

EVALUATING JUDICIAL STANDARDS OF CONDUCT IN THE
CURRENT POLITICAL AND SOCIAL CLIMATE: THE NEED TO
STRENGTHEN IMPROPRIETY STANDARDS AND REMOVAL
REMEDIES TO INCLUDE PROCEDURAL JUSTICE AND
COMMUNITY HARM

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In 1964, Richard Hofstadter published “The Paranoid Style in American Politics” in *Harper’s Magazine* in which he characterized the United States’ political life as being immune from the more egregious effects of class conflict.¹ Hofstadter was one of the twentieth century’s foremost American History scholars, and he argued that the fact that the United States did not turn to fascism or communism during the twentieth century’s crisis times stood as a testament to the nation’s institutional strengths.² Yet, he also noted that politics served “as an arena for uncommonly angry minds” and in turn, this enabled a “small minority” to possess ample political leverage so that their “animosities and passions” were incorporated by one of the nation’s two major political parties.³ Using 1964 presidential contender, Senator Barry Goldwater’s supporters as an example, Hofstadter contended that one of the central characteristics of the “small minorit[ies]” was their insistence that the nation’s elites had persecuted them, and whether or not the majority understood this to be true, they too were the victims of the persecution.⁴

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¹ See Richard Hofstadter, *The Paranoid Style in American Politics*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 3 (1996) [hereinafter *The Paranoid Style*].

² See RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 325–26 (1989); David Greenberg, *Richard Hofstadter’s Tradition*, *ATLANTIC* (Nov. 1998), <https://www.theatlantic.com/magazine/archive/1998/11/richard-hofstadters-tradition/377296/>.

³ *The Paranoid Style*, *supra* note 1, at 3.

⁴ See *id.* at 3, 23–24. See generally Richard Hofstadter, *Goldwater and Pseudo-Conservative Politics*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS*, *supra* note 1, at 93–141 (exploring Goldwater’s views as compared to other twentieth-century conservatives). See ROBERT DAVID JOHNSON, *ALL THE WAY WITH LBJ: THE 1964 ELECTION* 67–69 (2009), for further explanation of Goldwater’s platform and his follower’s embracement of an anti-

Although Hofstadter noted that there were “angry” historical movements across the political spectrum, the modern right wing’s adherents—as he termed them in 1964—believed themselves dispossessed, and their country having been taken from them.⁵ Similar themes were expressed by President Donald Trump in the 2016 presidential campaign.⁶

Hofstadter wrote in broad themes and he focused on the nation’s broad political system rather than a component part of it, such as the population’s relationship to a branch of government.⁷ His observations and conclusions remain relevant today, though it is worthwhile to analyze the effect and relationship of a “small minority” to a particular branch of government.⁸ In this regard, there is question as to whether the fifty state judicial branches are internally policed to minimize the possibility that modern “right wing” populism will undermine judicial independence and impartiality. Although political scientists will define modern populism differently,⁹ for the purpose of this Article, the United States’ current experience with populism includes sweeping resentments against minority groups (and in particular immigrants from non-European regions), political elites, and attacks on long-standing political institutions.¹⁰ And, as a caveat to this study,

establishment ideology. Among other aspects of his campaign, Goldwater promised to withdraw the United States from the Nuclear Test Ban Treaty with the Soviet Union and argued that the federal government lacked the authority to end segregation. JOHNSON, *supra* at 67.

⁵ *The Paranoid Style*, *supra* note 1, at 3, 23. During the early Cold War, to Right Wing allegations during the Cold War that the Supreme Court had gone soft on communism or coddled criminals. See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 474–75 (2000) (highlighting Nixon’s attack on the Court for being weak on crime); Nadine Strossen, *Freedom of Speech in the Warren Court*, in *THE WARREN COURT: A RETROSPECTIVE* 68, 79 (Bernard Schwartz ed., 1996) (discussing the Warren Court being attacked by anti-Communists and being accused of Communist influence).

⁶ See Mark Mellman, *Mellman: The Revolt of the Dispossessed*, HILL (Nov. 29, 2016), <https://thehill.com/opinion/mark-mellman/307971-mellman-the-revolt-of-the-dispossessed>.

⁷ See RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* 52 (1970); Richard Hofstadter, *The Pseudo-Conservative Revolt—1954*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS*, *supra* note 1, at 44–45, 49.

⁸ See Nils Gilman, *Revisiting Hofstadter’s Populism*, AM. INTEREST (May 2, 2018), <https://www.the-american-interest.com/2018/05/02/revisiting-hofstadters-populism/>.

⁹ See Daniele Albertazzi & Duncan McDonnell, *Introduction: The Sceptre and the Spectre*, in *TWENTY-FIRST CENTURY POPULISM: THE SPECTRE OF WESTERN EUROPEAN DEMOCRACY* 1, 3 (Daniele Albertazzi & Duncan McDonnell eds., 2008); David Landau, *The Limits of Constitutionalism: Populist Constitutions*, 85 U. CHI. L. REV. 521, 524–25 (2018).

¹⁰ See MARTIN A. SCHAIN, *TRANSATLANTIC COUNCIL ON MIGRATION, SHIFTING TIDES: RADICAL-RIGHT POPULISM AND IMMIGRATION POLICY IN EUROPE AND THE UNITED STATES* 1 (2018); John Batt, *American Legal Populism: A Jurisprudential and Historical Narrative, Including Reflections on Critical Legal Studies*, 22 N. KY. L. REV. 651, 760–61 (1995); Conor

similar concerns would be raised if a modern “left-leaning” populism had succeeded in national politics.¹¹

The problem of public trust in a fair judiciary is not new. In 1970, Chief Justice Warren Burger observed, “A sense of confidence in the courts is essential to maintain the fabric of an ordered liberty for a free people.”¹² While this statement may be nothing more than aspirational, Burger warned that when “people who have long been exploited . . . come to believe that courts cannot vindicate their legal rights from fraud,” an “incalculable damage [is done] to society.”¹³ It could be added that “exploitation” includes influencing people to deflect attention from the actual sources of exploitation to imaginary or tangential sources, which also may do damage to judicial institutions.¹⁴

A number of state supreme courts have held that judicial service requires a judge not only to be “learned in the law,” but also to adjudicate cases or appeals in a fair and impartial manner.¹⁵ When a judge takes an oath of office, he or she accepts a mandate of performing judicial duties in a conscientious and impartial manner.¹⁶ The impartiality requirement is both ancient and embedded in American jurisprudence.¹⁷ The judicial duty of impartiality also extends to both actual impartiality and the appearance of

Friedersdorf, *What Right-Wing Populist Movements Share: Blaming Immigrants*, ATLANTIC (June 29, 2017), <https://www.theatlantic.com/politics/archive/2017/06/what-right-wing-populist-movements-share-blaming-immigrants/532023/>.

¹¹ See Tom Ginsburg et al., *The Limits of Constitutionalism: The Coming Demise of Liberal Constitutionalism?*, 85 U. CHI. L. REV. 239, 241 (2018); Cas Mudde, *The Problem with Populism*, GUARDIAN (Feb. 17, 2015), <https://www.theguardian.com/commentisfree/2015/feb/17/problem-populism-syriza-podemos-dark-side-europe>; see also Joshua Kurlantzick, *So You Thought the Global Populist Wave Was Ebbing? Think Again.*, WASH. POST (Feb. 16, 2018), https://www.washingtonpost.com/news/democracy-post/wp/2018/02/16/so-you-thought-the-global-populist-wave-was-ebbing-think-again/?noredirect=on&utm_term=.bea0859b5352 (explaining the possible spread of Populism through democratic elections because of the pushback against the “mainstream parties”).

¹² Chief Justice Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 934 (1970).

¹³ *Id.*

¹⁴ See Elvia R. Arriola, *Democracy and Dissent: Challenging the Solomon Amendment as a Cultural Threat to Academic Freedom and Civil Rights*, 24 ST. LOUIS U. PUB. L. REV. 149, 159 (2005); see also *In re Abrams*, 257 P.3d 167, 174 (Ariz. 2011) (“Nothing threatens public confidence in the courts and the legal system more than a judge who abuses his power and exploits the prestige of his office for personal benefit.”).

¹⁵ *In re Inquiry Concerning Justice Court Judge William E. Bailey*, 541 So. 2d 1036, 1039 (Miss. 1989); see, e.g., *In re Shilling*, 415 N.E.2d 900, 903 (N.Y. 1980).

¹⁶ *Williams-Yulee v. Fla. Bar*, 135 S. Ct 1656, 1666 (2015); *Cincinnati Bar Ass’n v. Heitzler*, 291 N.E.2d 477, 482, 484 (Ohio 1972); *In re Barr*, 13 S.W.3d 525, 557 (Review Tribunal of Tex. 1998).

¹⁷ See, e.g., *McGuire v. Blount*, 199 U.S. 142, 143 (1905); *Randall v. Brigham*, 74 U.S. 523, 537 (1869).

impartiality.¹⁸ While the oath of judicial office may appear to be a simple ministerial act, the current political and cultural climate of “right-wing” populism has brought forth the possibility that judicial standards of conduct as embodied in oaths are, in some instances, not enforceable to a degree that will preserve the impartiality mandate.¹⁹

It should not be doubted that the public has an interest in an impartial judiciary. In 2015, the Supreme Court determined, in *Williams-Yulee v. Florida Bar* that a state can “prohibit judicial candidates from personally soliciting campaign funds.”²⁰ The compelling interest for Florida was the preservation of public confidence in an impartial judiciary.²¹ Florida’s Supreme Court justices and appellate court judges are appointed by a system of “merit selection,” but its trial judges are elected by popular vote.²² Florida’s statute preventing trial judges from soliciting campaign donations was challenged as a First Amendment violation.²³ The majority of the Court noted that while it is difficult to give “precise definition” to public confidence in the judiciary, public confidence is, nonetheless, a compelling interest.²⁴ This decision, however, relates to the financial conduct of judicial candidates.²⁵ Moreover, there is a tension between *Williams-Yulee* and the Court’s 2002 decision, *Republican Party of Minnesota v. White*.²⁶ In *White*, the Court determined that judicial campaign speech is constitutionally protected unless there is a compelling state interest to curtail such speech.²⁷ *White* arose from a challenge to Minnesota’s rule prohibiting judicial candidates from announcing positions on matters likely to come before the courts.²⁸ Both *Williams-Yulee* and *White*, however, narrowly focus on limitations placed on election campaigns and not on disqualification challenges arising from personal conduct

¹⁸ See *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); *Williams-Yulee*, 135 S. Ct. at 469 (Harlan, J., concurring); *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 805 (6th Cir. 1999) (quoting *United States v. Hickman*, 592 F.2d 931, 933 (6th Cir. 1979)).

¹⁹ See Sabrina Siddiqui, *Kavanaugh’s Angry Testimony Raises Doubts over Future Impartiality*, GUARDIAN (Oct. 3, 2018), <https://www.theguardian.com/us-news/2018/oct/02/kavanaugh-impartial-justice-testimony>.

²⁰ *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1672 (2015).

²¹ See *id.* at 1671.

²² See *id.* at 1662.

²³ See *id.* at 1664.

²⁴ *Id.* at 1667, 1671.

²⁵ See *id.* at 1662.

²⁶ *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

²⁷ See *id.* at 774–75, 788.

²⁸ See *id.* at 768, 776–77.

once a judge has assumed her or his judicial position.²⁹

This Article focuses on judicial conduct, rather than the narrower category of campaign speech, though campaign speech may, in many instances, be thought of as a subset of conduct. It also examines impropriety standards in a proposed holistic model. This model should not be interpreted to limit judicial independence in decision making, but it proposes that state disciplinary commissions and state supreme courts incorporate procedural justice and community harm concepts into their investigative and determination processes. Part I of this Article presents an examination of the current common frameworks shared by the states for addressing judicial conduct appealing to popular social and political influences. Included in this section is an analysis of the interrelationship between implicit bias and impropriety, as well as on community harm and procedural justice.

Part II provides both a historical and contemporary analysis of “populism,” including the effect of populism on the nation’s judiciary. This section provides an argument for why historic models of populism provide only minor guidance for addressing the current wave of populism’s impact on the courts. Namely, not only are there fundamental ideological differences between the prior populist movements, ascertaining lessons from the past can easily devolve into presentism, or put another way, the use of the past to ratify the present.³⁰ In essence, this section concludes with the admonition that the phrase “we have experienced this before,” is not a solution to judicial bias.

Part III then examines the effect of judicial behavior and populism in three areas of concern. These are: racially derogatory conduct by judges; demeaning conduct in regard to gender such as sexual harassment; and, discrimination against gays, lesbians, and transgendered persons (hereafter LGBT). The Article concludes with the argument that because judicial behavior, whether on the bench

²⁹ Compare *Williams-Yulee*, 135 S. Ct. at 1662 (“In an effort to preserve public confidence in the integrity of their judiciaries, many of those States prohibit judges and *judicial candidates* from personally soliciting funds for their *campaigns*.”) (emphasis added), with *White*, 536 U.S. at 768 (“Since 1974, [Minnesota judges] have been subject to a legal restriction which states that a ‘*candidate* for judicial office . . .’ shall not ‘announce his or her views on disputed legal or political issues.’”) (emphasis added).

³⁰ See DAVID HACKETT FISCHER, HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 135 (1970). However, according to legal historian and distinguished scholar, G. Edward White, presentism is inevitable and complete objectivity nearly impossible in the field of legal history. See G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781, 818 (2000).

or off, which is derogatory to persons on the basis of race, national origin, gender, LGBT status, or other protected classes creates a community harm which makes fair and impartial trials less likely, removal sanctions should be more readily accepted.

Concededly, there are crucial considerations in advancing an argument that the removal or long-term suspension of a judge from hearing all, or even a class of cases. Judicial removal and suspension are drastic acts that can have the effect of impeachment without a formal legislative process.³¹ That is, the removal or long-term suspension of a judge negates the intent of the political branches of government when judges are appointed, or the will of a state's voters in terms of elected judges.³² Secondly, freedom of speech is a principle right of all citizens, and there must be a compelling reason to place limits on this right.³³ Finally, some state constitutions permit permanent removal, and others only enable temporary suspension.³⁴ This makes the achievement of a national standard difficult. Although this Article is premised on the theory that judicial impartiality is a compelling reason, it must be acknowledged that a majority of the Court in *White*, did not agree that the reason was compelling enough to curtail election speech.³⁵ Finally, there is an underlying principle of judicial ethics that judges have a duty to adjudicate cases.³⁶

Although this Article concentrates on state judiciaries, it is important to understand that the federal judiciary is no less impacted by political and social currents. And, it should also be noted that the federal judiciary may serve as a barometer of judicial conduct to the state judiciaries. At present, there are 673 district court judges and

³¹ See Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1017–18 (2003).

³² See Ky. Judicial Conduct Comm'n v. Woods, 25 S.W.3d 470, 473 (Ky. 2000); *In re James*, 821 N.W.2d 144, 158 (Mich. 2012); *In re Roca*, 173 A.3d 1176, 1198 (Pa. 2017) (Donohue, J., dissenting). But see *In re McCree*, 845 N.W.2d 458, 474 n.39 (Mich. 2014).

³³ See, e.g., Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1067 (1996).

³⁴ Compare *In re Roca*, 173 A.3d at 1190 (“Against such backdrop it was not unreasonable for the [Court of Judicial Discipline] to conclude that Appellant’s removal [and permanent bar] from the bench was an appropriate sanction in light of all of the facts of the case.”), with *In re Watkins*, 757 S.E.2d 594, 607 (W. Va. 2013) (affirming the recommendations of the Judicial Hearing Board’s recommendation to suspend a judge as a result of the judges inappropriate behavior).

³⁵ See *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

³⁶ See *United States v. Malmsberry*, 222 F. Supp. 2d 1345, 1349 (M.D. Fla. 2002) (citing *United States v. Greenspan*, 26 F.3d 1001, 1005 (10th Cir. 1994); *In re American Ready Mix, Inc.*, 14 F.3d 1497, 1501 (10th Cir. 1994); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *Wash. Mut. Fin. Group, LLC v. Blackmon*, 2001-CA-01911-SCT (¶ 11) (Miss. 2004).

179 courts of appeals judges as authorized by federal law.³⁷ As of June 1, 2017, there were fifty-nine women serving as federal court of appeals judges.³⁸ Additionally, out of the 160 active appellate judges, twenty-one were African-American, fourteen were Hispanic, and five were Asian-American.³⁹ “As of June 1, 2017, a total of 194 women were serving as U.S. district court judges” (representing approximately one-third of the judiciary).⁴⁰ There were, in addition, eighty-one African-American judges, fifty-eight Hispanic judges, sixteen Asian judges, and one Native American judge.⁴¹ After President Trump’s first ten months in office, when combining the fourteen confirmations with the fifty-eight pending nominations, his judicial selections were ninety-one percent Caucasian, and eighty-one percent male.⁴² Given modern American populism’s attack on elites, coupled with a promise to return to a majoritarian power, President Trump’s public criticism of a United States District Court Judge named Gonzalo Curiel, who presided over a lawsuit where he was a defendant had a conflict of interest as a result the judge’s Hispanic heritage, is lamentably unsurprising.⁴³

I. ENFORCING JUDICIAL CODES OF CONDUCT AND SAFEGUARDING JUDICIAL AUTHORITY

Judicial codes of ethics and enforcement mechanisms which investigate and recommend sanctions against judges are designed “to preserve public confidence in the integrity and impartiality of the

³⁷ See BARRY J. McMILLION, CONG. RESEARCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILES OF SELECT CHARACTERISTICS 1–2 (2017), <https://fas.org/sgp/crs/misc/R43426.pdf>.

³⁸ *Id.* at 4.

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 15.

⁴¹ *Id.* at 17.

⁴² See Catharine Lucey & Meghan Hoyer, *Trump Choosing White Men as Judges, Highest Rate in Decades*, CHI. TRIB. (Nov. 13, 2017), <https://apnews.com/a2c7a89828c747ed9439f60e4a89193e>; Rorie Spill Solberg & Eric N. Waltenburg, *Trump’s Judicial Nominations Would Put a Lot of White Men on the Federal Courts*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/28/this-is-how-trump-is-changing-the-federal-courts/?utm_term=.0808e4aaa6e2.

⁴³ See Z. Byron Wolf, *Read This: How Trump Defended Criticism of Judge for Being ‘Mexican’*, CNN (Apr. 20, 2017), <https://www.cnn.com/2017/04/20/politics/donald-trump-gonzal-o-curiel-jake-tapper-transcript/index.html>; see also William Galston, *The Populist Challenge to Liberal Democracy*, 29 J. DEMOCRACY 1, 11, 12 (2018) (describing populism in modern America); Mark Champion, *The Rise of Populism*, WASH. POST, https://www.washingtonpost.com/business/the-rise-of-populism/2019/01/22/dae2fd80-1e06-11e9-a759-2b8541bbbe20_story.html?utm_term=.652296e88ad0 (last visited Mar. 5, 2019) (describing the populist trends that can be seen in President Trump).

judiciary.”⁴⁴ As the New York Court of Appeals acknowledged in 2001, “members of the judiciary are held to higher standards of conduct than members of the public at large and that relatively slight improprieties [may] subject the judiciary as a whole to public criticism.”⁴⁵ The ABA code and its state analogs generally address the overt acts of judges such as the failure to recuse from an adjudication in which the judge has a vested interest in the outcome; public speech and conduct which has the potential to undermine public confidence in the judiciary; and the unfair treatment of litigants.⁴⁶ It does not appear that any of the state enforcement mechanisms directly address standards for when a judge’s conduct enforces a community’s implicit bias.⁴⁷

Implicit bias can be defined as an unconscious mental process that affects social judgments.⁴⁸ An individual may believe herself or himself to be “colorblind,” or equitable in the treatment of others, but at the same time have their judgment on another person affected by internal assumptions based on race, gender, age, disability, or another visibly identifiable trait.⁴⁹ Usually, a group’s explicit biases show less than its implicit biases.⁵⁰ Judges are by no means immune

⁴⁴ *In re Wilfong*, 765 S.E.2d 283, 296 (W. Va. 2014).

