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# YALE LAW & POLICY REVIEW

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## Just Conduct: Regulating Bench-Bar Relationships

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INTRODUCTION .....	123
I. THE WORLD TURNED UPSIDE DOWN: JUDICIAL ACQUIESCENCE TO BAR INFLUENCE .....	129
A. <i>The Reform Process: Recasting Judiciaries as Part of the Profession</i> .....	130
B. <i>The ABA Model Codes: Preferential Access and Tightening Ties</i> .....	139
II. TOO CLOSE FOR COMFORT: THE DANGERS OF THE BAR'S MODEL.....	143
A. <i>The Threat to Judiciaries</i> .....	144
B. <i>The Threat to the Profession</i> .....	151
III. PROPOSALS FOR REFORM: MOVING TOWARD COLLABORATIVE GOVERNANCE.....	155
A. <i>An Ideal Model</i> .....	155
B. <i>Predicates to Reform</i> .....	157
C. <i>Theoretical Contours of Reform</i> .....	161
1. <i>Voluntariness</i> .....	161
2. <i>Stakeholder Participation</i> .....	162
3. <i>Problem-Solving Engagement</i> .....	164
4. <i>Transparency</i> .....	164
D. <i>Proposed Code Revisions</i> .....	166
CONCLUSION .....	168

### INTRODUCTION

Judicial conduct, particularly judicial *misconduct*, has long drawn public attention and concern.<sup>1</sup> In the past few years, media coverage has brought the

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1. Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. TEX. L. REV. 911, 911-12 (2007); see also Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914 (2010) (surveying the progress of judicial ethics from the early twentieth century); Roscoe Pound, *The Causes of Popular Dissatisfaction with the*

issue to the forefront, highlighting a reality that the legal profession might prefer to avoid—that problematic judicial conduct frequently implicates lawyers. Recent news stories have reported interactions between judges and lawyers that are clearly prohibited by the codes of judicial conduct: They entail bribery,<sup>2</sup> improper financial ties,<sup>3</sup> and even improper sexual relationships.<sup>4</sup> Recent reports have also covered problematic interactions between judges and lawyers that are not proscribed and are, in fact, *encouraged* by the codes of judicial conduct<sup>5</sup>—codes that prohibit similar ties between judges and other private

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*Administration of Justice*, 40 AM. L. REV. 729, 729 (1906) (“Dissatisfaction with the administration of justice is as old as law.”).

2. See, e.g., Robert Gavin, *Attorneys Voice Support for Spargo: Character Letters Received as Sentencing of Ex-State Supreme Court Jurist Nears*, ALBANY TIMES UNION, Dec. 19, 2009, at A1 (reporting the bribery and extortion of several lawyers in Albany, New York); Mitchell Landsberg, *Judge Accused of Bribery Attempt*, L.A. TIMES, July 10, 2009, at A8 (reporting the bribery of a deputy district attorney); Joel Stashenko, *Ex-N.Y. Judge Sentenced to 27 Months for Attempted Bribery*, LEGAL INTELLIGENCER, Dec. 23, 2009, at 4 (reporting a judge’s attempted extortion and bribery of lawyers).
3. See, e.g., *Pennsylvania: Ex-Judge Guilty Plea*, N.Y. TIMES, Apr. 3, 2010, at A14 (reporting on the guilty plea of a former Luzerne County judge accused of receiving kickbacks for convicting and sentencing youth to terms at for-profit detention centers run by lawyers).
4. See, e.g., Dahlia Lithwick, *Courtly Love: Why an Affair Fails the ‘Ick’ Test*, NEWSWEEK, May 3, 2010, at 21 (reporting on the death sentence of Charles Dean Hood, who was convicted of murder in a trial in which the trial judge and prosecutor were having an affair). For additional reports of judicial misconduct scandals implicating lawyers, see Nancy Swan, *News About Judicial Misconduct, Corruption, Accountability*, NANCY SWAN, <http://www.nancyswan.com/interests/judicial-reform/news> (last visited Oct. 20, 2011). For a comprehensive catalog of types and examples of judicial misconduct, see Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432-56 (2004).
5. See, e.g., Karen Heller, *Chief Justice Castille Should Forgo Gifts*, PHILA. INQUIRER, Nov. 28, 2010, at A2 (describing the thousands of dollars in gifts, rounds of golf, and travel expenses received by a justice from law firms that regularly appeared before him, which he justified as “ordinary social hospitality” permitted by the codes); Christina Pazzanese, *Opinion, OK for Judges To Attend Bar Events*, MASS. LAW. WKLY., Jan. 27, 2011, available at <http://masslawyersweekly.com/2011/01/27/opinion-ok-for-judges-to-party-at-bar-events> (“In a surprise move that should spice up guest lists around town, the Supreme Judicial Court has issued a Code of Judicial Ethics opinion declaring that judges can attend bar association functions, including educational conferences, receptions and even gala balls free from worry that doing so will violate their ethical obligations.”). A related issue, though not the subject of this Article, is that the absence of a code of judicial ethics governing United States Supreme Court Justices has allowed for recent conduct and behaviors that some perceive to be inappropriate. See Dahlia Lithwick, *Running with Gavels: Justices Need To Set Clearer Rules About Partisan Political Activity*, SLATE (Nov. 18, 2010, 6:28 PM), <http://www.slate.com/id/2275441>.

individuals. Perhaps unsurprisingly, these codes of judicial conduct, adopted in every state, are the product of a reform movement driven almost exclusively by the legal profession.<sup>6</sup>

The bar's leading role in the twentieth-century reform of judicial conduct regulation is one manifestation of the exceedingly close ties that bind our state judiciaries and the legal profession. Close ties between bench and bar are generally accepted as desirable in a liberal democracy such as our own.<sup>7</sup> However, as social scientists Terence Halliday, Lucien Karpik, and Malcolm Feeley have recently suggested, they are neither an unqualified good nor an end in themselves.<sup>8</sup> These scholars hypothesize that strong connections between a legal profession and judiciary may move "politics to or from a liberal form."<sup>9</sup> Drawing on case studies from a variety of nation-states,<sup>10</sup> they explain that bench-bar relationships occupy a continuum spanning from complete lack of engagement

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6. There is no single legal profession, as the practice of law is subject to great variation locally and by practice area. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 3 (1982); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, Scholer, 66 S. CAL. L. REV. 1145, 1151 (1993). However, because of the remarkable unity with which bar organizations have coalesced to address judicial conduct reform, and for ease of reference, I refer throughout this Article to the profession as though it were of a unitary nature.
  7. See generally *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* (Terence C. Halliday, Lucien Karpik & Malcolm Feeley eds., 2007) [hereinafter *FIGHTING FOR POLITICAL FREEDOM*] (reviewing examples of bench-bar relationships in a variety of political systems).
  8. See Terence C. Halliday, Lucien Karpik & Malcolm Feeley, *The Legal Complex in Struggles for Political Liberalism*, in *FIGHTING FOR POLITICAL FREEDOM*, *supra* note 7, at 1, 7-8, 28-32.
  9. *Id.* at 7-8.
  10. Of the case studies cited, only one, Professor Halliday's study of the Chicago Bar Association, is from a United States jurisdiction. See *id.* In his Illinois study, Professor Halliday concluded that although close ties can promote an efficient and fair justice system, they can also be exploited by the profession to assert increasing control over the judiciary. TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 216-17 (1987) ("[T]he bar has succeeded in penetrating to every corner of its primary institution . . . . That is to say, while the profession has tried to use its special knowledge and the experience of practitioners to increase court efficiency, reduce inconsistency and contradictions in rules, expedite the administration of justice, and order the entire system of rules and aspects of court organization in general codes, its prescriptive and policy functions have far exceeded the narrow limits that a strict constructionist interpretation of expertise would place on it."); see also Halliday, Karpik & Feeley, *supra* note 8, at 7-8 (citing the 1987 Halliday study for the proposition that relations between the bench and bar can be supportive but ambiguous in terms of their effects on liberal democratic values).

to complete engagement—from total disunity to total unity.<sup>11</sup> They hypothesize that if judiciaries and the profession are unified, their aligned interests confer political efficacy. But this political efficacy may be used to harm<sup>12</sup> as well as to promote<sup>13</sup> the core values of political liberalism.<sup>14</sup> The work of these social scientists raises important questions regarding the existing and ideal nature of bench-bar relationships within our country's legal systems.

A small but significant literature addresses discrete aspects of these relationships.<sup>15</sup> Important work has addressed the role of the profession in judicial selection and election systems.<sup>16</sup> More recently, systematic doctrinal work has addressed civil legal rules relating to, and arguably favoring, the legal profession.<sup>17</sup> This literature deepens our understanding of the close ties that

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11. See Halliday, Karpik & Feeley, *supra* note 8, at 7-8.
  12. See, e.g., Zühtü Arslan, *Reluctantly Sailing Toward Political Liberalism: The Political Role of the Judiciary in Turkey*, in *FIGHTING FOR POLITICAL FREEDOM*, *supra* note 7, at 219, 222-28 (describing how the judiciary and the profession in Turkey are largely conservative with reference to liberal democratic reform and generally support rather than challenge state policies that impede political liberalism).
  13. See, e.g., Shoab A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan Under Musharraf*, 35 *LAW & SOC. INQUIRY* 985, 990 (2010) (describing “how the relationship between the bar and the bench” in Pakistan “move[d] from unengaged to oppositional to cooperative” in “produc[ing] a mutually reinforcing struggle for political liberalism”); Neta Ziv, *Regulation of Israeli Lawyers: From Professional Autonomy to Multi-Institutional Regulation*, 77 *FORDHAM L. REV.* 1763, 1771-72 (2009) (describing how the Israeli bench and bar established a close relationship as “a means to strengthen the independence of law in a new liberal democracy”).
  14. Acknowledging the term “political liberalism” to be “notoriously ambiguous and much contested,” Halliday, Karpik & Feeley, *supra* note 8, at 10, Halliday, Karpik, and Feeley define it as entailing a moderate state, a strong and engaged civil society, and basic legal freedoms inherent in civil citizenship, *id.* at 10-11. These elements, in turn, generally entail a strong and independent judiciary, which is supportive of the rule of law. As used herein, the phrase “values of political liberalism” refers to all of these systemic values.
  15. See *infra* notes 16-17 and accompanying text.
  16. See, e.g., David Barnhizer, “On the Make”: Campaign Funding and the Corrupting of the American Judiciary, 50 *CATH. U. L. REV.* 361, 393 (2001); Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility To Pay for Justice*, 24 *GEO. J. LEGAL ETHICS* 225 (2011); Margaret S. Williams & Corey A. Ditslear, *Bidding for Justice: The Influence of Attorneys’ Contributions on State Supreme Courts*, 28 *JUST. SYS. J.* 135, 136 (2007).
  17. See, e.g., BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* (2011) [hereinafter *BARTON, THE LAWYER-JUDGE BIAS*]; Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 *ALA. L. REV.* 453 (2008) [hereinafter *Barton, Judges Systematically Favor*]; Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer*

characterize existing bench-bar relationships, but it stops short of addressing the critical question raised by the work of Halliday, Karpik, and Feeley: How can such relationships be shaped to promote rather than undermine the values of political liberalism?

