-go.html.

183. *Id.*

184. Terrence Stutz, *Sharon Keller re-elected to Texas criminal appeals court; Geraldine Miller leads in education board race*, DALLAS NEWS (Nov. 6, 2012, 11:38 PM), www.dallasnews.com/news/politics/state-politics/20121106-sharon-keller-re-elected. According to Keller, death penalty opponents protested at her house and she received "at least one credible death threat" as a result of the controversy. See Michael Graczyk, *Judge Sharon Keller speaks out after reprimand tossed*, DALLAS NEWS (Oct. 20, 2010, 8:41 AM), <http://www.dallasnews.com/news/state/headlines/20101020-Judge-Sharon-Keller-speaks-out-after-7068.ece>. Keller considered

Commentators opine she was reelected because of the large percentage of Republican straight-ticket voters in Harris County.¹⁸⁵

3. *Judge William Watkins*

A third example of widespread publicity of judicial misbehavior and a strong, negative public reaction occurred when Judge William Watkins was caught on camera screaming at Arthur Hage, as described in Part I of this Article.¹⁸⁶ YouTube users posted many comments in response to the video, labeling Judge Watkins “a piece of human garbage,” calling for him to be put “behind bars,” and suggesting he needs anger management classes.¹⁸⁷ One commentator wrote: “This worries me! My boyfriend . . . and I have to go before him tomorrow over child support for our special needs child[.] I hope he don’t [sic] scream at me . . .”¹⁸⁸

B. *What these Examples Demonstrate about the Public’s Role in Judicial Discipline*

As these examples show, any void in the transparency of judicial misconduct and resulting discipline is often filled by informal means, through the traditional press and social media. Some will look favorably on the publicity and the public’s ability to weigh in on the judge’s conduct. However, the publicity and resulting public reaction is troubling because it changes the consequences a judge suffers for her misbehavior. Regardless of whether the judge “deserves” the public reaction and resulting humiliation or anger, these consequences differ markedly from what disciplinary tribunals intend judges to experience as a result of public discipline.

IV. IN LIGHT OF THE SOCIAL MEDIA EFFECT AND LIKELY CONSEQUENCES OF SHAMING AN ANGRY JUDGE, CORRECTIONS SHOULD BE PREVENTIVE, CONSTRUCTIVE, AND RESTORATIVE

Disciplinary tribunals should either remove an offending judge or strive to correct his behavior without stigmatizing or alienating him. Restorative justice provides insight into how to use shame while avoiding its stigmatizing impact; organizations involved in educating judges and regulating their behavior should use these insights to make today’s discipline more effective at rehabilitating the

resigning, but decided against it because she did not want to appear to have surrendered to the pressure.

185. See Kolten Parker, *Past haunts judge seeking re-election*, HOUS. CHRON. (Oct. 24 2012), <http://www.chron.com/news/politics/article/Keller-faces-opponent-and-her-history-in-November-3979348.php>.

186. See *supra* notes 25–36 and accompanying text.

187. Judge Watkins YOUTUBE Video, *supra* note 16, at “Top Comments.”

188. *Id.*

angry judge. This approach would strive to make shame reintegrative, rather than simply stigmatizing.¹⁸⁹

At the outset, organizations involved in educating judges and regulating judicial behavior should strive to keep judges out of the disciplinary process by employing informal means of correcting misbehavior before it becomes serious or frequent. Bar associations, lawyers' assistance programs, the American Judicature Society,¹⁹⁰ and judicial education organizations¹⁹¹ should aim to educate judges not only about proper judicial demeanor, but also about how to maintain this demeanor during their time on the bench. Given that a judge is most likely to respond to corrections from someone whom he trusts,¹⁹² corrections should include peer-to-peer meetings about angry behavior, ideally before the behavior escalates in severity or frequency. Furthermore, to the extent possible, reconciliation-type meetings with the offended lawyer or party would serve as a valuable tool for correcting a judge's angry behavior.