⁴⁵ *In re Going*, 761 N.E.2d 585, 589 (N.Y. 2001). Other state high courts have accepted that judges have to be held to the highest standards of conduct. *See, e.g., In re Flanagan*, 690 A.2d 865, 881 (Conn. 1997); *In re Inquiry Concerning Gerard*, 631 N.W.2d 271, 276–77, 280 (Iowa 2001). In *Flanagan*, the Connecticut Supreme Court determined that although a judge may have had a sterling record as a conscientious judge, this did not absolve the judge for undermining the appearance of impartiality by having an adulterous affair with a subordinate employee. *See id.* at 866, 882. In *Gerard*, a judge was suspended for sixty days because of his dilatory approach to issuing judicial rulings as well as an improper intimate relationship with the district attorney. *In re Gerard*, 631 N.W.2d 276, 277, 280 (Iowa 2001).

⁴⁶ *See* MODEL CODE OF JUDICIAL CONDUCT r. 1.2, 2.2, 2.11 (AM. BAR ASS’N 2014).

⁴⁷ *See, e.g., Michele Benedetto Neitz, Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 163 (2013).

⁴⁸ *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POLY REV. 149, 152 (2010); John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 3 (2010); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 U.C.L.A. L. REV. 465, 473 (2010); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 429 (2007); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

⁴⁹ *See* William J. Hall et al., *Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review*, AM. J. PUB. HEALTH, Dec. 2015, at e60, e72; *see also* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1474 (1998) (“The data . . . clearly revealed patterns consistent with the expectation that White subjects would display an implicit attitude difference between the Black and White racial categories.”).

⁵⁰ *See* Gregory S. Parks, *Judicial Recusal: Cognitive Biases and Racial Stereotyping*, 18 N.Y.U. J. LEGIS. & PUB. POLY 681, 686, 696–97 (2015) (“As measured in the context of race,

to implicit bias.⁵¹ There is tested evidence that people are generally able to compensate for their implicit bias when they are aware of it.⁵² However, it also appears that there must be an acceptance that certain behaviors minimize the value of individuals based on the treatment of the individual's group identity.⁵³ A small number of state courts have found that the existence of implicit bias requires new approaches to ensuring fair trials.⁵⁴

On February 14, 2018, the Supreme Judicial Court of Massachusetts reaffirmed, in *Commonwealth v. Buckley*,⁵⁵ a long-standing principle that a police officer's judgment in effectuating the search of a person is an important element to assessing the lawfulness of the search, but then considered the impact of implicit bias on policing.⁵⁶ At first glance, there is little surprise to this decision. At approximately 10:50 p.m. on January 25, 2013, police officers conducted surveillance of an apartment building they suspected of being used for illicit drug activity and then observed the defendant and another person drive away from the building.⁵⁷ The headlights of the defendant's vehicle had not been turned on in addition to "traveling above the speed limit," thereby constituting a traffic infraction.⁵⁸ After making the traffic stop the police officer approached the vehicle and upon smelling marijuana subsequently asked the defendant if there was marijuana inside the vehicle, as to which the defendant said that "she did not think so" but that he could check the vehicle.⁵⁹ After obtaining consent, the police discovered cocaine and a firearm.⁶⁰ The defendant, an African-American male,

whites generally show much more of an explicit preference for whites (40.7% favor) than blacks (3.4% favor), especially when compared to other racial groups. More than half of whites (56.0%) show no preference for either group. At the implicit level, however, whites show a robust preference for whites (71.5% favor) over blacks (6.8% favor), with only 21.7% showing no preference. In fact, whites express more in-group favoritism on implicit measures (78.4%) than on explicit measures (51.1%).").

⁵¹ See *id.* at 696; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1208, 1232 (2009).

⁵² *Id.* at 1202–03.

⁵³ See *id.*

⁵⁴ See PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION 6 (2012), <http://www.national-consortium.org/~media/Microsites/Files/National%20Consortium/Implicit%20Bias/Helping-Courts-Address-Implicit-Bias.ashx>; see also Rachlinski et al., *supra* note 51, at 1226 (explaining methods to combat implicit biases in the criminal justice system).

⁵⁵ *Commonwealth v. Buckley*, 90 N.E.3d 767 (Mass. 2018).

⁵⁶ See *id.* at 770, 776, 777.

⁵⁷ *Id.* at 770.

⁵⁸ See *id.* at 770–71.

⁵⁹ *Id.* at 771.

⁶⁰ *Id.*

later challenged the voluntariness of his consent to search his vehicle but did not claim that he was racially profiled by the police.⁶¹ The state justices, however, recognized that there is both an explicit and implicit problem throughout the legal system which serves to deny minorities the same legal equality as the majoritarian population.⁶² Justice Kimberly S. Budd, in her concurrence, went further than the majority in noting that law enforcement decisions affected by implicit bias, even when made in good faith, stigmatize members of the minority population.⁶³

Two years earlier in *Commonwealth v. Warren*,⁶⁴ the Supreme Judicial Court of Massachusetts determined that consciousness of guilt evidence—including a person fleeing the police—should be given little weight as a determining factor of reasonable suspicion.⁶⁵ The justices relied on a study conducted by the Boston Police Department which found a pattern of racial profiling by police in the city and thus, “suggests a reason for flight unrelated to the consciousness of guilt . . . [including] the desire to avoid the recurring indignity of being racially profiled”⁶⁶ While the state’s highest court did not discuss implicit bias, it is clear that the justices were concerned that juries would be less likely to believe that innocent people would flee from police than fairness required.⁶⁷ In 2018, one justice, in a concurrence, recognized that implicit bias has the potential to undermine the right to a fair trial at all stages of a criminal trial.⁶⁸ A Massachusetts court rule now places on judges the duty to maximize the opportunity in voir dire to discover implicit bias.⁶⁹

In 2013 the Washington Supreme Court, in *State v. Saintcalle*,⁷⁰ determined that jury service “is a ground level exercise of democratic values.”⁷¹ *Saintcalle* arose from a trial judge’s overruling a

⁶¹ *Id.* at 772, 776–77.

⁶² *See id.* at 777.

⁶³ *See id.* at 781 (Budd, J., concurring) (citing *Commonwealth v. Feyenord*, 833 N.E.2d 590, 604 (Mass. 2005) (Greaney, J., concurring)).

⁶⁴ *Commonwealth v. Warren*, 58 N.E.3d 333 (Mass. 2016).

⁶⁵ *Id.* at 341–42.

⁶⁶ *See id.* at 342. The court held that based on the recent findings of a Boston Police Department report documenting a racial profiling pattern, courts should be reticent to accord too much weight to a minority member who flees from the police. *See id.*

⁶⁷ *See id.*

⁶⁸ *See Buckley*, 90 N.E.3d at 781–83 (Budd, J., concurring) (noting that there is a presumption, which the defendant must overcome, that a traffic stop was not based on an indefensible standard).

⁶⁹ *See MASS. SUPER. CT. R. 6.*

⁷⁰ *State v. Saintcalle*, 309 P.3d 326 (Wash. 2013).

⁷¹ *Id.* at 337. One of the important features about *Saintcalle*, was that the Court pointed

defendant's objection to a prosecutor's peremptory challenge against the sole African-American juror in a criminal trial.⁷² The state supreme court concluded that the "systematic removal" of minority jurors not only "cheap[ens] the value of the jury verdict," it also creates "a badge of inferiority" on the state's minority members.⁷³ In other decisions, the Washington Supreme Court determined that prosecutors, judges, and defense counsel are susceptible to implicit bias.⁷⁴ Thus, the Washington Supreme Court has extended its bias analysis to community harm without naming it as such, which, if permitted to continue, has the possibility of eroding fairness in all legal functions.

A. Judicial Authority and Implicit Bias: Creating a Community Harm

Judges hold a position of trust that is different from officials in the state and federal legislative and executive branches.⁷⁵ Justice John Paul Stevens, in his *White* dissent, pointed out that this position of trust remains the same whether a judge is appointed or elected.⁷⁶ In *Mistretta v. United States*,⁷⁷ the Court held that the judiciary's legitimacy depends on its impartiality.⁷⁸ Because of the judiciary's unique status, a judge's explicit bias may contribute to a jury's implicit bias, if not that of a community.⁷⁹ A judge who evidences a dislike or articulates a disparagement against a particularized group of individuals places his or her impartiality into doubt.⁸⁰ But this

out that not once since *Batson* had it overturned a conviction based on the peremptory challenge. *Id.* at 335.

⁷² *Id.* at 329.

⁷³ *Id.* at 337.

⁷⁴ See *State v. Walker*, 341 P.3d 976, 991 n.13 (Wash. 2015); see also *State v. Jefferson*, 429 P.3d 467, 480 (Wash. 2018) ("[T]hese proffered, racially neutral reasons for striking Juror 10 seem to lack support in the record. They reflect differential treatment [by the prosecutor] of the sole African American juror, and hence, they 'could' support an inference of implicit bias."); *State v. Gregory*, 427 P.3d 621, 635 (Wash. 2018) ("Given the evidence before this court and out judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance."); *In re Marriage of Black*, 392 P.3d 1041, 1052 (Wash. 2017) ("Given the facts of this case, the trial court's improper consideration of Rachele's sexual orientation was intertwined with an implicit preference for Charles' religious beliefs.")

⁷⁵ *Republican Party of Minn. v. White*, 536 U.S. 765, 797 (2002) (Stevens, J., dissenting).

⁷⁶ *Id.*

⁷⁷ *Mistretta v. United States*, 488 U.S. 361 (1989).

⁷⁸ *Id.* at 407.

⁷⁹ Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 282 (2000); see Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 842–43 (2012).

⁸⁰ See Neitz, *supra* note 47, at 143–44.

conduct can also harm the community by creating an environment in which the public normalizes prejudicial behavior.⁸¹

The right of confrontation presents one contextual model for assessing judicial conduct and community bias. In criminal trials, the right of confrontation is essential for a defendant to uncover a witness' bias or motivations to testify in less than truthful manner, as well as uncover a witness' faulty memory.⁸² In civil trials, although not a Sixth Amendment right, confrontation is nonetheless essential to ensure a fair trial because it permits counsel to uncover similar biases and motives of witnesses, as well as a witness' memory lapses.⁸³ In situations in which a judge has evidenced overt bias or lack of respect against an identifiable group and then limits cross-examination through the application of relevancy rules, the judge may cause the result of his or her trials to be suspect, even in instances where the limits are defensible.⁸⁴

While the Washington and Massachusetts appellate judiciary appears to have taken a lead in considering the effect of implicit bias on the whole trial,⁸⁵ there are a small number of other state appellate courts that have accepted that implicit bias may affect trials.⁸⁶ In 2012, an Ohio Court of Appeals judge, in a concurring opinion, urged that because trial judges were no more immune from implicit bias than the community at large, disparities in sentencing constituted a basis for appeals.⁸⁷ In 2017, the Iowa Supreme Court recognized that implicit bias exists in juries and that state's trial courts should be proactive in protecting defendants from the dangers of such bias.⁸⁸

There is, however, a critical caveat which must be recognized in examining the relationship between the judiciary and a community's

⁸¹ See Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 518 (2018).

⁸² See *Alford v. United States*, 282 U.S. 687, 692, 693 (1931) (citing *Tla-Koo-Yel-Lee v. United States*, 167 U.S. 274, 277 (1897); *Farkas v. United States*, 2 F.2d 644, 647 (6th Cir. 1924); *King v. United States*, 112 F. 988, 994 (5th Cir. 1902); *People v. Moore*, 89 N.Y.S. 83 (N.Y. App. Div. 1904)).

⁸³ See *Tolan v. Cotton*, 572 U.S. 650, 660 (2014).

⁸⁴ See, e.g., *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)); see also *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that a prosecutor violates the Equal Protection Clause when minority members are excluded without justification through the peremptory challenge process). In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Court extended *Batson* to civil trials. See *id.* at 631 (citing *Batson*, 476 U.S. at 96–97). In *Georgia v. McCollum*, 505 U.S. 42 (1992), the Court further extended *Batson* to prohibit a defense counsel in a criminal trial from excluding prospective jurors on the basis of race. See *id.* at 59.

⁸⁵ See *State v. Saintcalle*, 309 P.3d 326, 329, 335 (Wash. 2013); MASS. SUPER. CT. R. 6.

⁸⁶ See *State v. Plain*, 898 N.W.2d 801, 816, 817 (Iowa 2017); *In re Gremillion*, 2016-0054, p. 27–28 (La. 6/29/16); 204 So. 3d 183, 199.

⁸⁷ See *State v. Sherman*, 2012-Ohio-3958, at ¶¶ 45, 49 (Stewart, J., concurring).

⁸⁸ See *Plain*, 898 N.W.2d at 817.

implicit biases and the adoption of a community harm model. Although there is a recognition that implicit bias exists, it would be unconscionable to adopt a scheme which enables recusals based on a judge's race, religion, national origin, gender, or other protected class. In 1987, the Court of Appeals for the Eleventh Circuit determined, in *United States v. Alabama*,⁸⁹ that the race of a judge coupled with the judge's prior work as a civil rights attorney did not constitute a basis for requiring recusal.⁹⁰ Three years earlier, in a minority-based class-action suit against the city of Houston, Texas, the city attorney motioned an African-American federal judge, Gabrielle Kirk McDonald to recuse herself from the case on the basis of her race and that she had lived in Houston.⁹¹

The lawsuit arose as a challenge to Houston's voting scheme and while it was true that Judge McDonald shared the same race as the plaintiff class, she noted—in charitable terms—that a grant of recusal would be a disservice to the law.⁹² Although Judge McDonald was undoubtedly correct in her decision, President Trump's aspersion against Judge Curiel suggests that there remains a strongly-held belief that a judge's decisional processes are fundamentally defined by their race, gender, national origin, or other genetic features.⁹³ Judge McDonald's refusal to recuse in this instance serves as a reminder that adherence to the principle of dedication to the law and the refusal to countenance prejudice in a courtroom are both critical to the long-term faith in an impartial judiciary.⁹⁴

B. Canon-Based Regulation of Judicial Conduct

The American Bar Association's 2010 Canons of Judicial Ethics, as in the case of its 1924, 1972, 1990, and 2007 predecessors, were

⁸⁹ *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987).

⁹⁰ *See id.* at 1542–43 (“The fact that an individual belongs to a minority does not render one biased or prejudiced, or raise doubts about one's impartiality: ‘that one is black does not mean, *ipso facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant.’”).

⁹¹ *See Le Roy v. Houston*, 592 F. Supp. 415, 424 (S.D. Tex. 1984).

⁹² *Id.* at 416, 420.

⁹³ *See* Z. Byron Wolf, *Trump's Attacks on Judge Curiel Are Still Jarring to Read*, CNN (Feb. 27, 2018), <https://www.cnn.com/2018/02/27/politics/judge-curiel-trump-border-wall/index.html>; *see also* Cheryl L. Wade, *When Judges Are Gatekeepers: Democracy, Morality, Status, and Empathy in Duty Decisions (Help from Ordinary Citizens)*, 80 MARQ. L. REV. 1, 19–20 (1996) (“The judge's life experience and personal characteristics such as race, gender, sexual orientation, and socioeconomic status, inevitably and naturally influence the decision making process.”).

⁹⁴ *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.3 (AM. BAR ASS'N 2014).

issued to guide ethical judicial behavior.⁹⁵ While the ABA code is not enforceable in most state courts, each of the fifty states possess a judicial code of conduct which mirror, in varying degrees, the ABA's model codes.⁹⁶ Moreover, each state judiciary possesses a judicial investigatory mechanism which operates as an administrative agency.⁹⁷ Most state agencies are authorized to issue advisory opinions as to whether a certain type of conduct may undermine judicial impartiality or judicial independence.⁹⁸ Likewise, state supreme courts are empowered with rule-making authority which can also guide judicial behavior.⁹⁹

The first canon of the 2010 ABA Code mandates that judges "shall uphold and promote the independence, integrity, and impartiality of the judiciary."¹⁰⁰ This canon includes three rules which instruct judges to comply with the law, promote confidence in the judiciary, and restrain from actions constituting an abuse of judicial office.¹⁰¹ The code's second canon mandates that judges have to perform their duties with fairness and impartiality and without bias, prejudice, or harassment.¹⁰² Included in this ruleset is an admonition that judicial duties include upholding and applying the law.¹⁰³

On a state by state basis, there are differences in the degree to which judges may be disciplined for engaging in conduct which undermines public confidence in the judiciary. For instance, the Wisconsin Constitution permits the permanent removal of a judge for cause without legislative involvement.¹⁰⁴ Yet, the Wisconsin Supreme Court has made it clear that, short of a formal impeachment, only it, and not an executive branch agency, even with delegated authority from the legislature can remove a judge.¹⁰⁵ In Texas, the state judicial commission may censure a judge after a formal proceeding, but it can only recommend removal to the state's

⁹⁵ See *id.* at Preamble.

⁹⁶ See, e.g., CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03 (5th ed. 2013); James J. Alfini & Terrence J. Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671, 673 (1989).

⁹⁷ See Alfini & Brooks, *supra* note 96, at 680.

⁹⁸ See GEYH ET AL., *supra* note 96, at § 1.13; Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. REV. M.S.U.-D.C.L. 101, 102 (2001).

⁹⁹ See GEYH ET AL., *supra* note 96, at § 6.07.

¹⁰⁰ MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS'N 2010).

¹⁰¹ See *id.* r. 1.1, 1.2, 1.3.

¹⁰² *Id.* r. 2.2, 2.3.

¹⁰³ *Id.* r. 2.2.

¹⁰⁴ See WIS. CONST. art. VII, § 11.

¹⁰⁵ See *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 36, 376 Wis. 2d 147, 174, 897 N.W.2d 384, 397.

highest court.¹⁰⁶ Moreover, the Texas judiciary has developed a jurisprudence that a reprimand is assumed to have caused a judge to change his or her behavior, and therefore should not ordinarily serve as the basis for recusal, thereby giving the judge a clean slate.¹⁰⁷ Minnesota's disciplinary process is structured similarly to Texas.¹⁰⁸ The California Commission on Judicial Performance may censure, admonish, or remove a judge, but the commission's determinations are subject to appeal to the state supreme court.¹⁰⁹ The Arizona Supreme Court is authorized to censure, suspend without pay, or permanently remove a judge on a recommendation from the state commission on judicial conduct.¹¹⁰ In West Virginia, a judge may only be permanently removed through legislative impeachment.¹¹¹ The purpose of noting the distinctions between the state judicial disciplinary methods is that these distinctions will constitute one element to contextualize how the state supreme courts address allegations that judges have acted in a discriminatory manner.

C. Safeguards of Judicial Authority

In spite of the possibility that judges may be suspended or removed from office, a judge enjoys unique safeguards not found elsewhere.¹¹² Judges are generally immune from civil liability for actions arising out of judicial service.¹¹³ For instance, a judge who enables a medical sterilization procedure on a person without the person's knowledge is immune from civil suit.¹¹⁴ And, a judge who finds a defendant guilty or sentences a defendant based on discriminatory police actions or a discriminatory state law cannot be sued.¹¹⁵ As the Supreme Court

¹⁰⁶ See, e.g., *In re Keller*, 357 S.W.2d 413, 429 (Tex. 2010).

¹⁰⁷ See, e.g., *In re Welsh*, No. 09-15-00498-CV, 2016 Tex. App. LEXIS 9325, at *11–12 (Tex. App. Aug. 25, 2016) (citing *In re Lewis*, 495 S.W.3d 341, 345 (Tex. App. 2016)).

¹⁰⁸ See MINN. R. BD. ON JUD. STANDARDS r. 11.

¹⁰⁹ CAL. CONST. art. VI, § 18. For an explanation as to what constitutes willful misconduct, see *Dodds v. Comm'n on Judicial Performance*, 906 P.2d 1260, 1266 (Cal. 1995). In that decision the state court found that there were three elements to willful (judicial) misconduct: "1) 'unjudicial conduct,' 2) 'committed in bad faith,' 3) 'by a judge acting in his judicial capacity.'" *Id.* at 1266 (quoting *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1221 (Cal. 1975)).