In this Article, I address this question by examining the legal profession's leading role in the twentieth-century reform of state judicial conduct regulation and the resulting codes of judicial conduct.<sup>18</sup> I demonstrate that bar leaders justified their influential role by reference to their civic interests and quasi-governmental functions.<sup>19</sup> They portrayed their involvement as a natural outgrowth of their duty to maintain, improve, and practice in an effective court system.<sup>20</sup> But in addition to pursuing these civic, public-oriented goals, the bar also used the reform process to forward its powerful private interests as a

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*Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1185-86 (2003) [hereinafter Barton, *Institutional Analysis*].

18. There has been little scholarship addressing judicial conduct in the states. As noted, one exception is Halliday's 1987 sociological case study of the Chicago Bar Association. Halliday devoted two chapters to discussing the ties between the Association and the Illinois judiciary, HALLIDAY, *supra* note 10, at chs. 6-7, including reform efforts in the 1950s and 1960s (prior to Illinois's adoption of the American Bar Association's (ABA) Code of Judicial Ethics) to control judicial conduct outside of court. *See id.* at 181-89, 202-08. A limited amount of work addresses conduct permitted by the codes generally, without specific discussion of the impact on judge-lawyer relations. *See* Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257 (2007) (describing the 2007 Code and the revision process); Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 5 (1970) (discussing proposed revisions to the 1924 Canons and arguing that "we should encourage rather than discourage judicial activities that exceed the four corners of cases presented for disposition"); Robert McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 10 (1970) (distinguishing between "quasi-judicial activities, which are likely to be tolerated or even encouraged, and extra-judicial activities, which are likely to be forbidden or at most tolerated"). Existing work also addresses the potential for private interest group influence on the judiciary through privately sponsored educational trips and seminars. *See, e.g.*, Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941, 942-43 (2002) (describing concerns that special interests groups may try to lobby the federal judiciary through gifts of expense-paid trips to private seminars); Douglas T. Kendall & Jason C. Rylander, *Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary*, 18 GEO. J. LEGAL ETHICS 65 (2004) (same).
19. *See* Lucien Karpik, *Political Lawyers*, in *FIGHTING FOR POLITICAL FREEDOM*, *supra* note 7, at 463, 463-65; *see also* Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 YALE L. & POL'Y REV. 193, 223-26 (1997) (describing the civic-oriented activities of bar associations).
20. *See infra* notes 54-56 and accompanying text.

fee-for-service occupation, which holds a monopoly over the practice of law.<sup>21</sup> Scholarly commentary has sometimes emphasized one or the other aspect of the legal profession—its civic commitments<sup>22</sup> or its private interests<sup>23</sup>—but the two

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21. As social scientists have long recognized, bar associations in the United States are interested organizations—organizations that claim legitimacy by representing the interests of their members. See, e.g., DONALD C. BLAISDELL, MONOGRAPH NO. 26: ECONOMIC POWER AND POLITICAL PRESSURES 37-40 (1941) (submitted to the U.S. Temp. Nat'l Econ. Comm.); Robert H. Salisbury, *Interest Representation: The Dominance of Institutions*, 78 AM. POL. SCI. REV. 64 (1984); see also HALLIDAY, *supra* note 10, at 369 (“[I]t is naïve to suppose that professions will commit [their distinctive expertise] to the state irrespective of the interests of the profession—as it were, to write a blank check for the state to cash in on professional expertise when the state finds it expedient . . .”).
22. For example, sociological work in the functionalist tradition emphasized the social value of professions in maintaining social order and promoting values such as altruism. See KEITH M. MACDONALD, *THE SOCIOLOGY OF THE PROFESSIONS* 2-4 (1995); STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 25-26 (2004). See generally ALEXANDER M. CARR-SAUNDERS & P.A. WILSON, *THE PROFESSIONS* (1933) (espousing that the professions are key institutions that promote social stability); EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* (1957) (emphasizing the role of the professions in preserving the moral authority of the state by acting as intermediaries between individuals and the state); Talcott Parsons, *The Law and Social Control*, in *LAW AND SOCIOLOGY: EXPLORATORY ESSAYS* 56 (William M. Evan ed., 1962) (emphasizing the orientation of the professions toward collective well-being). More recently, legal scholars have drawn on this earlier work to describe current failings of the legal profession and to frame its ideal direction with reference to its lost past. See SCHEINGOLD & SARAT, *supra*, at 11-13. See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994) (chronicling a deepening crisis of values in the legal profession and a weakening commitment to law as a public vocation); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (describing the ideal of the “lawyer-statesman”—the lawyer who possessed the essential traits of prudence, wisdom, and judgment).
23. See MACDONALD, *supra* note 22, at 4-12; SCHEINGOLD & SARAT, *supra* note 22, at 26-28. See generally TERRENCE J. JOHNSON, *PROFESSIONS AND POWER* (1972) (emphasizing the market control that the professions hold over the production and deployment of their trade); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 208-44 (1979) (conceptualizing professionalization as a process of achieving social control by gaining market monopoly over knowledge and skills); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 654-58 (1981) (describing the legal profession’s interests in controlling the supply of lawyers and the demand of legal work through ethical rules).

coexist in constant tension.<sup>24</sup> I argue that accounting for both is critical to understanding and shaping desirable ties between the legal profession and state judiciaries.

I begin in Part II by describing the process through which the bar successfully inserted itself into the judicial conduct reform movement of the twentieth century. The American Bar Association (ABA) advanced the position that judiciaries were part of the profession—an inversion of the traditional view that the profession should serve strong independent judiciaries—in its ultimately successful attempt to draft authoritative codes of judicial conduct. State and local bar associations, working centrally through the ABA, then secured the codes' adoption by the states. Several provisions of these codes granted lawyers and legal organizations, including law firms, preferential access to members of state judiciaries. Preferential access, in turn, facilitated informal and frequent interactions between lawyers and judges and further tightened relationships between bench and bar.

In Part III, I argue that the resulting integration of the two institutions illustrates the risks that excessively close ties between state judiciaries and the legal profession can pose to the values of political liberalism. Multiple benefits can, and often do, flow from close and cooperative relationships. But both the state judicial conduct reform process and the codes it produced altered and tightened relationships in ways that jeopardize the independence and legitimacy of both bench and bar.

In Part IV, I advocate for reforms that will minimize these risks by accounting for the dual civic and private orientations of the profession and by empowering and encouraging strong and independent state judiciaries to engage with a strong and independent legal profession. I propose a model of the bench-bar relationship that is characterized by collaborative governance and guided by the principles of broad-based stakeholder participation, problem-solving engagement, and transparency. I conclude with specific suggestions for reforms to the ABA model codes aimed at reshaping the contours of bench-bar relationships.

#### I. THE WORLD TURNED UPSIDE DOWN: JUDICIAL ACQUIESCENCE TO BAR INFLUENCE

At the turn of the twentieth century, the legal profession and state judiciaries viewed themselves as distinct institutions, linked in hierarchical relationships in which the profession occupied a subservient but independent role. Through the process of judicial conduct regulation reform, the bar advanced a new model of its relationship with the country's judiciaries, which characterized judiciaries as a part of the legal profession. In this Part, I review the process through which the bar, and the ABA in particular, used the new model to justify

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24. See MICHAEL BURRAGE, *REVOLUTION AND THE MAKING OF THE CONTEMPORARY LEGAL PROFESSION: ENGLAND, FRANCE, AND THE UNITED STATES* 33 (2006); HALLIDAY, *supra* note 10, at 369-70.

its influential role in the reform movement and to become the authoritative drafter of codes of judicial conduct. I then review the resulting codes, which granted lawyers and legal organizations increasingly preferential access to judges.

A. *The Reform Process: Recasting Judiciaries as Part of the Profession*

At the beginning of the twentieth century, the bar saw its reputation as linked to that of the court system,<sup>25</sup> but it did not yet view the country's judiciaries as subsidiary parts of the legal profession. To the contrary, it acquiesced in the traditional view that the profession was a distinct and structurally subordinate institution.<sup>26</sup> Accordingly, when the ABA promulgated its first code of attorney conduct in 1908 to bolster public confidence in the legal system,<sup>27</sup> it explicitly declined to draft an analogous code for judges.<sup>28</sup> Although ABA members agreed that the existing means of judicial conduct regulation were ineffective,<sup>29</sup> they viewed questions of judicial discipline as implicating distinct legal and reputational concerns, which they were ill suited to address.<sup>30</sup> Even

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25. See, e.g., M.K. Harris, *Judges*, 4 CAL. BAR ASS'N PROC. 10 (1913) (expressing concern regarding judicial misconduct in the first decade of the twentieth century); Peter J. Shields, *The Judicial Office*, 3 CAL. BAR ASS'N PROC. 39 (1912) (same).
  26. See, e.g., *Nelson v. Commonwealth*, 109 S.W. 337 (Ky. App. 1908); *Fowler v. Harrison*, 42 S.E. 159 (S.C. 1902); ABA, *CANONS OF PROF'L ETHICS* CANON 22 (1908); *Sharswood's Ethics*, 32 A.B.A. REP. 83-84 (1907).
  27. ABA, *CANONS OF PROF'L ETHICS* (1908); James M. Altman, *Considering the A.B.A. 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2402-05 (2003).
  28. *The Origin and Adoption of the American Bar Association's Canons of Judicial Ethics*, 52 *JUDICATURE* 387 (1969) [hereinafter *Origin and Adoption*] (reviewing the history of the Canons).
  29. Existing means of state judicial conduct regulation were limited to removal processes provided for by federal and state constitutions, including impeachment, legislative address, judicial recall, and criminal sanctions. These forms of regulation targeted only the most egregious forms of behavior and were rarely used. Burke Shartel, *Retirement & Removal of Judges*, 20 *J. AM. JUD. SOC'Y* 133, 147 (1936); see also Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 *CHI.-KENT L. REV.* 1 (1977) (reviewing the infrequency with which these mechanisms were used).
  30. Some thought that if discipline was needed, it meant that the wrong individuals had been chosen as judges. See Harris, *supra* note 25, at 29. Others worried that new forms of discipline would lead only to a greater decline in public opinion of judiciaries. Charles Boston, the lawyer who would ultimately become the principal drafter of the judicial canons, argued that promulgating analogous canons for judges would send a troublesome message. Bowie, *supra* note 1. At the time, there was "agitation for a . . . recall of judicial decisions," and "it was not deemed wise to add fuel to that flame by intimating through the adoption of Canons of Judicial Ethics that the judiciary were in fault." *Id.* at 914 (quoting Charles Boston).



those who believed that articulated standards of judicial ethics were desirable agreed that “it was not the proper role of the bar to impose standards on the judiciary . . . [as] such canons would more appropriately be developed within the judiciary.”<sup>31</sup>

As instances of judicial misconduct continued, and the threat of unfavorable public perceptions of the legal system increased, the prevailing sentiment shifted. One scandal in particular—news that a federal judge was supplementing his \$7500 judicial salary with an additional \$42,500 as Commissioner of Baseball<sup>32</sup>—highlighted to bar leaders that judicial misconduct was eroding the profession’s legitimacy.<sup>33</sup> The ABA’s Executive Committee responded by appointing a committee to draft standards of judicial conduct in 1922. Two years later, the ABA House of Delegates adopted its first Canons of Judicial Ethics.<sup>34</sup>

The drafters of the Canons continued to express a deferential view of judiciaries as distinct and hierarchically superior institutions. The Committee on Judicial Ethics explained that the Canons were “a guide and reminder to the judiciary and for the enlightenment of others, concerning what the bar expects from those of its members who assume judicial office.”<sup>35</sup> Accordingly, the Canons’ drafters did not presume the authority to impose standards on judiciaries. Rather, they directed their guidance toward lawyers as they ascended to the bench. In this way, the drafters both justified their role in the drafting process and minimized the Canons’ threat to the functioning of judiciaries.