A. Continuing and Introductory Judicial Education

Education, for both new and more seasoned judges, should emphasize both the importance of demeanor and how to maintain it while on the bench. Judges should be taught and continually reminded about the importance of procedural fairness, regulating their emotions, decision fatigue, and the many stressors accompanying judging that can impact demeanor. Any judicial education should start with the premise that courtesy in the courtroom is important because participants in the legal system assess fairness on the basis of how they are treated.¹⁹³ Resources concerning procedural fairness should be made available to all judges. Judges should also be taught about emotional intelligence so that they can regulate their emotions instead of trying to suppress them.¹⁹⁴ In this

189. See *infra* Part IV.C.

190. See *About AJS*, AM. JUDICATURE SOC'Y, <http://www.ajs.org/about> (last visited Apr. 8, 2014) (explaining that the American Judicature Society was formed to "promote[] fair and impartial courts through research, publications, education, and advocacy for judicial reform.").

191. See, e.g., *About Us*, TEX. CTR. FOR JUDICIARY, <http://yourhonor.com/about> (last visited Apr. 8, 2014) (explaining that the Texas Center for the Judiciary's mission of "Judicial Excellence Through Education" is fulfilled "on a daily basis in a variety of ways including continuing judicial education programs, new judge mentoring programs, an integrated curriculum design, comprehensive faculty development, and the development of Bench Books and online resources for Texas judges."); *Education*, JUDICIAL EDUC. CENTER, <http://jec.unm.edu/education> (last visited Apr. 8, 2014) (providing resources for New Mexico judges).

192. See *infra* notes 219–21 and accompanying text.

193. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 73 (1990). As Terry Maroney explains in her article about angry judges: "[t]hrough complete suppression of judges' emotions is not a worthy goal, regulation of these emotions is The innate human capacity for regulation allows us continually to try and steer the emotional course best suited to the situation at hand." Maroney, *supra* note 2, at 1217.

194. See Maroney, *supra* note 2, at 1217.

way, judges could be better prepared for the challenges of serving as “the decider.”¹⁹⁵

This education should be available for all judges, not just those who exhibit anger and hostility in the courtroom. Judicial disciplinary organizations should work to preempt judges from engaging in angry behavior by making this education typical for all members of the judiciary.¹⁹⁶ In addition, judicial training organizations should teach judicial support personnel about the role decision fatigue may play in the judge’s behavior and decision-making. Support staff can be trained to ensure that judges take breaks throughout the day; even a short break before the end of a crowded docket may replenish the judge’s mental reserves.¹⁹⁷ Ultimately, support personnel may prove valuable in recognizing the signs of increasing strain and helping judges cope with the stress of decision-making.

In 2009, the American Bar Association (ABA) approved a resolution urging states to establish voluntary education programs intended to provide those considering a judicial career a better understanding of the judge’s role and responsibilities.¹⁹⁸ A study group of the ABA’s Standing Committee on Judicial Independence has also recommended some type of formal preparation for those who hope to be judges.¹⁹⁹ Programs providing Introductory Judicial Education (IJE) would develop “a cadre of potential jurists who have exhibited the interest and the commitment to acquire an extra educational credential that potentially could make them better qualified for the judiciary than other lawyers.”²⁰⁰

Professor Keith Fisher, who contributed to a symposium held to determine the value of IJE, has identified “[d]eclining [p]ublic [c]onfidence in the [j]udiciary” as one of the key reasons for such programs.²⁰¹ Fisher also highlighted the need for judges to treat parties and lawyers in their courtrooms with dignity and respect.²⁰² In light of the negative perceptions of the judiciary, largely based on some judges’ angry behavior, Fisher proposed that an IJE curriculum could include courses in developing listening skills, identifying personality conflicts,

195. George W. Bush coined this term to mean the person responsible for making countless difficult decisions. See ROY F. BAUMEISTER & JOHN TIERNEY, *WILLPOWER: REDISCOVERING THE GREATEST HUMAN STRENGTH* 90 (2011).