¹¹⁰ ARIZ. CONST. art. VII, § 4.

¹¹¹ W. VA. CONST. art. VIII, § 8.

¹¹² See GEYH ET AL., *supra* note 96, at § 13.01.

¹¹³ See *id.*

¹¹⁴ See *Stump v. Sparkman*, 435 U.S. 349, 364 (1978).

¹¹⁵ See *Pierson v. Ray*, 386 U.S. 547, 549–50, 553–54 (1967) (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872)); see also *Mireles v. Waco*, 502 U.S. 9, 12–13 (1991) (quoting *Stump*, 435 U.S. at 362 (1978) (holding a judge immune from suit for directing police to use excessive force in carrying out his judicial order)).

noted in *Dennis v. Sparks*,¹¹⁶ judicial immunity against civil suits may extend to allegations that a judge has corruptly decided an issue, because there is a greater principle of having judges at “liberty to exercise their independent judgment about the merits of a case.”¹¹⁷

A judge may, of course, be found guilty of violating the civil rights of a defendant if the judge knowingly acts contrary to law with the specific intent of depriving a citizen of his or her rights.¹¹⁸ However, this Reconstruction-era doctrine, which arose from a federal indictment of a state judge,¹¹⁹ has seldom been tested and subsequent courts have cast doubts on expanding the doctrine beyond the ability of the federal government to criminally prosecute a judge.¹²⁰ At present, this doctrine has not been applied to judicial speech.¹²¹ Moreover, there are other safeguards to judicial speech. In *In re Kendall*, the Court of Appeals for the Third Circuit held that unless a trial judge’s statements constituted an immediate danger to the administration of justice, courts of appeal could not employ their inherent contempt authority against the offending judge.¹²² *Kendall*, arose from a Virgin Islands trial judge who referred to a mandamus order from Virgin Island Supreme Court as proof that the justices had committed “gross dereliction of their sworn duties and of committing illegal acts.”¹²³ The Third Circuit recognized the value of promoting respect for the judiciary and that the trial judge had “gratuitously undermined” this value, but the use of contempt was not a proper means of discipline.¹²⁴

In spite of the probability that overt acts against specific social groups can contribute to a community’s implicit bias, judges have, in addition to other protections, a *de facto* safeguard against having to defend against their actions.¹²⁵ Breaches of the codes of judicial conduct are not ordinarily a basis for a litigant’s claims of partiality,

¹¹⁶ *Dennis v. Sparks*, 449 U.S. 24 (1980).

¹¹⁷ *Id.* at 26, 31 (citing *Pierson*, 386 U.S. at 554; *Bradley*, 80 U.S. at 349–50).

¹¹⁸ *See Ex Parte Virginia*, 100 U.S. 339, 345–46, 348–49 (1880).

¹¹⁹ *See id.* at 340.

¹²⁰ *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 624, 626 (2000); *Francis v. Lyman*, 108 F. Supp. 884, 887, 888 (D. Mass. 1952). *But see Picking v. Pa. R.R. Co.*, 151 F.2d 240, 250–51 (3d Cir. 1945) (finding that Congress in the passage of the Civil Rights Act effectively negated this judicial immunity for discrimination claims).

¹²¹ *See, e.g., In re Kendall*, 712 F.3d 814, 816 (3d Cir. 2013).

¹²² *See id.* at 816, 826.

¹²³ *Id.* at 829.

¹²⁴ *Id.* at 833.

¹²⁵ *See John P. Sahl, Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 229 (1994); Amy Wolf-Vanderbilt, *Implicit Bias Shapes Our Views Without Us Knowing It*, FUTURITY (Oct. 3, 2016), <https://www.futurity.org/implicit-bias-1261282-2/>.

discrimination, or favoritism.¹²⁶ Instead, judicial codes of conduct are designed to inform judges on standards of behavior required to ensure that the public has confidence in the judiciary's impartial administration of justice.¹²⁷ Likewise, the discipline of an errant judge is only a determination that the judge has undermined confidence in the judiciary.¹²⁸ For instance, a judge who "brandish[es]" a sexual toy at a public defender and later "refer[s]" to this incident twice in open court so as to curtail the victim's cross-examination of two witnesses," can be disciplined for devaluing the witness' dignity, even though the verdict in that particular case remains intact.¹²⁹ A judge who visits a legal brothel in Nevada and boasts about it in his home state, which prohibits prostitution, may be censured, but his past rulings in criminal trials arising from "public morals charges" will remain in effect.¹³⁰ Likewise, a judge who casts an aspersion against a child victim of a sexual assault may be suspended without pay, but the suspension does not translate into a retrial.¹³¹ And a judge who sexually harasses court personnel outside of a courtroom may also be found to have undermined the integrity of the judicial branch, though his determinations in sexual harassment cases may be upheld.¹³²

To be sure, there are instances in which a judge's poor behavior results in overturning a verdict, but invariably the behavior occurs while the judge adjudicates an issue as part of a bench trial.¹³³ In 1985, the New Jersey Supreme Court determined that a judge who injected his personal religious beliefs into an adjudication failed to uphold the principle of an impartial judiciary.¹³⁴ In that case, a father who had remarried sued his former spouse for visitation rights to his children.¹³⁵ The former spouse testified that she did not object to the father's visitation, but claimed the children refused to see their

¹²⁶ See, e.g., *Matthews v. State*, 64 N.E.3d 1250, 1255, 1256 (Ind. Ct. App. 2016).

¹²⁷ See, e.g., *In re Inquiry Concerning Holien*, 612 N.W.2d 789, 793 (Iowa 2000); *In re Gorby*, 339 S.E.2d 702, 703 (W. Va. 1985).

¹²⁸ See *In re Ross*, 428 A.2d 858, 869 (Me. 1981); *In re Nowell*, 237 S.E.2d 246, 257 (N.C. 1977); *Disciplinary Counsel v. O'Neill*, 103 Ohio St. 3d 204, 2004-Ohio-4704, 815 N.E.2d 286, at ¶ 33 (citing *Kloepfer v. Comm'n on Judicial Performance*, 782 P.2d 239, 262 (Ca. 1989)).

¹²⁹ See, e.g., *Geiler v. Comm'n on Judicial Qualifications*, 515 P.2d 1, 5, 9–10, 11 (Ca. 1973).

¹³⁰ See *In re Tschirhart*, 371 N.W.2d 850, 851, 853 (Mich. 1985).

¹³¹ See *Judicial Standards Comm'n of Mont. v. Baugh*, 2014 MT 149, ¶¶ 8–11, 13, 375 Mont. 257, 334 P.3d 352 (citing *State v. Rambold*, 2014 MT 116., ¶¶ 22–23, 375 Mont. 30, 325 P.3d 686).

¹³² See *In re Miera*, 426 N.W.2d 850, 851, 858–59 (Minn. 1988); *In re Seraphim*, 294 N.W.2d 485, 494–95, 501 (Wis. 1980).

¹³³ See, e.g., *In re J.A.*, 601 A.2d 69, 72, 76–77, 79 (D.C. 1991) (per curiam).

¹³⁴ See *In re Yaccarino*, 502 A.2d 3, 10, 11 (N.J. 1985).

¹³⁵ *Id.* at 10.

father after he remarried.¹³⁶ The judge instructed the former spouse that even though the father was a “100 carat cad,” she had “an absolute affirmative duty cast upon [her] by [her] God, [not the judge], but by God,” to influence her children to change their minds.¹³⁷ In this case, the judge’s ruling was overturned and remanded for a new hearing.¹³⁸ Finally, although in theory, a bar association can discipline a judge since a judge is also an attorney, there is resistance to this because it would enable a professional association to usurp a formalized administrative or judicial means for removal.¹³⁹ In 1991, the Pennsylvania Supreme Court, in *Office of Disciplinary Counsel v. Anonymous Attorney A*, determined that the state’s Judicial Inquiry and Review Board possessed exclusive constitutional jurisdiction to discipline judges.¹⁴⁰ In 1988, eight state judges were removed from office after receiving gifts of money from a labor union.¹⁴¹ At the same time the administrative board sought to discipline the eight judges, the state board of professional responsibility determined that the judges violated canons of legal ethics, and pursued disciplinary proceedings.¹⁴² Pennsylvania’s supreme court recognized that the eight judges may have violated various canons of legal ethics, but then determined that any lawyer disciplinary actions would have to be abated until the Judicial Inquiry and Disciplinary Review Board had completed its investigation and any judicial avenues of redress were finalized.¹⁴³ Pennsylvania is not alone in this construct. In *In re Troisi*,¹⁴⁴ the West Virginia Supreme Court determined that the state’s lawyer disciplinary proceedings could not take action against a judge who assaulted a litigant party until the judge was removed from the bench through the state’s formal judicial discipline processes.¹⁴⁵

D. Community Harm and Procedural Justice

When the overt conduct of a judge strengthens a community’s

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *See id.* at 11.

¹³⁹ *See* *Office of Disciplinary Counsel v. Anonymous Attorney A*, 595 A.2d 42, 43, 49 (Pa. 1991); Andrew E. Brashier, Comment, *Ex Parte Alabama State Bar: Who Has Jurisdiction When Judges Act Unethically as Lawyers?*, 33 AM. J. TRIAL ADVOC. 187, 189, 198, 201 (2009).

¹⁴⁰ *See Anonymous Attorney A*, 595 A.2d at 49.

¹⁴¹ *See id.* at 43, 44.

¹⁴² *See id.* at 43.

¹⁴³ *See id.* at 49.

¹⁴⁴ *In re Troisi*, 504 S.E.2d 625 (1998).

¹⁴⁵ *See id.* at 634.

implicit biases, the judge, either by design or accident, potentially creates community harm by not only shaping the unconscious attitudes of jury pools and witnesses, but also by undermining the principle of equal treatment for all litigants who may come to accept that judicial favoritism is an unfortunate permanent feature of the judicial system.¹⁴⁶ Concerns over judicial impartiality are not new. In *Tumey v. Ohio*,¹⁴⁷ the Supreme Court determined the Fourteenth Amendment guaranteed the right to an impartial judge.¹⁴⁸ While *Tumey* established a rule prohibiting state judicial officers from serving on trials in which they had a pecuniary interest in the outcome, it also noted that there were other areas of concern, such as family relations between the bench and bar.¹⁴⁹ Although the explicit conduct of judges falls into a different category than pecuniary interest, both have the possibility of eroding the public's perception of the courts.¹⁵⁰ In this respect, the notion of community harm has antecedent roots.

In addition to explicit judicial conduct reinforcing a community's implicit biases, another means for understanding community harm is to use concepts of procedural justice. Procedural justice may be defined by assessing whether litigants, witnesses, or the general public believe that the courts are fair and judicial rulings legitimate.¹⁵¹ When the general public experiences procedural justice, the public perceives the judicial system as legitimate.¹⁵² Studies on procedural justice have concluded that even in instances where a majority's beliefs do not prevail in court, the overall impression of the judiciary does not erode if there is a widespread belief that the judicial body that issued its decision evidenced its impartiality.¹⁵³ Despite judicial elections in some states, procedural

¹⁴⁶ See, e.g., James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 781, 785, 788 (2004).

¹⁴⁷ *Tumey v. Ohio*, 273 U.S. 510 (1927).

¹⁴⁸ See *id.* at 523; see also Joshua E. Kastenberg, *Chief Justice William Howard Taft's Conception of Judicial Integrity: The Legal History of Tumey v. Ohio*, 65 CLEV. ST. L. REV. 317, 320–21, 366 (2016) (providing an exposition of the Court's motivations to expand the federal right to the states).

¹⁴⁹ See *Tumey*, 273 U.S. at 523 (citing *Wheeling v. Black*, 25 W. Va. 266, 280 (1884)).

¹⁵⁰ See *Disciplinary Counsel v. O'Neill*, 103 Ohio St. 3d 2004, 2004-Ohio-4704, 815 N.E.2d 286, at ¶ 33 (citing *Kloepfer v. Comm'n on Judicial Performance*, 782 P.2d 239, 262 (Ca. 1989)); Kastenberg, *supra* note 148, at 320.

¹⁵¹ See, e.g., Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 128–29 (2011); Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 28 (2007).

¹⁵² See Victor D. Quintanilla & Michael A. Yontz, *Human-Centered Civil Justice Design: Procedural Justice and Process Value Pluralism*, 54 TULSA L. REV. 114, 115 (2018).

¹⁵³ See Kristina Murphy et al., *Nurturing Regulatory Compliance: Is Procedural Justice*

justice is not a solely majoritarian province.¹⁵⁴

Failures in obtaining procedural justice may result in classes of citizens deciding not to take part in trials and other judicial functions such as public hearings.¹⁵⁵ A recent study indicates that people believe when judges adhere to the rules governing their duties as embodied in the canons of judicial ethics and the plain language of judicial oaths, they will be more likely to participate in the judicial processes such as showing up for jury duty.¹⁵⁶ When people believe that the courts are unfair, they will be less likely to participate in judicial processes, or participate, and also resort to measures such as jury nullification.¹⁵⁷

The Court recently gave the concept of procedural justice support in *Rosales-Mireles v. United States*.¹⁵⁸ Decided on June 18, 2018, the Court determined that appellants erroneously convicted under the sentencing guidelines may raise for the first time a challenge to the sentence in a court of appeals, and the court of appeals must, when the sentencing miscalculation affects an appellant's substantial rights, exercise its discretion and vacate the sentence.¹⁵⁹ In writing for the majority opinion, Justice Sonia Sotomayor cited to the concept of procedural justice in noting that "regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the

Effective When People Question the Legitimacy of the Law?, 3 REG. & GOVERNANCE 1, 2 (2009); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANNU. REV. PSYCHOL. 375, 379–80 (2006); Quintanilla & Yontz, *supra* note 152, at 115.

¹⁵⁴ See Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 992 (2000); see also STEPHEN SHUTE ET AL., A FAIR HEARING?: ETHNIC MINORITIES IN THE CRIMINAL COURTS 26 (2005) ("Obviously, one would expect those acquitted to have a more favourable view of the fairness of the outcome, although not necessarily the fairness of the procedures.").

¹⁵⁵ See Thomas Baker et al., *Shared Race/Ethnicity, Court Procedural Justice, and Self-Regulating Beliefs: A Study of Female Offenders*, 49 LAW & SOC'Y REV. 433, 437 (2015).

¹⁵⁶ See Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL., PUB. POL'Y, & L. 78, 81 (2014) ("When officers wield their power in fair and just ways, this imbues them with a sense of appropriate normative purpose and values in the eyes of citizens, in turn strengthening the willingness of citizens to cooperate with legal authorities.").

¹⁵⁷ See Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1254 (2011); Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 398 (2004).

¹⁵⁸ *Rosales-Mireles v. United States* 138 S. Ct 1897, 1903 (2018). The appeal in this case challenged the permissive nature of Federal Rule of Criminal Procedure 52(b). See *id.* at 1903. This rule states, "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." FED. R. CRIM. P. 52(b).

¹⁵⁹ See *Rosales-Mireles*, 138 S. Ct at 1903. The petitioner in this case argued that although Federal Rule of Criminal Procedure 52(b) was written as a permissive rule, the application of the rule by the courts of appeal should be mandatory when a defendant's substantial rights in sentencing were negatively affected, even when the appellant did not raise an objection to the district court. See *id.* at 1903, 1905.

proceedings.”¹⁶⁰

In addition to the Court, a limited number of appellate courts have recognized the validity of procedural justice. In 2015, the Court of Appeals for the District of Columbia in *United States v. Bigly*¹⁶¹ determined that the district courts were obligated to consider non-frivolous mitigation evidence even if disfavored by the federal sentencing guidelines.¹⁶² Judge Janice Rodgers Brown in a concurrence determined that procedural justice is attained when a court responds to a defendant’s arguments.¹⁶³ This is because, in doing so, the court “communicates a message of respect for defendants, strengthening what social psychologists call ‘procedural justice effects,’ thereby advancing fundamental purposes of the Sentencing Reform Act.”¹⁶⁴ In 2014, the Kentucky Supreme Court upheld a state ethics rule which found that where the prosecution insisted on a defendant waiving the right to raise appeals based on ineffective assistance of counsel claims in order to obtain a plea agreement, the prosecution’s demand undermined the concept of procedural justice.¹⁶⁵ The Kentucky Supreme Court’s decision not only highlights the importance of procedural justice in criminal trials, but it also connected a rule of ethics as being important to establishing procedural justice.¹⁶⁶

Courts have also accepted the existence of a desired procedural justice goal in civil matters. In *Caban v. Jr. Seafood*,¹⁶⁷ the United States District Court for the District of Puerto Rico concluded, as a matter of procedural justice, that federal courts should be reticent to intrude into state (or in this case commonwealth) trials unless absolutely necessary, because the federal courts risk the population’s confidence in local trials.¹⁶⁸ In 2016, Justice Michael B. Hyman on

¹⁶⁰ *Id.* at 1910. It should be noted that the dissent in this opinion, as written by Justice Thomas, with Justice Alito joining, cast significant doubts on the application of procedural justice to federal criminal courts. *See id.* at 1914–15 (Thomas, J., dissenting).

¹⁶¹ *United States v. Bigly*, 786 F.3d 11 (D.C. Cir. 2015).

¹⁶² *Id.* at 15 (citing *In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009)).

¹⁶³ *Bigley*, 786 F.3d at 17 (Brown, J., concurring).

¹⁶⁴ *Id.*

¹⁶⁵ *See United States v. Ky. Bar Ass’n*, 439 S.W.3d 136, 140, 157–58 (Ky. 2014). In this decision, the United States Attorney challenged a state ethics rule claiming that the state rule usurped federal criminal practice. *See id.* at 141–42. However, the Kentucky Supreme Court determined that it had a duty to regulate the legal profession within the state’s borders. *See id.* at 157–58. In 2015, in *Sanders v. State*, 773 S.E.2d 580 (2015), the South Carolina Supreme Court adopted the reasoning underlying *Kentucky Bar Association*. *See Sanders*, 773 S.E.2d at 582 n.2.

¹⁶⁶ *See Ky. Bar Ass’n*, 439 S.W.3d at 157.

¹⁶⁷ *Caban v. Jr. Seafood*, 132 F. Supp. 3d 274 (D.P.R. 2015).

¹⁶⁸ *See id.* at 284 (citing *Globe Newspaper Co. v. Beacon Hill Architectural Comm’n*, 40 F.3d

the Illinois Appellate Court noted that procedural justice and fairness are not limited to outcomes of civil trials, but rather should be assessed by a judge's courtroom management and the effectiveness of attorneys.¹⁶⁹ The Illinois Appellate Court reviewed a pro-se appellant's assertion that she was not well represented in her personal injury lawsuit against the Chicago Transit Authority, and the Transit Authority's attorney openly disobeyed the judge's orders without being admonished by the judge.¹⁷⁰ Justice Hyman cautioned the court of appeals that it was critical, as a matter of public confidence in the judiciary, to explain to a pro se litigant why the appellate court determined she did not state a basis for appeal in her brief rather than dismiss the appeal outright.¹⁷¹

There are limits to courts accepting a role for procedural justice in judicial determinations. In *United States v. Colon*,¹⁷² Judge Jeffrey Meyer on the United States District Court for the District of Connecticut accepted that government agents had engaged in "manipulative, sneaky, and deceitful investigative methods," but had not violated the defendants' due process rights.¹⁷³ In *Colon*, government agents had created the means for the defendants' attempted commission of an armed robbery.¹⁷⁴ The defendants conceded that the government's conduct did not constitute entrapment, but was nonetheless unconstitutionally outrageous, and in the alternative, the government had undermined the concept of procedural justice.¹⁷⁵ Judge Meyer accepted the existence of procedural justice as a means for assessing the efficacy of criminal justice in the United States but noted that neither the Court of Appeals for the Second Circuit nor the Supreme Court had found procedural justice as a basis for quashing indictments, suppressing evidence, or overturning convictions.¹⁷⁶

Although the Supreme Court has only recently accepted the importance of procedural justice,¹⁷⁷ and although only the Kentucky Supreme Court has considered procedural justice as a means to

18, 24 (1st Cir. 1994)).