Several state and local bar associations took a more aggressive view of their roles in reform.<sup>36</sup> The California State Bar, for example, attempted to discipline

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31. See *Origin and Adoption*, *supra* note 28; see also Albert M. Kales, *Methods of Selecting and Retiring Judges*, 11 J. AM. JUD. SOC’Y 133 (1928); Albert Kales, *Methods of Selecting and Retiring Judges in a Metropolitan District*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 11 (1914).
  32. *The Landis Case*, 7 A.B.A. J. 87 (1921).
  33. One delegate to the 1921 ABA Convention asked, “[W]hat use is it for the Association to prescribe Canons of Ethics for the regulation of the conduct of active practitioners, if it knew that a man on whom the judicial ermine had fallen had yielded to the temptations of avarice and private gain?” *Forty-Fourth Annual Association Meeting*, 7 A.B.A. J. 470, 477 (1921).
  34. JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.01 (2007); see CANONS OF JUDICIAL ETHICS (1924), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924\\_canons.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.authcheckdam.pdf).
  35. *Final Report and Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 449, 449 (1923); see also CANONS OF JUDICIAL ETHICS pmb. (1924) (stating that the ABA was adopting them “as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them”).
  36. This approach was taken in Florida and Illinois. See *infra* note 41. Most bar associations followed the ABA’s intended approach and adopted the Canons as persuasive but not binding guidance. See Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 414 (1972) (reviewing the process

a judge for failure to comply with the Canons.<sup>37</sup> It justified its action by reference to the requirement, advanced by the bar in the first half of the nineteenth century, that judges have formal legal training.<sup>38</sup> Given that judges were lawyers first, the state bar asserted, they were properly subject to the bar's jurisdiction and disciplinary authority.<sup>39</sup> The California Supreme Court rejected this approach, explaining that while judges may have been lawyers before ascending to the bench, they were not members of the state bar and thus "not subject to [its] jurisdiction, control and processes."<sup>40</sup> The California court thereby drew a distinction between a judge's background as a lawyer, which it conceded, and a judge's identity as a member of the state bar, which it did not. Because legal training was a well-established requirement of most judicial offices, the first link posed little threat to the existing power dynamic between judiciaries and the profession. Accepting a judge's identity as a member of the state bar, however, would have represented a significant encroachment on judicial power. Following California's lead, other state high courts similarly rejected bar associations' authority to enforce the Canons by disciplining individual judges.<sup>41</sup>

In many states, bar associations pursued an alternative approach. Conceding the bar's inability to discipline a judge, but again relying on a judge's identity as a lawyer, these bar associations encouraged state high courts to enforce the Canons under their inherent judicial authority to regulate the practice of law.<sup>42</sup>

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through which most states adopted the Canons "in the same spirit in which they were drafted—as a guide to the conscience of the individual judge").

37. *State Bar of Cal. v. Superior Court*, 278 P. 432, 433-34 (Cal. 1929).
38. DORIS MARIE PROVINE, *JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM 1* (1986). Establishing this requirement was part of the bar's larger project of using the judiciary's image, prestige, and status as a branch of government to forward its own position. See Issachar Rosen-Zvi, *Constructing Professionalism: The Professional Project of the Israeli Judiciary*, 31 *SETON HALL L. REV.* 760, 775 n.65 (2001).
39. *State Bar of Cal.*, 278 P. at 433-34.
40. *Id.* at 439.
41. See, e.g., *In re Investigation*, 93 So. 2d 601 (Fla. 1957) (rejecting the Florida State Bar's authority to discipline a circuit judge); *In re Harriss*, 4 N.E.2d 387 (Ill. 1936); *In re Strahl*, 195 N.Y.S. 385, 387-88 (App. Div. 1922); see also *Legal Ethics, Power To Discipline Judges for Misconduct in Office*, 32 *ILL. L. REV.* 118, 120 (1938) (explaining that "disciplinary machinery [in Illinois] can be set in motion by petition of the bar associations, but official action can be taken only by the Supreme Court itself").
42. See Martineau, *supra* note 36, at 413 (summary of states' approaches to regulation of judicial conduct in the wake of promulgation of the Canons); Philbrick McCoy, *A Note on Judicial Ethics in California*, 22 *S. CAL. L. REV.* 240, 255 (1949). It was the bar itself that had persuaded courts to recognize their inherent powers to regulate the power of law in its efforts to curb the unauthorized practice of law on a case-by-case basis. Laurel A. Rigertas, *Lobbying and Litigating Against "Legal*

State high courts responded in varying ways. Some adopted this position and disciplined judges as lawyers.<sup>43</sup> Some disciplined judges pursuant to a constitutional grant of supervisory power over lower courts<sup>44</sup> or an inherent authority over the administration of justice.<sup>45</sup> And some insisted that even courts lacked authority to enforce the Canons and discipline judges.<sup>46</sup>

Throughout their opinions addressing the enforceability of the Canons, and despite their varied approaches, courts continued to embrace and express the traditional view of judiciaries as distinct institutions allied with, but superior to, the legal profession. They drew a distinction between lawyers, who were properly subject to court supervision, and judges, who required freedom from all outside interference in order to successfully perform their jobs.<sup>47</sup> In their

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*Bootleggers*—*The Role of the Organized Bar in the Expansion of the Court’s Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 68 (2009).

43. See, e.g., *In re Spriggs*, 284 P. 521 (Ariz. 1930); *In re Littell*, 294 N.E.2d 126, 130-31 (Ind. 1973); *In re Ruby*, 105 N.E.2d 234 (Mass. 1952); *In re Mattera*, 168 A.2d 38, 41-42 (N.J. 1961) (citing other grounds as well); *Jenkins v. Or. State Bar*, 405 P.2d 525 (Or. 1965); *Schoolfield v. Tenn. Bar Ass’n*, 353 S.W.2d 401 (Tenn. 1961); *In re Laughlin*, 265 S.W.2d 805, 808 (Tex. 1954); *In re Stolen*, 214 N.W. 379 (Wis. 1927); *In re Johnson*, 568 P.2d 855 (Wyo. 1977).
44. See, e.g., *Cusack v. Howlett*, 254 N.E.2d 506, 511-12 (Ill. 1969); *In re Judges of Mun. Court*, 188 N.W.2d 354, 358 (Iowa 1971); *In re Mattera*, 168 A.2d at 41-42 (citing other grounds as well).
45. See, e.g., *In re Mattera*, 168 A.2d at 41-42 (citing other grounds as well); *In re Heuermann*, 240 N.W.2d 603, 607 (S.D. 1976); *In re Code of Judicial Ethics*, 153 N.W.2d 873, 874 (Wis. 1967) (citing other grounds as well).
46. See, e.g., *Steiner v. Moore*, 213 So. 2d 404, 406 (Ala. 1968); *In re Hearings Concerning Canon 35*, 296 P.2d 465 (Colo. 1956); *In re Proposed Disciplinary Action*, 103 So. 2d 632, 635 (Fla. 1958); *In re Wehrman*, 327 S.W.2d 743, 744 (Ky. 1959); *In re Meraux*, 12 So. 2d 798 (La. 1943); *In re Graham*, 114 N.W.2d 333, 337 (Mich. 1962); *In re Watson*, 286 P.2d 254 (Nev. 1955); *Nix v. Standing Comm. on Judicial Performance*, 422 P.2d 203, 207 (Okla. 1966); *In re Woodward*, 384 P.2d 110, 113 (Utah 1963); *In re Carney*, 30 S.E.2d 789 (Va. 1944).
47. Some courts sought to preclude any entity—bar association, state court, or state legislature—from proceeding against a judge for purposes of regulating judicial conduct. See, e.g., *In re Colo. Bar Ass’n*, 325 P.2d 932, 937 (Colo. 1958) (explaining that “[t]he constitution fixes the remedy at impeachment”); *In re Investigation of Circuit Judge*, 93 So. 2d 601, 605 (Fla. 1957) (concluding that the independence of the judiciary is “safe-guarded in that the House has the sole power of impeachment and the Senate is vested with the sole power to try impeachments”); *In re Woodward*, 384 P.2d at 113 (concluding that “[j]udges, in the constitutional sense . . . are amenable only to the constitutional sanctions for removal”). Other courts accepted the possibility of discipline, but defined the requisite authority as residing exclusively within the judiciary. See, e.g., *In re Judges of Mun. Court*, 188 N.W.2d at 358 (finding the authority to discipline judges while emphasizing that “[t]he independence of all the courts in the exercise of judicial functions must be carefully protected and respected” and clarifying that the discipline cannot be im-

opinions, courts were also deliberate in characterizing their ties with the profession as vertical rather than horizontal. Drawing on rhetoric of the legal profession emphasizing the civic-minded nature of legal practice, the courts suggested that judges held themselves to high ethical standards even in the absence of enforceable codes of conduct.<sup>48</sup> But they clarified that judges, having assumed government office, were now above the legal profession. Lawyers played an important quasi-governmental role as officers of the court,<sup>49</sup> but remained beholden to judiciaries as the regulators of the practice of law.<sup>50</sup>

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plemented in a way that “dictate[s] to the judges how judicial issues in individual cases shall be decided”).