196. See Keith R. Fisher, *Education for Legal Aspirants*, 43 AKRON L. REV. 163, 164 (2010) (highlighting that many judges are ill-prepared for the various challenges associated with being a judge).

197. See Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT’L ACAD. SCI. U.S. 6889, 6892 (2011) (presenting evidence suggesting that a judge’s “tendency to rule in favor of the status quo” can be combatted by taking a break and eating).

198. Fisher, *supra* note 196, at 164.

199. *Id.* at 169–70.

200. *Id.*

201. *Id.* at 189.

202. *Id.* at 188.

docket management, financial planning, and proper treatment of court personnel, among other topics.²⁰³

IJE or on-the-job education during a judge's tenure, could prove costly, particularly if it is well executed. However, this cost should be weighed against the expenses required for state judicial conduct commissions to investigate and process complaints about angry judges, along with the added costs of state courts reviewing the commissions' decisions.

B. Peer-to-Peer Mentoring and Counseling

Ideally, methods of correcting judicial behavior should adhere to the same principle of procedural fairness set forth earlier in this Article: people perceive the fairness of proceedings in which they are involved based on whether the relevant legal authorities treated them with dignity.²⁰⁴ Similarly, procedural justice adherents suggest that when the disciplinary process treats people fairly and with dignity, they will view laws and authorities as more legitimate and more worthy of their respect.²⁰⁵ People then become self-regulating.²⁰⁶

This notion of procedural fairness is particularly important as it relates to discipline that stigmatizes. When shame makes an offender feel like an outcast, alienated from his community, the offender is likely to reject the sanctioning authority and thus fail to experience the prosocial consequences of the shame.²⁰⁷ Shaming works most effectively to modify offending when someone who is important to the offender imposes it.²⁰⁸

In the context of judicial discipline, this research suggests that the more a judge feels that the judicial disciplinary process is fair and administered by a trusted authority, the more likely the judge is to cooperate with the process and follow the governing ethical guidelines.²⁰⁹ Although not yet studied, some judges appear to distrust the process and the sanctioning bodies; these judges seem to believe that discipline is meted out arbitrarily.²¹⁰ Furthermore, judicial conduct commissions are *not* the judge's community, nor are they composed entirely of members of the judge's community.²¹¹ Accordingly, to the extent

203. *Id.* at 194–99.

204. *See supra* notes 17–19 and accompanying text.

205. Tyler, *supra* note 19, at 308.

206. *Id.*

207. *See* BRAITHWAITE, *supra* note 101, at 55.

208. *Id.*

209. *See supra* notes 17–19, 136–37 and accompanying text.

210. *See, e.g.,* Graczyk, *supra* note 284 (explaining that Judge Sharon Keller was critical of the Texas Commission of Judicial Conduct, complaining that it often overstepped its authority). Additionally, lawyers who represented Judge Nathan Hecht before the Texas Judicial Conduct Commission complained that discipline by the Commission is “arbitrary and capricious; they just do what they want to do” Dexheimer, *supra* note 5.

211. *See, e.g.,* *Members & Meetings*, COMM’N ON JUD. PERFORMANCE, http://cjp.ca.gov/members_meetings.htm (last visited Apr. 9, 2014) (explaining that the California Commission on

possible, and especially with respect to minor demeanor issues that have not yet escalated to formal disciplinary matters, the corrections process should be modified to allow a community of a judge's peers to implement remedial measures.

