




1-1-2010

Promoting Public Confidence in the Regulation of Judicial Conduct: A Survey of Recent Developments and Practice in Four Common Law Countries

Sarah M. R. Cravens
The University of Akron School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

 Part of the [Courts Commons](#), and the [International Law Commons](#)

Recommended Citation

Sarah M. Cravens, *Promoting Public Confidence in the Regulation of Judicial Conduct: A Survey of Recent Developments and Practice in Four Common Law Countries*, 42 MCGEORGE L. REV. (2016).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol42/iss1/10>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Promoting Public Confidence in the Regulation of Judicial Conduct: A Survey of Recent Developments and Practices in Four Common Law Countries

Sarah M. R. Cravens*

TABLE OF CONTENTS

I. INTRODUCTION	178
II. UNDERSTANDING PUBLIC CONFIDENCE	181
III. SYSTEMS AND METHODS OF JUDICIAL CONDUCT REGULATION IN FOUR COMMON LAW COUNTRIES.....	185
A. <i>Canada</i>	186
B. <i>Australia</i>	187
C. <i>England & Wales</i>	189
D. <i>New Zealand</i>	191
IV. THEMES EMERGING FROM THESE APPROACHES	194
A. <i>Substantive Factors in Regulation of Judicial Conduct</i>	195
1. <i>Codes and Guides</i>	195
2. <i>Appearance Standards</i>	196
3. <i>Integrity</i>	199
4. <i>Impartiality: Demeanor and Speech</i>	200
5. <i>Sidestepping the Process: Apologies and Resignations</i>	201
6. <i>High Thresholds for Discipline or Removal</i>	203
B. <i>Factors Relating to Process in the Regulation of Judicial Conduct</i>	205
1. <i>Established, Consistent Procedures Known to the Public</i>	205
2. <i>Identity of Decisionmakers and Others in the Process</i>	205
3. <i>Official Powers of the Decisionmakers</i>	206
4. <i>Transparency and Publicity Related to Judicial Misconduct</i>	207
a. <i>Transparency and Publicity of Reasoning and Outcomes</i>	207
b. <i>Transparency and Publicity about the Process and its Availability</i>	208
c. <i>Publicity of Statistics</i>	209
d. <i>Other Efforts</i>	210
V. CONCLUSION	211

* Associate Professor, The University of Akron School of Law. Many thanks to all those who offered questions and comments at presentations of portions of this work at the Symposium at the McGeorge School of Law, as well as at the Third International Legal Ethics Conference (Gold Coast, Australia), the University of Maryland School of Law, and The University of Akron School of Law. Special thanks to Mark Harrison for commentary on the Article at the Symposium, and to Elizabeth Reilly for helpful comments and questions throughout the development of the Article.

I. INTRODUCTION

For nearly a century, the United States has seen the continuing development and refinement of judicial conduct regulation,¹ but it was only around the turn of the twenty-first century that several other common law countries turned in earnest either to the initial formalization or the reform of such regulation.² The fact that none of this movement on judicial conduct regulation outside of the United States has precisely imitated any of the systems in place in the United States suggests that a look at these various efforts abroad, both their purposes and the mechanisms being put in place to achieve those purposes, may be of interest.³ This Article therefore provides an overview or survey of recent developments and practices in four national common law systems—those of Australia, Canada, England & Wales, and New Zealand—in which recent efforts have been made to address matters of judicial conduct regulation relating in particular to the promotion of public confidence in the judiciary. It seeks, further, to determine what may be learned from these efforts.

Meaningful regulation of judicial conduct must flow from a clear idea of the ends for which the judiciary is constituted and the values or virtues central to the accomplishment of those ends. It must then connect the regulation of judicial conduct (as opposed to actual judicial decisionmaking) with those ends and values. In order to judge what judges do or how they behave, apart from the actual decisions they make, one must tailor that judgment to what matters to the role they play. Thus, in order to realize the benefit of efforts at reform, objectives need to be clearly articulated and embedded in the design of that reform. Some common themes immediately emerge when looking at the objectives of conduct regulation stated in the sources from each of the systems discussed here. Foremost among these are the themes of independence, impartiality, integrity, and public confidence. This Article focuses on the last of these, which is often given pride of place as a primary driving force behind the others: promotion and

1. See, e.g., CANONS OF JUDICIAL ETHICS (1924); CODE OF JUD. CONDUCT (1972); MODEL CODE OF JUD. CONDUCT (1990); MODEL CODE OF JUD. CONDUCT (2007).

2. For example, the Parliament of New Zealand passed the Judicial Conduct Commissioner and Judicial Conduct Panel Act in 2004 (amended in 2010). The Council of Chief Justices of Australia produced its *Guide to Judicial Conduct* (Second Edition) in March 2007. The Judges' Council of England & Wales published its *Guide to Judicial Conduct* in October 2004 and the Act of Parliament establishing the prescribed procedures for judicial discipline and the Office of Judicial Complaints dates from 2006. Of course it is not the case that there was no regulation of judicial conduct prior to these dates, but certainly these are the most significant and programmatic efforts at formal and standardized regulation in these other common law countries. On earlier efforts at regulation of judicial misconduct, see, e.g., M.H. Hoeflich, *Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages*, 2 LAW & HIST. REV. 79 (1984); Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1 (1977).

3. To the extent that some of the state systems of judicial conduct regulation in the United States govern conduct in regimes that incorporate popular election of judges, it is unsurprising that other common law countries (where the idea of election of judges is considered bizarre if not outright dangerous!) would not have imitated these systems. However, to the extent that other state systems and the federal system operate in contexts with exclusively appointed judges, it is interesting that there has not been more direct influence.

maintenance of public confidence in the judiciary.⁴ Public confidence is indeed desirable for the legitimacy of the institution, but what do we mean by public confidence in the judiciary? And what concerns attend the use of public confidence as a goal or as a measure of performance? How do various countries aim at public confidence and what mechanisms do they use in their systems of judicial conduct regulation that can be meaningfully connected to the achievement of public confidence? Do they work? This Article examines those questions.

Judges in common law countries share, more or less, the same practical basic job description.⁵ They are charged with deciding, according to the law, the cases properly before them. Further, judges are expected to exercise judgment where the law may be underdetermined in prior interpretations of the law, reasoning by analogy, looking for fit with other aspects of determined law, and so on. The trick is in moving from that generally agreeable statement to the workable and meaningful regulation of judicial *conduct*, particularly where the stated goal of a regulatory regime is public confidence. The focus, in these common law countries coming more recently to the task of establishing formal mechanisms for regulation of judicial conduct, is clearly *on* public confidence.⁶ Some have argued that the best way for judges to gain public confidence is simply to do a good job.⁷ That, of course, may be true, but it demands answers to complicated questions about what public confidence is, why it is important, and what it means for a judge to do a good job. Furthermore, there turns out to be some conceptual and

4. See, e.g., CANADIAN JUDICIAL COUNCIL, ETHICAL PRINCIPLES FOR JUDGES 14, available at http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf (last visited Aug. 2, 2010) [hereinafter ETHICAL PRINCIPLES] (on file with the *McGeorge Law Review*) (“Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law.”).

5. While there may be a basic agreement at a conceptual level about the job of a common law judge, there are of course differences as well, so it will be useful to take certain issues off the table for the discussion that follows. For example, let us assume that we are dealing only with the regulation of appointed judges, rather than elected judges. (The regulation of elected judges, particularly in the state courts of the United States, raises issues that demonstrate the very reasons why judges ought not be elected in the first place.) Let us further assume that we are dealing with judges who are given either life or fairly long term tenure. With these as common terms, we may somewhat more easily build up an idea of shared goals and values for the judiciary and imagine, with those goals in mind, what judicial regulation actually consistent with those goals would look like, and how it would succeed or fail in accomplishing those goals, either practically or theoretically.

6. Concerns about public confidence in regulation of judicial conduct are mirrored in the judicial appointments process. With regard to the judiciary of England & Wales, Baroness Prashar stated: “In determining good character, the Commission will adopt two fundamental principles: the overriding need to maintain public confidence in the standards of the judiciary; and that public confidence will only be maintained if judicial office holders and those who aspire to such office maintain the highest standards of probity in their professional, public and private lives” Baroness Prashar, Chairman, Jud. Appointments Comm’n, Middle Temple Guest Lecture 10 (Nov. 6, 2006), available at http://www.judicialappointments.gov.uk/static/documents/JAC_Speech_Middle_Temple_Guest_Lecture_061106.pdf (on file with the *McGeorge Law Review*).

7. See Murray Gleeson, Chief Justice, High Court of Australia, Public Confidence in the Courts 7 (keynote address and paper delivered at “Confidence in the Courts” Conference Feb. 9-11, 2007), available at http://www.hcourt.gov.au/speeches/cj/cj_9feb07.pdf (on file with the *McGeorge Law Review*).

practical slippage when it comes to what exactly we want public confidence to be *in*. Is it in the primary decisionmaking work of the judiciary, or is it in the regulation of judicial conduct (or, more particularly, *misconduct*) itself? There are, of course, close connections between the two, but the more precise we can be on this question, the better we may understand the efforts at and the effects of reform.

This Article focuses on the goal of public confidence as it is promoted in a variety of common law countries, examining the various approaches to achieving public confidence and what those approaches may tell us about the meaning and importance of this goal. It further considers whether the goal as illuminated by the practical approaches bears any real relationship to the important substance of judicial ethics.⁸ Others have already explored the concept of public confidence in the regulation of judicial conduct in United States,⁹ but one potential application of this exploration of the handling of this concept in *other* judiciary systems may be to provide background for further work on the goal of judicial confidence at home, and to see how we might be further served by similar innovations in our own systems, both state and federal.¹⁰

Public confidence is not the only concern in the regulation of judicial conduct, but it has in many instances been set explicitly ahead of other concerns in the regulation of judicial conduct, which makes it worthy of close

8. The purpose of this article is not primarily to compare directly one system to another to examine the viability of different efforts to promote public confidence in the context of those other systems. Instead it examines their approaches independently and looks at the nuts and bolts of various mechanisms, whether substantive or procedural, to see what “public confidence” means in these contexts.

9. See, e.g., Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA (Keith J. Bybee ed., 2007) (exploring the history of efforts in the United States to regulate the judiciary for impartiality and public confidence); AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21st CENTURY JUDICIARY 10 (2003) (giving recommendations on how to increase public confidence in the judiciary).

10. Public confidence is well established as a concern both of the ABA and the United States federal judiciary, so these discussions of public confidence should have some comparative value. For instance, the ABA Model Code of Judicial Conduct (2007), requires conduct that promotes public confidence in the integrity and impartiality of the judiciary, and the comments to several other rules show this concern is shot through the basic understanding of what the rules are for. MODEL CODE OF JUD. CONDUCT R. 1.2 (2007); see also *id.* at Preamble, R. 1.2 cmts 1, 3, & 6, R. 2.1 cmt 2, R. 2.4 cmt 1, R. 2.7 cmt 1, R. 2.12 cmt 2, R. 2.16 cmt 1, R. 3.6 cmt 1, R. 4.1 cmt 3 (citing concerns for “public confidence” in the judiciary). In the 2008 Code of Conduct for United States Judges and the procedures for implementation of those rules, there are similar indications. CODE OF CONDUCT FOR U.S. JUDGES, Canon 1 commentary, Canon 2A and commentary, Canon 3(A)(6) commentary, Canon 4F (2008); see also RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Judicial Conference of the United States at §§3(h)(2) & cmt., 23(a), 26 cmt., 27 cmt. (2008). Much has been written in the wake of the Breyer Report and the adoption of these new rules and procedures about improvements to transparency and remaining questions about the identity of the decision-makers. See, e.g., Arthur D. Hellman, *When Judges are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 325 (2008); David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909 (2009). However, there are many other facets to public confidence as understood and sought in other countries, from which United States observers may learn.

examination.¹¹ All of the systems examined here note the importance of the same basic qualities in the judiciary, and all of them are subject to further questions of definition: independence, impartiality, integrity, and good behavior.¹² This Article explores the regulation of those qualities only insofar as they bear directly on questions of public confidence.