48. See, e.g., *In re Littell*, 294 N.E.2d at 130-31 (observing an “interrelationship between disciplinary rules applicable to attorneys and the code of judicial conduct and ethics” and explaining that “a licensed attorney, while serving as a judge, is subject to the stringent requirements of both”); *In re Mattera*, 168 A.2d at 41 (“In terms of a rational connection with fitness at the bar, behavior of an attorney in judicial office cannot be insulated from the demands of professional ethics. On the contrary, the judge’s role is so intimate a part of the process of justice that misbehavior as a judge must inevitably reflect upon qualification for membership at the bar.”); *Jenkins*, 405 P.2d at 528 (“As far as his duty to his profession is concerned, a judge is a lawyer whose labors are performed behind the bench instead of before it.”); *Nix*, 422 P.2d at 203 (Halley, C.J., dissenting) (“When an attorney becomes a judge, he does not cease to be an attorney and a member of the bar.”).
49. See, e.g., *In re Colo. Bar Ass’n*, 325 P.2d at 937 (“It would be impossible for the court to effectively function in this field without the assistance of the members of the bar.”); *In re Integration of Neb. State Bar Ass’n*, 275 N.W. 265, 268 (Neb. 1937) (“[Lawyers] are in effect an important part of the judiciary system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice.”). This was the traditional and long-standing view. See, e.g., *In re Day*, 54 N.E. 646, 652 (Ill. 1899) (describing lawyers as “persons who assist in the administration of justice as its officers”).
50. See, e.g., *Fla. Bar v. McCain*, 330 So. 2d 712, 718 (Fla. 1976) (Sundberg, J., concurring) (“The Florida Bar as an arm of this Court is charged to act responsibly. If it acts irresponsibly this Court has the power and the duty to impose appropriate sanctions against the offending members.”); *In re Integration of Neb. State Bar Ass’n*, 275 N.W. at 268 (“The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government.”). Even as state high courts delegated regulatory authority back to state bar discipline committees, they frequently characterized the committees as their own agents rather than agents of the state bar association. See, e.g., *In re Colo. Bar Ass’n*, 325 P.2d at 936 (“[The state bar disciplinary committee] functioning in disciplinary proceedings . . . ceases to be a representative of the bar association and becomes a committee of this court, and as such is responsible solely to the court.”); *In re Investigation of Circuit Judge*, 93 So. 2d 601, 608 (Fla. 1957) (“In disciplinary matters the Board of Governors of the Integrated Bar serves merely as an adjunct or administrative agency of this Court with authority to make recommendations.”).

Gradually, the bar began challenging this traditional model of the relationship between judiciaries and the profession. As judicial misconduct continued,<sup>51</sup> and courts remained reluctant to enforce discipline,<sup>52</sup> the bar began advancing a new model—judiciaries as subsidiary parts of the legal profession.<sup>53</sup> Reliance on this model represented a significant change in strategy. Previously, the bar had used the descriptive claim that judges were lawyers in order to justify bar association or court authority to discipline individual judges. With the new model, the bar made a normative claim that the organized legal profession was properly conceived of as the broader institution, which encompassed judiciaries. The new strategy enabled the bar to assume a much more extensive and influential role in judicial conduct regulation.

Bar leaders advanced their views in law review articles and bar journals. They explained that if judiciaries were subsumed into the legal profession, self-regulation of judiciaries was regulation of and by “the legal profession—

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51. See *Judicial Propriety*, 56 A.B.A. J. 50, 50 (1970) (noting that “[s]eldom, if ever, has judicial conduct come under such close public scrutiny in the United States as it has during the last two years”); Theodore G. Garfield et al., *What Court Reform Can Do for You: Improving the Image of the Judge, the Lawyer and the Organized Bar*, 49 J. AM. JUD. SOC’Y 133 (1965) (noting a crisis of public confidence in the courts); see also RUSSELL R. WHEELER & A. LEO LEVIN, *JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES* 24-25 (1979) (describing “the series of judicial scandals that achieved widespread publicity in the 1960s and 1970s,” which “created pressure to strengthen judicial disciplinary mechanisms”).
52. Many courts were perceived to be passive in their enforcement efforts. See Jack E. Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117, 1121, 1125 (1966) (noting that vesting disciplinary authority in a state high court “depend[ed] upon the willingness of the state supreme court and chief justice to take a strong lead, which not many high courts and chief justices are able or inclined to do”). Others continued to treat the Canons as offering only persuasive guidance. See *supra* note 46. Even courts that purported to enforce the Canons took approaches that were perceived to be insufficient. For example, some courts held their authority to be limited to conduct involving moral turpitude or other conduct that would subject a lawyer to disbarment, which precluded discipline for a wide array of problematic conduct that had prompted calls for reform in the first place. See, e.g., *In re Spriggs*, 284 P. 521 (Ariz. 1930); *In re Wehrman*, 327 S.W.2d 743 (Ky. 1959); *In re Bd. of Comm’rs of the State Bar*, 337 P.2d 400 (N.M. 1959); see also Jonathan T. Swain, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190 (1976) (reviewing the states that took this approach).
53. See, e.g., Jack Frankel, *Judicial Conduct and Removal of Judges for Cause in California*, 36 S. CAL. L. REV. 72, 73 (1963) (describing the regulation of the judiciary as a part of professional self-regulation); McCoy, *supra* note 42, at 241 (“[J]udges of courts of record, although set apart for special duty in the administration of justice, are also members of the bar, and so are bound by all the obligations of the legal profession.” (quoting Justice Conrey) (internal quotation marks omitted)); see also HALLIDAY, *supra* note 10, at 172 (noting the same reversal in the Illinois Bar Association’s efforts to reform the Illinois judicial codes in the early 1970s).

lawyers and judges alike.”<sup>54</sup> Purporting to offer wisdom that they had gained from their own experience with regulation, prominent lawyers explained that bench and bar should work together to institute more effective judicial discipline mechanisms.<sup>55</sup> Doing so would restore public confidence in the courts: “Bar leaders realized some time ago that the image of the bar would be enhanced, not hurt, by taking steps to censure and disbar unworthy lawyers. The same principle applies to judges.”<sup>56</sup> Lawyers therefore justified their role in reform by reference to the profession’s civic commitments and quasi-governmental role.

With public and judicial attention focused on the bar’s civic orientation, bar leaders became more assertive with their views on judicial discipline. They explained that the disciplinary system could not remain within the exclusive control of judges—“[o]therwise, the ethical scheme is vulnerable to the criticism that it is self-protective.”<sup>57</sup> They also emphasized the importance of mandatory and enforceable standards of judicial conduct.<sup>58</sup> As one lawyer explained, “The most stringent of ethical standards are of little consequence unless the public is convinced that the standards are uniformly and vigorously enforced.”<sup>59</sup>

During the second half of the twentieth century, the bar’s shift in approach and in rhetoric empowered it to assume two influential roles in the reform of judicial conduct regulation.<sup>60</sup> First, state bars, working centrally through the ABA, took leadership roles in establishing state judicial conduct commissions—

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54. Jack E. Frankel, *Judicial Ethics and Discipline for the 1970s*, 54 JUDICATURE 18, 18 (1970).

55. See, e.g., William T. Braithwaite, *Judicial Misconduct and How Four States Deal with It*, 35 LAW & CONTEMP. PROBS. 151, 153 (1970) (“[T]he principal policy objective of a procedure for dealing with judicial misconduct . . . is to insure society’s confidence in the formal system of dispute resolution.”); Frankel, *supra* note 52, at 1118; Frank Greenburg, *The Task of Judging the Judges*, 59 JUDICATURE 458, 462 (1976); Gerald C. Snyder, *Rules of Conduct*, 53 JUDICATURE 307, 313 (1970) (“The twenty-five standards of judicial conduct, a living ‘rule’ of conduct by judges, will materially assist in the restoration of public confidence in the judiciary and in the promotion of justice.”).

56. Frankel, *supra* note 52, at 1118.

57. John Weistart, *Foreword*, 35 LAW & CONTEMP. PROBS. 1, 2 (1970) (asking “whether the judiciary has the capacity to perform adequately the regulatory function which would be necessary to satisfy the recently surfaced public concern with judicial ethics” and concluding that “[t]he standards for conduct perhaps are best devised by a body structured to permit formal input from community sources. Otherwise, the ethical scheme is vulnerable to the criticism that it is self-protective.”).

58. Martineau, *supra* note 36, at 410.

59. Greenburg, *supra* note 55, at 463.

60. Joseph Tydings, *The Congress and the Courts: Helping the Judiciary To Help Itself*, 52 A.B.A. J. 321, 325 (1966) (noting that “[t]he organized Bar has often taken the lead in efforts to modernize court machinery, particularly on the state level,” and that it would again in this instance).

independent committees authorized to investigate complaints, file and prosecute charges, and recommend or impose sanctions.<sup>61</sup> After the California State Bar played an important role in establishing the first modern judicial conduct commission in 1960,<sup>62</sup> several other state bars, acting with the centralized support of the ABA, followed its lead.<sup>63</sup> By 1981, every state in the country had a modern judicial conduct commission.<sup>64</sup>

Second, the bar's new approach empowered the ABA to assert itself as the drafter and reviewer of codes of judicial conduct. Responding to growing criticism of the 1924 Canons, the ABA appointed a committee to draft a revised code, to be stated in mandatory terms.<sup>65</sup> The ABA House of Delegates adopted the revised code at its 1972 annual meeting and created a special committee to promote its adoption in the states.<sup>66</sup>

In the post-Watergate atmosphere of distrust of governmental self-regulation,<sup>67</sup> it was not difficult for the ABA's special committee to make

61. I. TESITOR & D. SINKS, *JUDICIAL CONDUCT ORGANIZATIONS 19-27* (2d ed. 1980).
62. See Frankel, *supra* note 53, at 85 (describing the bar's role in creating the California Judicial Conduct Commission).
63. See Robert W. Galvin, *Regulating Judicial Misconduct in Massachusetts*, 27 *NEW ENG. L. REV.* 189, 208-09 (1993). For histories of the processes in various states noting the role of the bar, see James Alfini, Shailey Gupta-Brietzke & James McMartin IV, *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 *S. TEX. L. REV.* 889, 891-92, 908 (2007).
64. TESITOR & SINKS, *supra* note 61, at 19-27. These commissions fall within two categories. Forty-one states have one-tier commissions, which handle all phases of the process, from investigating complaints to either imposing sanctions or recommending them to the state's highest court. The remaining states have two-tier systems, in which a first panel investigates complaints and files and prosecutes formal charges, while a second panel adjudicates the charges and, where appropriate, imposes sanctions. Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 *KY. L.J.* 811, 811-12 (1988).
65. In contrast to the aspirational tone of the 1924 Canons, the 1972 Code's Preface stated: "The canons and text establish mandatory standards . . . . It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement." *CODE OF JUDICIAL CONDUCT Preface* (1972).
66. E. Wayne Thode, *The Code of Judicial Conduct—The First Five Years in the Courts*, 1977 *UTAH L. REV.* 395, 395 (1977).
67. *The Judicial Tenure Act: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. 25 (1977) (statement of Rep. Nunn) (urging action by all branches of government to restore public confidence in government after Watergate); JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 225-26 (1974) (linking the Watergate scandal to the growth of cynicism over the quality of the nation's leadership).

the case for enforceable standards of conduct.<sup>68</sup> But its strategies in promoting the 1972 Code went beyond advocating adoption and had the ultimate effect of solidifying the ABA's role in future drafting processes. One member of the committee addressed the concern that adoption could lock state judiciaries into unchangeable standards of conduct by explaining that the code would be "review[ed] periodically . . . for the purpose of assessing its relevance to current conditions and problems."<sup>69</sup> If the ABA were to perform this function, states could then decide whether to adopt any such amendments, at relatively little cost in time or money.