Organizations that facilitate peer-to-peer counseling already exist, but are generally used for other types of challenges.²¹² In the context of stress and alcohol and drug abuse, judges can participate in peer-to-peer counseling through state bar Lawyer Assistance Programs.²¹³ These programs help judges identify substance abuse and mental health problems, and promote early intervention and treatment.²¹⁴ These programs often provide confidential peer mentoring by other judges who have experienced similar problems.²¹⁵ Judges typically volunteer for these programs, both as mentors and mentees. For example, the Texas Lawyers Assistance Program maintains a database of volunteer judges who are willing to provide support to other judges struggling with substance abuse or mental health disorders.²¹⁶ The Texas program also provides contact information for the ABA's Judges Helping Judges National Hotline, a program designed to help judges obtain assistance for themselves or their colleagues while maintaining confidentiality.²¹⁷

Accordingly, state bar associations that have not already done so should establish programs like Judges Helping Judges, or at least expand the scope of existing programs to offer informal, confidential means of resolving demeanor problems (not just substance abuse issues) before formal disciplinary proceedings are initiated. Ideally, judicial conduct commissions could then refer

Judicial Performance is composed of eleven members: one appellate court judge, two Superior Court judges, two attorneys, and six lay citizens).

212. Some jurisdictions offer mentoring opportunities for both new judges and more seasoned judges who face particular challenges. *Judicial Resources*, TEX. CENTER FOR JUDICIARY, <https://www.yourhonor.com/judicial-resources> (last visited Apr. 9, 2014) (establishing a "Find a Mentor" program). In addition, certain judicial conduct commissions specifically allow mentoring in lieu of traditional discipline. *See, e.g.*, TEX. CONST., art. V, § 1-a(8) (permitting the Judicial Conduct Commission to, after an investigation, require a judge to obtain "additional training or education"); N.M. JUDICIAL STANDARDS COMM'N R. 33(C) (2010), *available at* http://nmjsc.org/docs/SKMBT_C55210041915041.pdf (allowing for "[n]on-disciplinary dispositions," including "professional counseling, mentorship, or other assistance for the judge.").

213. *See, e.g.*, *Texas Lawyers Assistance Program*, ST. BAR TEX., <http://www.texasbar.com/AM/Template.cfm?Section=Judges1&Template=/CM/HTMLDisplay.cfm&ContentID=15127> (last visited Apr. 9, 2014); *New Mexico and Judges Assistance Program*, ST. BAR N.M., <http://www.nmbar.org/JLAP/JLAP.html> (last visited Apr. 9, 2014).

214. *See, e.g.*, *New Mexico and Judges Assistance Program*, *supra* note 213.

215. *See, e.g.*, *Texas Lawyers Assistance Program*, *supra* note 213.

216. *Id.*

217. *Id.* *See also* AM. BAR ASS'N, 2010 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS 14–22 (2010) *available at* http://www.americanbar.org/content/dam/aba/migrated/legal-services/colap/downloads/20110311_aba_2010_colap_comprehensive_survey.authcheckdam.pdf (providing a comprehensive look at the services provided by Lawyers Assistance Programs and Lawyers and Judges Assistance Programs as well as data on the funding sources, clients served, and resources provided for each state's program).

allegations of minor wrongdoing by angry judges (i.e., complaints that would otherwise typically be dismissed or result in a private warning after investigation) to these informal programs for resolution by mentoring, counseling, or a reconciliation meeting. Such a partnership between judge assistance programs and judicial conduct commissions, which the American Judicature Society encourages,²¹⁸ would help prevent judicial demeanor problems from ever escalating to formal judicial misconduct charges.

Along the same lines, former Los Angeles Superior Court Judge David Rothman recommends that judges undertake their own informal correction methods when confronted with judicial demeanor issues.²¹⁹ Specifically, Judge Rothman suggests that based on a judge's duty to take corrective action,²²⁰ judges should undertake informal processes to mentor or otherwise correct the behavior of other judges who violate rules of judicial conduct. This could include a reconciliation meeting or a presiding or other senior judge mentoring the judge who engaged in inappropriate conduct.²²¹ Allowing corrective action to take place either through an established Lawyers Assistance Program or other informal means could be the most effective means of protecting the public, as the authority providing the correction would presumably be one the offending judge trusts, and, ideally, the proceeding would not become adversarial. As discussed below, striving to make the process just (from the judge's perspective) and the correction restorative rather than punitive would serve to eliminate the harmful consequences that come with shaming the offending judge.