¹⁶⁹ See *Wing v. Chi. Transit Auth.*, 2016 IL (1st) 153517, ¶ 22 (Hyman, J., concurring).

¹⁷⁰ See *id.* at ¶¶ 20, 22.

¹⁷¹ See *id.* at ¶ 24.

¹⁷² *United States v. Colon*, 71 F. Supp. 3d 269 (D. Conn. 2014).

¹⁷³ *Id.* at 275.

¹⁷⁴ See *id.* at 273.

¹⁷⁵ See *id.* at 271, 282.

¹⁷⁶ See *id.* at 282.

¹⁷⁷ See *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1910 (2018).

gauge attorney ethics,¹⁷⁸ there is a logical nexus between society's view in the integrity of an impartial judiciary which treats all classes of citizens with equal respect, and society's willingness to take part in its jurisdiction's judicial functions in a fair and open-minded manner.¹⁷⁹

II. HISTORIC MODELS OF POPULISM AND THE RULES OF JUDICIAL ETHICS: THE PAST IS NOT PROLOGUE

The United States possesses a history of political and social movements which coalesced around beliefs that undemocratic or external forces threatened to extinguish “free will.” One only need look at the Anti-Masonic Party of the early nineteenth century, the American (or Know-Nothing) Party of the mid-nineteenth century, or the so-called “Dixiecrats,” in the late 1940s, to find evidence that anti-establishment and anti-government sentiment has existed in a continuum in the United States.¹⁸⁰ Although these “third-parties” generally disappeared after one or two election cycles, their underlying ideologies were often subsumed into the nation's majoritarian parties.¹⁸¹ Moreover, the judiciary was not immune from populist movements.¹⁸² In 1854, Supreme Court Justice John McLean went so far as to encourage nativists—that is, the Know Nothings—to field anti-government candidates in state and national elections.¹⁸³

¹⁷⁸ See *United States v. Ky. Bar Ass'n*, 439 S.W.3d 136, 157 (Ky. 2014).

¹⁷⁹ See Hollander-Blumoff, *supra* note 151, at 132, 149; Sward, *supra* note 157, at 398.

¹⁸⁰ See, e.g., GLENN FELDMAN, *THE GREAT MELDING: WAR, THE DIXIECRAT REBELLION, AND THE SOUTHERN MODEL FOR AMERICA'S NEW CONSERVATISM* 83–84, 98–99, 204 (2015); WILLIAM PRESTON VAUGHAN, *THE ANTIMASONIC PARTY IN THE UNITED STATES: 1826-1843* 99 (1983); Lorraine Boissoneault, *How the 19th-Century Know Nothing Party Reshaped American Politics: From Xenophobia to Conspiracy Theories, the Know Nothing Party Launched a Nativist Movement Whose Effects are Still Felt Today*, SMITHSONIAN (Jan. 26, 2017), <https://www.smithsonianmag.com/history/immigrants-conspiracies-and-secret-society-launched-american-nativism-180961915/>.

¹⁸¹ See, e.g., DONALD J. GREEN, *THIRD-PARTY MATTERS: POLITICS, PRESIDENTS, AND THIRD PARTIES IN AMERICAN HISTORY* 2 (2010); STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE* 8, 10 (2d. ed. 1984).

¹⁸² See, e.g., MICHAEL HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 913–14 (1999); Thomas E. Carney, *The Political Judge: Justice John McLean's Pursuit of the Presidency*, 111 OHIO HIST. 121, 127 (2002).

¹⁸³ See HOLT, *supra* note 182, at 913–14 (“McLean had flirted with the Antimasonic nomination in 1832, bid for the Whig nomination in 1836, and orchestrated a concerted effort for the party's 1848 laurels by presenting himself as a No Party reformer.”); Carney, *supra* note 182, at 127 (“McLean became a perennial candidate, with his name being mentioned at more than five different nominating conventions; on at least two occasions he withdrew his name from consideration.”).

In 1892, the Populist Party's presidential candidate, James Baird Weaver wrote, "[I]t is not alone essential that our courts shall be pure in fact. The people must have an abiding faith in their integrity. Society becomes insecure in proportion as popular confidence is shaken in this respect."¹⁸⁴ Weaver went on to accuse the federal judiciary of being in league with railroads, bankers, and investors and alleged a judicial lineage to the pro-slavery justices who served in the decades prior to the Civil War.¹⁸⁵ Although Weaver's statements may have been considered revolutionary, his negative assessment on the judiciary is not novel to United States history.¹⁸⁶

Third-party leaders sometimes expressed a belief that the federal judicial system was designed to prevent the success of an ideology that challenged the supremacy of prevailing norms.¹⁸⁷ In 1905, Eugene Debs (a labor leader who later ran for president as a Socialist Party candidate) claimed in a speech titled "Growth of the Injunction" that the Judicial Branch had departed from its duty of impartiality and aligned itself with corporations and banks to the detriment of labor.¹⁸⁸ Debs went so far as to call William Howard Taft, a former judge on the Court of Appeals for the Sixth Circuit and future president, a man with "unswerving loyalty to capital and unmitigated contempt for labor."¹⁸⁹ Debs was hardly a political outlier. He garnered six percent of the popular vote in a four-way race against Taft, Theodore Roosevelt, and Woodrow Wilson in 1912.¹⁹⁰ Debs's Socialist Party platform included the abolition of the

¹⁸⁴ JAMES B. WEAVER, A CALL TO ACTION 67 (1892). Through this work, Weaver insisted that corporate interests such as privately owned railroads were a threat to freedom, and that these interests were powerful enough to capture the judicial branch. *See id.* at 82, 101. He noted that whoever became president after 1892 would likely have three nominees to the Court and he drew an analogy to the Court on the eve of the Civil War in which the "slave interests" had made it impossible for morality to triumph. *Id.* at 93. Weaver saw corporate interests as an equal threat to democracy as slavery had been, and he warned that both Harrison and Cleveland would nominate justices who sided with corporations, just as earlier presidents had appointed pro-slavery men to the bench. *See id.* at 80–83.

¹⁸⁵ *See id.* at 80–81, 86, 101.

¹⁸⁶ *See* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 1 (1994); Alan Furman Westin, *The Supreme Court, the Populist Movement and the Campaign of 1896*, 15 J. POL. 3, 20–21 (1953).

¹⁸⁷ *See* Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Countermajoritarian Problem*, 73 UMKC L. REV. 53, 56 (2004); John B. Judis, *Us v. Them: The Birth of Populism*, GUARDIAN (Oct. 13, 2016), <https://www.theguardian.com/politics/2016/oct/13/birth-of-populism-donald-trump>.

¹⁸⁸ *See* EUGENE V. DEBS, *Growth of the Injunction*, in WRITINGS AND SPEECHES OF EUGENE V. DEBS 167, 169 (1948) [hereinafter DEBS, *Growth of the Injunction*].

¹⁸⁹ *See Id.*

¹⁹⁰ *See Eugene V. Debs*, HIST., <https://www.history.com/topics/us-politics/eugene-v-debs> (last visited Mar. 7, 2019); *see also* ERNEST FREEBERG, DEMOCRACY'S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT 19–20 (2008) (discussing Woodrow Wilson and

federal injunction as well as diminishing the Judicial Branch's jurisdiction to matters involving disputes between the states.¹⁹¹ The goal of removing the Supreme Court from state judicial decisions would later be adopted by mid-twentieth century southern democrats, albeit for a vastly different reason.¹⁹²

The nation's first economic downturn, known as the Panic of 1819, resulted in the first consequential popular attack on an established state court.¹⁹³ Kentucky, the fifteenth state admitted to the Union, saw its state legislature and judiciary engage in a jurisdictional fight in which the constitutionally established judiciary was voted out of existence.¹⁹⁴ The basis for the legislature's action had to do with a popular belief that the banks, particularly the Bank of the United States, had limited monies during the financial crisis and the judiciary favored creditors at the expense of beleaguered farmers.¹⁹⁵ In 1820, the state's voting population overwhelmingly elected the Debt Relief Party—a state-level party—to a majority in both of the state's legislative houses.¹⁹⁶

Kentucky's legislature abolished debtors' prisons and extended the time that farmers had to pay off their debts.¹⁹⁷ The Kentucky Court of Appeals struck down several of the new laws and, in turn, the legislature established a new court of appeals in 1824.¹⁹⁸ But, the original appellate court refused to disband and a standoff between the "Old Court" on the one side, and the legislature and "New Court" on the other.¹⁹⁹ During the two-year period, the "New Court" and the

Theodore Roosevelt's approach to silencing Debs during the 1912 election).

¹⁹¹ See DEBS, *Growth of the Injunction*, at 171; FREEBERG, *supra* note 190, at 85.

¹⁹² See KARL FREDERICKSON, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932-1968* 218 (2001); Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 487 (2006).

¹⁹³ See Kristin A. Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 302, 308–09 (2010).

¹⁹⁴ See JAMES RAMAGE & ANDREA S. WATKINS, *KENTUCKY RISING: DEMOCRACY, SLAVERY, AND CULTURE FROM THE EARLY REPUBLIC TO THE CIVIL WAR* 3 (2011); *Admission of States to Union*, U.S. HIST., <https://www.u-s-history.com/pages/h928.html> (last visited Mar. 7, 2019).

¹⁹⁵ See David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. PA. J. CONST. L. 1, 51–52 (2015); John Yoo, *Judicial Supremacy Has Its Limits*, 20 TEX. REV. L. & POL'Y 1, 12 (2015); see also SEAN WILIENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 288 (2005) (discussing the measures taken by the Relief-Party in an effort to enact several pro-debtor measures including laws extending the time granted to repay creditors).

¹⁹⁶ See WILIENTZ, *supra* note 195, at 288.

¹⁹⁷ See *id.*

¹⁹⁸ See RAMAGE & WATKINS, *supra* note 194, at 87.

¹⁹⁹ See *id.*; see also ROBERT V. REMINI, *HENRY CLAY: STATESMAN FOR THE UNION* 199 (1991) ("The struggles between the New Court and the Old Court, which carried forward the quarrel between the Relief and the Anti-Relief parties, shaped Kentucky Politics throughout the decade of the 1820s and beyond.").

“Old Court,” invalidated each other’s rulings and issued contempt rulings against their political opponents.²⁰⁰ When, in 1826, the economic downturn had been reversed, a new legislature invalidated the new court of appeals.²⁰¹

A. Nineteenth Century Populism: An Absence of Continuity with the Present

Defining late nineteenth century populism requires an understanding that there is a scholarly debate as to whether the populists transitioned into the progressive wings of the Republican and Democratic Parties.²⁰² While legal history may perhaps be considered a distracting diversion, it is important in explaining why any use of the past century’s populist history as a model to assess the present would be in error. This is because much of the writing on the origins, goals, and impact of populism has altered over time.²⁰³ In the mid-twentieth century, mainstream historians accepted an interpretation by Frederick Jackson Turner that the populist movement was a democratic revolt in the western states against eastern business interests.²⁰⁴ Turner hypothesized that the pioneers who settled in the western frontier had developed an individuality that resulted in an American ethos or character, which challenged settled institutions.²⁰⁵ Turner viewed populists as people who protected democracy by demanding that the government control forces such as railroads and eastern-based wealth that threatened democracy’s well-being.²⁰⁶ By characterizing wealthy easterners as modern-day aristocrats, Turner was able to distinguish late nineteenth century populism with socialism or other “foreign”

²⁰⁰ See, e.g., John C. Doolan, *The Old Court- New Court Controversy*, 11 GREEN BAG 177, 183 (1899).

²⁰¹ See RAMAGE & WATKINS, *supra* note 194, at 87.

²⁰² See Stuart Chinn, *Political Parties and Constitutional Fidelity*, 102 MARQ. L. REV. 388, 436–37 (2018); Cliff Schechter, *Extremely Motivated: The Republican Party’s March to the Right*, 29 FORDHAM URB. L.J. 1663, 1665–66, 1667 (2002); see also CHESTER MCARTHUR DESTLER, AMERICAN RADICALISM, 1861-1901: ESSAYS AND DOCUMENTS 15 (1946) (describing the emergence of populism).

²⁰³ See Mark A. Graber, *Thick and Thin: Interdisciplinary Conversations on Populism, Law Political Science and Constitutional Change*, 90 GEO. L.J. 233, 238–39 (2001).

²⁰⁴ See CHARLES POSTEL, THE POPULIST VISION 6 (2007).

²⁰⁵ See *id.* at 26; see also DAVID W. NOBLE, HISTORIANS AGAINST HISTORY: THE FRONTIER THESIS AND THE NATIONAL COVENANT IN AMERICAN HISTORICAL WRITING SINCE 1830 51 (1965) (“In the arid West these pioneers . . . see the sharp contrast between their traditional idea of America, as the land of opportunity, the land of self-made man, free from class distinctions and from the power of wealth, and the existing America, so unlike the earlier ideal.”).

²⁰⁶ See NOBEL, *supra* note 205, at 51.

ideologies.²⁰⁷ As a result, the modern understanding of nineteenth century populism is that it was both inherently “American,” compatible with democracy, and many of its sub-ideologies became component parts of the modern party system.²⁰⁸

Richard Hofstadter, like Turner, recognized that populism had rural origins, but he also noted that by 1880, the demographics of the United States had transitioned from a largely Yankee-Protestant majority with an attendant morality centered on the concept of hard work, to a diversified population caused by Eastern and Central European immigration.²⁰⁹ Unlike Turner, Hofstadter noted that nineteenth century populism was inherently anti-immigrant, and labor leaders and skilled craftsmen viewed immigration as a threat to their economic status.²¹⁰ More recently, Professor Gretchen Ritter has argued that, while populism differed by region, the most common theme was in its anti-monopolistic focus.²¹¹ Professor Ritter’s theory explains the brief alliance between diverse economic groups.²¹² Midwestern farmers demanded the government own or regulate banks and railroads, while the labor leaders in the cities vehemently opposed low-wages associated with immigration.²¹³ Professor Ritter’s work also takes note of an important facet of American history that Turner ignored. The decade following 1880 was a period of economic uncertainty, characterized by labor strikes which approached 10,000 in total.²¹⁴

In addition to Ritter’s view of populist movements as being anti-monopolistic, it is important to note that the populist’s presidential candidate James Baird Weaver, who had attacked the judiciary, was not a political outsider. A Union general and Civil War veteran who fought under General William Sherman, Weaver served three terms in Congress as a member of the Greenback Party.²¹⁵ When that party

²⁰⁷ See *id.*

²⁰⁸ See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–67 (2001); Thompson Chengeta, *When at Loggerheads with Customary International Law: The Right to Run for Public Office and the Right to Vote*, 43 BROOK. J. INT’L L. 399, 414 (2018).

²⁰⁹ See RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 8 (1955).

²¹⁰ See *id.* at 178.

²¹¹ See GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA* 255 (1997).

²¹² See *id.* at 256.

²¹³ See *id.*

²¹⁴ See FLORENCE PETERSON, *BUREAU OF LABOR STATISTICS, STRIKES IN THE UNITED STATES 1880-1936* 21 (1937).

²¹⁵ See *Weaver, James Baird*, *BIOGRAPHICAL DIRECTORY U.S. CONG.*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000225> (last visited Mar. 7, 2019).

collapsed, he joined with the Populists.²¹⁶ While Weaver has largely been relegated to a historic footnote, it is noteworthy that he received over eight percent of the popular vote and won all of the Electoral College votes in Colorado, Nevada and Idaho.²¹⁷ He also won one of Oregon's and North Dakota's four electoral votes.²¹⁸ Most importantly, Weaver was hardly a political outsider.

B. Modern United States Populism

If nineteenth century populism adopted a conviction that the majority's identity and their ability to economically succeed had been diminished by foreign elements, modern right-wing populism adds to this character a notional belief that there exists a liberal assault on religion, and an imposed institutional "political correctness" that neuters fundamental tenets of national existence.²¹⁹ Moreover, a current focus of modern populists include doubts as to whether Hispanic and Muslim citizens can be considered "American."²²⁰ President Trump's earlier assertion that President Barak Obama was not a native-born citizen²²¹ was by no means relegated to campaign hyperbole. In 1993, noted economist Paul Krugman, who later was awarded the Nobel Memorial Prize in Economic Sciences, warned that domestic opposition to the North America Free Trade Agreement (NAFTA) was a form of modern populism.²²² Krugman argued that the agreement's opponents had advanced an overly

²¹⁶ See JAMES L. HUSTON, *SECURING THE FRUITS OF LABOR: THE AMERICAN CONCEPT OF WEALTH DISTRIBUTION 1765–1900* 355 (1996); Westin, *supra* note 186, at 3.

²¹⁷ See RALPH YOUNG, *DISSSENT: THE HISTORY OF AN AMERICAN IDEA* 253 (2015).

²¹⁸ See *id.*

²¹⁹ See, e.g., David Nakamura, *Celebrating Merry Christmas Again: Trump Opens New Front in the Culture Wars*, WASH. POST (Dec. 1, 2017), https://www.washingtonpost.com/politics/celebrating-merry-christmas-again-trump-opens-new-front-in-the-culture-wars/2017/11/30/e28a40e0-d5ee-11e7-a986-d0a9770d9a3e_story.html?noredirect=on&utm_term=.401d89ad6931.

²²⁰ See Teran Powell, *I Wear It Very Proudly that I'm an American: Janan Najeeb*, WUWM (Jan. 11, 2019), <https://www.wuwm.com/post/i-wear-it-very-proudly-im-american-janan-najeeb#stream/0>; Zac Cheney-Rice, *Tom Brokaw Wants Hispanics to Assimilate. Hispanics Aren't the Problem.*, INTELLIGENCER (Jan. 27, 2019) <http://nymag.com/intelligencer/2019/01/tom-brokaw-trumpets-his-ignorance-of-hispanic-assimilation.html>; Fabiola Santiago, *Latinos can Never Assimilate Enough for the Tom Brokaws of America*, MIAMI HERALD (Jan. 31, 2019), <https://www.miamiherald.com/news/local/news-columns-blogs/fabiola-santiago/article225195465.html>.

²²¹ See Hanna Krueger et al., *Trump's Most Notable Insults*, HILL (July 26, 2015), <http://thehill.com/blogs/ballot-box/249102-trumps-most-notable-insults>.

²²² Paul Krugman, *The Uncomfortable Truth About NAFTA: It's Foreign Policy, Stupid*, 72 FOREIGN AFF. 13, 13–14 (1993); *Past Winners of the Nobel Memorial Prize in Economic Science*, N.Y. TIMES (Oct. 12, 2015), <https://www.nytimes.com/2015/10/13/business/economy/past-winners-of-the-nobel-memorial-prize-in-economic-science.html>.

simplistic and false narrative that American jobs would be lost to Mexico.²²³ Some of America's more prominent NAFTA opponents, such as Patrick Buchanan, added to this narrative that NAFTA presented a danger to America's identity.²²⁴ Although NAFTA is almost twenty-five years old, it remains a rally-point for modern populists.²²⁵

According to University of Georgia political science professor, Cas Mudde, modern populism is a "thin ideology."²²⁶ Unlike socialism or fascism, Professor Mudde posits that populism "calls for kicking out the political establishment, [without] specify[ing] what should replace it."²²⁷ Professor Mudde points out that populism is also a label which is seldom claimed by the people advancing its ideology, and indeed the term "populism," carries several negative connotations.²²⁸ University of Oregon political science Professor Joseph Lowndes, argues that modern United States populism has, at its core, an appeal to both "whiteness and masculinity."²²⁹ As examples for this argument, Lowndes begins with the presidential campaign of George Wallace in 1968, and then uses Richard Nixon's attacks on liberal elites, as well as Ronald Reagan's campaign against "welfare queens."²³⁰ The real target of these attacks, Lowndes points out, was not the individual recipients of welfare or the nation's universities, but rather, a federal government which enabled a system to take resources from working "middle Americans," and transfer these to others, ostensibly non-white Americans.²³¹ Lowndes concludes his essay on populism with an exposition on President Trump's campaign, which included veiled promises to regain a period in which a white majority was also the dominant political and economic voice.²³²

Professor Pippa Norris, a Harvard University political science

²²³ See Krugman *supra* note 222, at 14.