The ABA's strategies were effective. By the time the ABA promulgated a new code of judicial conduct in 1990, the 1972 version had been adopted by forty-seven states and the District of Columbia.<sup>70</sup> By the time it published a third version in 2007, twenty of those states, the District of Columbia, and two previous non-Code states<sup>71</sup> had adopted new codes based on the 1990 version.<sup>72</sup> Additional states adopted portions of the 1990 Code while retaining portions of the 1972 Code.<sup>73</sup> Since the 2007 amendments, nineteen states have adopted the

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68. Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in *BENCH PRESS* 21, 30-31 (Keith J. Bybee ed., 2007).
69. Martineau, *supra* note 36, at 418; *see also* Harrison, *supra* note 18, at 257 (noting that "significant, often dramatic, developments in the legal, social, and political environment" since the drafting of the 1990 Code called for a comprehensive review of the Code).
70. The three exceptions were Montana, Rhode Island, and Wisconsin. ALFINI ET AL., *supra* note 34, § 1.03 n.17. Other states' codes were virtually identical to the Model Code. Moreover, courts' descriptions of their adoption processes lend support to the notion that adoption was generally uncritical. *See* Griffen v. Ark. Judicial Discipline & Disability Comm'n, 130 S.W.3d 524, 531 (Ark. 2003) ("In 1972, the American Bar Association published its Model Code of Judicial Conduct and in 1973, this court adopted it."); *Spector v. State Comm'n on Judicial Conduct*, 392 N.E.2d 552, 558 (N.Y. 1979) (Fuchsberg, J., dissenting) (describing New York's Code as based on "the seminal model" approved by the ABA). Even where there were differences, they were presented as fairly superficial. *See, e.g., In re K.E.M.*, 89 S.W.3d 814, 827 n.15 (Tex. App. 2002) ("The American Bar Association approved its [M]odel Code of Judicial Conduct in 1972. The Texas Supreme Court adopted the substance of that code, with minor changes, in 1974.").
71. ALFINI ET AL., *supra* note 34, § 1.03 n.18. The two previously non-Code states were Rhode Island and Wisconsin. *Id.*
72. *Id.* In some cases, states altered the language of the code more than they had with the 1972 Code, but the changes were generally not substantive. *See, e.g., In re Code of Judicial Conduct*, 643 So. 2d 1037, 1040 (Fla. 1994) ("The new Code of Judicial Conduct we have approved is substantially the same as the Model Code of Judicial Conduct adopted by the ABA in 1990.").
73. ALFINI ET AL., *supra* note 34, § 1.03 nn.19-20. This left Montana as the only non-Code state. *Id.*



new code in whole or in part.<sup>74</sup> Currently, every state has a judicial code of conduct modeled after one or more of the ABA's codes.<sup>75</sup> The practical effect of the reform of judicial conduct regulation in the states, therefore, was to instantiate the bar as a leader in the reform process and the ABA as the authoritative actor in future drafting processes.<sup>76</sup>

*B. The ABA Model Codes: Preferential Access and Tightening Ties*

The ABA and state bars were successful in cultivating influence in the process of state judicial conduct reform, at least in part because they promised that their efforts would ensure judicial quality, legitimacy, and independence. But while purporting to act in the public interest—as protectors and defenders of the courts—they were also promoting their members' private interests. Starting with the 1972 Code, the ABA used its new position as drafter of the revised codes to secure for lawyers and legal organizations preferential access to judiciaries through two categories of code provisions.<sup>77</sup> The first category drew a distinction between law-related and non-law-related events and organizations and granted preferential treatment to the former. The second addressed social

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74. Since 2007, nineteen states have implemented the 2007 Code, including Montana—the only state previously to have had a code not based on the ABA's Model Code. *See* ARIZ. SUP. CT. R. 81 (2009); ARK. CODE OF JUDICIAL CONDUCT (2009); COLO. CODE OF JUDICIAL CONDUCT (2010); CONN. CODE OF JUDICIAL CONDUCT (2011); DEL. JUDGES' CODE OF JUDICIAL CONDUCT (2010); HAW. SUP. CT. R. 5 (2009); IND. CODE OF JUDICIAL CONDUCT (2009); IOWA SUP. CT. R. 51 (2010); KAN. SUP. CT. R. 601B (2009); MD. CT. APP. R. 16-813 (2010); MINN. CODE OF JUDICIAL CONDUCT (2009); MONT. CODE OF JUDICIAL CONDUCT (2009); NEB. CODE OF JUDICIAL CONDUCT (2008); NEV. CODE OF JUDICIAL CONDUCT (2010); OHIO CODE OF JUDICIAL CONDUCT (2009); OKLA. CODE OF JUDICIAL CONDUCT (2011); UTAH CODE OF JUDICIAL CONDUCT (2010); WASH. CODE OF JUDICIAL CONDUCT (2011); WYO. CODE OF JUDICIAL CONDUCT (2009). Nine of those states previously had the 1990 Code and nine had the 1972 Code. ALFINI ET AL., *supra* note 34, § 1.03, nn.17-18.
75. ALFINI ET AL., *supra* note 34, § 1.03 (noting that Montana, which has since adopted a code modeled after the 2007 ABA Code, is “the only non-Code state”); *id.* § 1.03 n.19 (listing the five states that have combinations of the 1972 and 1990 Codes). The only state with provisions that stray from the Model Codes' provisions is Oregon. Oregon's code represents a combination of 1972 Code provisions, 1990 Code provisions, and some additional non-Code provisions, such as rules calling for advisory opinions. The order of these provisions does not track any version of the Model Code. *See* OR. CODE OF JUDICIAL CONDUCT R. 1-101 to 6-102 (2002).
76. *See* HALLIDAY, *supra* note 10, at 199 (describing an advisory role as intermediate in Halliday's four forms of bar agency).
77. *Cf.* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 143-44 (2000) (describing the self-interested nature of standards of attorney conduct).

hospitality and gifts and allowed frequent, informal interactions between individual judges and lawyers. In contrast to the bar's initial focus on deterring judicial *misconduct*—which had justified its involvement in reform in the first place—these provisions were affirmatively oriented toward conditioning judicial *conduct* by encouraging judicial involvement in the legal profession.

The first category of new provisions facilitated judicial participation in bar associations and other law-related organizations. Viewing the 1924 Canons' attitude toward judges' involvement in legal organizations as "at most lukewarm,"<sup>78</sup> the 1972 drafters included a new canon that not only authorized but actively encouraged such involvement.<sup>79</sup> They added a new provision permitting judges to assist in certain fundraising activities for bar associations and legal organizations,<sup>80</sup> while continuing to prohibit parallel conduct for other types of civic and community organizations.<sup>81</sup> These provisions aligned with ABA efforts, begun at the turn of the century, to increase the number of judges in its membership in order to engage judges with the practicing bar.<sup>82</sup> They also bolstered the bar's claim that judiciaries were a part of the legal profession.

The drafters of the 1990 Code eliminated the differential treatment of legal and non-legal organizations in the text of the Canons,<sup>83</sup> but continued to encourage judicial participation in legal organizations through code commentary.<sup>84</sup> The decision to lessen the preferential treatment of legal organizations in the rules themselves was criticized,<sup>85</sup> and the drafters of the 2007 Code brought

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78. E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 76 (1973).
79. See CODE OF JUDICIAL CONDUCT Canon 4C cmt. (1972) ("To the extent his time permits, he is encouraged to [contribute to the development of the legal system] either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.").
80. *Id.* Canon 4C.
81. *Id.* Canon 4C & cmt.
82. *Second Day: Morning Session*, 38 A.B.A. REP. 30 (1915).
83. LISA MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 30 (1992) (explaining that "the Committee became convinced that all of the activities of a judge that are engaged in outside the realm of judicial duties ought to be subject to a single set of overarching principles" and that as a result, it "combined in a single Canon 4 the subject matter of Canons 4, 5 and 6 of the 1972 Code").
84. See MODEL CODE OF JUDICIAL CONDUCT Canon 4B cmt. (1990) ("[A] judge is encouraged to [contribute to the improvement of the law, the legal system, and the administration of justice], either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law."); see also *id.* ("As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice.").
85. See, e.g., Mark Scott Bagula & Robert C. Coates, *Trustees of the Justice System: Quasi-Judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct*, 31 SAN DIEGO L. REV. 617 (1994) (arguing that the 1972 Code's approach

back a sharper distinction to be “more encouraging” of judicial cooperation with the practicing legal profession.<sup>86</sup> In addition to reiterating a judge’s special competence to contribute to the development of the law,<sup>87</sup> the drafters emphasized a judge’s duty to support professionalism within the practicing bar.<sup>88</sup> The drafters also rested several new provisions on a distinction between law-related and non-law-related events and organizations, which the reporter to the drafting committee, Professor Charles Geyh, described as a “theme that occurs throughout Canon 3.”<sup>89</sup>

Thus, the 2007 Code permits court facilities and other court resources to be used in connection with law-related events but not non-law-related events.<sup>90</sup> It provides that a judge may attend a fee-waived event sponsored by a law-related organization regardless of the cost to other participants,<sup>91</sup> but may attend a fee-waived event sponsored by a non-law-related organization only if all participants attend for free.<sup>92</sup> It permits a judge to be a featured speaker at a fundraising event,<sup>93</sup> and to solicit membership even where solicitation constitutes a form of fundraising,<sup>94</sup> for law-related but not non-law-related organizations. The 2007 drafting committee’s reporter justified this last distinction by reference to ties between the profession and judiciaries. He explained that participation in fundraising and membership solicitation for “a law-related organization,

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of differentiating between types of extrajudicial conduct was desirable so as to encourage conduct by judges aimed at improving the legal system).