An obvious challenge to the informal process is that a judge might not be willing to confront another judge with an allegation of misconduct or wrongdoing. Furthermore, a judge might be unwilling to report his colleague to

218. See *Guidelines for Cases Involving Judicial Disability*, 69 JUDICATURE 110, 111 (1985) (providing that "it may be advisable for judicial conduct organizations to encourage the creation or expansion of state assistance programs where assistance programs are lacking.").

219. Telephone Interview with Judge David Rothman (Nov. 9, 2012) (on file with author).

220. For example, the California Code of Ethics provides that: "[w]henever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority." CA. CODE OF JUDICIAL ETHICS Canon 3D(1) (2013), available at http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf. Canon 3D defines "appropriate corrective action" to include "direct communication with the judge or lawyer who has committed the violation, other direct action . . . or a report of the violation to the presiding judge, appropriate authority, or other agency or body." *Id.* The 2007 ABA Model Code of Judicial Conduct does not provide such an expansive rule regarding informal corrective action. See generally MODEL CODE OF JUDICIAL CONDUCT (2007). Rather, ABA Model Rule 2.15 of Canon 2 requires a judge who has knowledge of another judge's commission of a violation of the Code of Judicial Canon 2 regarding conduct to "inform the appropriate authority." MODEL CODE OF JUDICIAL CONDUCT R. 2.15 (2007). The 2011 edition of the Code defines "appropriate authority" as "the authority having responsibility for initiation of disciplinary process." MODEL CODE OF JUDICIAL CONDUCT Terminology (2011).

221. Telephone Interview with David Rothman (Nov. 9, 2012) (on file with the author).

the presiding judge or to an assistance program.²²² As one commentator notes, judges might not report “because of a human tendency of judges, like others, to ‘close ranks’ to protect their own or because [of] a ‘thin black robe of silence’ among judges”²²³ Yet, this is precisely why judges *should* be inclined to confront a colleague who has displayed anger in the courtroom; arguably, judges feel responsible for maintaining the judiciary’s integrity and should take corrective action to fulfill that responsibility.²²⁴

In addition, some state judicial conduct commissions are authorized to order peer counseling and mentoring as part of the formal disciplinary process.²²⁵ Although these corrections are arguably not as effective when imposed by someone outside of offending judge’s community, they should be used when possible (as private corrections) to modify the judge’s behavior before the commission pursues public proceedings against the judge.

C. Reconciliation-Type Meetings

As a third approach, shame can be used not to stigmatize but rather to “reintegrate” the judge into her community. As aforementioned, reintegrative shaming attempts to use shame as a constructive force, combining strong disapproval of an offender’s bad conduct with respect for the person who committed the act and an invitation to rejoin her community.²²⁶ Unlike stigmatizing shame,²²⁷ this process encourages feelings of shame regarding the *behavior* but avoids stigmatizing the individual.²²⁸ Commentators define restorative justice “a process that brings victims and offenders together to face each other, to inform each other about their crimes and victimization, to learn

222. See JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.04 (4th ed. 2007) (explaining that judicial conduct commissions were created in part because of the impression that judges could not effectively “self-regulate,” as they were too inclined to protect one another).

223. Greene, *supra* note 45, at 717–18.

224. One judge’s behavior reflects on the entire judiciary. See, e.g., *In re Fuller*, 798 N.W.2d 408, 420 (S.D. 2011) (emphasizing that the judge’s misbehavior “makes it more difficult for every judge in this state to maintain that respect for our courts and thus our ability to effectively resolve society’s legal disputes.”).