II. UNDERSTANDING PUBLIC CONFIDENCE

As one indication of the centrality of the promotion of public confidence in the development or formalization of judicial conduct regulation in recent years in common law countries around the globe, one may look to the statements of purpose or guiding principles in the black letter of the documents establishing the codes, procedures, and governing bodies for these systems. For example, the Australian Guide to Judicial Conduct, under the heading of “Guiding Principles,” establishes the following priorities:

The principles applicable to judicial conduct have three main objectives: [t]o uphold public confidence in the administration of justice; [t]o enhance public respect for the institution of the judiciary; and [to] protect the reputation of individual judicial officers and of the judiciary. Any course of conduct that has the potential to put these objectives at risk must therefore be very carefully considered and, as far as possible, avoided.¹³

11. This concern is not unique to systems outside of the United States. United States Supreme Court jurisprudence reveals a wide variety of indications that public confidence in the judiciary is at a premium, not just in conduct regulation, but more broadly considered in the role of the judge and of the judiciary as an institution. In what may be the most well-known reference to public confidence in the judiciary in Supreme Court jurisprudence, Justice Frankfurter once wrote: “The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.” *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). This concern underscores the possibility that whatever we can learn by looking at the treatment of public confidence in other countries may be useful in improving U.S. efforts in this area.

12. See generally AUSTRALASIAN INST. OF JUDICIAL ADMIN. INC., GUIDE TO JUDICIAL CONDUCT 1 (2d ed.), available at [http://www.aija.org.au/online/GuidetoJudicialConduct\(2ndEd\).pdf](http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf) (last visited Aug. 2, 2010) [hereinafter AUSTRALIAN GUIDE] (on file with the *McGeorge Law Review*) (offering “practical guidance” to members of the judiciary); ETHICAL PRINCIPLES, *supra* note 4 (noting what is expected of Canadian judges); JUDICIAL COUNCIL OF ENGLAND & WALES, GUIDE TO JUDICIAL CONDUCT (2008 Supp.), available at http://www.judiciary.gov.uk/docs/judges_council/judicialconduct_update0408.pdf [hereinafter ENGLAND & WALES GUIDE] (on file with the *McGeorge Law Review*) (noting the standards of judicial conduct in Britain); COURTS OF NEW ZEALAND, GUIDELINES FOR JUDICIAL CONDUCT, available at <http://www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct/Guidelines-for-Judicial-Conduct.pdf> (last visited Aug. 2, 2010) [hereinafter NEW ZEALAND GUIDELINES] (on file with the *McGeorge Law Review*) (listing judicial conduct guidelines for the New Zealand judiciary).

13. AUSTRALIAN GUIDE, *supra* note 12, at 3.

Along similar lines, the Act creating New Zealand's Judicial Conduct Commissioner states that its purpose "is to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system . . ." ¹⁴ The Canadian Judicial Council is "committed to fostering ongoing confidence in the judiciary." ¹⁵ Parliament created the Office for Judicial Complaints for the Judiciary of England & Wales to "support[] the Lord Chancellor and Lord Chief Justice in their joint responsibility to maintain public confidence in members of the judiciary." ¹⁶

What *is* this public confidence that is so important to achieve and maintain? How would one determine its presence, absence, or extent? Why is public confidence in the judiciary an important goal? And again, what is this confidence supposed to be *in*? One Australian commentator has asked whether we are even certain that public confidence in the judiciary is necessarily a good thing. ¹⁷ Will people have greater confidence if they do or do not know "how the sausage is made"? One more or less universal complication is that it is difficult to talk in a meaningful way about public confidence in the judiciary when so few people really pay any attention to the judiciary, except perhaps when something scandalous shows up in the newspaper. ¹⁸ Many things that bear on meaningful public confidence in theory are in practice of little apparent interest to the general public (and of course there is still the problem of defining "the public"). ¹⁹ "Much of what we call public confidence consists of taking things for granted." ²⁰ Former long-time Chief Justice of the High Court of Australia, Murray Gleeson, has

14. Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, § 4 (N.Z.), available at <http://www.legislation.govt.nz/act/public/2004/0038/4.0/viewpdf.aspx> (last visited Aug. 2, 2010) [hereinafter Judicial Conduct Act 2004] (on file with the *McGeorge Law Review*).

15. CANADIAN JUDICIAL COUNCIL, MANAGING CHANGE: THE 2008-2009 ANNUAL REPORT OF THE CANADIAN JUDICIAL COUNCIL 4, available at <http://www.cjc-ccm.gc.ca/cmslib/general/CJC-annual-report-2008-2009-finalE.pdf> [hereinafter CJC 2008-2009 ANNUAL REPORT] (on file with the *McGeorge Law Review*).

16. OFFICE FOR JUDICIAL COMPLAINTS, ANNUAL REPORT 2008-2009 7, available at http://www.judicialcomplaints.gov.uk/docs/OJC_Annual_Report_2008_-_2009.pdf (last visited Aug. 2, 2010) [hereinafter OJC 2008-2009 ANNUAL REPORT] (on file with the *McGeorge Law Review*).

17. Greg Woods, Public Confidence in the Judiciary: Some Historical Observations, and a Proposal 1 (paper delivered at the "Confidence in the Courts" Conference Feb. 9-11, 2007), available at <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Confidence%20courts/papers/Woods.pdf> (on file with the *McGeorge Law Review*).

18. This concern is illuminated by the political reality in the United States, of what Professor Geyh has called the "Axiom of 80" regarding public interest and participation in the judicial election process: "(1) Roughly 80% of the public prefers to select its judges by election and does so; (2) Roughly 80% of the electorate does not vote in judicial elections; (3) Roughly 80% of the electorate cannot identify the candidates for judicial office; and (4) Roughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive." Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52 (2003). When the public has the opportunity to participate directly in the shaping of the judiciary, and yet apparently know and care so little, what can be expected for education and interest levels in other contexts in which that level of participation is not even invited?

19. Gleeson fears the "silent majority" is not heard as "the public" on these matters. Gleeson, *supra* note 7, at 6; see also Woods, *supra* note 17, at 1.

20. Gleeson, *supra* note 7, at 2. Gleeson draws a comparison here with the unquestioning but ultimately ignorant Australian belief in the integrity of the electoral process. *Id.* at 2-3.

questioned the usefulness of a focus on public confidence, suggesting that it is insufficiently observable (and insufficiently understood) to serve as a reliable measure.²¹

“Public confidence” might refer to the degree to which the average reasonable person is satisfied with the job performance of the judiciary, either as individuals or as a group. But the average reasonable person knows little about judicial performance or what it means to fulfill the obligations of the judicial role. After all, even among those who pay close attention to, or even *play* the judicial role, there is much disagreement about how to characterize the obligations and proscriptions of the judicial role.

“Public confidence” might mean, on the other hand, something more like “customer satisfaction,” in which case one might ask whether the average person—either a direct consumer of judicial services or just a citizen-observer affected secondhand by the judge’s work—believes that judges are doing their jobs the way those *consumers* believe the job *ought* to be done. This option obviously layers in yet further problems of uncertainty and inconsistency. Presumably public confidence cannot simply be coextensive with popular opinion about whether a judge made the correct decision in a particular case.²² If the primary concern were to capture public approval or agreement as to actual decisionmaking, one might reasonably imagine that the public would be more directly involved in decisionmaking, either on appeal or in the process of judicial discipline. If public confidence were truly about responsiveness to the “consumer” of judicial services, then perhaps there should be a regime akin to jury-duty for public involvement. From the fact that this is *not* the system in any of the countries examined here, one possible conclusion to be drawn is that public confidence cannot be properly understood as directly based on what the public would decide or how the public expects judges to behave.

There is surely a difference between public confidence and popularity. Judges should be able to make unpopular decisions without risking a lack of public confidence, and should not make popular decisions simply to try to win public confidence.²³ There are complaints from some corners about judges being “out of touch” with the public, but it is unclear exactly what that means, or how and why judges need to be “in touch” with the public in order to instill or maintain public confidence in their work.²⁴

Still, the involvement and the education of the public are not irrelevant to a meaningful understanding of public confidence. Continued public participation in the judicial systems, it is argued, may promote acceptability of decisions. Indeed,

21. *Id.*

22. See THE FEDERALIST NO. 78 (Alexander Hamilton) (1788).

23. See, e.g., NEW ZEALAND GUIDELINES, *supra* note 12, at ¶ 61; Gleeson, *supra* note 7, at 7.

24. David Brown, *Popular Punitiveness, the Rise of the ‘Public Voice’ and Other Challenges to Judicial Legitimacy* 5-6 (paper delivered at the “Confidence in the Courts” Conference Feb.9-11, 2007) (on file with the *McGeorge Law Review*).

some associate the decline in use of juries in Australia (and thus the decline in participation of members of the public in the work of the judiciary) with a loss of public confidence in the judiciary.²⁵ This raises the question of whether public confidence is in fact a matter of understanding or acceptability of decisions, or even perhaps what it means to talk about the “acceptability of decisions” in this context. A February 2009 press release from the judiciary of England & Wales presents a pertinent angle on acceptability of decisions when it states: “Fewer than 1% of all convictions in the Crown Court and just 1.3% of sentences are successfully appealed in the Court of Appeal, which should increase public confidence in the Criminal Justice System.”²⁶ One might question the logic of this statement, but the underlying concern for promoting the idea of public confidence is clear. There is perhaps a more meaningful connection between cogent, reasoned opinions explaining outcomes and the acceptability of decisions than there is between actual participation in the process and acceptability of decisions. However, with a public that does not, for the most part, read actual court opinions, perhaps participation is the more effective mechanism for promotion of public confidence, at least insofar as it promotes awareness of the work done by the judiciary.

Some of the regimes discussed in this Article put substantial emphasis on the basic connection between public confidence and information. For example, this is largely the driving force behind recent movement in the judiciary of England & Wales, and Australian courts now have public information officers, not just for managing crises, but for regular educational purposes.²⁷ Some suggest an even more extensive use of such a system, in arranging for retired judges or academics to be available to comment on decisions, rather than leaving criticism, informed or otherwise, to whoever can shout the loudest and the soonest after a decision is handed down.²⁸ One writer suggests a trend in Australia running from an initial demystification of the judiciary through to the development of a lack of respect for the judiciary.²⁹ Some of this may result from the decline of the work of juries in Australia, and some from the reality that news coverage is much more extensive today than it was a generation ago, but it is still the case that newsworthy items about judges are unlikely to be those that instill confidence—it is the scandals that will be reported.³⁰ In any event, the discussion below will illuminate just how prominently the questions about availability of information

25. See Gleeson, *supra* note 7, at 3-4.

26. Press Release, Judicial Commc'ns Office, Court of Appeal Contributes to Public Confidence in the Criminal Justice System (Jan. 19, 2009), available at <http://www.judiciary.gov.uk/media/media-releases/2009/news-release-0209> (on file with the *McGeorge Law Review*).

27. Gleeson, *supra* note 7, at 4.

28. Woods, *supra* note 17, at 11.

29. Brown, *supra* note 24, at 2-3.

30. *Id.* at 1 (noting the rise of the “public voice” and the decline of expertise of those who are speaking out, suggesting challenges will only increase for maintaining public confidence in the courts); see also Gleeson, *supra* note 7, at 5-6.

feature in the regulation of judicial conduct in efforts to promote public confidence.³¹ This is one of the areas in which the slippage occurs on the question of public confidence *in what, exactly*.

In short, invocations of the term “public confidence” tend to be fairly ambiguous, and it is not even clear that there is one consistent understanding of the term, but a careful look at the ways in which different systems attempt to promote it may help present a clearer understanding of the term itself and why the concept matters. If a clear and useful understanding emerges, and if it can be shown to match up well with specific mechanisms to achieve it, that will help the continuing shaping of the mechanisms to do so even more effectively. On the other hand, if the understanding does not coalesce clearly or does not connect up well with the mechanisms developed so far to achieve the ends of public confidence, it will be easier to redirect those efforts.