86. ABA, REPORTER’S EXPLANATION OF CHANGES: ABA MODEL CODE OF JUDICIAL CONDUCT 34 (2007) [hereinafter 2007 REPORTER’S EXPLANATION], available at [http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/mcjc\\_2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/mcjc_2007.authcheckdam.pdf) (explaining that the revised Comment to Rule 3.1 was meant to be “somewhat more encouraging than was the 1990 Code so that judges will reach out to the communities of which they are a part, and avoid isolating themselves”).
87. MODEL CODE OF JUDICIAL CONDUCT R. 3.1 & cmt. 1 (2007) (“Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects.”).
88. *Id.* R. 1.2 cmt. 4.
89. 2007 REPORTER’S EXPLANATION, *supra* note 86, at 50 (explaining that “[t]his distinction between events and organizations that are or are not law-related is another theme that occurs throughout Canon 3”).
90. *Id.* at 33.
91. MODEL CODE OF JUDICIAL CONDUCT R. 3.13(C)(2)(a), R. 3.14 (2007).
92. 2007 REPORTER’S EXPLANATION, *supra* note 86, at 50.
93. *Id.* at 41-42.
94. *Id.* at 41 (“[T]he Commission decided to limit the permission granted to solicit membership to membership in law-related organizations—one of several places in Canon 3 where this line is drawn.”).

such as a bar association or moot court society, would be perceived as more natural or more appropriate than . . . [for] a fine arts society or the American Red Cross.”<sup>95</sup>

The second category of new Model Code provisions granting the bar preferential treatment allowed frequent, informal social interactions between individual judges and lawyers. The drafters of the 1972 Code employed a new “ordinary social hospitality” standard, which they described as “more liberal [in comparison to the 1924 Canons] in allowing judges to accept certain types of gifts under certain conditions.”<sup>96</sup> On the face of the rule, the new standard applied equally to all of a judge’s social interactions. But the drafter’s explanations and official comments revealed a desire to facilitate bench-bar interactions. In rejecting the 1924 Canons’ flat prohibition on judges’ receipt of gifts, presents, or favors from litigants or lawyers appearing before them,<sup>97</sup> the drafters explained that judges should be encouraged to foster bonds within the legal profession.<sup>98</sup> Accordingly, new provisions permitted judges and their spouses to accept invitations to lawyers’ social events<sup>99</sup> and to bar-related functions or activities “devoted to the improvement of the law, the legal system, or the administration of justice.”<sup>100</sup>

The drafters of the 1990 and 2007 Codes revised the 1972 provisions regarding judge-lawyer social interactions to make them even more permissive. While prohibiting receipt of gifts or things of value from lawyers or law firms that had or likely would come before a judge,<sup>101</sup> the 1990 Code permitted receipt of ordinary social hospitality from all lawyers.<sup>102</sup> The official annotation explained that “ordinary social hospitality” could include, among other things, “dinners and receptions, where the sponsoring bar association pays the judge’s expenses”<sup>103</sup>

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95. *Id.*; see also *id.* at 42 (providing the same rationale for the rule allowing a judge to be a featured speaker or participant at an event that has a fundraising purpose if, but only if, the organization is law-related).

96. MILORD, *supra* note 83, at 41 (describing the 1972 revisions process).

97. CANONS OF JUDICIAL ETHICS Canon 32 (1924), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924\\_canons.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.authcheckdam.pdf) (a judge “should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment”).

98. CODE OF JUDICIAL CONDUCT Canon 5A cmt. (1972); MODEL CODE OF JUDICIAL CONDUCT Canon 4A cmt. (1990) (“Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.”).

99. CODE OF JUDICIAL CONDUCT Canon 5A(4)(b) (1972).

100. *Id.* Canon 5C(4)(a).

101. MODEL CODE OF JUDICIAL CONDUCT Canon 4D(5)(h) (1990).

102. ABA, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 301 (1990).

103. *Id.* at 303.

and “invitations to a law firm’s holiday party, open house or summer picnic.”<sup>104</sup> The drafters of the 2007 Code went even further. Viewing the 1990 Code’s ban on gifts and substantial invitations from lawyers appearing before a judge<sup>105</sup> as “more stringent than necessary,”<sup>106</sup> they added provisions allowing such gifts and invitations if reported.<sup>107</sup> Both the 1990 and 2007 Codes grant judges virtually unrestricted discretion to receive gifts and invitations from lawyers who do not appear before them,<sup>108</sup> even though it is virtually impossible to predict which lawyers will appear before a judge in any given year.

As these provisions reveal, the ABA and state bars were forwarding their powerful private interests in drafting and promoting adoption of the revised model codes. While purporting to act exclusively in a civic-oriented role as a protector and defender of the courts, they were also securing for their members preferential treatment and preferential access to judges. Preferential access, in turn, tightened the bar’s connection with state judiciaries, reinforced the rhetoric of judiciaries as subsidiary parts of the legal profession, and empowered the profession to exert continuing influence over judicial conduct regulation. The net result was an increase in the practicing bar’s power at the expense of judicial autonomy.

## II. TOO CLOSE FOR COMFORT: THE DANGERS OF THE BAR’S MODEL

The legal profession’s civic and private interests are not mutually exclusive, and the inevitable tension between them need not preclude beneficially close ties with state judiciaries. But through the process of reforming judicial conduct regulations, the bar’s dual orientation manifested itself in troubling ways, allowing it to promote its private interests under the cover of its civic commitments. As a result, the bar’s role in judicial conduct reform interlocked the interests of judiciaries and the profession to the detriment of both. Prior to the reform movement, judiciaries were largely self-governed and exclusively oriented toward the state. Likewise, the profession, just coming into its heyday, was largely autonomous and self-governing. By forwarding the position that judiciaries were a subsidiary part of the profession and by creating judicial conduct rules that reinforced that position, the bar created the appearance that judicia-

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104. *Id.* at 303-04.

105. *Id.*

106. 2007 REPORTER’S EXPLANATION, *supra* note 86, at 50.

107. *Id.*; see also MODEL CODE OF JUDICIAL CONDUCT R. 3.15 (2007) (“Reports made in compliance with this Rule shall be filed as public documents in the office of the clerk of the court on which the judge serves or other office designated by law, and, when technically feasible, posted by the court or office personnel on the court’s website.”).

108. MODEL CODE OF JUDICIAL CONDUCT R. 3.13(B)(2) (2007); MODEL CODE OF JUDICIAL CONDUCT CANON 4D(5)(h) (1990).

ries, like the bar, were oriented in part toward private economic and political interests. Similarly, the bar imputed to itself a heightened orientation toward state interests.<sup>109</sup> In this Part, I argue that, by interlocking the interests of bench and bar in this way, reform of state judicial conduct regulation has compromised the independence and legitimacy of both institutions.

#### A. *The Threat to Judiciaries*

In advocating judicial conduct reform throughout the twentieth century, the ABA and state bars promised that enforceable codes of conduct would increase public confidence in the courts, thereby strengthening judicial legitimacy and bolstering judicial independence.<sup>110</sup> But by empowering the bar's private interests, the reform process has jeopardized both of these core values of political liberalism. In successfully claiming authority to direct the process of reform, the bar increased its own power at the expense of judicial power. In successfully promoting conduct provisions that permit informal and unmonitored interactions between lawyers and judges, the bar created opportunities for and appearances of improper private influence over judges. In both of these ways, the reform process and the resulting codes of conduct have threatened the independence and legitimacy of state judiciaries.

Autonomy from the profession is infrequently discussed as an axis of judicial independence. The scholarly literature has traditionally focused on the judiciary's independence from the political branches of government, primarily in the literature addressing the federal judiciary,<sup>111</sup> and independence from

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109. Only by claiming an orientation toward the state could the bar successfully transform its technical expertise into a claim of moral authority. Cf. HALLIDAY, *supra* note 10, at 216-17 (describing how the Chicago Bar Association's efforts regarding the state judiciary, which entailed both exerting control and attaining autonomy from politics, represented an increased orientation toward the public arena of the state).

110. See *supra* notes 57-59 and accompanying text.

111. Some scholars have focused on the Framers' intent regarding separation of powers and the early development of judicial review and judicial power in relation to Congress and the President. See, e.g., Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992). Some scholars focused on the key role played by informal norms, working alongside formal constitutional protections, in establishing and reinforcing judicial independence from the political branches at key moments in American history. See, e.g., CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2006); Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 909 (2007). Scholars addressing the modern federal judiciary have focused on the proper nature and level of dialogue between the judiciary, Congress, and the President. See, e.g., ROBERT A. KATZMANN, *COURTS AND CONGRESS* (1997); ROBERT A. KATZMANN,

political reprisals to unpopular decisions, primarily in the literature addressing elected state judiciaries.<sup>112</sup> A small but growing body of literature addresses the potential threat posed by private interest groups,<sup>113</sup> particularly in the context of judicial selection and elections.<sup>114</sup>

Attention to private interests has increased since the Supreme Court's 2009 decision in *Caperton v. A.T. Massey Coal Co.*<sup>115</sup> The *Caperton* Court held that where the impartiality and legitimacy of state court proceedings are compromised by excessive campaign contributions, the Due Process Clause may require judges to recuse themselves.<sup>116</sup> The holding of *Caperton* addressed campaign contributions, but the facts highlight informal contacts as another point of concern. In addition to making over three million dollars in campaign con-

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JUDGES AND LEGISLATURES: TOWARD INSTITUTIONAL COMITY (1988); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996) [hereinafter Geyh, *Paradise Lost*].

112. Work addressing state courts was largely nonexistent until the past several years. See Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323, 325 (2003) (noting that "[m]ost legal scholars who write about judicial independence know nothing and care less about state courts"). But there is now a steadily growing body of scholarship that measures state court independence in relation to the electorate. See, e.g., Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79 (1998); Stephen Croley, *The Majoritarian Difficulty: Elective Judiciary and Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Charles Gardner Geyh, *The Endless Judicial Selection Debate*, 21 GEO. J. LEGAL ETHICS 1259 (2008). Many scholars propose reforms to better insulate state judiciaries from partisan politics. See, e.g., SARA MATHIAS, *ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS* (1990); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003).
113. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).
114. See, e.g., Barnhizer, *supra* note 16, at 393; Gregory A. Caldeira, Marie Hojnacki & John R. Wright, *The Lobbying Activities of Organized Interests in Federal Judicial Nominations*, 62 J. POL. 51, 51-52 (2000); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1266 (2008); Maura Anne Shoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839 (1994).
115. 129 S. Ct. 2252 (2009).
116. In the months following the Supreme Court decision, a *National Law Journal* article expressed a growing concern when it asked, "Is justice for sale?" and observed that "[a]n unprecedented number of incumbent state judges are facing a flood of special interest dollars aiming to kick them off the bench." Susan Liss & Adam Skaggs, *Is Justice for Sale?*, NAT'L L.J. (Sept. 6, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202471560436>.

tributions to one justice, the litigant in question vacationed with a second justice, all while his case was pending before both justices.<sup>117</sup>

*Caperton* underscores the importance of addressing autonomy from the legal profession as an element of judicial independence. The Court's reasoning suggests that in the hands of any group other than the bar or a legal organization, the preferential access permitted by the ABA Codes would be viewed as an unwarranted intrusion on the decisional autonomy of judges. Similarly, if any other group had exerted the influence over the conduct reform process that was exerted by the ABA, it would be viewed as a direct challenge to judicial independence. The ABA's involvement, however, was uncritically accepted in the states because of the profession's purported ability and inclination to protect judicial independence while safeguarding the public interest.<sup>118</sup>

This acceptance ignored the reality that when the bar acts to influence the legal occupation and the practice of law, its special attributes render it a particularly powerful and potentially problematic private interest group.<sup>119</sup> Existing accounts of the salutary effects of interest group politics presuppose that competing factions or interests exist to check undesirable interested outcomes.<sup>120</sup> But because of the bar's monopoly over legal practice, it acts free from competing interests when addressing matters directly related to the practice of law.<sup>121</sup>

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117. *Caperton*, 129 S. Ct. at 2258.