²²⁴ See FREDERICK W. MAYER, *INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS* 270 (1998).

²²⁵ See Simon Lester & Inu Manak, *A Framework for Rethinking NAFTA for the 21st Century: Policies, Institutions, and Regionalism* 2–3 (Ctr. for Trade & Econ. Integration, Working Paper No. 2017-10, 2017).

²²⁶ Uri Friedman, *What Is a Populist: And Is Donald Trump One?*, ATLANTIC (Feb. 27, 2017), <https://www.theatlantic.com/international/archive/2017/02/what-is-populist-trump/516525/>.

²²⁷ *Id.*

²²⁸ See CAS MUDDÉ & CRISTÓBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* 2 (2017).

²²⁹ Joseph Lowndes, *Populism in the United States*, in *THE OXFORD HANDBOOK OF POPULISM* 232, 233 (Cristóbal Rovira Kaltwasser et al. eds., 2017).

²³⁰ *Id.*

²³¹ See *id.*

²³² See *id.* at 242.

professor, provides a different explanation of modern populism.²³³ Populism, according to Norris, has three primary dimensions regardless of whether it is a “right-wing” or “left-wing” movement.²³⁴ The first is that moral virtue and power should reside with ordinary people and not elites.²³⁵ Secondly, populism is an inherently anti-establishment movement.²³⁶ Finally, it is lacking in structural mechanisms and there is a tendency to have power concentrated in a populist movement’s charismatic leader.²³⁷ It should be added that modern right-wing populist rhetoric is partly based on insulting individuals and groups that its leaders oppose.²³⁸ This rhetoric does have an effect on the federal and state judiciaries in that President Trump has approached the judiciary consistent with the prevailing rhetorical norms.²³⁹ Indeed, his accusation that Judge Curiel was incapable of exercising independent judgment because of his Hispanic heritage, fits neatly in both Professor Norris and Professor Mudde’s models of populism.²⁴⁰

III. CASE STUDIES ON JUDICIAL CONDUCT

Freedom of speech is a fundamental right of individuals protected by both the First and Fourteenth Amendments.²⁴¹ Neither the

²³³ See Thomas B. Edsall, *The Peculiar Populism of Donald Trump*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/opinion/the-peculiar-populism-of-donald-trump.html>; Sean Illing, *Why Trump’s Populist Appeal Is About Culture, Not the Economy: A Harvard Political Scientist on the West’s Cultural Crisis*, VOX (Mar. 27, 2017), <https://www.vox.com/conversations/2017/3/27/15037232/trump-populist-appeal-culture-economy>.

²³⁴ See Illing, *supra* note 233.

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See *id.*; see also Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* 30 (Harvard Kennedy Sch., Working Paper No. RWP16-026, 2016) (“Populists support charismatic leaders, reflecting a deep mistrust of the ‘establishment’ and mainstream parties who are led nowadays by educated elites with progressive cultural views on moral issues.”).

²³⁸ See Robert C. Rowland, *Donald Trump and the Rejection of the Norms of American Politics and Rhetoric*, in AN UNPRECEDENTED ELECTION: MEDIA, COMMUNICATION, AND THE ELECTORATE IN THE 2016 CAMPAIGN 189, 195 (Benjamin R. Warner et al. eds., 2018). There have also been discussions regarding specific instances of right-wing rhetoric based on the insult. See, e.g., Eliza Collins, *Top 5 Insults Donald Trump Has Used on Twitter*, USA TODAY (Sept. 21, 2016), www.usatoday.com/story/news/politics/onpolitics/2016/09/21/top-5-insults-donald-trump-has-used-twitter/90797666; Krueger, et al., *supra* note 221; Tessa Stuart, *Donald Trump’s Meanest Twitter Insults*, ROLLING STONE (Mar. 10, 2016), www.rollingstone.com/politics/news/donald-trumps-favorite-twitter-insults-20160310.

²³⁹ See Wolf, *supra* note 93.

²⁴⁰ See *id.*

²⁴¹ See *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570–71 (1942) (quoting *Lovell v. Griffin*, 303 U.S. 444, 450 (1938)).

federal government nor the state governments can prohibit speech that may constitute “hate speech.”²⁴² Nonetheless, the federal and state judiciaries have upheld limits on the speech of government personnel.²⁴³ In spite of these limits, it is not settled if there is a universal standard of limits for judges. For instance, in *Butler v. State Judicial Inquiry Commission*,²⁴⁴ the Alabama Supreme Court determined that judicial ethics canons prohibiting a candidate for judicial office from knowingly or recklessly attacking another candidate with false information was an overbroad restraint on free speech.²⁴⁵ Likewise, in *In re Chmura*,²⁴⁶ the Michigan Supreme Court found that the state’s prohibition against a judicial candidate disparaging an opponent with false or misleading statements was too overbroad an intrusion into the right of free speech.²⁴⁷

Although one could analyze the impact of modern “right wing” populism’s impact on several classes of people, this Article concentrates on gender, race, and the LGBT community. This section begins with an analysis of how the principle of free speech has been used to protect judicial conduct. It then progresses into an analysis as to how various state supreme courts have assessed discrimination against the three groups as well as penalized judges who departed from expected standards of judicial conduct.

A. *Free Speech vs. Judicial Impartiality: The (Past) California Model and Current “Mississippi Approach”*

Although there are several appellate court decisions encompassing a question of whether removal or recusal is an appropriate remedy for instances where judicial speech expresses discrimination against

²⁴² See *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

²⁴³ See, e.g., *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973); *Brown v. Glines*, 444 U.S. 348, 356 n. 13 (1980) (“[A] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government.”). But see *Cole v. Richardson*, 405 U.S. 676, 684 (1972) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (finding that the government can constitutionally mandate certain speech from government employees through oaths).

²⁴⁴ *Butler v. State Judicial Inquiry Comm’n*, 802 So. 2d 207 (Ala. 2001).

²⁴⁵ See *id.* at 218.

²⁴⁶ *In re Chmura*, 608 N.W.2d 31 (Mich. 2000).

²⁴⁷ See *id.* at 45.

a group,²⁴⁸ a 1982 California Supreme Court decision, *In re Stevens*²⁴⁹ may be the most helpful in providing context to the tension between free speech and the regulation of judicial conduct.²⁵⁰ In 1981, California's Commission on Judicial Performance concluded that Judge Charles S. Stevens had, since his appointment in 1971, "repeatedly and persistently used racial and ethnic epithets, and made racially stereotypical remarks to counsel and court personnel."²⁵¹ Although the *Los Angeles Times* reported that Stevens claimed his comments were "made in jest," Southern California nonetheless learned of his statements.²⁵²

Most of Judge Stevens' conduct occurred in his chambers and not in open court.²⁵³ The state commission concluded that there was no evidence that Judge Stevens had disparately treated litigants or witnesses on the basis of race, but his conduct was censurable.²⁵⁴ The California Supreme Court, in a two-paragraph opinion, upheld the commission's recommendation of a censure against Judge Stevens on the basis that it was "prejudicial to the administration of justice that brings the judicial office into disrepute."²⁵⁵ The censure, however, placed no limits on Judge Stevens from accepting future cases.²⁵⁶ Associate Justice Otto Kaus issued a concurring opinion, which essentially took the majority to task for not fully articulating the nature of Stevens' speech, which included racial epithets against African-Americans and Philippine-Americans in open court.²⁵⁷

²⁴⁸ Compare *In re Chevron U.S.A.*, 121 F.3d 163, 164 (5th Cir. 1997) ("[W]e conclude that the actions complained of meet the standards for recusal . . . but, as we explain, we exercise our discretion and decline to issue the requested writ."), and *Roberts v. Bailar*, 625 F.2d 125, 130 (6th Cir. 1980) ("[T]he District Judge had a duty to recuse himself in order to preserve the indispensable semblance of fairness."), with *Miss. Comm'n on Judicial Performance v. Osborne*, 2008-JP-00454-SCT (¶ 43) (Miss. 2009) ("Judge Osborne's actions constituted willful misconduct in office and conduct prejudicial to the administration of justice We thus order Judge Osborne to be suspended from office for a period of one year.").

²⁴⁹ *In re Stevens*, 645 P.2d 99 (Cal. 1982).

²⁵⁰ See *id.* at 99.

²⁵¹ *Id.*

²⁵² Phillip Hager, *Judge Faces Censure for Ethnic, Racial Remarks*, L.A. TIMES, Mar. 5, 1982, at 7.

²⁵³ *In re Stevens*, 645 P.2d at 99.

²⁵⁴ See *id.*

²⁵⁵ *Id.*

²⁵⁶ See CAL. CONST. art. VI § 18; *In re Stevens*, 645 P.2d at 99.

²⁵⁷ *In re Stevens*, 645 P.2d at 99 (Kaus, J., concurring). While the majority only issued a brief decision upholding the censure, Associate Justice Otto Kaus concurred where he listed what he believed to be the most egregious examples of Stevens' conduct. Justice Kaus noted,

During an in-chambers discussion regarding a criminal case involving two black defendants and a white victim, Judge Stevens remarked to counsel that black persons have to learn how to live in their own neighborhoods and that it was "typical" of black

Associate Justice Stanley Mosk, in his dissent, conceded that he was appalled with Stevens' conduct, but he accused the majority of not adequately protecting free speech.²⁵⁸ Justice Mosk drew a distinction between on-bench conduct and extrajudicial conduct, and then argued that the majority punished Stevens for an arena of behavior that it could not intrude into.²⁵⁹ In doing so, he drew on the civil rights battles of the previous two decades where "many a red-neck sheriff interpreted civil rights speeches—particularly in and around court houses—as impermissible conduct."²⁶⁰ In essence, Justice Mosk, who had been regarded as a liberal pro-civil rights justice, argued that a greater good required permitting a judge to have the same free speech protections as the citizenry.²⁶¹ His purpose for making this argument was not simply a fear of an administrative agency being permitted to curtail free speech rights.²⁶² It was also because he viewed that limits on extrajudicial speech would undermine the independence of the state judiciary and force judges to hide their prejudices.²⁶³

Judge Mosk's freedom of judicial speech jurisprudence survives into the present, but the state courts of appeal who favor its

persons to fight unfairly.

Judge Stevens, during his term in office, referred to black persons as "Jig, dark boy, colored boy, nigger, coon, Amos and Andy, and jungle bunny." With one exception, Judge Stevens did not use these terms in open court or with reference to a party, witness or attorney in a case before him. In 1974, in a probate case involving a controversy between black litigants regarding burial of a loved one, Judge Stevens stated in the presence of court personnel only, "let's get on with this Amos and Andy show." On another occasion, he privately referred to his court clerk as being "lazier than a coon."

During another in-chambers discussion, Judge Stevens stated to a public defender that "Filipinos can be good, hard-working people and that they are clean, unlike some black animals who come into contact with the court."

Id. at 99–100 (Kaus, J., concurring).

²⁵⁸ *See id.* at 101 (Mosk, J., dissenting).

²⁵⁹ *See id.*

²⁶⁰ *Id.*

²⁶¹ *See id.* (quoting *Baumgartner v. United States*, 322 U.S. 665, 674 (1944)); *Stanley Mosk*, CAL. SUPREME CT. HIST. SOC'Y, <https://www.cschs.org/history/california-supreme-court-justices/stanley-mosk/> (last visited Mar. 12, 2019).

²⁶² *See In re Stevens*, 645 P.2d at 100–01 (Mosk, J., dissenting).

²⁶³ *See id.* at 101. Justice Mosk concluded,

If the day comes—and in view of the majority opinion it may be here—when judges at any level are to be disciplined for their manner of expression, however primitive, then we no longer have an independent judiciary in California. Judges will inevitably become timid and stifled, even though the Constitutions of the United States and of California apply to all persons; nothing in their text suggests that judges are excluded from protection.

Id.

continuance tend to protect judges who demean minority groups.²⁶⁴ Moreover, there are instances in which judicial discipline is imbalanced. In 2009, the Mississippi Supreme Court, in *Mississippi Commission on Judicial Performance v. Osborne*, upheld the suspension of a judge who articulated racially disparaging language and warned the state judiciary that “[n]o one is compelled to serve as a judge, but once an individual offers himself or herself for service, that individual accepts the calling with full knowledge of certain limitations upon speech and actions in order to serve the greater good.”²⁶⁵ During a reelection campaign, Judge Solomon Osborne was quoted as saying to a predominately African-American audience: “White folks don’t praise you unless you’re a damn fool. Unless they think they can use you. If you have your own mind and know what you’re doing, they don’t want you around.”²⁶⁶

The Mississippi Commission on Judicial Performance—the state’s statutorily created administrative agency charged with investigating complaints against judges—recommended a lifetime suspension from judicial service against Judge Osborne.²⁶⁷ Although the state supreme court found that Judge Osborne had “a long history of violating the judicial canons” of ethics, and had already resigned, it determined that a one year suspension was a more appropriate remedy.²⁶⁸ One year before the state supreme court upheld the suspension sanction against Judge Osborne, it upheld a public reprimand for Judge Nikki Boland after she stated, “African-Americans in Hinds County can go to hell for all I care.”²⁶⁹ There were factual differences between the conduct of the two judges. Judge Osborne was in the process of campaigning for reelection and advanced a defense that his statements—after first denying making

²⁶⁴ Compare CHARLES GARDNER GEYH, ET AL., 1 JUDICIAL CONDUCT AND ETHICS, § 10.06(3) (5th ed. 2018) (“Statements of opinion on public issues may be controversial or offensive to certain groups while still falling in the ambit of protected discourse, particularly where the statements are ambiguous or context-dependent.”), with *id.* at § 3.03 (“[A]t the very least, it is both undignified and discourteous for a judge to make a racially derogatory statement from the bench, and therefore violative of Canon 3(B)(4) of the 1990 Code, it may also be indicative of bias.”).

²⁶⁵ Miss. Comm’n on Judicial Performance v. Osborne, 2008-JP-00454-SCT (¶ 22) (Miss. 2009). The state supreme court is composed of nine elected justices who serve for eight-year terms. See MISS. CONST. art. VI, §§ 145B, 149.

²⁶⁶ *Osborne*, 2008-JP-00454-SCT at (¶ 60) (Dickinson, J., concurring in part and dissenting in part).

²⁶⁷ See *id.* at (¶ 7) (majority opinion). The Commission is established under Mississippi law. See MISS. CODE ANN. §§ 9-19-1–9-19-31 (1972).

²⁶⁸ *Osborne*, 2008-JP-00454-SCT at ¶¶ 35, 43.

²⁶⁹ Miss. Comm’n on Judicial Performance v. Boland, 2007-JP-00661-SCT (¶ 9) (Miss. 2008) (en banc).

them—constituted protected speech.²⁷⁰ Judge Boland conveyed her statements at a judicial conference in Dallas, Texas and then left from office.²⁷¹

It is problematic that, while both judges articulated racially derogatory comments, the Caucasian judge received a reprimand rather than a suspension, and a harsher punishment was levied against the African-American judge.²⁷² Put another way, the state supreme court's decision regarding Judge Boland arguably contains an subliminal message that defaming the state's majority population carries a greater possibility of removal, then does provoking speech against minority populations. If one considers Mississippi's demographics, a state with almost three million residents, in light of the goal of a colorblind judiciary, the uneven discipline of Boland and Olson could be interpreted as the state judiciary informing both its majority Caucasian (59.2%) population, and minority African-American (37.8%) population that judges who have exhibited a devaluing of people on the basis of their minority race or national origin, may one day return to the judiciary at a faster rate than those who devalue Mississippi's majority population.²⁷³

Wholly absent from either *Osborne* or *Boland* is a recognition of how judicial actions of an explicit nature can constitute community harm by strengthening implicit biases. According to the American Public Media Reports, Mississippi's prosecutors strike African-American jurors through the peremptory strike process in criminal trials at four times the rate that Caucasian jurors are removed.²⁷⁴ Beyond the continued disparate treatment of jurors based on race, there may be an underlying judicial attitude which conveys to the legal community a wider acceptability of discrimination against

²⁷⁰ See *Osborne*, 2008-JP-00454-SCT at ¶¶3, 5.

²⁷¹ *Boland*, 2007-JP-00661-SCT at ¶ 3. Judge Boland, advanced as her defense that she was ill at the time she made her comments and also that her speech was protected under the First Amendment. See *id.* at ¶¶ 16, 34.

²⁷² Compare *Boland*, 2007-JP-00661-SCT at ¶ 68 (finding a public reprimand to be appropriate), with *Osborne*, 2008-JP-00454-SCT at ¶ 43 (issuing a one-year suspension).

²⁷³ See *Quick Facts: Mississippi*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/ms/PST045218> (last visited Mar. 13, 2019).

²⁷⁴ See Will Craft, *Mississippi D.A. Has Long History of Striking Many Blacks from Juries*, AM. PUB. MEDIA (June 12, 2018), <https://features.apmreports.org/in-the-dark/mississippi-district-attorney-striking-blacks-from-juries/>; Jerry Mitchell, *Report: Mississippi DA Struck Black Jurors at 4½ Times Greater Rate*, CLARION LEDGER (June 12, 2018), <https://www.clarionledger.com/story/news/2018/06/12/does-da-curtis-flowers-case-see-strike-black-potential-jurors/692156002/>; *Study: Local Mississippi Prosecutors Struck Black Jurors at More than Four Times the Rate of Whites*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/7123> (last visited Mar. 13, 2019).

minority populations.²⁷⁵ Notably, some of the state's justices have attacked one of the fundamental cornerstones of ensuring equal treatment under the law. In *Czekala-Chathamfiled, v. State ex rel. Hood*,²⁷⁶ the state supreme court issued an order to the state's lower courts to accept subject matter jurisdiction over same-sex marriages and divorces.²⁷⁷ In essence, a majority of the state's justices mandated that *Obergefell v. Hodges*,²⁷⁸ the United States Supreme Court's opinion finding that same-sex couples possessed a right under the Fourteenth Amendment's Due Process Clause and Equal Protection Clause to marry, and, commensurately divorce, was the law of Mississippi.²⁷⁹

Prior to *Obergefell*, Mississippi's voters and legislators had opposed same-sex marriage, by placing into the state constitution a ban specific to same-sex marriages.²⁸⁰ In *Czekala*, two of the state's justices dissented from the order implementing *Obergefell* on the basis that the United States Supreme Court had exceeded its authority.²⁸¹

Associate Justice Josiah Coleman emphatically asserted that his state constitutional oath of office barred him from enforcing *Obergefell*.²⁸² After accusing five United States Supreme Court justices of usurping a state's sovereign authority, he took the opportunity to place some of the blame on the Supreme Court under Chief Justice Earl Warren for creating the basis to enable such a usurpation in the issuance of its early civil rights opinions.²⁸³ In doing so, he asserted that inferior court judges do not owe fealty to the Supreme Court, but then argued that since *Brown v. Board of*

²⁷⁵ See *Boland*, 2007-JP-00661-SCT at ¶ 68; *Osborne*, 2008-JP-00454-SCT at ¶ 43; *In re Agresta*, 476 N.E.2d 285, 286 (N.Y. 1985) (per curiam); J. Thomas Sullivan, *Discrimination in The Administration of Criminal Justice: Lethal Discrimination*, 26 HARV. J. RACIAL & ETHNIC JUST. 69, 110 (2010).

²⁷⁶ *Caekala-Chathamfiled v. State ex rel. Hood*, 2014-CA-00008-SCT (Miss. 2015).

²⁷⁷ See *id.* at 187. The Mississippi Supreme Court is composed of nine judges. See MISS. CONST. art. VI, § 145-B.

²⁷⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²⁷⁹ See *Caekala-Chatamfield*, 2014-CA-00008-SCT at ¶¶ 4, 6.