Whatever regulatory steps may be taken to foster greater public confidence in the judiciary, it will always be hard to measure their success.³² However, the better we can at least grasp a definition of public confidence, the better the means can be connected with the ends, and in turn, the more we may be able to trust that there are effective measures in place to promote this value on which these systems place so much emphasis, however difficult it may be to measure. This Article examines some of these regulatory efforts abroad, both to better understand what “public confidence” means in practice and to see what substantive and procedural mechanisms and approaches are best designed to promote or even achieve the kind of confidence that will be most meaningful.

III. SYSTEMS AND METHODS OF JUDICIAL CONDUCT REGULATION IN FOUR COMMON LAW COUNTRIES

It will be useful at this point to provide a basic description of the current state of the developing systems, both substantive and procedural, in each of the countries discussed in this Article. In order to fit so many systems into the same frame for examination, these descriptions are necessarily general overviews, and where there are both federal or national *and* state, provincial, or territorial court systems in the same country, the focus here is only on the federal or national system in that country.

31. See *infra* Part IV.

32. Some have, in various ways and in various settings, made efforts to measure public confidence in certain aspects of the work of the judiciary, through polling or other assessments of quantifiable data, but none measure precisely the angle of public confidence that this article explores. However, for measurements of related concepts, see, e.g., Mike Hough et al., Scientific Indicators of Confidence in Justice: Tools for Policy Assessment (2009), available at <http://www.eurojustis.eu/fotoweb/22.pdf> (on file with the *McGeorge Law Review*) (reporting on research on development of survey-based indicators of public confidence in justice in EU member states); James W. Stoutenborough & Donald P. Haider-Markel, *Public Confidence in the U.S. Supreme Court: A New Look at the Impact of Court Decisions*, 45 SOC. SCI. J. 28 (2008) (analyzing relationship between specific Court decisions and public confidence, using data on public opinion).

A. Canada

Canada has been at the work of regulating judicial discipline in a formal way for longer than some of the other countries discussed here. Parliament created the Canadian Judicial Council (CJC) in 1971, giving it authority over federally appointed members of the judiciary.³³ The CJC first published an aspirational guide to judicial conduct in Canada called *Ethical Principles for Judges* in 1998.³⁴ Complaints about judicial conduct are typically dealt with by some combination of the relevant Chief Judge and the relevant judicial council.³⁵ In the CJC process, the only *official* sanction available for misconduct is removal from the bench, and the CJC cannot actually impose that sanction itself, but rather it has to make a recommendation to the Minister of Justice, who may proceed through Parliament to do so.³⁶

Reported cases from the CJC dealing with misconduct of federal judges are relatively rare, as there is an apparent strong preference for voluntary resignations from the bench in the face of conduct complaints with any merit.³⁷ Over the past ten years, an average of 168 conduct complaints have been filed with the CJC each year.³⁸ Yet anecdotal perspectives on the Canadian judicial ethics scene indicate some frustration with the preference for sweeping ethics problems under the rug through resignations. There is great confidence in the appointment process, but not necessarily in the discipline process. Of course, the two are logically connected. If judges are well-chosen for their positions, there would presumably be less call for complaint. Further, if judges are *known* to be well chosen for their positions, there will be less suspicion about whether there ought to be more complaints. This focus of energy on the appointment process rather than the discipline process, along with the relative paucity of opinions from the CJC on judicial conduct issues and the preference for resignations rather than going through the process, seems to indicate that the public confidence sought by the CJC mechanisms is truly confidence in the work of the institution

33. See generally CANADIAN JUDICIAL COUNCIL, http://www.cjc-ccm.gc.ca/english/index_en.asp (last visited Aug. 2, 2010) [hereinafter CJC Website] (on file with the *McGeorge Law Review*). There are also ten provincial and territorial judicial councils. *Id.*

34. ETHICAL PRINCIPLES, *supra* note 4.

35. See CJC Website, *supra* note 33.

36. Judges Act, R.S.C. 1985, c. J-1, Part II, §§ 65, 69, available at http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_mp_judgesact_en.asp (on file with the *McGeorge Law Review*). Some provincial councils explicitly state their power to impose lesser sanctions on their own. See, e.g., PROVINCIAL COURT OF BRITISH COLUMBIA, http://www.provincialcourt.bc.ca/printthispage/complaint_process.html (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*); ONTARIO JUDICIAL COUNCIL, THIRTEENTH ANNUAL REPORT: 2007-2008 5, available at <http://www.ontariocourts.on.ca/ojc/en/annualreport/07-08.pdf> (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

37. The CJC website lists reports and decisions from only eight inquiry committees dating back to 1990. CANADIAN JUDICIAL COUNCIL, Inquiry Committee Decisions, http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inquiry_en.asp (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

38. See CJC 2008-2009 ANNUAL REPORT, *supra* note 15, at 16.

of the judiciary as a whole, rather than confidence in the process of regulating judicial conduct.

B. Australia

There is a guide to judicial conduct for federal judges³⁹ in Australia, written in 2002, but it is wholly aspirational.⁴⁰ Rather more importantly, there is currently no standard national complaints-handling system or procedure, which has prompted calls for reform over the past few years. Most recently, these calls for reform have resulted in the creation of a set of recommendations from the Australian Senate Legal and Constitutional Affairs Committee.⁴¹ The Law Council of Australia has come out against the suggested changes to current practices, first on grounds that the current practices are not broken, and therefore do not require repair, and second on the ground of concern about the constitutional viability of any such system (which is thought to threaten judicial independence).⁴² What exists at present is an informal system of private management of judicial conduct by the heads of jurisdiction, and when there is something so significant that it might rise to the level of the need for removal, it is up to Parliament to create an ad hoc procedure for investigating and making a decision about whether to remove the judge.⁴³ When such Parliamentary investigations have occurred in the past, they have created something of a media circus each time.⁴⁴ Some perspectives on the Australian judicial ethics scene indicate frustration with the lack of information about what is really going on—

39. States and territories also have their own judiciaries and some, including most notably New South Wales, have much more fully developed formal regulation of judicial conduct than the current federal system. See generally JUDICIAL COMMISSION OF NEW SOUTH WALES, <http://www.judcom.nsw.gov.au/> (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*); see also Peter A. Sallman, Judicial Conduct: Still a Live Issue? 2 (paper delivered to the Judicial Conference of Australia Sept. 3, 2005) (on file with the *McGeorge Law Review*) (noting well developed system in NSW and developing system in Victoria). However, here I will focus here on the federal judiciary in Australia.

40. AUSTRALIAN GUIDE, *supra* note 12, at 1 (“The purpose of this publication is to give *practical guidance* to members of the Australian judiciary at all levels.”).

41. See PARLIAMENT OF AUSTRALIA, AUSTRALIA’S JUDICIAL SYSTEM AND THE ROLE OF JUDGES (Dec. 9, 2009), available at http://www.aph.gov.au/senate/committee/legcon_ctte/judicial_system/report/index.htm [hereinafter AUSTRALIAN SENATE REPORT] (on file with the *McGeorge Law Review*) (set of recommendations from Senate Legal and Constitutional Affairs Committee); see also Chris Merritt, *Federal Body to Handle Complaints*, THE AUSTRALIAN, June 20, 2008.

42. See LAW COUNCIL OF AUSTRALIA, INQUIRY INTO AUSTRALIA’S JUDICIAL SYSTEM AND THE ROLE OF JUDGES 3 (Apr. 30, 2009) (“While supporting the development of independent and transparent mechanisms for dealing with judicial complaints, the Law council sees no need for and is not in favor of a national judicial complaints handling system.”). There are similar indications of resistance to change, for similar reasons, in the area of judicial appointments. See, e.g., Philip Ruddock, Confidence in the Courts 20, 30 (paper delivered at the “Confidence in the Courts” Conference Feb. 9-11, 2007) (on file with the *McGeorge Law Review*).

43. See AUSTRALIAN SENATE REPORT, *supra* note 41, at § 7.2.

44. See, e.g., Sallman, *supra* note 39, at 13; ENID CAMPBELL & H.P. LEE, THE AUSTRALIAN JUDICIARY 101-131 (2001); H.P. Lee and V. Morabito, *Removal of Judges—The Australian Experience*, SING. J. LEGAL STUD. 40 (1992).

that “out of sight, out of mind” is not the right approach and cannot be counted on to mean that Australian judges really behave better than other judges.⁴⁵ The Senate Committee recommendations include, most importantly, proposals for the adoption of a written complaint handling policy to be made publicly available on the Internet,⁴⁶ and for the regular publication by all federal courts of a quarterly complaint handling summary status (without personal details to identify the judicial officers in question).⁴⁷ One of the intriguing features of the committee report is that it is *not* explicitly couched in terms of concern for public confidence, although that term is sprinkled throughout the report in quotations from the commentary of those whose views the Committee took into account.⁴⁸

As the system currently stands, Australia is perhaps the most overt in its expression of public confidence as a basic guiding principle when it comes to the substance of judicial conduct standards in its written guide. As noted above, the *Australian Guide to Judicial Conduct* establishes three primary objectives: “[upholding] public confidence in the administration of justice, [enhancing] public respect for the institution of the judiciary[,] and [protecting] the reputation of individual judicial officers and the judiciary.”⁴⁹ These objectives are not about regulating conduct with an eye to achieving actually just outcomes, but rather about maintaining confidence and respect, that is to say, about keeping up appearances. It is only as a way of aiming at those public confidence goals that the guide continues: “There are three basic principles against which judicial conduct should be tested to ensure compliance with the stated objectives. These are: Impartiality; Judicial Independence; and Integrity and personal behaviour.”⁵⁰ The guide goes on to provide specific guidance as to conformance of conduct in those areas that have much in common with codes and guides in other countries, all shot through with clear concerns for public confidence as explored in the discussion below.⁵¹ This set-up indicates that in Australia, public confidence is meant to be in the institution of the judiciary and in its operation, more broadly,

45. In his broad discussion of judicial conduct issues, Prof. Sallman notes:

It has long been assumed, and indeed said from time to time, that the Australian judiciary is a well-behaved judiciary, both on and off the bench and for that reason conduct issues have not loomed large as an issue of public policy discussion. . . . I might say that I was politely rebuked in a couple of submissions received during the Victorian review for expressing far too sanguine a position on the state of the nation in relation to judicial conduct issues. Of course as a matter of empirical knowledge we can never have a clear, authoritative picture of judicial conduct . . . [O]ne has no way of knowing . . . how many complaints there are or what they are about. It is even possible that removable conduct occurs which for one reason or another is never discovered or revealed.

Sallman, *supra* note 39, at 8-9.

46. AUSTRALIAN SENATE REPORT, *supra* note 41, at §2.9. For further relevant (and more specific) recommendations see *id.* at §§ 7.82-7.83.

47. *Id.* §§2.19-2.20.

48. *Id.* §§7.19, 7.45, 7.54, 7.72.

49. AUSTRALIAN GUIDE, *supra* note 12, at 3.

50. *Id.*

51. *Id. passim.*

rather than specifically in its regulation of misconduct. This makes a certain amount of sense of the current lack of specific or standardized procedures and the lack of transparency regarding disposition of disciplinary complaints, in that confidence in the implementation of oversight is simply not the intended focus.

C. England & Wales

The judiciary of England & Wales has a written *Guide to Judicial Conduct*,⁵² but it is not binding due to concern about how that might threaten judicial independence.⁵³ The Introduction to the guide indicates that it was created, at least in some large measure, as a response to the creation of similar codes elsewhere at the time.⁵⁴ The judiciary of England & Wales is perhaps the most overt about seeking public confidence directly in its *process* of judicial conduct regulation, rather than confidence more generally in the work of the judiciary as a whole. In 2006, the Office for Judicial Complaints (OJC) was created first and foremost to “support[] the Lord Chancellor and Lord Chief Justice in their joint responsibility to maintain public confidence in members of the judiciary.”⁵⁵ The OJC works on the investigations and make recommendations but ultimately the Lord Chancellor and the Lord Chief Justice make the final decisions.⁵⁶ The OJC is further tasked with providing “efficient and effective customer friendly services.”⁵⁷ The first two annual reports from the OJC referred to its “customers” and “stakeholders,” but that language has largely disappeared now from the website and the most recent annual report.⁵⁸ For some perspective on the work of the OJC, of the nearly 900 complaints filed against mainstream judges in the 2007-2008 reporting year, only one resulted in any discipline, and that was only a reprimand.⁵⁹ During the 2008-2009 reporting year, total complaints were down by seven percent, and of 870 complaints against the mainstream judiciary, seventeen resulted in disciplinary action.⁶⁰

52. ENGLAND & WALES GUIDE, *supra* note 12.

53. *Id.* at iv, 5.