225. See *supra* note 212.

226. BRAITHWAITE, *supra* note 101, at 55.

227. See *id.* (describing the differences between reintegrative shaming and disintegrative shaming).

228. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 231 (2003). Proponents of reintegrative shaming suggest that restorative justice works because of the shame that results from the wrongdoer acknowledging his offense. See Michael S. King, Critique and Comment, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1109 (2008). The symbolic reparation that accompanies a successful mediation conference in the restorative justice field requires these two necessary steps: (1) the offender clearly expresses genuine shame and remorse over his actions; and (2) the victim begins to forgive the offender. See *id.* In restorative justice, how shame is used (or not used) will often determine whether the conference succeeds. See *id.*

about each others' backgrounds, and to collectively reach agreement on a 'penalty' or 'restorative justice sanction.'"²²⁹ This Article uses the term "restorative corrections" to mean corrections that contain certain attributes of traditional restorative justice programs; it does not mean corrections as an alternative to incarceration for a criminal.²³⁰ Rather, the Article borrows two key attributes from restorative justice programs to recommend the same as innovations to traditional forms of judicial discipline: the focus on community and the use of reintegrative shaming.

In the context of criminal law, reintegrative shaming occurs in reconciliation meetings where the offender, victim, and facilitator come together to discuss proper reparations.²³¹ Reintegrative shaming in the context of judicial corrections could also involve a meeting between the offender and the offended party, along with a facilitator trained to encourage a productive dialogue between the two parties. The offending judge would have the opportunity to offer an authentic apology to the offended party,²³² which, if accepted, could resolve the matter. Therefore, rather than the peer-to-peer meetings described above, this approach would include the offended person as well.

Ideally, this restorative approach would aid in eliciting an empathic response from the judge, rather than an angry, hostile one. It would also provide the offended party an opportunity to air his concerns to the offending judge and explain the impact of the judge's behavior on the party.²³³ In assessing discipline, sanctioning tribunals occasionally acknowledge the judge's contrition about her offensive behavior.²³⁴ However, unless ordered by the

229. Luna, *supra* note 228, at 228.

230. This Article's discussion of restorative justice is not meant to compare judges' misbehavior to crimes, but rather to extend the concept of restorative justice to the context of judicial discipline.

231. See King, *supra* note 228, at 1104–05 (discussing various types of reconciliation meetings, including victim-offender mediations, family group conferences, and circle methods, which involve more participants, including supporters of both the victim and the offender as well as community leaders).

232. See Goodman, *supra* note 100, at 1537–38 (distinguishing between real apologies, in which the offender accepts responsibility for his actions, and "botched apologies," in which the offender attempts to justify her behavior and fails to express remorse). See also Stephanos Bibas & Richard A. Bierschbach, Essay, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 88–90 (2004) (highlighting the profound impact that remorse and apology can have in the criminal law context); Luna, *supra* note 228, at 229 ("Accountability is evidenced by recognizing the wrongfulness of one's conduct, expressing remorse for any resulting injury, and taking steps to repair damaged social relationships.").

233. See Brown & Wolf, *supra* note 18, at 254–55 (explaining that the restorative approach facilitates a broader dialogue about the offender's conduct by including the offended party in the disciplinary process).

234. See, e.g., *In re Deming*, 736 P.2d 639, 659 (Wash. 1987) (en banc) (stating that in determining an appropriate sanction, the court considers factors such as whether the judge apologized for misconduct).

commission, the victim of the judge's rude, offensive behavior rarely hears an apology.²³⁵

Although this type of meeting between the offender and the offended could prove extremely beneficial as an alternative to traditional judicial discipline, the idea is fraught with challenges. First, it puts the angry judge and the object of the judge's wrath at the same table, on equal footing. This runs contrary to our typical perception of the judge as holding a position of power in our society.²³⁶ Additionally, it is difficult to imagine a judge having the humility to participate and learn from this experience.