²⁸⁰ MISS. CONST. art. XIV, § 263-A. While this article took effect in 2004 after a popular vote, it should be pointed out that this article replaced an article repealed in 1987 banning interracial marriage. See MISS. CONST. art. XIV, § 263 (repealed 1987). The Supreme Court had struck down such bans in *Loving v. Virginia*, 388 U.S. 1 (1967). Hence one could posit that Mississippi's legislature and voters resisted immediate implementation of a removal of a prior restriction on marriage.

²⁸¹ See *Caekala-Chatamfield*, 2014-CA-00008-SCT at ¶ 6 (Dickinson, J., dissenting); *id.* at ¶¶ 3-4 (Coleman, J., dissenting).

²⁸² See *id.* at ¶ 7 (Coleman, J., dissenting) ("No inferior judge, to my knowledge, has ever taken an oath of fealty to the United States Supreme Court, but here we take an oath of office prescribed by the Constitution of Mississippi.")

²⁸³ See *id.* at ¶¶ 9-10, 15.

Education, and, in particular *Cooper v. Aaron*, the Court has undertaken an error-based attitude that the Constitution is what a majority of the Court determines it to be.²⁸⁴ Presiding Justice Jess Hays Dickinson likewise argued in his dissent that *Obergefell* undermined Mississippi's judicial oath of office so as to create a justiciable issue.²⁸⁵ Both justices, to be sure, were sincere in their belief that the four United States Supreme Court justices who dissented in *Obergefell* correctly accused the majority of unconstitutionally legislating a new right and in the process overturning the rights of the state's voters.²⁸⁶ Yet, the *Czekala* dissent may have empowered the state's lesser judges to articulate criticisms of equal treatment norms. Having recognized this possibility, it must be stressed that the justices were wholly within their judicial authority to dissent and it would undermine judicial independence to place limits against this type of dissent.²⁸⁷ Yet, the tenor of their argument could serve as an unintended basis for trial judges to engage in conduct which stigmatizes minorities and, in turn, strengthens the community's implicit biases.

B. LGBT and Equal Rights: The Marriage Cases

In 2016, the Oregon Commission on Judicial Fitness unanimously recommended removing Judge Vance Day from his position.²⁸⁸ The state's administrative commission determined that Judge Day had, among other deficiencies, violated a state judicial code by "prohibiting manifestation of bias or prejudice in the performance of judicial duties."²⁸⁹ The commission also determined that Day undermined confidence in the judiciary through willful

²⁸⁴ See *id.* at ¶ 10.

²⁸⁵ See *id.* at ¶¶ 6, 15 (Dickinson, J., dissenting).

²⁸⁶ See *id.* at ¶ 6 ("The *Obergefell* dissenters have raised a question which—as Justice Coleman explains—implicates our oath of office as justices of this Court: Did the *Obergefell* majority engage in legislative enactment, rather judicial interpretation, exceeding the power conferred upon it by the United States Constitution?"); *id.* at ¶¶ 14–15 (Coleman, J., dissenting).

²⁸⁷ See *id.* at ¶ 18 (Dickinson, J., dissenting).

²⁸⁸ Inquiry Concerning a Judge (Day), 413 P.3d 907, 912 (Or. 2018). Day first came to the commission's attention, in 2012, when he chastised a youth soccer referee over the referee's performance at his son's game. See *id.* at 914–15. According to the referee, Day handed the referee his business card indicting that he was a trial judge, and this served to intimidate the referee. *Id.* at 914. The commission determined, at first, not to fully investigate this incident after determining that the complaints against Day were misplaced. *Id.* at 915.

²⁸⁹ *Id.* at 912. Oregon Code of Judicial Ethics, Rule 3.3(B) prohibits a judge from the manifestation of bias or prejudice in the performance of judicial duties. See OR. MODEL CODE OF JUDICIAL CONDUCT r. 3.3 (2013).

misconduct.²⁹⁰ On March 15, 2018, the Oregon Supreme Court, in a *per curiam* opinion, upheld six of the eight misconduct charges that the commission had found Judge Day guilty of.²⁹¹ Judge Day had strong beliefs regarding the Second Amendment to the point where he permitted a former Navy SEAL convicted of DUI to handle firearms and refused to perform same-sex marriages after *Obergfell*.²⁹² Day employed a “screening process” to avoid his office being used for same-sex marriages.²⁹³

In regard to Judge Day’s refusal to perform same-sex marriages, the state supreme court concluded that “solemnizing marriages,” while discretionary for judges, is a judicial act and therefore, a judge cannot “screen” marriage applicants to refuse same-sex couples the same treatment accorded opposite sex couples.²⁹⁴ The Oregon Supreme Court reminded trial judges that the state’s judicial rule prohibiting a judge from manifesting bias is measured by whether a member of the public would find a judicial act an obvious indicia of judicial bias.²⁹⁵ The Court went on to note that racial slurs and epithets, as well as other actions to demean a class of persons based on race, religion, gender, or national origin, were clearly within the prohibited conduct of the rule.²⁹⁶ But the rule also prohibits “irrelevant references to personal characteristics” and “facial expressions and body language [that] convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice.”²⁹⁷

In assessing Judge Day’s use of a screening process, the Court upheld the commission’s determination that Day’s actions were

²⁹⁰ See *Inquiry Concerning a Judge (Day)*, 413 P.3d at 923.

²⁹¹ See *id.* at 912.

²⁹² Whitney Woodworth, *State Dismisses Criminal Charges Against Suspended Judge Vance Day*, SALEM STATESMAN J. (Oct. 23, 2018), <https://www.statesmanjournal.com/story/news/crime/2018/10/23/judge-vance-day-criminal-charges-dismissed-oregon/1744815002/>. The Oregon Supreme Court concluded,

Day genuinely cared about the participants. He put his “heart and soul” into the VTC, motivated by his desire to honor and assist veterans, not to promote his own interests. He had “tremendous respect” for the participants, cared for them, and wanted to help their positive transition back to society. The record also shows that respondent had a deep respect for, a sincere interest in, and a fascination with, military history and the work of the armed forces.

Inquiry Concerning a Judge (Day), 413 P.3d at 916.

²⁹³ See *Inquiry Concerning a Judge (Day)*, 413 P.3d at 921–22.

²⁹⁴ See *id.* at 951, 953.

²⁹⁵ See *id.* at 951–52.

²⁹⁶ See *id.* at 951.

²⁹⁷ *Id.*

willful.²⁹⁸ The Court then upheld the recommended sanction against Judge Day and removed him from his judicial duties for a three year period.²⁹⁹ While the Court focused on Judge Day's disregard for upholding the trust of his office, part of the basis for the Court's lengthy sanction against Judge Day was to promote public confidence in the judiciary.³⁰⁰ Day appealed to the Supreme Court, but on October 9, 2018, the Court denied *certiorari* to his appeal.³⁰¹

While Judge Day is not solely responsible for widespread news reporting on his activities in the sense that he did not initiate interviews or contact media personnel, it must be noted that his conduct was widely reported in Oregon, and across the United States.³⁰² The *New York Post* reported that Day had hung a picture of Hitler in his courtroom, but conceded that Day might have done this as a misunderstood honor to World War II veterans who defeated Nazi Germany.³⁰³ The state's leading newspaper in terms of circulation, *The Oregonian* reported that Day's suspension was the third longest in the state's history.³⁰⁴ CBN News offered a defense of Day under the claim that his devout Christian faith was the target of the state judicial commission.³⁰⁵ By the end of 2015, Judge Day

²⁹⁸ See *id.* at 953.

²⁹⁹ See *id.* at 959. The Court noted: "A suspension may be appropriate if a judge engages in misconduct directly related to the judge's official duties, when the record shows that the judge does not 'view[] the future in a manner materially different from the past.'" *Id.* at 957 (citing *In re Schenck*, 870 P.2d 185, 210 (Or. 1994)).

³⁰⁰ *Id.* at 959 ("We conclude that a lengthy suspension is required, to preserve public confidence in the integrity and impartiality of the judiciary.")

³⁰¹ See Day v. Or. Comm'n on Judicial Fitness & Disability, 139 S. Ct. 324 (2018); *Suspended Oregon Judge Vance Day Strikes Out at U.S. Supreme Court*, OREGONIAN (Oct. 9, 2018), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/10/suspended_oregon_judge_vance_d.html.

³⁰² See, e.g., Aimee Green, *Oregon Judge Vance Day Indicted for Allegedly Providing Gun to Felon*, OREGONIAN (Nov. 17, 2016), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/11/oregon_judge_vance_day_indicte.html; *Kim Davis Isn't the Only One Refusing Same-Sex Marriages*, USA TODAY (Sept. 5, 2015), <https://www.usatoday.com/story/news/nation-now/2015/09/05/kentucky-clerk-same-sex-marriage-license-religious-freedom/71770124/>; *What Does It Mean to Be a Judge?*, STATESMAN J. (Jan. 27, 2016), <https://www.statesmanjournal.com/story/opinion/2016/01/27/what-does-mean-judge/79364298/>.

³⁰³ See Meg Wagner, *Oregon Judge Who Refused to Perform Same-Sex Marriages Hung Picture of Hitler in Courthouse, Bullied Veterans: Documents*, N.Y. POST (Sept. 9, 2015), <https://www.nydailynews.com/news/national/ore-judge-hung-hitler-portrait-courthouse-bullied-vets-article-1.2353159>.

³⁰⁴ See Aimee Green, *Judge Vance Day—Who Wouldn't Marry Same-Sex Couples—Suspended for 3 Years*, OREGONIAN (Mar. 15, 2018), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/03/oregon_supreme_court_xxxx_judg.html.

³⁰⁵ See Mark Martin, *Christian Judge Who Stood for Marriage May Fall to Deep Blue Liberal Agenda*, CBN NEWS (Apr. 6, 2017), <https://www1.cbn.com/cbnnews/us/2017/april/oregon-judge-fights-to-keep-his-job-blames-deep-blue-state-politics>.

became emblematic of a so-called “culture war.”³⁰⁶ In February 2016, the *Washington Post* headlined an article with “Meet the judge who honors Hitler, hates gays, has ‘pattern of dishonesty.’”³⁰⁷ One year later, the *Washington Times* headlined an editorial, “In Oregon, the left targets an Evangelical GOP judge.”³⁰⁸ People appearing in Judge Day’s courtroom, whether in a litigant, witness, juror, or observer capacity might well wonder if Judge Day had prejudged a case, even if he had entered into all cases with an internal determination to impartial and fair to all parties.

Judge Day also published a brief law review essay in his own defense as well as a defense of Judge Neely, a Wyoming judicial officer who refused to perform same-sex marriages.³⁰⁹ Judge Day began his argument with the observation that “in a constitutional republic the institution responsible for adjudicating disputes and interpreting the application of the law must be held in high esteem by the society it serves.”³¹⁰ He also recognized the importance of impartiality and pointed out that in 1346, Parliament, under King Edward III of England, enacted a statute mandating “equal Law and Execution of right to all our Subjects, rich and poor.”³¹¹ Yet, having recognized the importance of a judge’s impartial conduct, he argued that judicial disciplinary commissions and state supreme courts which upheld disciplinary recommendations have evolved from punishing actual transgressions to enforcing “conformity of thought.”³¹² He claimed he understood the importance of having a judiciary with a diversity of thought, but added that with *Obergfell*, some of the judicial ethics commissions applied a religious litmus test to the judiciary.³¹³ Judge Day concluded his article with the

³⁰⁶ See, e.g., *Culture Wars, a Split America and an Oregon Judge Under Investigation*, STATE (Sept. 5, 2015), <https://www.thestate.com/news/politics-government/article34225287.html>.

³⁰⁷ Tom Jackman, *Meet the Judge Who Honors Hitler, Hates Gays, Has ‘Pattern of Dishonesty’*, WASH. POST (Feb. 29, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/02/29/meet-the-judge-who-honors-hitler-hates-gays-has-pattern-of-dishonesty/?utm_term=.2152cd447278.

³⁰⁸ Ralph Z. Hallow, *In Oregon, the Left Targets an Evangelical GOP Judge*, WASH. TIMES (Mar. 26, 2017), <https://www.washingtontimes.com/news/2017/mar/26/vance-day-evangelical-judge-targeted-left-oregon/>.

³⁰⁹ See Vance R. Day, *In re Neely: The “Pedestal Principle” and Judicial First Amendment Liberties in an Era of Increasing Thought Conformity*, 30 REGENT U. L. REV. 119, 125, 133 (2017).

³¹⁰ *Id.* at 119.

³¹¹ *Id.* at 123.

³¹² See *id.* at 127, 129–30.

³¹³ See *id.* at 128. Judge Day noted that Justice Samuel Alito warned that *Obergfell* would result in discrimination against citizens whose religious beliefs were contrary to the decision. See *id.* at 128–29.

admonition that a judge's liberty of conscience should be no more constrained than that of ordinary citizens.³¹⁴ In a manner similar to Justice Mosk, Judge Day made an important argument about the basic constitutional rights of freedom of speech and conscience.³¹⁵ Like Justice Mosk, Judge Day's argument did not consider how a judge's overt conduct may effect a community's internal biases and reinforce stereotypes and assumption that have a probability of undermining fair trials for litigants who come from disfavored backgrounds.

In *Neely v. Wyoming Commission on Judicial Conduct and Ethics*,³¹⁶ the Wyoming Supreme Court found the state commission's recommendation to discipline Judge Ruth Neely from her judicial office after refusing to perform same-sex marriages was merited.³¹⁷ Judge Neely informed a local newspaper, the *Pinedale Roundup*, that her religious beliefs prevented her from performing same-sex marriages.³¹⁸ The Wyoming Supreme Court articulated that its decision was not an appraisal of the legality of same-sex marriages, or the reasonableness of Judge Neely's religious beliefs.³¹⁹ Moreover, the state justices acknowledged that Judge Neely had continuously served as a part-time magistrate since 1994, a date prior to *Obergefell*, and had sought guidance from the state's Judicial Ethics Advisory Committee before she knew of the commission's investigation.³²⁰ However, in 2014, a United States District Court, in an unpublished order, enjoined Wyoming from enforcing any law or judicial rule that prohibited same-sex marriages.³²¹ Thus, in addition to *Obergefell*, there was a federal district court order requiring the state to not only permit same-sex marriages, but also raise no barriers to the state's citizens who wanted a same-sex marriage.³²²

Judge Neely raised two arguments against her removal.³²³ The

³¹⁴ *See id.* at 133.

³¹⁵ *See id.* at 130.

³¹⁶ *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, 390 P.3d 728 (Wyo. 2017).

³¹⁷ *Id.* at ¶ 1, 390 P.3d at 732. Judge Neely was a part time magistrate. *Id.*

³¹⁸ *Id.* at ¶ 9, 390 P.3d at 734.

³¹⁹ *Id.* at ¶¶ 3, 8, 390 P.3d at 732, 734. The court accepted that Judge Neely's religious beliefs were sincere and that her religious convictions served as a personal bar to her performing same-sex marriages. *Id.* at ¶¶ 3, 8, 390 P.3d at 732, 733.

³²⁰ *See id.* at ¶¶ 4, 10–11, 390 P.3d at 733, 734; *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (decided June 26, 2015, 20 days after Judge Neely's inquiry to the Judicial Ethics Advisory Committee).

³²¹ *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 U.S. Dist. LEXIS 148481, at *21–22 (D. Wyo. Oct. 17, 2014).

³²² *See id.*

³²³ *Neely*, 2017WY 25, ¶¶ 15, 31, 390 P.3d at 735, 739.

first was that her religious rights under the federal and state constitutions were protected against the type of judicial discipline imposed on her.³²⁴ Secondly, because there were magistrates willing to perform same-sex marriages, her removal was not incompatible with further judicial service.³²⁵ The Wyoming Supreme Court determined that while Judge Neely had a constitutional right to her beliefs, *Williams-Yulee* held that the preservation of public confidence in the integrity of the judiciary was a compelling interest that required public censure.³²⁶ The state judiciary also noted that unlike other religious conviction decisions arising from mandatory societal functions such as public schools, judicial service requires a commitment to impartiality.³²⁷ The state supreme court reviewed Judge Neely's conduct independent of the commission and determined that she had undermined the duty to promote confidence in the judiciary by evidencing a lack of impartiality and independence.³²⁸ However, the justices determined that permanent removal was too harsh of a remedy as it would "unnecessarily circumscribe protected expression," and instead concluded that censure was more appropriate, coupled with an order to either perform same-sex marriages or no marriages at all.³²⁹

A different result was reached by the Mississippi Supreme Court in 2004 in *Mississippi Commission on Judicial Performance v. Wilkerson*.³³⁰ In 2002, Judge Connie Glenn Wilkerson published a letter in *The George County Times* in which he argued that "homosexuals belong in mental institutions."³³¹ In response to this letter and an ensuing complaint, the state judicial performance commission charged Judge Wilkerson with "conduct prejudicial to the administration of justice" and bringing his office into disrepute.³³² The state supreme court, however, placed paramountcy on the First Amendment's guarantee of free speech in reviewing Judge

³²⁴ See *id.* at ¶ 15, 390 P.3d at 735.

³²⁵ See *id.* at ¶ 31, 390 P.3d at 739.

³²⁶ See *id.* at ¶¶ 1, 20, 390 P.3d at 732, 736 (citing *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015)).

³²⁷ See *Neely*, 2017 WY 25, at ¶ 36, 390 P.3d at 741 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972)).

³²⁸ See *Neely*, 2017 WY 25, at ¶ 66, 390 P.3d at 750.

³²⁹ See *id.* at ¶¶ 75–76, 390 P.3d at 753.

³³⁰ *Miss. Comm'n on Judicial Performance v. Wilkerson*, 2002-JP-02105-SCT (Miss. 2004).

³³¹ *Id.* at ¶¶ 2–3. Based in Lucedale, Mississippi, the *George County Times* has been in continuous operation since 1904. See GEORGE CTY. TIMES, <http://www.gctimesonline.com/> (last visited March 1, 2019).

³³² *Wilkerson*, 2002-JP-02105-SCT (¶ 13).

Wilkerson's actions.³³³ In doing so, the state justices emphasized *Minnesota v. White* over the Canons of Judicial Ethics' goal of maintaining an impartial judiciary in both fact and appearance.³³⁴ Moreover, the state justices framed Judge Wilkerson's conduct as being a part of a larger political debate regarding gay rights.³³⁵ It is true that the state supreme court decided *Wilkerson* prior to *Obergefell*, and had Judge Wilkerson's statements been directed specifically at same-sex marriage, the state's justices would have been able to frame his conduct as part of an ongoing political and legal debate.³³⁶ But, Judge Wilkerson directed his public statements against a class of persons who constitute a percentage of Mississippi's population, and it would be likely that a member of the class would appear in his courtroom. The state supreme court also held that Judge Wilkerson's statements constituted protected religious speech and any limitation on such speech constituted a prior restraint without a compelling interest.³³⁷ While the decision was issued prior to *Yulee*, it is important to point out that neither the majority nor dissenting opinions acknowledge that *White* involved the speech of a lawyer running for an elected judicial position, while *Wilkerson* involved the speech of a judicial officer who was currently serving in that capacity.³³⁸

The Mississippi Supreme Court emplaced another flaw in *Wilkerson* by finding a decision by the Court of Appeals for the Fifth Circuit analogous to the issue raised by Wilkerson's behavior.³³⁹ The Fifth Circuit's decision, *Scott v. Flowers* had nothing to do with a broad political issue.³⁴⁰ The underlying facts in *Scott* stem from an elected justice of the peace named James M. Scott, who took exception to a county court overturning his assessment of fines against persons charged with traffic infractions.³⁴¹ Rather than file a complaint

³³³ See *id.* at ¶ 7.

³³⁴ See *id.* at ¶¶ 21–22 (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002)).

³³⁵ See *Wilkerson*, 2002-JP-02105-SCT (¶ 23).

³³⁶ Compare *id.* at ¶ 3 (in *Wilkerson* the court was asked to address speech that targeted the sexual orientation of some individuals), with *Obergefell v. Hodges* 135 S. Ct. 2584, 2588 (2015) (in *Obergefell* the court was asked to address the prohibition of same-sex marriage, not a person's self-identification as homosexual).