54. *Id.* at 1-6.

55. OJC 2008-2009 ANNUAL REPORT, *supra* note 16, at 7; *see also* The Judicial Discipline (Prescribed Procedures) Regulations 2006 (2006 No. 676) Part 1, § 3 [hereinafter *Judicial Discipline Regulations*] (on file with the *McGeorge Law Review*).

56. *Judicial Discipline Regulations*, *supra* note 55, at Part 7, § 35(2).

57. OFFICE FOR JUDICIAL COMPLAINTS, ANNUAL REPORT 2006-2007 4, available at http://www.judicialcomplaints.gov.uk/docs/OJC_Annual_Report_2006-2007.pdf (last visited Aug. 2, 2010) [hereinafter OJC 2006-2007 ANNUAL REPORT] (on file with the *McGeorge Law Review*).

58. Compare *id.* and OFFICE FOR JUDICIAL COMPLAINTS, ANNUAL REPORT 2007-2008 5, 10, available at http://www.judicialcomplaints.gov.uk/docs/OJC_Annual_Report_07-08.pdf (last visited Aug. 2, 2010) [hereinafter OJC 2007-2008 ANNUAL REPORT] (on file with the *McGeorge Law Review*), with OJC 2008-2009 ANNUAL REPORT, *supra* note 16, and OFFICE FOR JUDICIAL COMPLAINTS, Welcome to the Office of Judicial Complaints, <http://www.judicialcomplaints.gov.uk> (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

59. See OJC 2007-2008 ANNUAL REPORT, *supra* note 58, at 19-20.

60. OJC 2008-2009 ANNUAL REPORT, *supra* note 16, at 9, 12.

As a further signal of the importance of public confidence in the process, another layer of oversight has been created in the form of an ombudsman for complaints regarding the disciplinary process as well as the appointments process.⁶¹ One part of the ombudsman's statutory remit is to review complaints about the OJC's handling of complaints.⁶² The gist of the ombudsman's work so far has presented a generally positive view of the work and the continued improvements of the OJC.⁶³ So, on the side of public confidence in the monitoring of judicial conduct, there is the fact that these offices exist, that they are not run by judges (i.e. insiders), and that they are well-publicized, as are their processes.

Great strides have been made in terms of transparency of the process and even of some outcomes, but even so, there is perhaps still room for improvement, if the goal is confidence in the disciplinary process. Though more information is available now than in the past,⁶⁴ very little substantive non-statistical information that comes out of this process is made available to the public. Statements are released by the OJC when the Lord Chancellor and Lord Chief Justice make a decision of some kind, but they contain very little information about what conduct was at issue, in what factual circumstances, and what reasoning went into the decision.⁶⁵ The OJC's annual report details statistics regarding the number of complaints filed and some basic information about what categories they fell into (how many reprimands and removals there were at each level of the judiciary, etc.), but even this information is very rudimentary.⁶⁶ Without facts or reasoning, it is difficult to know what can be taken from this information. In the two most recent annual reports, there were four case studies giving different simple scenarios in which complaints were brought that resulted in discipline.⁶⁷ This is a step forward, but the examples are still so brief that it is hard to reach a clear understanding of the reasoning behind the decisions.

61. See generally JUDICIAL APPOINTMENTS & CONDUCT OMBUDSMAN, <http://www.judicialombudsman.gov.uk/> (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

62. JUDICIAL APPOINTMENTS & CONDUCT OMBUDSMAN, ANNUAL REPORT 2008-09 6, available at <http://www.judicialombudsman.gov.uk/docs/JACOAnnualReport2008-09.pdf> (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

63. See *id.* at 4, 12.

64. For example, an Op-Ed. from several years ago complained about several specific areas of desired improvements. See Robert Verkaik, Op-Ed., *Bring Judicial Misconduct into the Open*, THE INDEPENDENT (London), Mar. 28, 2007, available at <http://www.independent.co.uk/news/uk/crime/legal-opinion-bring-judicial-misconduct-into-the-open-446892.html>. Several of those areas of concern have recently been addressed and improved, at least as to the names of the judges involved.

65. Examples of these briefs statements are available on the OJC website. See OFFICE FOR JUDICIAL COMPLAINTS, Press Releases and Statements, <http://www.judicialcomplaints.gov.uk/publications/news.htm> (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

66. See OJC 2008-2009 ANNUAL REPORT, *supra* note 16, at 9-13.

67. See *id.* at 14-15; OJC 2007-2008 ANNUAL REPORT, *supra* note 58, at 36-37.

The press release for the 2008-2009 Annual Report announced some relevant improvements.⁶⁸ For example, going forward, whenever a judge is removed from office, a public statement will be made.⁶⁹ (Those remain cursory at best.) More significantly, perhaps, with regard to public confidence concerns, it says this: “For the first time this annual report includes the number of judicial office holders who resign during an investigation. This increased openness should help the public to have confidence that all complaints about the conduct of judicial office holders are investigated thoroughly.”⁷⁰ The annual report also touts the fact that “[j]udicial discipline matters are now more transparent and open and extensive information about complaints and the complaint process as a whole is now available.”⁷¹ One might dispute the characterization of the information as “extensive” but certainly it is more than the complete lack of information previously available to the public.

While it appears that the practical efforts at reform in England & Wales have largely focused on promotion of public confidence in the regulatory oversight mechanism itself, there is of course a connection or a translation from that concern to concern for public confidence in the quality of the judiciary and its work more generally. If judicial conduct is being efficiently policed, then presumably what remains is worthy of confidence. The only risk in this approach is that by focusing on rooting out misconduct, one publicizes the misconduct rather than the high quality work, and thus creates more negative associations than may be useful.

D. New Zealand

Until recently, although New Zealand courts in fact *had* a document called *Guidelines for Judicial Conduct*, it was not known or available to the public.⁷² Those guidelines are now available on the Internet.⁷³ Language in a recent opinion from the Supreme Court of New Zealand makes clear that the guidelines

68. Press Release, Office for Judicial Complaints, Office for Judicial Complaints Publishes 2008-2009 Annual Report (Feb. 25, 2010), available at http://www.judicialcomplaints.gov.uk/docs/OJC_Annual_Report_2008-2009_Press_Statement_Final_24_02_10.pdf [hereinafter Press Release, OJC 2008-2009 Annual Report] (on file with the *McGeorge Law Review*).

69. *Id.*

70. *Id.*

71. OJC 2008-2009 ANNUAL REPORT, *supra* note 16, at 7.

72. See, e.g., *Saxmere Co. Ltd. v Wool Bd. Disestablishment Co. Ltd.* (2009) NZSC 122 (SC 64/2007), at ¶ 5; Miguel Demapan, Pacific Experience with Codes of Conduct 4 (2007), available at http://www.paclii.org/PJDP/resources/PJC/Pacific_Experience_with_Codes_of_Conducts.pdf (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

73. NEW ZEALAND GUIDELINES, *supra* note 12. The guidelines are now available online. They were first adopted in 2003 but the edition available on the website is from 2005. *Id.* The courts' website indicates that they “are expressed to be guidance to judges, not rules” *Id.* No information is readily available to explain why these were previously unavailable or why they have been made public, so the public is left to speculate. There is some possibility of a connection with a recent controversy over a prominent refusal to recuse. See discussion *infra* at notes 115-119 and accompanying text.

2010 / Promoting Public Confidence in the Regulation of Judicial Conduct

provide guidance only, not rules to be strictly imposed.⁷⁴ As to procedure, a 2004 Act of Parliament created the office of the Judicial Conduct Commissioner (JCC) to address concerns about public confidence in the judiciary.⁷⁵ By contrast to the OJC in England & Wales, the office in New Zealand is held by a single person rather than a number of civil servants.⁷⁶ After consultation with the Chief Justice, “[t]he Commissioner is appointed by the Governor-General on the recommendation of the House of Representatives.”⁷⁷ There have been two Commissioners since the establishment of the office in 2005, both of them lawyers in private practice.⁷⁸ In late March 2010, Parliament passed an amended version of the Act, which now provides for the appointment of a Deputy Commissioner as well.⁷⁹

All complaints about judicial conduct are initially directed to the Commissioner.⁸⁰ The Commissioner decides whether to dismiss a complaint on any of a number of enumerated grounds.⁸¹ If the Commissioner does not dismiss the complaint, he may choose either to refer the complaint to the relevant head of bench⁸² or to recommend that the Attorney General establish a Judicial Conduct Panel.⁸³ A Judicial Conduct Panel would include judges (active or retired) and a lay member.⁸⁴ In the years since the establishment of the JCC, only ten of 438 complaints filed have been referred to a head of bench, and no judicial conduct panels have been established.⁸⁵ All other complaints have either been dismissed or are still pending.⁸⁶ There is at least anecdotal concern that some legitimate complaints are never actually made, due to the realities of practice before judges in such a relatively small legal community. There is thus concern that minor conduct problems in New Zealand simply fall through the cracks.

The Public Issues Committee of the Auckland District Law Society issued a paper in late 2007 on judicial conduct issues, showing a particular concern that

74. *Saxmere Co. Ltd.*, 2009 NZSC 122 at ¶ 11; *see also* NEW ZEALAND GUIDELINES, *supra* note 12, at 2.

75. JUDICIAL CONDUCT ACT 2004, *supra* note 14, at § 4.

76. *See id.* § 7(1).

77. *Id.* §§ 7(2)-(3).

78. *See* OFFICE OF THE JUDICIAL CONDUCT COMMISSIONER, http://www.jcc.govt.nz/template.asp?folder=COMPLAINT_PROCESS (last visited Aug. 12, 2010) [hereinafter JCC Website] (on file with the *McGeorge Law Review*). The first Judicial Conduct Commissioner was Ian Haynes, a practicing attorney in a private firm. He was replaced in 2009 by Sir David Gascoigne, who is now a consultant to his former firm. *Id.*

79. Judicial Conduct Commissioner and Judicial Conduct Panel Amendment Act 2010, §§8A-B (N.Z.) [hereinafter Judicial Conduct Amendment Act 2010] (on file with the *McGeorge Law Review*).

80. *See* Judicial Conduct Act 2004, *supra* note 14, at §§ 8, 11.

81. *Id.* § 16.

82. *Id.* § 17.

83. *Id.* § 18.

84. *Id.* § 22.

85. OFFICE OF THE JUDICIAL CONDUCT COMMISSIONER, ANNUAL REPORT FOR 2008/2009 4, available at <http://www.jcc.govt.nz/pdf/annual-report-08-09.pdf> (last visited Aug. 2, 2010) [hereinafter JCC ANNUAL REPORT 2008/2009] (on file with the *McGeorge Law Review*).

86. *Id.*

the JCC system was not designed effectively to deal “with cases of relatively minor judicial misconduct, such as rudeness to counsel or parties.”⁸⁷ The paper advocates greater openness about sanctions imposed.⁸⁸ The law society paper also advocates further public debate over how best to deal with misconduct “in a manner which preserves confidence in the system.”⁸⁹ It is not entirely clear to an outside observer whether the confidence desired in New Zealand is for the work of the judiciary more broadly or the system of conduct regulation in particular, but there are at least indicators of the former.

The original Commissioner raised several practical difficulties he encountered in implementing the procedures and principles prescribed in the Act. For example, he sought direction for handling, or an alternative mechanism for handling, complaints in those instances in which the Commissioner has a conflict of interest.⁹⁰ This is a legitimate and particularly problematic question in such a small legal community. From the creation of the office, the Commissioner simply had to do his best not to be affected by the conflict of interest, but now the 2010 Amendment Act addresses this concern by providing for the appointment of a Deputy Commissioner who can handle complaints in such situations.⁹¹

In summary, although New Zealand has established procedures for the Judicial Conduct Commissioner to follow when dealing with a complaint, no Commissioner has yet actually *used* the more innovative aspects of those procedures, in particular the one that might have most bearing on the promotion of public confidence. The potential benefit to public confidence of having the multi-faceted panel (that is, of having a lay member and other “outsiders” involved) is lost if those outsiders are never used to play this role.