Furthermore, at times procedural hurdles might stand in the way of such a meeting. Many disciplinary commissions lack the ability under their governing rules to impose innovative alternatives to discipline. Although some commissions can require counseling, mentoring,²³⁷ and education as part of the disciplinary process, others are limited to private and public admonishments and suspensions.²³⁸ Commissions that do have some degree of flexibility might use these innovative techniques in an effort to modify the judge's angry behavior. For example, the New Mexico Judicial Standards Commission is permitted to impose non-disciplinary dispositions, including counseling, mentoring, or other assistance.²³⁹ Similarly, the California Commission on Judicial Performance may "defer termination of a preliminary investigation for a period not to exceed two years for observation and review of a judge's conduct."²⁴⁰ During this

235. See *In re Assad*, 185 P.3d 1044, 1054 (Nev. 2008) (ordering the judge to issue a formal apology to the aggrieved party and enroll in a judicial ethics class after he ordered that the girlfriend of a man who failed to pay traffic tickets be thrown into jail when the man failed to appear in court).

236. Lubet, *supra* note 4, at 12. In describing the judge's role in today's society as a "maximum boss," Lubet noted that "[w]e stand when the judge enters and leaves the room. Our 'pleadings' are 'respectfully submitted.' Before speaking, we make sure that it 'pleases the court.' We obey the judge's orders and we even say 'thank you' for adverse rulings." *Id.*

237. See, e.g., *Public Reprimand and Order of Additional Education: Honorable George Henry Boyette Justice of the Peace, Precinct 3 College Station, Brazos County, Texas*, ST. TEX. COMMISSION JUD. CONDUCT 3 <http://wtaw.com/wp-content/uploads/2011/08/BoyettJudicialConduct20111.pdf> (publicly reprimanding Judge George Boyette and ordering him to obtain ten hours of instruction with a mentor, in addition to judicial education). See also *In re Davis*, 82 S.W.3d 140, 150–51 (Tex. Spec. Ct. Rev. 2002) (publicly reprimanding Judge Rick Davis and requiring him to meet with a mentor judge for eight hours).

238. According to the American Judicature Society, some states allow for informal dispositions before formal charges are filed (including mentoring and counseling), while others do not. See CYNTHIA GRAY, *A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS* 87–89 (2002). For example, Alabama allows the commission to impose advice and further counseling as an informal disposition, whereas Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Oregon, Utah, and Washington do not allow for informal dispositions. *Id.*

239. N.M. JUDICIAL STANDARDS COMM'N, *supra* note 212.

240. CAL. COMM'N ON JUDICIAL PERFORMANCE R. 112 (2013), available at http://cjp.ca.gov/res/docs/appendix/CJP_Rules.pdf.

monitoring period, the Commission could hold a reconciliation meeting.²⁴¹ These meetings could also be implemented informally, through a lawyers' assistance program or the court itself, facilitated by the presiding judge.

In addition, if the case is still pending and the judge is still presiding, a conversation between the judge and the offended party could not occur. Similarly, some judges or offended parties may not agree to this type of meeting, depending on their level of distrust of the system or each other. If the judge displayed anger at a criminal defendant that was in some way related to the defendant's crime, a judge may be unwilling to apologize for his behavior, feeling it was justified.²⁴² However, if the case is closed or the judge is no longer presiding over the case, a reconciliation meeting can offer a valuable opportunity for the judge to hear from the offended party about how the judge's anger and hostility affected him.