118. In explaining the ABA's role in the 1972 revision process, the reporter emphasized the involvement of judges, noting that "[t]he ABA . . . is not a 'private association of lawyers.' Thousands of judges are members of the Association." THODE, *supra* note 78, at 47. Others emphasized the role that the bar had traditionally taken in many aspects of court reform. Tydings, *supra* note 60, at 325. Over time, the ABA's role simply became accepted. Cf. Kaufman, *supra* note 18, at 3 n.4 (noting the entrustment of the revision process to an ABA committee).

119. See HALLIDAY, *supra* note 10, at 52; Charles L. Cappell & Terence C. Halliday, *Professional Projects of Elite Chicago Lawyers*, 8 AM. B. FOUND. RES. J. 291, 293 (1983). Studies of the political efficacy of the bar have affirmed this observation. Umbrella bar associations have been plagued by collective action problems having to do with specific political issues, but they have been politically effective in matters relating to legal practice. See, e.g., MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 177 (1979); Cappell & Halliday, *supra*, at 293; Robert L. Nelson & David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 1, 7 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992).

120. See, e.g., ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (2005).

121. Partly for this reason and partly because of shared interests in matters relating to legal practice, umbrella bar associations, which have been plagued by collective action problems when advocating specific political positions, have been politically effective in matters relating to legal practice. See LARSON, *supra* note 119, at 177; Cappell & Halliday, *supra* note 119, at 293-94.



Moreover, because the bar possesses specialized expertise, it acts outside of the scope of effective monitoring by the public or a nonspecialized body such as a legislature.<sup>122</sup>

The bar's political efficacy is further magnified when it seeks to influence judicial conduct regulation.<sup>123</sup> In this context, the bar is not only working in its occupational interests, but is also leveraging its close and unique relationship with its regulators, state judiciaries. Bar influence over attorney conduct regulation raises the specter of regulatory capture. Bar influence over judicial conduct regulation raises an even more worrisome concern—that the bar will not only capture but more explicitly control and co-opt power from its regulator, which is itself a branch of government.

The dangers of control and co-optation were realized through the twentieth-century process of judicial conduct regulation reform. The legal profession successfully persuaded judiciaries to defer to its views on judicial conduct, from views regarding desirable mechanisms and means of enforcement to views regarding specific standards of conduct. It thereby took control of a key judicial accountability mechanism, expanding its own power by convincing judiciaries to cede a portion of their inherent authority.

The resulting code provisions pose a threat to judicial independence in two principal ways. First, they allow behaviors that may create opportunities and appearances of judicial bias and partiality. For example, they allow judges to attend law-related, fee-waived (or expense-paid) educational trips, derided by critics as “junkets,”<sup>124</sup> which may appear to play a greater role in advancing the political and ideological positions of their sponsors than in furthering the education of their participants.<sup>125</sup> Code provisions allow judges to accept gifts and social invitations from lawyers who practice before them, which may appear to compromise judges' decisional independence. And code provisions allow judges

122. See HALLIDAY, *supra* note 10, at 374-75; DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 9 (1999); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION* 33-34 (1991).

123. See Karpik, *supra* note 19, at 467; see also HALLIDAY, *supra* note 10, at 52 (describing the legal profession as both a normative profession and a partially state-constitutive profession, which conveys a “double increment of advantage” in matters of collective action related to the profession).

124. See, e.g., Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539, 550-51 (1994).

125. See Green, *supra* note 18, at 942 (describing a 2000 study published by the Community Rights Counsel that concluded that judicial seminars relating to environmental law were “a veiled effort to lobby the judiciary” and noting that “[s]ince at least 1979, privately funded programs for judicial education, particularly in the area of law-and-economics, have been the subject of public discussion and often public criticism”).

to solicit membership and participate in fundraising activities for legal organizations, which may appear to use the prestige of judicial office to coerce donations. Some commentators, including prominent federal judges, have suggested that even membership in bar associations and other legal organizations can create problematic appearances of judicial partiality.<sup>126</sup> In all of these cases, appearances can be as harmful as realities.<sup>127</sup> When a judge's decisional autonomy appears compromised, regardless of whether it actually is, judicial legitimacy is diminished and judicial independence is threatened.

The second way in which the ABA Codes pose a threat to judicial independence is that they allow the interpretation of ambiguous provisions to be conditioned by bar norms, which include private interests and private orientations, rather than by independent judicial norms, which ideally are oriented exclusively toward state and public interests. For example, the ABA Codes permit a judge to accept invitations and "ordinary social hospitality" from a lawyer, even when the lawyer regularly appears before the judge.<sup>128</sup> Commentary acknowledges the

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126. Most prominently, former Chief Justice Rehnquist resigned his ABA membership in 1992. Randall T. Shepard, *Judicial Professionalism and the Relations Between Judges and Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 223, 230 (2000). Though he did not explicitly state his reasons, they were widely believed to relate to the ABA's political positions and potentially problematic appearances. *Id.* The following year, Judge Acker of the Northern District of Alabama resigned as well, explicitly citing the need to avoid problematic appearances. Judge Acker described the ABA as having joined the list of political organizations for which it was improper for judges to belong because it "routinely takes official positions on issues upon which I and other judges likely will be called upon to rule." *Id.* For an overview of the debate regarding judicial participation in the ABA, see Diarmuid F. O'Scannlain, *What Role Should Judges Play in the ABA?: The Appellate Judges Conference Position*, 31 JUDGES' J. 9 (1992); and William F. Womble, Geoffrey C. Hazard, Jr. & M. Peter Moser, *What Role Should Judges Play in the ABA?: The JAD Position*, 31 JUDGES' J. 9 (1992).

127. Some have argued that focusing on appearances—particularly "appearances of impropriety"—is an ineffective or inappropriate means of addressing judicial misconduct. See Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1105 (2004) ("[T]he [appearance of impropriety] standard promotes the wrong idea—that in order to keep judges from acting unethically, ethical rules must prevent judges from *appearing* to act unethically . . . [and] that if judges appear to be acting ethically, they probably are."). With respect to judicial conduct, as opposed to *misconduct*, appearances are critical. The appearance of bias and partiality bears not just on decisional outcomes but also on judicial legitimacy, and can be as harmful to judicial legitimacy as actual bias and partiality.

128. MODEL CODE OF JUDICIAL CONDUCT R. 3.13(B)(3) (2007) (ordinary social hospitality); *id.* R. 3.13(C)(2) (invitations); MODEL CODE OF JUDICIAL CONDUCT Canon 4D(5)(c) (1990) (ordinary social hospitality); *id.* Canon 4D(5)(h) (representing the one exception by precluding invitations from lawyers appearing before the judge); CODE OF JUDICIAL CONDUCT Canon 5C(4)(b) (1972) (ordinary social hospitality); *id.* Canon 5C(4)(a) (invitations).

difficulty of defining this standard with precision and explains the drafters' decision to "permit[] the scope of permissible social hospitality to vary somewhat from place to place, depending on local customs and practices."<sup>129</sup> Given the extensive contacts that the preferential access provisions encourage, judges may interpret these and other flexible standards from within a culture driven by bar norms and lawyer influence. And if they do so, they may engage in conduct that, while not technically proscribed by the codes, may appear unacceptable and improper to the public.<sup>130</sup> In a recent and particularly egregious example, it came to light that the "ordinary social hospitality" that a state supreme court justice had accepted from law firms that regularly appeared before him included "thousands of dollars in gifts, rounds of golf, and travel expenses."<sup>131</sup>

Code provisions attempt to address the resulting potential for bias and partiality in two ways. First, they prohibit any conduct that gives rise to an appearance of impropriety or partiality.<sup>132</sup> Second, they require a judge to disqualify herself if "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer."<sup>133</sup> These standards, which require a subjective determination of the appearance or actuality of bias by the judge, are not an effective antidote to an excess of informal interactions between lawyers and judges. In addition to being lenient,<sup>134</sup> they are plagued by the interpretive problems just discussed. A judge's understanding of when the appearance or actuality of personal bias is present is likely to be driven by a normative community that accepts and values close and frequent informal interactions between judges and lawyers. For the

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129. ABA, *supra* note 102, at 302; *see also* Cal. Comm. on Judicial Ethics, Advisory Op. 43 (1994) (explaining the term by reference to the type of social event or gift that is "common among people in the judge's community"); Okla. Judicial Ethics Advisory Panel, Advisory Op. 2001-03 (2001) (same).

130. Defenders of the model codes might answer some of these concerns by reference to catch-all code provisions that prohibit appearances of impropriety. *See* MODEL CODE OF JUDICIAL CONDUCT CANON 1 (2007); MODEL CODE OF JUDICIAL CONDUCT CANON 2A cmt. (1990). But these provisions have little effect in deterring behavior that is not clearly proscribed by more specific code provisions. Accordingly, the drafters considered adding "a comment to the effect that ordinarily, when judges are disciplined for violating their duty to avoid the appearance of impropriety, it is in combination with other, more specific rule violations that give rise to the appearance problem." 2007 REPORTER'S EXPLANATION, *supra* note 86, at 7; *see also* Harrison, *supra* note 18, at 262 (discussing the sentiment that an appearances standard is too vague for independent enforcement).

131. Heller, *supra* note 5, at A2 (describing "thousands of dollars in gifts, rounds of golf, and travel expenses" that were received by a justice from law firms that regularly appeared before him).

132. MODEL CODE OF JUDICIAL CONDUCT CANON 1 (2007).

133. *Id.* R. 2.11(A)(1).