Furthermore, New Zealand’s *Guidelines for Judicial Conduct* were not known or available to the public until 2009, which seems an odd approach with respect to public confidence. Perhaps the failure to make the code public from the outset simply indicates a lesser concern with confidence in the regulatory process and a greater focus on the primary decisionmaking work of the judiciary. The situation has, at any rate, been remedied to the extent that the guidelines are now publicly available, but one still does have to look hard to find them.

In terms of public information available, there is little that is of any meaningful use in determining what constitutes judicial misconduct in practice in New Zealand, or why, what the ramifications for any particular misconduct

87. Auckland District Law Society: Public Issues Committee, Judicial Conduct ii (Nov. 14, 2007) (discussion paper), available at <https://www.adls.org.nz/about-adls/committees/public-issues-committee/public-issue-papers> (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

88. *Id.* at 5-6 (“[A] judicial officer is fulfilling a public office in the day-to-day administration of justice. This character does not lend itself to secrecy.”).

89. *Id.* at ii.

90. See OFFICE OF THE JUDICIAL CONDUCT COMMISSIONER, ANNUAL REPORT FOR 2006/2007 6, available at <http://www.jcc.govt.nz/pdf/annualreport0607.pdf> (last visited Aug. 2, 2010) [hereinafter JCC ANNUAL REPORT 2006/2007] (on file with the *McGeorge Law Review*).

91. Judicial Conduct Amendment Act 2010, *supra* note 79, at §§8A-B.

found would be, and so on. The only public information available on judicial misconduct comes in annual reports from the Judicial Conduct Commissioner, who provides only the barest statistics such as numbers of complaints filed, numbers of complaints dismissed on various enumerated grounds, numbers of complaints referred to a head of bench, and numbers of complaints carried over into the next year.⁹² This lack of detailed information may indicate again the extent to which confidence is not specifically sought for the process of regulation itself. The process in New Zealand seems to be merely a backup device to promote public confidence in the judiciary as a whole, through a showing or offering of basic oversight.

With this general overview in mind, of how these four national judicial systems operate in terms of regulation of judicial conduct, we turn next to a closer examination of the specific aspects of these models that bear most significantly on public confidence.

IV. THEMES EMERGING FROM THESE APPROACHES

Looking at these basic aspects of design in systems purporting to aim at public confidence, several themes emerge as important. First, there appears to be some general correlation between the target of the desired confidence and the emphasis and shape of various aspects of judicial conduct regulation. Where confidence is sought primarily in the judicial system as a broader whole, there is less focus on process and transparency and more reliance on big picture underlying policy in the codes or guiding principles. Process, in these systems, is only a mechanism to further those underlying values. Where process and transparency are more central, the emphasis appears to lie more on the desire for confidence in the oversight mechanisms themselves. It is not entirely clear whether this is unintended slippage from an original focus on confidence in the judiciary as a whole, or whether it is an intentional shift. Whatever the intent at the outset, a system's treatment of a variety of factors, both substantive and procedural, come together to achieve varying potential levels of confidence in the whole and in the regulations of conduct.

In the next section, this Article examines some of the most pertinent of these factors, how they play into the various systems at issue, and what public confidence ends are or might be furthered by the implementation of particular approaches to some important questions. The discussion that follows is divided generally into two major categories—substantive factors and procedural factors. In the discussion of substantive factors, topics include the existence and availability of a code or guide, the use of appearance standards, standards for “integrity,” handling of impartiality in demeanor and extrajudicial speech, possibilities for side-stepping the process through apologies or resignations, and

92. JCC ANNUAL REPORT 2008/2009, *supra* note 85, at 4-6.

potential pitfalls of high thresholds for discipline or removal. In the discussion of factors related to process, topics include the existence of established and consistent procedures known to the public, the identity of decisionmakers and others involved in the regulatory process, the official and practical powers of the decisionmakers, and transparency and publicity related to misconduct. In all of these matters, this Article examines how the treatment of these key factors connects with the achievement of the goal of promoting public confidence in the judiciary, and in some instances, whether further innovations might be possible or advisable.

A. *Substantive Factors in Regulation of Judicial Conduct*

1. *Codes and Guides*

At this point, all of the countries examined here have a written code or guide of some kind. The codes or guides tend to be limited to providing guidance rather than binding authority. In at least one case, this is due to concerns about how a binding code would infringe on judicial independence.⁹³ This presents an interesting question of “independence *from what?*” that is an interesting problem in its own right with regard to public confidence. Of course, having a written code or guide, even if it is meant only as aspirational guidance and not as binding authority, sends an important message to the public that there *are* clear expectations about judicial conduct, which serves both to educate the public about the judicial role and to assure the public that there is concern about regulating the substance of judicial conduct.

It is unclear, for example, why the New Zealand code was initially kept a secret among judges, but it is possible that the reasoning is along the lines of what initially prevented the development of a code in the United States. When the initial development of a judicial code was considered in 1908, there were concerns that the introduction of such a code would send a message that there was a problem with judicial misconduct that was in particular need of correction, which would undermine, rather than promote, confidence in the judiciary.⁹⁴ Such concerns have become somewhat obsolete now that the code in New Zealand is publicly available, but the question remains, on the subject of content and emphasis, as to what messages a code may send to the public about realistic concerns for misconduct.

At this point, there appears to be agreement that *having* some form of written guidance and making that available to the public is good for public confidence both in the system as a whole and in the practice of conduct regulation. Therefore we turn now to the most relevant aspects of the substance of that guidance in

93. ENGLAND & WALES GUIDE, *supra* note 12, at iv; ETHICAL PRINCIPLES, *supra* note 4, at 3.

94. See Geyh, *Preserving Public Confidence*, *supra* note 9, at 27.

order to assess what they may reveal about understandings of and approaches to public confidence in the judiciaries of these other common law countries.

2. Appearance Standards

Each of the systems examined indicates in its code or guide some level of concern for the appearance, as well as the reality of proper judicial conduct.⁹⁵ One of the most common areas in which this concern comes up is that of recusal. The complication, especially when comparing the analysis across countries, is that recusal issues walk a blurry line between true judicial *conduct* matters on the one hand, and *merits-related* decisionmaking matters on the other. Each system examined in this Article is clear about the need to draw this line when it comes to judicial conduct regulation—that a question about whether a judicial decision was correct is a matter for appeal and not for the disciplinary authority—but in practice, conduct that might implicate bias or the appearance of bias is often hard to place clearly in one category or the other.

If allegations about bias are appropriate subjects for the regulatory scheme, and if the conduct is regulated for the purpose of achieving public confidence, arguably apparent bias (even if false) would matter as much, if not more, than actual bias (particularly if that actual bias were unknown). Justice Thomas, in his account of examples of misconduct in office, says specifically that bias and prejudice fall into this category, arising out of the concern for impartiality.⁹⁶ Thomas turns directly to the necessity of an appearance standard for assessing misconduct.⁹⁷ Former Australian Chief Justice Gleeson suggests that there is no way that public confidence would exist if people believed impartiality could not be achieved,⁹⁸ but somewhere along the way, the concern shifts from the actual impartiality that would instill public confidence to the instilling of public confidence itself, whether it is reflective of the underlying realities or not.⁹⁹ A survey of recent cases involving recusal in other countries indicates a variety of

95. See, e.g., NEW ZEALAND GUIDELINES, *supra* note 12, at 3; ETHICAL PRINCIPLES, *supra* note 4, at 27; ENGLAND & WALES GUIDE, *supra* note 12, at 22-27. This standard is often used in the United States, where reasoning is more readily available in judicial misconduct cases, as a face-saving measure.

96. HON. JUSTICE JAMES THOMAS, JUDICIAL ETHICS IN AUSTRALIA 51 (2d ed. 1997).

97. The standard Thomas would use for requiring recusal is “if there is any real possibility a reasonable apprehension [that a judge might not bring an impartial and unprejudiced mind to the deciding of a case] might result.” *Id.* at 51.

98. See Gleeson, *supra* note 7, at 5.

99. I have suggested elsewhere that standards based on appearances of impartiality are unreliable, so will not belabor the point here, except to suggest that such a disconnection is potentially dangerous and obfuscatory, and that a focus on the provision of reasoning may ultimately provide a more reliable and useful way of understanding judicial outcomes and ensuring, to the extent possible, the legitimacy of the decisionmaking process. See generally Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007); Sarah M. R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637 (2005).

understandings of how appearances may or may not play into concerns for public confidence. The following examples may shed some light.

The one case from England & Wales in the reporting year 2007-2008 in which a complaint against a mainstream judge resulted in a public reprimand was a case involving a judge's refusal to recuse on the basis of appearance of bias.¹⁰⁰ As that underlying case unfolded, it became very clear that it was a matter of actual and not only apparent impropriety, manifested in intemperate behavior on the bench.¹⁰¹ It is worth noting here as well that an opinion is available on this matter with full facts and explanation is precisely *because* it lies at this crucial borderline between matters regarding outcomes, which are appropriate for appeal, and matters purely regarding judicial misconduct.¹⁰² The lead opinion in this case does note that it is "a most unusual case," which it may be on many grounds, but in terms of promotion of judicial confidence in the judiciary, it seems particularly noteworthy for the availability of a full explanation on the legal appeal side and a cursory public treatment on the judicial conduct regulation side (only a brief notice of reprimand, without explanation, was provided in a press release).¹⁰³ There is something of a disconnect here between, on the one side an indication that judicial misconduct is taken seriously where it affects the course of a case, and on the other side, that the information made available as a matter of the official handling of judicial misconduct misses an opportunity to reassure the public in substantive or meaningful terms about the quality of the judiciary or the quality of oversight of the judiciary.

Recusal was also the subject of some recent high profile cases in New Zealand and Canada. For an indication of the imprecision and unreliability that can be introduced into the regulatory scheme where bias allegations, and particularly appearance-based analysis, are concerned, consider the matter before the CJC in 2003 concerning Justice Boilard.¹⁰⁴ The CJC criticized the judge (via letter) for an aspect of his handling of a case that was in the middle of trial.¹⁰⁵ The letter was leaked in advance to a journalist and garnered much public attention.¹⁰⁶ Arguably wisely, given the focus in the *Ethical Principles for Judges* on public confidence and appearances, the judge recused himself, reasoning that the public

100. Howell v. Lees Millais, [2007] EWCA Civ 720 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2007/720.html> (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

101. *Id.* ¶¶ 4, 22-30, 32-33.

102. *Id.* ¶ 1.

103. Press Release, Judiciary of England & Wales, Mr. Justice Peter Smith—Office for Judicial Complaints Investigation (Apr. 18, 2008), available at http://www.judicialcomplaints.gov.uk/docs/Mr_Justice_Peter_Smith_-_OJC_Investigation_Statement_0108.pdf [hereinafter *Mr. Justice Peter Smith*] (on file with the *McGeorge Law Review*).

104. See generally CANADIAN JUDICIAL COUNCIL, REPORT OF THE CANADIAN JUDICIAL COUNCIL TO THE MINISTER OF JUSTICE OF CANADA UNDER SS. 65(1) OF THE *JUDGES ACT* CONCERNING MR. JUSTICE JEAN-GUY BOILARD OF THE SUPERIOR COURT OF QUEBEC (2003), available at http://www.cjc-ccm.gc.ca/cmslib/general/conduct_inq_boilard_ReportJC_200312_en.pdf (on file with the *McGeorge Law Review*).

105. *Id.* at 3.

106. *Id.*

might question his impartiality and his moral authority to continue the case.¹⁰⁷ In the first instance, the inquiry committee of the CJC found his recusal itself to be misconduct, calling it an improper recusal undertaken in a fit of pique, and finding that the judge was obliged to stay on the case.¹⁰⁸ The full council committee on the other hand, found this focus on appearances to be perfectly appropriate and upheld the recusal as proper.¹⁰⁹ The committee thus cannot even seem to agree on the proper use of appearances for regulation of judicial conduct.