³³⁷ *Wilkerson*, 2002-JP-02105-SCT (¶¶ 34, 44).

³³⁸ *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1656 (2015); *Wilkerson*, 2002-JP-02105-SCT (¶ 21) (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002)); *Wilkerson*, 2002-JP-02105-SCT (¶¶ 66–67, 75) (Carlson, J. dissenting) (citing *White*, 536 U.S. at 774–78).

³³⁹ See *Wilkerson*, 2002-JP-02105-SCT (¶ 24) (citing *Scott v. Flowers*, 910 F.2d 201, 203 (5th Cir. 1990)) (labelling *Flowers* as a factually similar case).

³⁴⁰ See *Flowers*, 910 F.2d at 203–04.

³⁴¹ See *id.*

through the judicial system, Scott authored an “open letter” to county officials decrying “an injustice in the administration of the county court system,” with a claim that “the county court system is not interested in justice.”³⁴² After a local newspaper published the letter, and a county judge filed a complaint, the Texas Commission on Judicial Conduct issued a formal reprimand.³⁴³ However, the state commission did not document an instance where Scott had wrongly treated a traffic court litigant.³⁴⁴

The Court of Appeals for the Fifth Circuit determined that it possessed jurisdiction over Scott’s lawsuit against the state commission because it found that the state commission’s censure constituted a judicial act, and this act implicated a First Amendment right of free speech.³⁴⁵ The appellate court next determined that Scott, even as a public employee, had a right to openly address matters of public concern that were not specific to the conditions of his own employment.³⁴⁶ That is, Scott had attempted to educate the county voters that the administration of justice, in his opinion, threatened the safety of the county, and as a result, the commission’s action could not withstand scrutiny.³⁴⁷ The best that can be said about the Mississippi Supreme Court’s analysis is that it championed the principle of transparency in noting that Judge Wilkerson did not hide his beliefs, and it indicated to him that he would likely face

³⁴² *Id.* at 203–04, 205.

³⁴³ *See id.* at 204.

³⁴⁴ *See id.* at 204–05.

³⁴⁵ *See id.* at 205, 208–09.

Thus, Scott had no vehicle other than a civil rights suit by which to challenge the Commission’s allegedly unconstitutional reprimand. Although he could have elected to bring such an action in either state or federal court, his choice of the federal forum does not in any way suggest a deliberate circumvention of state court review. We thus conclude that we have jurisdiction to consider Scott’s first amendment claims, and we now proceed to evaluate their merits.

Id. at 208–09.

³⁴⁶ *Id.* at 211 (quoting *Moore v. Kilgore*, 877 F.2d 364, 371 (5th Cir. 1989)).

³⁴⁷ *Scott*, 910 F.2d at 211–13.

Neither in its brief nor at oral argument was the Commission able to explain precisely how Scott’s public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe that those interests are ill served [sic] by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered the very goals that the Commission wishes to promote.

Id. at 213.

recusal motions in the future.³⁴⁸ However, this places a burden on a litigant to challenge the judge.³⁴⁹

On March 2, 2018, the United States District Court for the District of Alabama sided with Alabama Supreme Court Justice Tom Parker, and issued an injunction against the State Judicial Inquiry Commission from disciplining Parker on the basis of a speech that he made after *Obergefell* had been issued, but before the state supreme court determined whether *Obergefell* required state judicial officers to perform same-sex marriages.³⁵⁰ In 2015, during a radio interview, Parker challenged *Obergefell's* constitutionality and suggested that Alabama could ignore *Obergefell* much as Wisconsin had once ignored *Dred Scott*.³⁵¹ In 2018, Parker sought federal relief against the state commission because he was campaigning to be elected as the state's chief justice, and he believed that his views on federalism and his arguments on Supreme Court overreach were valid campaign speech.³⁵² The United States District Court agreed with Parker's argument and issued an injunction against the commission.³⁵³ On November 6, 2018, Parker was elected chief justice.³⁵⁴ As a result, Parker was free, as a sitting judge, to not simply criticize the Supreme Court, but also to advocate for the disparate treatment of LGBT persons.

C. Race and National Origin

Like sexual harassment, racially divisive judicial conduct has a deleterious effect on the fair adjudication of legal proceedings.³⁵⁵ Yet, there have been instances where state supreme courts have found a means to protect judicial appeals to racial divisions on the basis of

³⁴⁸ Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶¶ 3, 41) (Miss. 2004).

³⁴⁹ See *id.* at ¶ 41.

³⁵⁰ See Parker v. Judicial Inquiry Comm'n of Ala., 295 F. Supp. 3d 1292, 1312 (M.D. Ala. 2018); Obergefell v. Hodges 135 S. Ct. 2584, 2584 (2015). Prior to *Obergefell*, same-sex marriages were not recognized in Alabama and judges were prohibited from issuing marriage licenses. See *Ex parte State ex rel. Ala. Policy Inst.*, 200 So. 3d 495, 500 (Ala. 2015); Parker, 295 F. Supp. 3d at 1295.

³⁵¹ Scott v. Sandford, 60 U.S. 393 (1857); see Parker, 295 F. Supp. 3d at 1295–96.

³⁵² See Parker, 295 F. Supp. 3d at 1297.

³⁵³ See *id.* at 1311.

³⁵⁴ Samantha Michaels, *Roy Moore's Protégé Was Just Elected as Alabama's Supreme Court Chief Justice*, MOTHER JONES, <https://www.motherjones.com/politics/2018/10/roy-moore-tom-parker-alabama-roe-v-wade-supreme-court-justice/> (last updated Nov. 6, 2018).

³⁵⁵ See MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. 1–3 (AM. BAR ASS'N 2010) (“A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”).

protected speech. In 2003, in *Griffen v. Arkansas Judicial Discipline and Disability Commission*,³⁵⁶ the Arkansas Supreme Court quashed an admonishment of a judge who had encouraged the state legislature to consider withholding funds from the University of Arkansas.³⁵⁷ In 2002, Judge Wendell Griffen addressed the Arkansas Legislative Black Caucus after the university terminated the employment of a long-serving African-American athletic coach.³⁵⁸ Judge Griffen asked the caucus members to consider that the termination decision was based on the coach's race rather than the basketball team's win-loss record, and that the firing was emblematic of racial inequities in the state.³⁵⁹ His proposed solution to the legislature was the withholding of funds from the university.³⁶⁰ In doing so, he intimated that a majoritarian Caucasian student population would feel the effects of defunding more than Arkansas' African-American student population.³⁶¹

He defended himself by arguing that his statements were permitted as a matter of a judge consulting the legislative branch on a matter of personal interest and that his statements were also protected by the First Amendment.³⁶² The Judicial Commission determined that *Republican Party of Minnesota v. White* only applied to elections and therefore Judge Griffen could be sanctioned.³⁶³ However, the Arkansas Supreme Court found that *White's* admonition against curtailing speech in the absence of a compelling interest meant the state rules governing judicial conduct also had to

³⁵⁶ *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 130 S.W.3d 524 (2003).

³⁵⁷ *See id.* at 538.

³⁵⁸ *See id.* at 525–26.

³⁵⁹ *See id.* at 526–27. Judge Griffen stated,

Our citizens are still paying, financially, emotionally, academically, and culturally, for inequities in public secondary education that followed the curse Governor Faubus left on our state. . . . Show them you will not support schools where black students, professors, and staff members are forced to watch their opportunities in higher education languish while their white counterparts enjoy most favored status at state expense. Chancellor White and Frank Broyles say they fired Coach Richardson because they lack confidence in his leadership, despite the successful results he produced over the past seventeen years. Whether you believe them or not—and I do not believe them—send them a budgetary vote of no confidence concerning sorry leadership about racial inclusion over the past 130 years at the University of Arkansas. SHOW THEM THE MONEY!

Id. at 526–27.

³⁶⁰ *See id.* at 526–27.

³⁶¹ *See id.*

³⁶² *See id.* at 528.

³⁶³ *See id.* at 535.

clearly prohibit specific behavior.³⁶⁴ In this instance, the justices determined that the rule permitting legislative consulting was too vague to permit a penalty against the judge.³⁶⁵ The Arkansas Supreme Court's decision is problematic because it fails to address limits on racially-based speech designed to deprive a class of people access to a basic institution. What if a judge were to argue that the state university system had accepted too many members of an "undeserving" minority group at the expense of the rest of the state's population? Would the state supreme court have arrived at a different result?

Another problematic decision was issued by the South Dakota Supreme Court in 2011. In *In re Fuller*,³⁶⁶ the state justices reviewed the conduct of a long-serving judge which included the judge screaming at female clerks and calling an attorney an "asshole" in open court.³⁶⁷ His racial speech included instances where he took down Native American artwork from the courtroom walls when attorneys needed to use an image projector and while returning the artwork he informed the court, "this is where I hang my Indians."³⁶⁸ While the South Dakota Supreme Court forced Judge Fuller to accept retirement, they left open the possibility that he could return to the bench and noted: "[h]istory is replete with those who have overcome a weakness or character flaw and risen to what Attorney at Law Abraham Lincoln declared to be the 'better angels of our nature.'"³⁶⁹ Almost nine percent of South Dakota's population is Native American,³⁷⁰ and would be reasonable to conclude that both Judge Fuller and the South Dakota Supreme Court had enabled a

³⁶⁴ See *id.* at 536.

³⁶⁵ See *id.* It should be noted that most recently, Judge Griffen has been confronted with new allegations that he acted unethically as a judge. In this instance, the judge participated in an anti-death penalty demonstration where he laid on a cot while clothed in prison garb. See Max Brantley, *Judge Griffen Moves to Dismiss Disciplinary Action, Cites Supreme Court Involvement*, ARK. TIMES (Apr. 5, 2019), <https://www.arktimes.com/ArkansasBlog/archives/2019/04/05/judge-griffen-moves-to-dismiss-disciplinary-action-cites-supreme-court-involvement>. Rather than remove Judge Griffen from his position as a judge, the Arkansas Supreme Court removed him from hearing death penalty cases. See *In re Kemp*, 894 F. 3d 900, 903 (8th Cir. 2018). While there is nothing in Griffen's later action that was directly based on conduct of a racial, sexist, or other discriminatory matter, it is clear that the earlier response of the state supreme court did not place the judge on sufficient notice to conform to judicial standards.

³⁶⁶ *In re Fuller*, 2011 S.D. 22, 798 N.W.2d 408.

³⁶⁷ See *id.* at ¶¶ 19–20, 798 N.W.2d at 413.

³⁶⁸ *Id.* at ¶ 30, 798 N.W.2d at 415.

³⁶⁹ *Id.* at ¶¶ 54, 55, 798 N.W.2d at 421, 422 (quoting *In re Discipline of Laprath*, 2003 S.D. 114, ¶ 87, 670 N.W.2d 41, 66).

³⁷⁰ See *Quick Facts: South Dakota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/sd> (last visited Mar. 14, 2019).

furthering of community harm by strengthening anti-Native American biases.

There are state supreme courts which have placed the duty of impartiality above the concept of unbridled free speech.³⁷¹ The Washington Supreme Court presents one example. In *In re Hammermaster*, the state supreme court upheld a sanction against a judge who inquired into the legal status of Hispanic witnesses and defendants.³⁷² The state commission recommended a censure and thirty day suspension against the judge, but the state supreme court ordered a censure and six month suspension.³⁷³ In *Sanders v. Washington State Commission on Judicial Conduct*,³⁷⁴ the Washington Supreme Court, concerned with the “substantial basis and expectation that Justice Sanders would be in contact with possible litigants who had pending litigation before the court,” upheld a sanction against a state supreme court justice which included a public admonishment.³⁷⁵ The sanction arose, in part, from the justice’s visit to a sexual offender facility and meeting with defendants who had cases pending before the court.³⁷⁶ Given Washington’s progressive acceptance of the ills of implicit bias, it is unsurprising that the state supreme court would depart from a long-standing norm that each justice on a court of final appeal has the sole authority to decide whether they should serve on a particular issue.

New York also presents a system which recognizes that a judge’s racially divisive speech will not only undermine the judicial branch, it will also contribute to stigmatizing a group of people.³⁷⁷ In 1985, the Court of Appeals of New York determined that racism was incompatible with judicial service.³⁷⁸ In *In re Mulroy*,³⁷⁹ the New

³⁷¹ See *In re Hammermaster*, 985 P.2d 924, 936 (Wash. 1999) (“Judicial independence does not equate to unbridled discretion to bully and threaten, to disregard the requirements of the law, or to ignore the constitutional rights of defendants.”).

³⁷² See *id.* at 941.

³⁷³ See *id.* at 942, 943.

³⁷⁴ *In re Disciplinary Proceeding Against Sanders*, 145 P.3d 1208 (Wash. 2006).

³⁷⁵ See *id.* at 1212–13. Justice Sanders was no stranger to complaints and judicial disciplinary proceedings. See *In re Disciplinary Proceeding Against Sanders*, 955 P.2d 369, 377 (Wash. 1998); Maureen O’Hagan, *Justice Sanders Admonished for Ethics-Rules Violation*, SEATTLE TIMES (Apr. 9, 2005), <https://www.seattletimes.com/seattle-news/justice-sanders-admonished-for-ethics-rules-violation/>.

³⁷⁶ See *Sanders*, 145 P.3d at 1209.

³⁷⁷ See *In re Agresta*, 476 N.E.2d 285, 286 (N.Y. 1985).

³⁷⁸ See *id.* During sentencing proceedings, Judge Agresta, during a guilty plea colloquy, accused the defendant of not cooperating with the prosecution in regard to informing on his peers. See *id.* Justice Agresta stated: “I know there is another nigger in the woodpile. I want that person out. Is that clear? What about that Mr. Blount? You want to think it over?” *Id.*

³⁷⁹ *In re Mulroy*, 731 N.E.2d 120 (N.Y. 2000).

York Court of Appeals upheld the state commission's determination to remove a judge who articulated racially disparaging remarks in describing the victim of a crime.³⁸⁰ While at a charity event, Judge J. Kevin Mulroy approached a prosecutor and began an *ex parte* discussion about a pending murder trial involving four defendants.³⁸¹ Although this type of *ex parte* conversation is generally considered a violation of a judge's duty of impartiality, the contents of the conversation proved more troubling than the violation of the *ex parte* prohibition.³⁸² Judge Mulroy urged the prosecutor to offer "reasonable" plea deals to the defendants before assuring the prosecutor that the community would not negatively react to such a deal since the sixty-seven year old murder victim was "just some old nigger bitch."³⁸³ In a very brief decision, the appellate court determined that regardless of Judge Mulroy's prior judicial record, this record could not be used to excuse or mitigate racial epithets or ethnic slurs in a quasi-official context and therefore, removal was the appropriate sanction.³⁸⁴

In contrast to New York, in 2004, the Louisiana Supreme Court determined that the state judicial commission's recommendation to suspend a judge without pay for one year was too severe of a punishment for the judge's conduct.³⁸⁵ In 2003, Judge Timothy Ellender attended a Halloween costume party in which he and his spouse dressed as prisoners.³⁸⁶ During the party, the judge donned an "afro wig" and applied black makeup in a manner described as "blackface."³⁸⁷ In early November, the local media reported the

³⁸⁰ See *id.* at 121, 123. It should be noted that Judge J. Kevin Mulroy was also accused of failing to act in an impartial manner and had advanced his personal influence through his judicial office. See *id.* at 123. One of the distinguishing features of Judge Mulroy's appeal to the state's highest appellate court was that it was accompanied by three amicus briefs. See Brief of Amicus Curiae County Judges Ass'n of the State of New York, *In re Mulroy*, 731 N.E.2d 120, 1999 WL 33659949 (arguing that the permanent removal of Judge Mulroy would curtail the independence of trial judges); Brief of Amicus Curiae Onondaga County Bar Ass'n Assigned Counsel Program, Inc., *In re Mulroy*, 731 N.E.2d 120, 1999 WL 33660417 (conceding that Judge Mulroy had made "a number of ill-advised and careless comments" but the sanction of a permanent removal was too severe); Brief of Amicus Curiae Syracuse Ass'n of Defense Lawyers on Behalf of Hon. J. Kevin Mulroy, *In re Mulroy*, 731 N.E.2d 120, 1999 WL 33659950 (arguing that a permanent removal would permit the government to "subject [judges] to unwarranted criticism").

³⁸¹ See *In re Mulroy*, 731 N.E.2d at 121.

³⁸² See *id.*

³⁸³ *Id.* The appellate court noted that in a prior instance, Judge Mulroy denigrated Italian-Americans. *Id.*

³⁸⁴ See *id.* at 123.

³⁸⁵ *In re Ellender*, 04-2123, p. 5, 13 (La. 12/13/04); 889 So. 2d 225, 229, 234.

³⁸⁶ *Id.* at p. 2, 889 So. 2d at 227.

³⁸⁷ See *id.*

judge's conduct, and shortly after, New Orleans' television stations and CNN reported on the judge.³⁸⁸ Judge Ellender admitted to his conduct, but nevertheless "refuted the allegation that . . . called into question his . . . ability to be fair and impartial."³⁸⁹ Further, Judge Ellender denied that he had portrayed African-Americans in a derogatory manner.³⁹⁰ The state judicial commission recommended the suspension of Judge Ellender without pay for a one year period.³⁹¹

Justice Chet Traylor, in writing the Louisiana Supreme Court's majority opinion, began by assuring the public that the state's judges had be above reproach so that their conduct bolstered public confidence in the judiciary.³⁹² The majority opinion not only upheld the suspension, it also required Judge Ellender to enroll in a university course focused on the effect of racism in society.³⁹³ Two justices dissented against the decision on the basis that Judge Ellender's conduct was an isolated incident and that he had publicly apologized for it, and therefore the one-year suspension was excessive.³⁹⁴ Judge Ellender returned to his judicial position in 2005, but in 2009, he was suspended once more.³⁹⁵ This allegation of misconduct was based on discourteous conduct toward a female litigant in a hearing for a temporary restraining order brought by a wife on behalf of herself and her daughters; which indicated that because no physical abuse had occurred, Judge Ellender found there had been no wrongdoing and in which he admonished the wife for bringing an action for a temporary restraining order rather than divorce.³⁹⁶ Clearly, Judge Ellender, like Judge Kozinski, did not consider his previous discipline as being worthy of cognition.³⁹⁷

There is another troubling aspect to Judge Ellender's conduct. A

³⁸⁸ *See id.*

³⁸⁹ *See id.* at p. 3–4, 889 So. 2d at 228.

³⁹⁰ *See id.*

³⁹¹ *See id.* at p. 5, 889 So. 2d at 229.

³⁹² *See id.* at p. 9, 889 So. 2d at 231.

³⁹³ *See id.* at p. 11–12, 13, 889 So. 2d at 233, 234. The court found that Judge Ellender did not intend to offend any person and noted that an examination of Judge Ellender's behavior demonstrated his inability to understand the magnitude of his actions. *See id.* at p. 12, 889 So. 2d at 233.

³⁹⁴ *See id.* at p. 2, 3–4, 889 So. 2d at 234–35 (Victory, J., dissenting); *id.* at p. 1, 889 So. 2d at 235 (Hightower, J., dissenting).

³⁹⁵ *See In re Ellender*, 09-0736, p. 8 (La. 07/01/09), 16 So. 3d 351, 356.

³⁹⁶ *See id.* at p. 2–3, 6, 16 So. 3d at 353, 355. This time, the Court upheld a thirty-day suspension for Judge Ellender and ordered him to undertake a domestic violence course. *Id.* at p. 15, 16 So. 3d at 360; *see also*, Tom Planchet, *Terrebone Judge Timothy Ellender Suspended Again*, HOUMA TODAY (July 1, 2009), <http://www.houmatoday.com/news/20090701/terrebonne-judge-timothy-ellender-suspended-again> (discussing Judge Ellender's suspension).