D. Traditional Discipline by a Conduct Commission

With improved efforts to keep a judge's anger from escalating to the point that formal disciplinary charges are filed, judicial conduct commissions should serve as the ultimate step, to be used only when other informal means have failed. Commissions already dismiss over eighty percent of judicial conduct complaints.²⁴³ With the remaining allegations that commissions find meritorious, and to the extent allowed by their applicable governing rules,²⁴⁴ commissions should streamline discipline for angry judges, offering one private warning (perhaps coupled with counseling or education) and, for a subsequent meritorious complaint, imposing discipline that will express the commission's condemnation while getting the judge's attention.²⁴⁵ Typically, this means a suspension.²⁴⁶

Commissions should avoid the typical, intermediate steps, such as publicly reprimanding angry judges without suspension.²⁴⁷ By avoiding these steps,

241. Alternatively, if the disciplinary tribunal lacks authority to implement a reconciliation meeting, judges within that jurisdiction, under the direction of the presiding judge, could undertake to conduct the meeting themselves.

242. See Maroney, *supra* note 2, at 1257 (arguing that a judge is entitled to express anger or emotion during a sentencing hearing because it "vividly demonstrates to victims and their survivors that they are within the judge's zone of care.").

243. GRAY, *supra* note 238, at 3.

244. See *id.* at 87–98 (providing a list of informal and formal sanctions available to state judicial conduct commissions).

245. By the time a second complaint is filed against a judge, he may have already engaged in additional acts of anger and hostility on the bench, as indicated by the fact that complaints often list multiple instances of misconduct against a particular judge.

246. See *In re Eiler*, 236 P.3d 872, 882 (Wash. 2010) (en banc) (suspending a judge for five days after explaining that the more typical sanctions, reprimand or censure, would be too lenient and likely ineffective to change the judge's behavior).

247. Public reprimands are commonly imposed for serious and repeated demeanor issues. See, e.g., *In re Schapiro*, 845 So. 2d 170, 173–74 (Fla. 2003) (approving the commission's

sanctioning tribunals will prevent shame from exacerbating the judge's anger while still imposing discipline that serves to get the judge's attention and thereby protect the public. Furthermore, when necessary, sanctioning tribunals should remove angry judges from the bench. This should occur only when informal, followed by formal means of discipline (as described in this Article), have failed to modify the judge's behavior. Given the likelihood of recurrence and the ineffectiveness of shaming discipline, sanctioning bodies should protect the public by removing those angry judges for whom these corrections have failed.²⁴⁸

V. CONCLUSION

In this "Age of Transparency," publicizing both the misbehavior of angry judges and the discipline imposed for such behavior is tempting. The public loves learning about other people's "dirty laundry," particularly the wrongdoing of celebrities and judges. And, whatever shame and humiliation result from the publicity seems a fitting consequence for some judges' wrongdoing; because judges have a strong interest in maintaining their reputations, shame, in theory, should motivate judges to behave with proper decorum on the bench.

Yet, shame impacts behavior in mysterious ways. The consequences of shaming someone who is prone to anger are unpredictable at best and destructive at worst. This is especially true when the shame the judge experiences as a result of her behavior will, in all likelihood, be magnified by social media. The social media effect serves to not only publicize the judge's wrongdoing, but also allow the public to react and thereby participate in the shaming.

Accordingly, the time has come to revolutionize conceptions of judicial discipline, modify past assumptions, and take seriously the task of determining whether public sanctions serve to correct the misbehavior of angry judges. Watching and listening to Judge William Watkins lose his temper and scream at Arthur Hage in the courtroom is troubling and leaves no doubt that organizations involved in judicial education, support, and discipline should work to prevent such outbursts and modify judges' angry behavior through corrections. Yet, public discipline—discipline that shames—is unlikely to serve these purposes.

recommendation of a public reprimand for a judge who repeatedly made belittling remarks, including calling an attorney "stupid" in court); *In re Wright*, 694 So. 2d 734, 735–36 (Fla. 1997) (reprimanding a judge for rude and inappropriate behavior, including telling a party to "[k]eep your mouth shut").

248. See *In re Spruance*, 532 P.2d 1209, 1226 (Cal. 1975) (en banc) (removing a judge from office and explaining that the court has a "duty to preserve the integrity and independence of the judiciary").