Another recent high-profile case from Canada implicates not only recusal and appearances, but also alleged improprieties with regard to extrajudicial speech.¹¹⁰ Justice Matlow became very publicly embroiled in a controversy regarding a private interest in a local development project.¹¹¹ The CJC Report, which is exceedingly thorough in its provision of facts and reasoned analysis, states:

It was not Justice Matlow's opposition, as a private citizen, to the Thelma Road Project or his leadership of that opposition or his meeting with public officials about that opposition or even seeking news media coverage about the issue that is problematic. Instead it is the way in which Justice Matlow carried out those activities that has raised entirely legitimate concerns about his conduct.¹¹²

These concerns were based primarily on Justice Matlow's abuse of his prestigious position as a judge in that private activity.¹¹³ Justice Matlow continued in this period to hear cases involving the city (to which he was privately opposed in the development matter), raising concerns about recusal, on which the inquiry committee and the full CJC were at variance, with the inquiry committee relying on appearance standards and the CJC relying on actuality standards.¹¹⁴ This seems, substantively, to get away from a focus on public confidence as the driving force.

In New Zealand, a case concerning recusal appears to have created some havoc in the office of the Judicial Conduct Commissioner. A complaint was initially lodged with the Commissioner in May 2008 regarding Supreme Court

107. *Id.*

108. *Id.* at 1-2.

109. *Id.* at 4.

110. For further discussion of the relationship between public confidence and the regulation of extrajudicial speech, see *infra* Part IV.A.4.

111. CANADIAN JUDICIAL COUNCIL, REPORT OF THE CANADIAN JUDICIAL COUNCIL TO THE MINISTER OF JUSTICE IN THE MATTER OF §65 OF *JUDGES ACT* REGARDING THE HONOURABLE THEODORE MATLOW OF THE ONTARIO SUPERIOR COURT OF JUSTICE ¶¶ 1, 4-40 (2008), available at http://www.cjc-ccm.gc.ca/cmslib/general/Matlow_Docs/Final%20Report%20En.pdf [hereinafter MATLOW REPORT] (on file with the *McGeorge Law Review*).

112. *Id.* ¶ 114.

113. *Id.* ¶¶ 117-23.

114. *Id.* ¶¶ 124-163.

Justice Wilson, who had refused to recuse himself from a case in which the lawyer arguing the case was his business partner.¹¹⁵ The Commissioner at the time (Haynes) initially disclaimed any jurisdiction in the case, a position to which there was opposition.¹¹⁶ After a long period without action from the Commissioner, the aggrieved party moved the Supreme Court to vacate the panel opinion perceived to be tainted by Justice Wilson's bias, and prevailed.¹¹⁷ Mr. Haynes has since resigned from the JCC, and has been replaced by Mr. Gascoigne, before whom the complaint is still pending.¹¹⁸ The ramifications in the judicial conduct complaint process have yet to be worked out, now nearly two years after the initial complaint.¹¹⁹

These examples provide some indication of the confusion that persists, whatever the procedural mechanism in use, at the intersection of conduct and decisionmaking in a regime ruled substantively on appearances.

3. Integrity

"Integrity" is an often-used but seldom well-defined term that can get bound up with issues of public confidence as well as issues of appearances when it comes to the substance of judicial conduct regulation.¹²⁰ The public wants judges with integrity. "Integrity," in this context, is often used as a kind of catch-all for the general idea of being reasonably decent, upstanding, and honorable, but more often than not it is used without any serious consideration of what any of those ideas mean, exactly, within the context of the judicial role.¹²¹ Where integrity in

115. Phil Taylor, *The Judge, the QC and the \$8 Million Case*, N.Z. HERALD, Dec. 12, 2009, available at <http://www.nzherald.co.nz/news/print.cfm?objectid=10614970> (on file with the *McGeorge Law Review*).

116. *See id.*

117. *See Saxmere Co. Ltd. v Wool Bd. Disestablishment Co. Ltd.* (2009) NZSC 122 (SC 64/2007).

118. *See Taylor, supra* note 115.

119. The case has continued to develop since the presentation of this paper at the Symposium and remains unresolved. On the recommendation of the JCC, the Acting Attorney General had initially instituted what would have been the first Judicial Conduct Panel for the further investigation of the Justice Wilson matter, but before the Panel could take up its work, the Panel was struck down by the High Court. *See Audrey Young, Court Quashes Decision for Panel on Wilson Complaints*, N.Z. HERALD, Sep. 28, 2010, available at <http://www.nzherald.co.nz/news/print.cfm?objectid=10676677> (on file with the *McGeorge Law Review*).

120. *See ETHICAL PRINCIPLES, supra* note 4, at 13 ("Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons."); ENGLAND & WALES GUIDE, *supra* note 12, at 19.

121. To the extent that "integrity" has a useful meaning, I would suggest that meaning has to do with issues of consistency and genuine fit, issues that can become extraordinarily complex and difficult. One part, at least, of the JUDICIAL COUNCIL OF ENGLAND & WALES, GUIDE TO JUDICIAL CONDUCT, *supra* note 12, at 19, captures this aspect of the term, addressing issues of work/life balance, avoiding charges of hypocrisy, etc. So, for example, there is the concern for integrity when looking at a judge's body of decisions—do the outcomes appear to fit with the reasoning (or, indeed, has the judge provided reasoning to support outcomes? And does that reasoning fit with the corpus of established law?) Or is there a conflict between whatever values are embedded in the law and the judge's personal values? Can a judge have "integrity" if his or her values conflict with the law to be applied? Is the "integrity" we value that which would require the judge to apply the law

this sense may be relevant for public confidence in terms of questions of conduct, it may refer to an insistence that judges not consider themselves above the law, and thus not engage in off-the-bench activities that indicate disrespect for the law.¹²² There the behavior has nothing to do with, for example, the impartiality of decisionmaking, but it indicates to the public that the judge's approach to the law in the decisionmaking process may possibly be one of less than the required deference.¹²³ Without further specific definition of what integrity *means* in the various invocations in the guides to conduct in each of these countries, it is hard for it to go much beyond the general idea of showing respect for the law and for the judicial role. This may be a good aspiration to promote for the benefit of public observers, but it is less than sufficiently precise for clear and consistent application, which might ultimately cut against public confidence. Clarity will be the key to the success of "integrity" as a standard, whether the confidence is sought in the institution or in the oversight mechanisms specifically.

4. *Impartiality: Demeanor and Speech*

Judicial temper or demeanor is a common area for complaints about judicial conduct readily associated with public confidence because of its public nature and its close relationship with concerns about impartiality on the bench. Rudeness or incivility from the bench—yelling at, mocking, or demeaning those in the courtroom, whether they are lawyers, parties, witnesses, or court staff—constitutes a judicial conduct problem appropriate for regulation.¹²⁴ This intemperate behavior demonstrates too much personal investment in the people and/or the issues before the court to allow for appropriately impartial decisionmaking. Whatever the source of the conduct (whether it be indulgence of a personal or ideological bias or simply a rash or disrespectful nature), it shows an inability to coolly consider the legal issues before the court. In any event, the height of emotion impedes properly impartial decisionmaking, and regulation of this conduct gets at core role-obligations, thereby potentially promoting public confidence more broadly in the role. It is important to note that "intemperate" speech need not be considered misconduct in all cases. The key distinction comes from the source and the degree of the intemperance. It is only when either the judge's irritation arises from some source outside the parameters of the case or the irritation becomes so extreme (however legitimately provoked by happenings within the case), as to indicate that the judge can no longer be properly impartial,

without regard for his or her own personal values, or is the integrity we value that which would allow the judge to find some way of fitting one with the other? The idea of valuing "integrity" in the judicial role is far more complicated than the sense of "honor" and respectable presentation to the public so often used. Given the more complex sense of the word, this may play into public confidence, but primarily as a matter of looking at the judge's decision-making.

122. See, e.g., AUSTRALIAN GUIDE, *supra* note 12, at 6.

123. See, e.g., NEW ZEALAND GUIDELINES, *supra* note 12, at 7.

124. See, e.g., ETHICAL PRINCIPLES, *supra* note 4, at 27; AUSTRALIAN GUIDE, *supra* note 12, at 17.

that it would be misconduct to remain on the case in such a state.¹²⁵ Substantive regulation of this kind of conduct goes directly to the realities of impartial decisionmaking, and in doing so sends an appropriate message to support public confidence in the judiciary.

A related subject for judicial conduct regulation is extrajudicial speech, which is also public in nature and potentially tied directly to concerns about confidence in judicial impartiality.¹²⁶ Extrajudicial remarks may be delivered quite dispassionately, and thus indicate no problem of intemperance, but there is still a potential conduct problem due to the questions that may arise about objectivity and open-mindedness on matters before the court, currently or in the future. This is particularly problematic if the judge is making public statements indicating an established position on an unsettled point of law or an application of the law yet to be determined.¹²⁷ Where a judge is unlikely to be called on to act in an official capacity on a matter related to the statements, there may be no problem.¹²⁸ Judicial contribution to the development of the law can be very valuable in certain circumstances, after all, so there is no need to stifle judges as a general matter of conduct regulation, but in order to fulfill their obligations and preserve public confidence, their involvement in law reform, for example, ought to be kept within reasonable bounds and accompanied by appropriate recusals.¹²⁹ To regulate these conduct issues gets at the core of the obligation of impartiality and thus has the potential to send very positive and proper messages for purposes of public confidence. However, for the present, the substantive regulation in this area stops short of any apparent aspiration to affirmatively promote public confidence through extrajudicial speech, but rather rests at restricting what would undermine public confidence in the judiciary more broadly.

5. *Sidestepping the Process: Apologies and Resignations*

Two options have emerged that sit perhaps at the boundary between substance and procedure in the regulation of judicial conduct: the apology and the resignation. The Judicial Conduct Commissioner in New Zealand suggested that there should be an option for dismissal, at his discretion, of a complaint that has resulted in an apology from the judge in question, accepted as sufficient to satisfy the complainant.¹³⁰ This would regard the regulation of conduct as a much

125. This is another indication of an instance in which behavior and biased substantive decision-making may overlap in such a way that it would not make sense to deal with the issue exclusively by means of the appellate process. See *supra* Part IV.A.2 for further discussion of bias as misconduct.

126. See, e.g., ENGLAND & WALES GUIDE, *supra* note 12, at 9, 34-35; ETHICAL PRINCIPLES, *supra* note 4, at 28-29; AUSTRALIAN GUIDE, *supra* note 12, at 23.

127. NEW ZEALAND GUIDELINES, *supra* note 12, at 6.

128. See, e.g., *id.* at 4 (“The requirement of impartiality does not mean that judges cannot have sympathies or opinions about matters of public interest.”).

129. *Id.* at 6, 11, 14.

130. See Judicial Conduct Amendment Act 2010, *supra* note 79, at §15A(3).

more a private than a public matter, which seems potentially at odds with a robust view of public confidence in the judiciary. Might it not damage public confidence to know that if the person complaining is satisfied, there is no further recourse for an outraged public (or a public that *would* be outraged if only it *knew*)? The 2010 Amendment Act addresses this point, empowering the Commissioner to take no further action on a complaint (rather than dismissing it) if it has either been resolved to the complainant's satisfaction by an *explanation* from the judge, but stating that an accepted *apology* from the judge is, by itself, insufficient to justify dismissal.¹³¹ That may simply result in clever semantics, and implementation will devolve to the discretion of the Commissioner, but perhaps future annual reports will show how well the distinction can be drawn.