³⁹⁷ *See In re Ellender*, 09-0736, p. 13, 16 So. 3d at 358 (Judge Ellender argued that his past conduct was sufficiently different from the conduct under review in this instance).

small number of courts have recognized that the use of blackface can constitute an act of racism, even when done as a parody.³⁹⁸ In *Tindle v. Caudell*, the Court of Appeals for the Eighth Circuit determined that the employment termination of a police officer who appeared in “blackface” at a private Halloween party did not violate the officer’s First Amendment rights.³⁹⁹ However, a decade earlier, the Court of Appeals for the Fourth Circuit in *Berger v. Battaglia*,⁴⁰⁰ determined that the use of “blackface” for the purposes of public parody, would not justify the termination a police officer’s employment since the act was protected by the First Amendment.⁴⁰¹ The Fourth Circuit recognized that a police officer’s use of blackface in an open setting in which the officer performed an Al Jolson rendition, could be an affront to the relevant community, in this case, a portion of Baltimore’s population, but the population’s right to confront the officer was through peaceful protest.⁴⁰²

D. Sexism and Sexual Harassment: “Locker Room Talk”

In contrast to judicial conduct relating to LGBT persons, several state commissions and state supreme courts have shown strength in disciplining judges who engage in sexist behavior.⁴⁰³ This section concentrates on sexist behavior of a not physically assaultive nature. Judicial behavior which fits within the definition of a crime is likely to result in a finding that the offending judge is not fit—whether temporarily or permanently—to serve in a judicial capacity.⁴⁰⁴ For instance, a judge who publicly shoves his spouse during an argument may be suspended until the judge completes a domestic violence program.⁴⁰⁵ There are, however, questions as to whether a judge who sexually harasses or demeans office staff may be suspended or removed for such conduct, or, for that matter evidences a bias against women.⁴⁰⁶

³⁹⁸ See, e.g., *Tindle v. Caudell*, 56 F.3d 966, 968, 973 (8th Cir. 1995).

³⁹⁹ *Id.* at 968, 973.

⁴⁰⁰ *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985).

⁴⁰¹ *Id.* at 1001.

⁴⁰² *Id.* at 994, 1001.

⁴⁰³ See *In re Carpenter*, 17 P.3d 91, 92, 95 (Ariz. 2001); *In re Assini*, 720 N.E.2d 882, 883, 885–86 (N.Y. 1999) (per curiam); *Kennick v. Comm’n on Judicial Performance*, 787 P.2d 591, 593, 605 (Cal. 1990).

⁴⁰⁴ See generally *Code of Conduct for United States Judges*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> (last visited Feb. 13, 2019) (“A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”).

⁴⁰⁵ *In re Disciplinary Proceeding Against Turco*, 970 P.2d 731, 733 (Wash. 1999).

⁴⁰⁶ Compare *In re Gordon*, 917 P.2d 627, 627 (Cal. 1996) (finding a public reprimand through

Although this Article focuses on state judicial conduct, there is a federal judicial example that presents warnings as to the danger of not adequately sanctioning judges who act in a sexist manner.⁴⁰⁷ In 2009, Chief Justice John Roberts convened a special panel composed of the Judicial Council of the Third Circuit to investigate the conduct of Judge Alex Kozinski, the Chief Judge of the Court of Appeals for the Ninth Circuit.⁴⁰⁸ An attorney had informed *The Los Angeles Times* that Kozinski had pornography on his website and then formally issued a complaint against Kozinski.⁴⁰⁹ Judge Kozinski maintained a website which contained “a photo of naked women on all fours painted to look like cows,’ a video of a half-dressed man cavorting with a sexually aroused farm animal,’ and ‘a graphic step-by-step pictorial in which a woman is seen shaving her pubic hair.’”⁴¹⁰ Kozinski admitted to maintaining the images on his website but testified that he believed the website was for private storage purposes and therefore not available to the public.⁴¹¹ After a detailed analysis, the Third Circuit’s special panel concluded that an admonishment was sufficient to resolve the complaint.⁴¹² While the investigation and subsequent action of the investigation were purely a federal matter, the outcome evidences that an admonishment for a judge collecting and showing electronic displays demeaning to women may not be enough of a deterrent against undermining impartiality in the future. In 2017, six former law clerks and administrative personnel accused Judge Kozinski of sexual misbehavior.⁴¹³ By the end of that year, another nine women accused him of similar conduct.⁴¹⁴ On December 18, 2017, Judge Kozinski retired from his judicial duties

the issued decision as the appropriate response for the judge’s “sexually suggestive remarks”), *with In re Seaman*, 627 A.2d 106, 108–109, 124 (N.J. 1993) (finding a sixty-day suspension and a required sexual harassment educational program to be a proper punishment for sexual harassment).

⁴⁰⁷ See *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 295 (3d Cir. 2009).

⁴⁰⁸ See *id.* at 279–80, 283.

⁴⁰⁹ *Id.* at 281.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² See *id.* at 295.

⁴¹³ See Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, WASH. POST (Dec. 18, 2017), https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html?utm_term=.4bf64705342d.

⁴¹⁴ See Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779e_story.html?utm_term=.a816354b06d0.

and was effectively removed from taking part in further judicial activities.⁴¹⁵

In contrast to the federal judicial council investigation into Judge Kozinski,⁴¹⁶ the West Virginia Supreme Court, in 1995, determined that a judge's removal from the bench and suspension of his license to practice law was an appropriate sanction for using lewd language to a female court employee as well as touching her without her consent.⁴¹⁷ However, in this decision, the judge entered into an agreement with the state judicial commission in which he would not contest the sanctions against him including a \$10,000 fine.⁴¹⁸ A decade later, the state supreme court determined that a one-year suspension was appropriate for a magistrate who propositioned four female litigants.⁴¹⁹

The Montana Supreme Court, in *Harris v. Smartt*,⁴²⁰ upheld the removal of a judicial officer who downloaded pornographic images onto his state-owned computer.⁴²¹ In that decision, a justice of the peace was found to have maintained pornography in his chambers and this pornography was discovered as a result of a computer administrator trying to diagnose a computer error.⁴²² The state supreme court recognized that Montana's constitution afforded greater privacy rights and free speech protections than the Federal Constitution, but then concluded the judicial officer violated his duty of impartiality in fact and appearance.⁴²³ Moreover, the state justices noted that the judicial officer's behavior garnered considerable media attention.⁴²⁴ While the state judicial commission

⁴¹⁵ See Zapotosky, *supra* note 414.

⁴¹⁶ See Matt Zapotosky, Judiciary Closes Investigation of Sexual Misconduct Allegations Against Retired Judge Alex Kozinski, WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/world/national-security/judiciary-closes-investigation-of-sexual-misconduct-allegations-against-retired-judge-alex-kozinski/2018/02/05/e3a94bb8-0ac0-11e8-95a5-c396801049ef_story.html?utm_term=.f0c37e6a6c9.

⁴¹⁷ See *In re Hey*, 457 S.E.2d 509, 510–11, 514, 515 (W. Va. 1995).

⁴¹⁸ See *id.* at 511, 515. The maximum discipline available in West Virginia was \$5,000. *Id.* at 514.

⁴¹⁹ See *In re Toler*, 625 S.E.2d 731, 735, 740 (W. Va. 2005).

⁴²⁰ *Harris v. Smartt*, 2002 MT 239, 311 Mont. 507, 57 P.3d 58, *vacated* 2003 MT 135, 316 Mont. 130, 68 P.3d 889.

⁴²¹ See *id.* at ¶¶ 13, 21.

⁴²² See *id.* at ¶¶ 17–18. It must be noted that the judicial officer was also investigated for sexual assault. See *State ex rel. Smartt v. Judicial Standards Comm'n*, 2002 MT 148, ¶ 5, 310 Mont. 295, 50 P.3d 150.

⁴²³ *Smartt*, ¶¶ 65, 77, 82 (citing *State v. Sheetz*, 950 P.2d 722, 724 (Mont. 1995); *Gryczan v. State*, 942 P.2d 112, 121 (Mont. 1997); *State v. Siegal*, 934 P.2d 176, 183 (Mont. 1997); *State v. Bullock*, 901 P.2d 61, 75 (Mont. 1995)).

⁴²⁴ *Harris*, ¶ 83. See *Commission Urges JP's Ouster*, BILLINGS GAZETTE (Nov. 30, 2001), https://billingsgazette.com/news/local/commission-urges-jp-s-ouster/article_ca303793-3376-

recommended a permanent suspension from office and Montana's supreme court adopted this recommendation, it is noteworthy that the state justices found that there was a deleterious effect on the public's view of the state judiciary, and the judicial officer's claim that "he was composing a joke birthday card for his wife," did not constitute a defense in this instance.⁴²⁵ It is also noteworthy that one justice, James Nelson, concurred in the decision but with the caveat that the state's judicial ethics canons had to be strengthened and given greater prohibitory precision.⁴²⁶

The Montana Supreme Court is by no means alone in assessing the impact of sexism on the bench to both the judiciary and society. In 2015, Pennsylvania's Judicial Conduct Board filed a complaint alleging that Justice J. Michael Eakin had abused his authority by forwarding numerous e-mails that contained statements that were derogatory in their gender, racial, and ethnic content.⁴²⁷ Many of the forwarded e-mails were sent from a state computer.⁴²⁸ In between the board's determination and Justice Eakin's appeal to the Pennsylvania Supreme Court, he resigned.⁴²⁹ The e-mails contained images of nude and semi-nude women accompanied by "jokes based on negative social and gender stereotypes."⁴³⁰ The state supreme court determined that "the 'appearance of impropriety'" standard extended to off-duty conduct, though it found that Justice Eakin's use of a government computer rendered the distinction between off-duty and on-duty conduct irrelevant.⁴³¹ Because Eakin had resigned from

5e27-b792-af375a231144.html; *JP Collects Full Pay as Case Is Debated*, BILLINGS GAZETTE (July 5, 2002), https://billingsgazette.com/news/local/jp-collects-full-pay-as-case-is-debated/article_f9c7858d-bb32-53dd-a431-b1716c12030a.html; *Smartt 'Not Fit' to Be Judge, Commission's Lawyer Says*, MONT. STANDARD (Feb. 14, 2002), https://mtstandard.com/news/state-and-regional/smartt-not-fit-to-be-judge-commission-s-lawyer-says/article_08cea4b8-8f22-50ed-ad25-a8ee617439a7.html.

⁴²⁵ See *Smartt*, ¶¶ 1, 83–84.

⁴²⁶ See *id.* at ¶ 89 (Nelson, J., concurring). Another justice, Karla Gray, concurred with the majority's analysis but dissented from the majority's determination to suspend the judicial officer ten days after the decision's issuance. See *id.* at ¶ 117 (Gray, J., concurring in part and dissenting in part). Justice Gray argued that permanent removal should have taken immediate effect. *Id.* However, one dissenting justice not only pointed out the evidence used in the proceeding constituted a violation of the judicial officer's privacy rights, but also, that the pornographic images were private use. See *id.* at ¶¶ 131–147 (Treiweiler, J., dissenting) ("Smartt simply viewed material in the privacy of his office which most people consider offensive. For that, his job has been taken away. God protect us from the wrath of the righteous.").

⁴²⁷ *In re Eakin*, 150 A.3d 1042, 1045 (Pa. Ct. Jud. Discipline 2016).

⁴²⁸ See *id.* at 1049.

⁴²⁹ See *id.* at 1046.

⁴³⁰ *Id.* at 1051.

⁴³¹ See *id.* at 1056, 1057 (quoting *In re Larsen*, 616 A.2d 529 (Pa. 1992)).

the court, he could no longer be removed.⁴³² Nonetheless, the court found that Justice Eakin's conduct merited a penalty.⁴³³ The basis for the penalty, as the court noted, was that the forwarded e-mails embodied "beliefs [that] are antithetical to the privilege of holding public office, where the charge is to serve, not demean, our citizens."⁴³⁴

In 2011, the Arizona Supreme Court censured and permanently enjoined Judge Theodore Abrams from holding further judicial office after it was discovered that he had engaged in an ongoing intimate relationship with one female attorney who frequently appeared in his court, and harassed another female attorney who had spurned his advances.⁴³⁵ Judge Abrams did not notify opposing counsel of his relationship with the attorney he was involved with, which violated a separate judicial canon.⁴³⁶ As for his harassment of the second attorney, the court noted that he had "demean[ed] and humiliat[ed] her," and "injured the legal system by exploiting his judicial position in pursuit of sexual gratification."⁴³⁷ However, although the prohibition appears to be a blanket condemnation of judicial sexual harassment, it must be noted that Judge Abrams had already resigned at the time of the decision.⁴³⁸

IV. CONCLUSION

In 2015, a study found that prosecutors in Caddo Parrish, Louisiana exercised peremptory challenges against African-American jurors at three times the rate that non-black jurors were struck.⁴³⁹ Despite the Court's admonition in *Batson*,⁴⁴⁰ it is clear that there is a discriminatory practice against African-American jurors in one part of Louisiana. While it is difficult to draw a direct line from Judge Timothy Ellender's conduct to that of prosecutors who

⁴³² *In re Eakin*, 150 A.3d at 1061 ("[W]e substantially and significantly reduce . . . the sanction given Respondent's . . . resignation.").

⁴³³ *See id.*

⁴³⁴ *Id.* ("With their imagery of sexism, racism, and bigotry, is arrogance and the belief that an individual is better than his or her peers.").

⁴³⁵ *In re Abrams*, 257 P.3d 167, 168, 174–75 (Ariz. 2011).

⁴³⁶ *See id.* at 168. The canon Judge Abrams violated was Code of Judicial Conduct: Rule 2.11, "failing to disqualify himself 'in any proceeding in which the judge's impartiality might reasonably be questioned.'" *Id.* at 170.

⁴³⁷ *Id.* at 171.

⁴³⁸ *Id.* at 169.

⁴³⁹ Alexandria Burris, *Black Jurors More Likely to be Struck from Caddo Juries*, SHREVEPORT TIMES, (Aug. 17, 2015), <https://www.shreveporttimes.com/story/news/local/2015/08/17/black-jurors-likely-struck-caddo-juries/31852745/>.

⁴⁴⁰ *See Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986).

routinely exercise peremptory challenges against minorities, it cannot be missed that Ellender was not removed from the bench after disparaging African-Americans.⁴⁴¹ Had the state judicial disciplinary agency or the Louisiana Supreme Court applied a community harm standard to Ellender and removed him, it at least would have sent a signal to the prosecutors that racism against minorities has no place in the charging of crimes or the prosecution's adjudicatory functions. Removal may have also brought greater confidence to Louisiana's population that the judiciary would follow its own goal of colorblind impartiality.

It is true that a judge possess the same free speech rights as does the general citizenry, but various rights, in particular, freedom of speech, may be curtailed by the fundamental demands of the twin duties of impartiality and independence.⁴⁴² It is true that the Supreme Court has held that a state or the federal government enjoys greater latitude to regulate speech when it acts in its capacity as an employer.⁴⁴³ However, the Court has also distinguished the judiciary from normal employment.⁴⁴⁴ Although well before the 2016 election judges had been discovered to have engaged in sexual harassment, articulated racially disparaging comments, or evidenced hostility to gays, lesbians, and transgendered (LGBT) persons, there has been a rise in the political targeting of minorities (including certain religious minorities) and LGBT persons since that time.⁴⁴⁵

A trial litigant, whether in a civil or criminal trial, is entitled to a jury that is not predisposed to a result based on racial, religious, or gender bias.⁴⁴⁶ The same rule holds true for judges. A litigant is

⁴⁴¹ *In re Ellender*, 04-2123, p. 12 (La. 12/13/04), 889 So. 2d 225, 233, 234.

⁴⁴² *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015).

⁴⁴³ *See, e.g., Waters v. Churchill*, 511 U.S. 661, 671 (1994); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 140 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

⁴⁴⁴ *Compare Williams-Yulee*, 135 S. Ct. at 1665 (applying strict scrutiny where a candidate for judicial office challenges First Amendment violations), *with Waters*, 511 U.S. at 668 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)) (applying a specialized standard of review, “the Connick test” for other government employees).

⁴⁴⁵ *See e.g., Mark Berman, Hate Crimes in the United States Increased Last Year, the FBI Says*, WASH. POST (Nov. 13, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/11/13/hate-crimes-in-the-united-states-increased-last-year-the-fbi-says/?utm_term=.1e61356a370a; Sam Petulla et al., *The Number of Hate Crimes Rose in 2016*, CNN (Nov. 13, 2017), <https://www.cnn.com/2017/11/13/politics/hate-crimes-fbi-2016-rise/index.html>. In terms of crimes against religious minorities, there has been a rise of crimes against Muslims in the United States since the election. *See e.g., Katayoun Kishi, Assaults Against Muslims in U.S. Surpass 2001 Level*, PEW RESEARCH CTR. (Nov. 15, 2017), <http://www.pewrese arch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/>.

⁴⁴⁶ *See Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986) (citing *Martin v. Texas*, 200 U.S. 316, 321 (1906); *Ex parte Va.*, 100 U.S. 339, 345 (1880)).

entitled to challenge a juror for cause as well as a judge.⁴⁴⁷ Some jurisdictions extend the “appearance of impropriety” standard to recusal.⁴⁴⁸ However, no rule of judicial ethics exists which takes into account how a judge’s public or known private conduct might affect the right to a fair trial by strengthening a community’s implicit biases.⁴⁴⁹ One means to curtail this possibility is to make the removal of judges who engage in sexist, racist, or other bigoted acts more likely. Some states, such as Oregon, New York, and Washington have taken a step in this direction.⁴⁵⁰ But, most of the state supreme courts have not.⁴⁵¹ And, while it appears that there is less tolerance for sexism in the courts, and a few states have removed judicial officers who refused to perform same-sex marriages,⁴⁵² there remains inequities in judicial discipline and tolerance for derogatory conduct toward minority groups.⁴⁵³ In the end, assessing judicial misconduct not only against the current standards of judicial canons of ethics, but also by adding considerations of community harm will enable a state judicial system to better protect the integrity of its judicial system by instilling long-term public confidence and wider participation in it.

⁴⁴⁷ See, e.g., CAL. CIV. PROC. CODE § 170.6 (West 2018).

⁴⁴⁸ See, e.g., *Ex parte Bryant*, 682 So. 2d 39, 41 (Ala. 1996); *Tennant v. Marion Health Care Found.*, 459 S.E.2d 374, 385 (W. Va. 1995).

⁴⁴⁹ See, e.g., MODEL CODE OF JUDICIAL CONDUCT r. 2.3 (prohibiting judges from “manifesting bias,” but does not discuss how judicial conduct may impact community biases).

⁴⁵⁰ See *In re Mulroy*, 731 N.E.2d 120, 121, 123 (N.Y. 2000); *Inquiry Concerning a Judge (Day)*, 413 P.3d 907, 959 (Or. 2018); *In re Hammermaster*, 985 P.2d 924, 927, 943 (Wash. 1999).

⁴⁵¹ See *In re Ellender*, 04-2123, p. 13 (La. 12/13/04), 889 So. 2d 225, 234; Bob Egelko, *Court Commissioner Disciplined for Abusive Behavior Toward Interpreter*, S.F. CHRON. (Oct. 4, 2017), <https://www.sfchronicle.com/bayarea/article/Court-commissioner-disciplined-for-abusive-12253514.php> (describing a judge with a history of making sexist and racist comments who was repeatedly disciplined but not removed from the bench).

⁴⁵² See Pete Williams, *Wyoming Judge Faces Removal for Refusing Same-Sex Marriages*, NBC NEWS (Aug. 17, 2016), <https://www.nbcnews.com/news/us-news/wyoming-judge-faces-removal-refusing-same-sex-marriages-n632906>; *Not Going to Miss the Ayatollah of Alabama: State’s Chief Justice Removed in Gay-Marriage Dispute*, L.A. TIMES (Sept. 30, 2016), <https://www.baltimoresun.com/news/nation-world/ct-alabama-justice-suspended-over-gay-marriage-stance-20160930-story.html>.

⁴⁵³ Compare *In re Ellender*, 04-2123, p. 13, 889 So. 2d at 234 (finding one-year suspension, with six months deferred if the Judge completed racial sensitivity training, adequate), with *In re Mulroy*, 731 N.E.2d at 123 (finding removal appropriate).