In another case considering the role of judicial apologies, the report of the CJC to the Minister of Justice recommending removal of Justice Cosgrove begins: "Public confidence in the judiciary is essential in maintaining the rule of law and preserving the strength of our democratic institutions."¹³² Justice Cosgrove had issued apologies for his conduct (perhaps better termed here "acknowledgments of error"¹³³), which became the subject of analysis in the CJC Report, as follows:

Even accepting that the judge's apology was sincere, we must consider an additional—more important—aspect in deciding whether a recommendation for removal is warranted: the effect upon public confidence of the actions of the judge in light of the nature and seriousness of the misconduct. For Council, therefore, the key question is whether the apology is sufficient to restore public confidence. Even a heartfelt and sincere apology may not be sufficient to alleviate the harm done to public confidence by reason of serious and sustained judicial misconduct.¹³⁴

After quoting a list of factors to be considered and referring to CJC precedent, the report concluded by quoting the earlier decision in this matter that "[g]iven the judge's serious misconduct over an extended period of time, this statement, even viewed in its most positive light, cannot serve to restore public confidence in the judge, or in the administration of justice."¹³⁵

Along similar lines, one must consider the effect of resignations from the bench—whether they should end the disciplinary process, whether they should be

131. *See id.* §§15A(2)(a), 15A(3).

132. CANADIAN JUDICIAL COUNCIL, REPORT OF THE CANADIAN JUDICIAL COUNCIL TO THE MINISTER OF JUSTICE IN THE MATTER OF §65 OF *JUDGES ACT* REGARDING THE HONOURABLE PAUL COSGROVE OF THE ONTARIO SUPERIOR COURT OF JUSTICE 1 (2009), available at http://www.cjc-ccm.gc.ca/cmslib/general/Report_to_Minister_Justice_Cosgrove.pdf (on file with the *McGeorge Law Review*).

133. *Id.* at 7.

134. *Id.* at 8.

135. *Id.* at 9.

publicized or explained, and so on. Canadian perspectives on this point emphasize the priority of getting bad judges off the bench, so if not having to go through the disciplinary process, or not having their resignations made any more public than they will inherently be, will encourage that behavior, that is the preferable course. To be fair, that policy aligns sensibly with the goal of public confidence in the judiciary as an institution, underscoring as it does the practical importance of who is and is not doing the judging. However, without more public analysis or explanation, an opportunity to educate the public is lost, and an opportunity is lost as well for development of the law of judicial misconduct by deepening an understanding of what goes on and why it is or is not acceptable. Thus there is perhaps value lost for any who seek public confidence in the regulation of conduct itself. Accordingly, the judiciary of England & Wales has been responsive in some measure to concerns about public information in this area, and now at least provides public notice of judicial resignations in the face of conduct complaints.

6. *High Thresholds for Discipline or Removal*

On occasion, an outcome seems unhinged from the goal of promoting public confidence in a way that relates to the height of the threshold for discipline. In one Canadian case, a judge had made extrajudicial statements to a newspaper on a controversial matter of a political nature, which was likely to come before the court of which he was a member.¹³⁶ This conduct was deemed by the CJC to be highly “inappropriate and unacceptable” and the judge was found to have “failed in the due execution of his office.”¹³⁷ However, the applicable standard for removal was whether the breach is “so manifestly and profoundly destructive of judicial impartiality, integrity and independence that it undermines individual and public confidence in the justice system, thereby rendering the judge incapable of performing the duties of his office[.]”¹³⁸ The CJC, finding that the standard was not met, was left to accept the “unacceptable.”¹³⁹ It is arguable that the standard itself, clearly intending to aim at public confidence, aims so low as to undermine that confidence by accepting behavior that constitutes “failure.”

It is perhaps less *clearly* a matter of a high standard, given the lack of reasoning available, but there seems to be a similar issue in the case of Justice Smith in the England, discussed above.¹⁴⁰ While the excerpts of the transcript available in the underlying case reveal behavior constituting clear violations of

136. INQUIRY COMM., REPORT TO THE CANADIAN JUDICIAL COUNCIL OF THE INQUIRY COMMITTEE APPOINTED PURSUANT TO SUBSECTION 63(1) OF THE *JUDGES ACT* TO CONDUCT AN INQUIRY CONCERNING MR. JUSTICE BERNARD FLYNN WITH RESPECT TO STATEMENTS MADE BY HIM TO A JOURNALIST WHOSE ARTICLE APPEARED IN THE NEWSPAPER *LE DEVOIR* ON FEBRUARY 23, 2002 5 (2002).

137. *Id.* at 43.

138. *Id.*

139. *Id.* at 43-44. Similar language appears in *MATLOW REPORT*, *supra* note 111, at 38.

140. *Mr. Justice Peter Smith*, *supra* note 103.

standards of conduct in ways that clearly bear on issues of public confidence in the judiciary,¹⁴¹ the press release available on the OJC website (quoted here in its entirety) says only:

Following investigation under the Judicial Discipline Regulations 2006, the Lord Chancellor and the Lord Chief Justice have carefully considered the Court of Appeal's comments on the conduct of Mr. Justice Peter Smith in the case of *Howell and others v Lees-Millais and others* and have concluded that the conduct in question amounted to misconduct. As a result, the Lord Chief Justice has issued a reprimand to the judge. The Lord Chief Justice has said: "I consider that a firm line has now been drawn under this matter. Both I and the Lord Chancellor value the services of Mr. Justice Peter Smith and he has my full confidence."¹⁴²

Here, the underlying standard for conduct seems to have come unhinged from disciplinary standards and explanations that would actually promote public confidence in the handling of judicial misconduct. The facts, standards, and reasoning used to reach a determination that a reprimand was the appropriate sanction are not available for public examination. This leads to a less than confidence-building conclusion that the public should rely on the fact that the Lord Chief Justice has confidence in this judge. To the extent that public confidence is meant to be placed *either* in the institution *or* in the conduct oversight process, this approach of giving some but not enough information, arguably fails.

The decision to establish and publish a code or guide to conduct, in and of itself relates to public confidence, in that it sends a message that there are substantive expectations about a certain level of quality in judicial work as well as behavior, and it sets a basis for some form of enforcement. The substantive content of such a code goes further: in defining the core qualities that matter; in setting thresholds high or low when it comes to expectations of quality and behavior; in establishing when appearances may matter as much or more than realities; and in provisions of the code that reflect the extent to which core judicial role obligations are owed to individuals or to the public at large. But for a full picture of approaches to public confidence, we must turn also to matters of process—to how this substance is put into practice.

141. *Howell v. Lees Millais*, [2007] EWCA Civ 720 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2007/720.html> (last visited Aug. 2, 2010) (on file with the *McGeorge Law Review*).

142. *Mr. Justice Peter Smith*, *supra* note 103.

B. *Factors Relating to Process in the Regulation of Judicial Conduct*

1. *Established, Consistent Procedures Known to the Public*

While there is great variety in the procedural approaches used in these different countries, there is generally agreement that public confidence is enhanced by public awareness at least of the fact that there are mechanisms in place for consideration and handling of allegations of judicial misconduct. The clearest indication of the emphasis on this subject for purposes of public confidence is in the brochures, pamphlets, and websites established in Canada, New Zealand, and England & Wales to explain the processes for lay people, and to make the processes readily accessible. The annual reports in each of these three countries serve a similar function, though with greater emphasis on the fact that the procedures are actually *used* to some effect.

The judiciary of England & Wales goes one step further by having a Judicial Appointments and Conduct Ombudsman to oversee the procedures, reviewing and auditing the work done by the OJC. New Zealand falls perhaps somewhere between the belt-and-suspenders approach of England & Wales, and the informal behind-the-scenes approach of federal courts in Australia, in that there *are* clearly established procedures, but the one most clearly designed to appeal to public confidence—the Judicial Conduct Panel—has never actually been used. The failure to use the available procedure undermines its value for purposes of confidence in the system of regulation.

Even where the focus is on public confidence in the primary work of the judiciary, rather than on public confidence in the regulation of judicial conduct, knowledge that there *is* some established mechanism for oversight presumably aids in that broader goal. This is perhaps at least part of the motivation behind the proposals for procedural reform in Australia.

2. *Identity of Decisionmakers and Others in the Process*

The identity of the decisionmakers and others officially involved in the process may say much about what public confidence means in each of these systems. Are they “insiders” or “outsiders”? Are they specially trained? How many are involved in a given case? Is there oversight of the decisionmakers, and if so, by whom? The answers to these questions have the potential to illuminate a better understanding of what kind of public confidence is sought and why it matters.

On the one hand, as suggested above, a direct way to address public confidence would be to use the public in some way as the decisionmakers.¹⁴³ Participation and some measure of control would directly implicate that value.

143. See discussion *supra* at Part II.

Along related lines, with appearance standards looking for what the reasonable observer would perceive, it would seem the most direct approach to simply ask those reasonable observers. However, since no system examined in this Article has taken this approach, perhaps the concern for public confidence is more a matter of attempting to foster public confidence by *letting* the public *know* that their confidence is a matter of concern, rather than asking them to make the decisions.

The OJC in England & Wales has not taken quite so direct a route, but it has gone some distance in this direction by involving non-judicial civil servants in the process of handling complaints. Furthermore, when review bodies are convened, they do include non-judicial members.¹⁴⁴ Ultimate decisions are made by the Lord Chancellor and the Lord Chief Justice, but having these “outsiders” involved in the process demonstrates a strong commitment to the promotion of public confidence that does not appear so strongly in other systems.

Australia’s federal system takes a somewhat different angle on public confidence in this area, in that the ultimate decisionmaking body on removal of judges is Parliament. This is perhaps the most readily identifiable representative body of the public at large, and the actual decisionmaking rests in that body’s hands, so it is a plausible construction of public confidence to repose the authority there. However, this measure only covers removal of judges, not the more run-of-the-mill judicial misconduct, so it is only a small gesture when it comes to more everyday matters. Those are still handled largely by judges and behind closed doors, which does little to affirmatively promote confidence in the process or the outcomes.

New Zealand has a provision for the participation of lay members of the public in the process, but only if a Judicial Conduct Panel is formed. Because that has not yet happened, there has been no involvement of lay people at all in the decisionmaking process in New Zealand. The Judicial Conduct Commissioner is not a judge, which is perhaps helpful when it comes to a basic idea of “insiders” and “outsiders,” although the concerns about conflicts of interest have brought into relief the reality that the legal community in New Zealand is so small that the elite lawyers who would be asked to serve as Commissioner are, in fact, “insiders” anyway, even if they are not members of the judiciary themselves.

3. *Official Powers of the Decisionmakers*

To a certain extent, the theme of the official powers of the decisionmakers wraps back into concerns expressed earlier as a matter of high thresholds for sanctions and as a matter of the identity of decisionmakers, but it also has further implications for public confidence in the official availability of a range of sanctions. If the public is aware only of the possibility of removal from the

144. The Judicial Discipline (Prescribed Procedures) Regulations, 2006, S.I. 2006/676, §28 (U.K.).

bench, and knows that this is reserved only for misconduct beyond the pale, the natural concern would be that judges can therefore “get away with” a certain amount of misconduct without ramifications. This takes the idea of judicial “independence” in the wrong direction.

It may be that *informally* there is plenty of inherent power in the hands of the relevant decisionmakers in any of these systems to discipline a judge for lower-level misconduct in whatever way is appropriate to the circumstances, but if that is not made explicit (as it is, for example in some of the provincial/territorial systems in Canada¹⁴⁵), an opportunity is lost to buoy up public confidence. England & Wales took a small step in this direction, without providing a list of the lesser sanctions available, by issuing press releases, however cursory, covering lesser sanctions imposed by the Lord Chancellor and the Lord Chief Justice.¹⁴⁶ More explanation of those sanctions, of course, would be even better.

4. *Transparency and Publicity Related to Judicial Misconduct*

a. *Transparency and Publicity of Reasoning and Outcomes*

There is a bit of a contrast among these countries about the role to be played by transparent provision of information in promoting public confidence in the judiciary. This transparency breaks down into a few different categories of information. There is information and publicity about outcomes of specific cases regarding judicial misconduct, and the reasoning behind them. There is collective information about the big picture of the judicial conduct regulation process (basic statistics about numbers of complaints filed, types of misconduct claimed, the number of cases resulting in discipline, and so on). Finally, there is information about the availability of the judicial conduct complaints system and information about how to use it. Each of these might influence public confidence in different ways.

In Canada, for matters before the CJC, the reports of inquiry committees and the ultimate recommendations of the full CJC are readily available via the CJC website.¹⁴⁷ There is a wealth of useful information and analysis in these reports, but so few cases reach this stage (due either to resignations or dismissals early in the process), that it is a small body of examples to work with. In Australia and

145. ONTARIO JUDICIAL COUNCIL, *supra* note 36, at 5.

146. To view these statements, see OFFICE FOR JUDICIAL COMPLAINTS, PRESS RELEASES & STATEMENTS, <http://www.judicialcomplaints.gov.uk/publications/news.htm> (last visited Aug. 12, 2010) (on file with the *McGeorge Law Review*).

147. To view Inquiry Committee reports, see CANADIAN JUDICIAL COUNCIL, INQUIRY COMMITTEE DECISIONS, http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inquiry_en.asp (last visited Aug. 12, 2010) (on file with the *McGeorge Law Review*). To view reports from the full body of the CJC making recommendations to the Minister of Justice, see CANADIAN JUDICIAL COUNCIL, PAST NEWS RELEASES, http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_pastrelease_en.asp (last visited Aug. 12, 2010) (on file with the *McGeorge Law Review*).

New Zealand, there is almost no information readily available to the public about reasoning in cases alleging judicial misconduct. As one Australian observer writes: “Frankly, one of the difficulties, which is at once of course a blessing, is that we have very little jurisprudence to draw upon in relation to the idea of judicial misbehaviour.”¹⁴⁸ In England & Wales, by contrast, this has been, in recent years, a primary area of continued movement towards provision of more and more information. It is still fairly little by state standards in the United States, though perhaps it is similar to some recent developments in the federal system in the United States.¹⁴⁹ An editorial opinion piece in 2007 bemoaned the lack of information made public about complaints against the judiciary of England & Wales.¹⁵⁰ It noted that of 250 complaints made in 2004 (before the OJC existed), sixty-eight resulted in some form of response, but none was deemed worthy of *public censure*.¹⁵¹ Since the creation of the OJC, there has been steady movement toward more publicity of the names of judges and the disciplinary measures taken against them,¹⁵² but this still happens without sufficient details to understand what happened to prompt the discipline or why that outcome was appropriate. The value or efficacy of providing so little information along these lines remains questionable insofar as it relates to public confidence either in the judiciary as an institution or in the regulatory process.

Reasoned explanations, understandable to lay people, would surely be the most meaningful device to achieve public confidence among those sufficiently interested to try to understand the work of the courts and of those overseeing judicial behavior. This is where many of the systems examined here fall short of achieving all that might be achieved for purposes of public confidence across the board.

b. Transparency and Publicity about the Process and its Availability

Canada and England & Wales have made particularly strong efforts as to the transparency and publicity of the process and its availability. In Canada, there is a booklet for the public explaining the process and the standards for conduct complaints in non-technical language, and the annual reports provide simple, practical examples of complaints and how they would be treated in the CJC process.¹⁵³ In England & Wales, similar efforts to make the process known and

148. Sallman, *supra* note 39, at 12.

149. See, e.g., CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 10; RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, *supra* note 10.

150. Verkaik, *supra* note 64.

151. *Id.*

152. See Press Release, OJC 2008-2009 Annual Report, *supra* note 68.

153. See CANADIAN JUDICIAL COUNCIL, THE CONDUCT OF JUDGES AND THE ROLE OF THE CANADIAN JUDICIAL COUNCIL (2004), available at http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_CJCRole_2004_en.pdf (on file with the *McGeorge Law Review*); CJC 2008-2009 ANNUAL REPORT, *supra* note 15, at 9-15; CANADIAN JUDICIAL COUNCIL, THE CANADIAN JUDICIAL COUNCIL ANNUAL REPORT 2007-

easily accessible for lay people are visible in a very strong Internet presence with very user-friendly information and direction. The annual reports of the OJC recently introduced a similar device of simple exemplar complaints and results. There is a further public confidence question buried in the matter of what kinds of complaints to use in these small samples. The OJC report gives four examples, all of which found that there *was* misconduct.¹⁵⁴ The examples from Canada are now more varied as the legitimacy or illegitimacy of the complaints made.¹⁵⁵ There are thus interesting questions to resolve about what will most help or hurt public confidence, and what will best and most accurately educate the public about the system, but the main thing, for public confidence, is the baseline effort to make the process and its availability more widely known. A more limited version of these approaches appears in New Zealand, where the JCC website gives user-friendly information about how the process works, but there are no exemplar cases or hypothetical results provided, and one can take much less in the way of meaningful confidence from what is there.¹⁵⁶

In Australia, by contrast (but as makes sense in the absence of a formal or centralized complaints handling procedure), there is little information for the public about the process or the availability of any oversight mechanisms. The recent Australian Senate committee report on improvements to the judicial complaints handling process particularly notes this concern and specifically “recommends that the High Court of Australia adopt a written complaint handling policy and make it publicly available, including on its website”¹⁵⁷ This demonstrates the importance of awareness of the process to its legitimacy in the eyes of the public.

c. Publicity of Statistics

The explanatory brochure from the CJC takes a direct approach where statistics are concerned, stating: “Canadians can have confidence in their judges. From tens of thousands of judicial hearings that take place every year in Canada’s superior courts comes a very low number of complaints.”¹⁵⁸ Indeed, much effort appears to have gone into work on producing annual reports on judicial conduct regulation in three of the countries at issue here, explaining how the available processes have been used and generally what the results have been. There is not enough information in these reports for a full substantive understanding of judicial misconduct that is or is not occurring, but the effort at

2008: PROMOTING EFFICIENCY, ACCESSIBILITY AND QUALITY 15-27 (2008), available at http://www.cjc-ccm.gc.ca/cmslib/general/Annual_Report_07-08_FINAL_E.pdf (on file with the *McGeorge Law Review*).

154. OJC 2008-2009 ANNUAL REPORT, *supra* note 16, at 14-15.

155. CJC 2008-2009 ANNUAL REPORT, *supra* note 15, at 9-15.

156. See JCC Website, *supra* note 78.

157. See AUSTRALIAN SENATE REPORT, *supra* note 41, at § 2.9.

158. CANADIAN JUDICIAL COUNCIL, THE CONDUCT OF JUDGES AND THE ROLE OF THE CANADIAN JUDICIAL COUNCIL, *supra* note 153.

greater transparency is valuable nonetheless. Given the apparent lack of a deeper public understanding of the workings of the judicial role, perhaps for the purposes of the general public's confidence, the bare numbers and general categories are sufficient or even preferable, simply to show that the process is being used. Australia now has before it a proposal from the Senate Legal Affairs committee that, following consultation about the best way to achieve this, all federal courts publish quarterly complaint handling summary status reports on their websites recording the number of complaints received and in relation to each complaint, the date it was received, the nature of the complaint, the date on which it was resolved, and a summary of any action taken in response to the complaint.¹⁵⁹

d. Other Efforts

In Australia, courts have public information officers—not just for managing crises, but also for regular educational purposes—in an attempt to make up for the movement away from jury service.¹⁶⁰ Even so, there are concerns about ill-informed griping about court decisions, so one judge has recommended the use of retired judges or academics to change the tone by offering measured explanations of these decisions and the work of the courts.¹⁶¹ Proper explanations of decisions, asserts former Chief Justice Gleeson, are necessary to confidence in the system.¹⁶² Obviously this applies across the board to all court decisions, but it applies just as strongly to cases of alleged judicial misconduct.

The CJC's *Ethical Principles for Judges* goes somewhat further by putting the responsibility on current judges to help educate the public:

Public education with respect to the judiciary and judicial independence thus become an important function, for misunderstanding can undermine public confidence in the judiciary. . . . Judges, therefore, should take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence, in view of the public's own interest.¹⁶³

Judges, as those with the most intimate understanding of what the role requires, are indeed in a good position to help educate the public, but of course in doing so, judges must be always mindful of the need to balance this educational assistance with the maintenance of impartiality and independence in the role.

159. See AUSTRALIAN SENATE REPORT, *supra* note 41, at § 2.19.

160. Gleeson, *supra* note 7, at 4.

161. Woods, *supra* note 17, at 11.

162. See Gleeson, *supra* note 7, at 4.

163. ETHICAL PRINCIPLES, *supra* note 4, at 11.

Perhaps the greatest area of variation among these countries is in the approaches to implementation of the substantive rules, guidance, and other understandings or expectations about judicial conduct. Efforts to promote awareness of the process and its outcomes are perhaps the most explicit or overt part of any jurisdiction's efforts to promote public confidence—all the more so as the focus shifts from confidence in the judiciary as a whole to confidence in the regulatory mechanisms themselves. However, the mere fact of established procedures is an important starting point for developing trust in the quality of the judiciary as a whole. All of the choices that fall between that establishment of procedures and the efforts at publicizing the work done through those procedures—choices about who will make decisions and how, what their powers will be, and so on—add nuances and direction to the efforts to achieve public confidence and to a picture of what public confidence means in a given system.

V. CONCLUSION

Former Australian Chief Justice Murray Gleeson has said that the best way for judges to gain public confidence is simply to do a good job.¹⁶⁴ In similarly basic terms, it is true as well that the system needs integrity as a whole. Public confidence is quite properly, even necessarily, a part of that whole, but it is not itself the sole measure or guarantor of integrity. If a system promotes impartiality, independence, integrity, and good behavior supportive of such traits, presumably there will be better decisionmaking towards reaching actually just outcomes. It is that better decisionmaking, those actually just outcomes, that will be best designed to yield a byproduct of *meaningful* public confidence in the judiciary. That is, if the system is designed to promote impartial decisionmaking, meaningful public confidence should follow, whereas the fact of public confidence does not necessarily ensure the legitimacy either of the institution or individual decisions. The institution must be legitimate, and that substantive legitimacy will in turn garner public confidence.

The regulation of judicial conduct plays an important role in maintaining the legitimacy of the system so essential to achieving public confidence. To do that, though, the regulation must be informed by the pursuit of those substantive values and obligations that reside at the core of the concept of the judicial role. In the end, meaningful public confidence will be best supported by an emphasis on transparency and reason-giving, both in the judicial decisionmaking and in the judging of judicial conduct. Both are necessary to a successful judicial (and judicial regulation) system, but it is only insofar as public confidence is actually informed by the facts illuminated by the transparency and the reason-giving, that it can be meaningfully considered in reference to the success or failure of the system. To this end, lawyers, as informed and invested actors working in the field

164. Gleeson, *supra* note 7, at 14.

with judges, have the potential to play an important role in fostering public confidence in the judiciary.¹⁶⁵ Still, I would suggest that the judiciary, institutionally as well as individually, and the bodies that regulate judicial conduct, ought to be aiming at the best possible quality of decisionmaking, rather than aiming directly at public confidence itself and in so doing potentially conveying the idea that the impression is more important than the underlying reality.

Those systems that have edged or even aimed closer to seeking public confidence *in the regulatory or disciplinary process itself* take the risk of losing the important focus on establishing and maintaining public confidence in the day-to-day work of the judiciary. Even though there is an important connection between the latter focus and the regulation of conduct, in practice, the emphasis shifts away from any meaningful analysis or education of the public about core role obligation or proper fulfillment of the judicial role and toward provision of bare statistics on complaints and dispositions, and the advancement of the suggestion that judges need at all times to be under a watchful eye, to be kept in check by these regulatory mechanisms. Where bare statistics and vague notions of the need for vigilance become the focus, public confidence will not be best served.

To the extent that the four systems discussed in this Article have involved lay people as participants in the process of managing or evaluating complaints about judicial conduct, and to the extent that they have opened the process to public view through the publication of guides to conduct and, even more so, through the publication of information about the handling of actual complaints, they get at public confidence in a potentially meaningful way. To the extent that they withhold information about judicial misconduct where it has in fact been determined to have occurred, these systems might be getting at the realities of misconduct behind the scenes, but they send the wrong message to the public and unnecessarily risk the undermining of confidence in judicial conduct as well as the conduct itself. Whatever the approach ultimately taken, even the process of looking closely and thoughtfully at the mechanisms used and the provisions written up by each of these systems will be useful in better understanding how we might improve existing systems with innovations or refinements to make judicial conduct regulation as broadly effective as possible. But at the end of the day, meaningful public confidence will *follow*, rather than lead, efforts to achieve the best in our judiciary through regulation of judicial conduct.

165. *Id.* at 12.