134. In comparison, conflicts arising from a financial interest in or a particular relationship with a party require automatic disqualification. *Id.* R. 2.11(A)(2)-(6).

same reasons, there is a real risk that courts will be too lenient in reviewing a judge's refusal to disqualify herself.<sup>135</sup>

The problematic influence of bar norms in shaping judicial conduct is compounded in two additional ways: by a lack of transparent prospective guidance and by deep-seated dependencies between many state judges and their states' practicing bars. Complaints and resulting disciplinary proceedings are kept confidential at least until a judicial conduct commission brings formal charges of misconduct against a judge.<sup>136</sup> In many states, they are kept confidential until and unless sanctions are imposed.<sup>137</sup> This means that judges seeking to conform their conduct to the requirements of the codes, and anyone trying to evaluate a judge's conduct as against the codes, have limited information regarding the line between permissible and impermissible conduct. In some states, the problem is mitigated by advisory opinions construing particular code provisions.<sup>138</sup> But these advisory opinions, which carry questionable persuasive force, do not resolve all ambiguity, nor are they available in all states.<sup>139</sup>

The problem is further compounded by dependencies between many state judges and the practicing bar, which create incentives for state court judges to embrace rather than resist close ties with the profession. In states that utilize judicial elections for selection or retention, judges depend for their jobs on their states' practicing legal communities, which participate heavily in fundraising, campaigning, and voting for judicial candidates.<sup>140</sup> Ideally, elections could function to hold judges accountable for their conduct and misconduct. But whether due to lack of interest by voters or lack of transparent information regarding individual judges, judicial conduct and misconduct appear to play little role in election results.<sup>141</sup> More often than not, the electorate's voting patterns appear

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135. See JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, *JUDICIAL CONDUCT AND ETHICS* § 4.16, at 140 (3d ed. 2000); see also Miller, *supra* note 4, at 460-61 (discussing the problems associated with using recusal and disqualification as remedies for parties who question a judge's impartiality).

136. SHAMAN, LUBET & ALFINI, *supra* note 135, § 13.15, at 469-70.

137. All fifty states keep judicial disciplinary proceedings confidential, at least until a judicial conduct commission brings formal charges. *Id.* § 13.15, at 470. Twenty-two states make proceedings public once a commission, after a finding of probable cause, files formal charges; nineteen states make proceedings public once a commission makes a recommendation of discipline to the state supreme court; and nine states and the District of Columbia make proceedings public only when a supreme court orders a sanction. *Id.*

138. *Id.* § 1.11, at 22-25.

139. *Id.*

140. See Swisher, *supra* note 16; Williams & Ditslear, *supra* note 16, at 136.

141. See Daniel Burke, *Code of Judicial Conduct Canon 7B(1)(c): Toward the Proper Regulation of Speech in Judicial Campaigns*, 7 *GEO. J. LEGAL ETHICS* 181, 205-07 (1993); Alex B. Long, "Stop Me Before I Vote for This Judge Again": *Judicial*

to mirror prevailing political preferences.<sup>142</sup> This only reinforces judges' reliance on campaign support from lawyers and bar groups. Notwithstanding the strong political agendas that may lie behind lawyers' rhetoric of procedural fairness and technical competence, judges are drawn to the promise of nonpolitical support from lawyers and bar groups.

Dependencies on the practicing bar are strong even in states with appointed judiciaries. Bar associations often play key roles in recommending individuals for office.<sup>143</sup> And in states where judicial terms are limited, or where judges frequently opt to retire or are voted out of office, judges rely on the practicing bar for future career opportunities.<sup>144</sup> Judges in all states, therefore, have reason to value ties with the profession. The effect is to further empower bar norms to inform definitions of appropriate judicial conduct, but where bar norms rather than independent judicial norms condition the behavior of judges, judicial independence and legitimacy suffer.

### B. *The Threat to the Profession*

Even though the profession advanced its own private interests through the process of judicial conduct reform, its institutional position has suffered along with that of the judiciary. Increasingly close ties with state courts have dampened professional independence and threatened professional legitimacy. This, in turn, has weakened the profession's justifications for the privileges of self-governance and monopoly.

Professional independence entails autonomy along two different but related axes: autonomy from clients and autonomy from the state.<sup>145</sup> Autonomy from clients allows lawyers to exercise some degree of independent moral judgment in balancing their often-conflicting duties to clients, courts, and the public interest.<sup>146</sup> Autonomy from the state, achieved through self-regulation as well as

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*Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1, 42-44 (2003).

142. See, e.g., Editorial, *A Blow to the Courts*, N.Y. TIMES, Nov. 9, 2010, at A34 (reporting the defeat in a retention election of three Iowa Supreme Court Justices who had ruled in favor of same-sex marriage).
143. Johnstone, *supra* note 19, at 226.
144. See Christopher R. McFadden, *Judicial Independence, Age-Based BFOQS, and the Perils of Mandatory Retirement Policies for Appointed State Judges*, 52 S.C. L. REV. 81, 128-31 (2000); William Glaberson, *Judges Quitting at Unusual Rate as Salaries Lag*, N.Y. TIMES, July 5, 2011, at A1.
145. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10-13 (1988).
146. See, e.g., Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665, 1667-68 (2009). Scholars disagree as to the desired extent of independence from clients and client demands, but some degree of independence is considered necessary to ensure that lawyers do not facilitate client wrongdoing. See Gordon, *supra* note 145, at 11-12 (noting a lack

economic independence,<sup>147</sup> empowers the legal profession to serve as a protector of individual rights and as an intermediary between society and the state.<sup>148</sup> Explaining the value of this type of independence,<sup>149</sup> the ABA's Model Rules of Professional Conduct state: "An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."<sup>150</sup> It is this second form of professional independence—autonomy from the state—that has been primarily implicated and threatened by the process of judicial conduct reform.

As a practical matter, this form of independence permits the profession to mobilize politically in opposition to the state when it believes the state is overreaching and threatening the values of political liberalism.<sup>151</sup> The ABA itself has done so on several occasions, including in response to the rise of the regulatory state during the New Deal (a position from which it subsequently retreated) and in response to President Roosevelt's court-packing plan.<sup>152</sup> More recently, the ABA has opposed the death penalty on the grounds that its administration is inconsistent with constitutional norms<sup>153</sup> and supported the rights of gays and lesbians to marry.<sup>154</sup> The profession also played a crucial role in identifying and addressing perceived rights violations at Guantánamo.<sup>155</sup>

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of consensus regarding the extent to which lawyers should exercise independent moral judgment in representing clients).

147. See Halliday, Karpik & Feeley, *supra* note 8, at 20 (explaining that Venezuelan and Egyptian examples demonstrate how the private market reduces dependency on the state and ensures financing that allows for successful political mobilization).
148. See Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1281-82 (2003); Gordon, *supra* note 145, at 10-11; Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 944-45 (2006).
149. This type of professional independence is believed to be central to a liberal democracy. See Margulies, *supra* note 148, at 944; Kathleen M. Sullivan, *The Good that Lawyers Do*, 4 WASH. U. J.L. & POL'Y 7, 13 (2000).
150. MODEL RULES OF PROF'L CONDUCT pmbll., at 10 (1983).
151. See Halliday, Karpik & Feeley, *supra* note 8, at 34.
152. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 195, 221-24 (1976).
153. SCHEINGOLD & SARAT, *supra* note 22, at 46-47.
154. Edward A. Adams, *ABA Backs Marriage Equality for Gays and Lesbians*, A.B.A. J. (Aug. 10, 2010), [http://www.abajournal.com/news/article/aba\\_backs\\_marriage\\_equality\\_for\\_gays\\_and\\_lesbians/](http://www.abajournal.com/news/article/aba_backs_marriage_equality_for_gays_and_lesbians/).
155. David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981 (2008). Lawyers have addressed these perceived violations not only by providing pro bono legal counsel to detainees notwithstanding government pressure to withdraw from representation, but also by identifying, publicizing, and working

When the ABA discusses professional independence from the state, it generally addresses independence from the political branches of government.<sup>156</sup> Independence from the judiciary, however, does not appear to be either necessary or desirable in the bar's view. Thus, the ABA's Model Rules take the position that close ties or even unity between bench and bar—which entails a corresponding lack of professional independence from the courts—is what ensures professional independence from the state. The Preamble states that regulation of the profession by the courts protects the “independence of the profession and the public interest which it serves.”<sup>157</sup> But this explanation of the desirability of close bench-bar ties is only relevant to the influence of the judiciary over the profession—the regulator over the regulated. Influence of the profession over the judiciary—the regulated over the regulator—implicates an entirely different set of concerns. In that context of judicial conduct regulation, appearances of excessive closeness between judges and lawyers can raise doubts as to courts' efficacy in regulating the practice of law. Such appearances lend credence to the theory that the profession has moved closer to capturing its primary regulator, particularly when combined with two additional factors: state judiciaries' delegation of most aspects of attorney conduct regulation back to the bar and judges' general reluctance to sanction instances of lawyer misconduct in court.<sup>158</sup> These appearances trigger increased calls for outside regulation, which represents a direct threat to professional independence.<sup>159</sup>

Specific provisions of the ABA's judicial conduct codes—namely, the preferential access provisions—are also problematic for the institutional legitimacy and independence of the profession. Much as they do for judges, these

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against government policies with which they have disagreed. It was, of course, government lawyers who validated and defended these policies in the first place. But the question of the proper kind and extent of professional independence of government lawyers is distinct from that of the independence of the profession at large. See Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931 (2008). For more examples of lawyers opposing the state, see Robin D. Barnes, *Natural Legal Guardians of Judicial Independence and Academic Freedom*, 77 FORDHAM L. REV. 1453, 1456 (2009).

156. MODEL RULES OF PROF'L CONDUCT pmbll., at 10-11 (1983).

157. *Id.* at 11.

158. Barton, *Institutional Analysis*, *supra* note 17, at 1168. See generally Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the “Captured” Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457 (2002) (arguing that the defendant-favorable characteristics of the tort of legal malpractice evidence the bar's capture of the judiciary).

159. See Barton, *Institutional Analysis*, *supra* note 17, at 1168; see also Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 657 (2006) (“Over the last quarter century, the deficiencies in self-regulation have attracted growing attention. Legislators, administrative agencies, federal courts, and malpractice insurance companies have come to play an increasing role in professional governance.”).

provisions give rise to problematic appearances, if not realities. For example, provisions that allow lawyers to extend social invitations and gifts to judges and to reimburse judges' costs in attending trips and seminars signal that savvy lawyers can and do curry favor with judges. For many litigants, this appearance may reinforce the notion that winning in court is a matter of retaining the right lawyer, not of having a meritorious claim. For criminal defendants, it may offer another reason to distrust lawyers. Defendants may interpret close and comfortable interactions between a judge and defense counsel—particularly court-appointed defense counsel—as evidence that counsel's loyalty lies with the judge and with the court system, rather than with the defendant.<sup>160</sup>

Broadening from the effects on individual litigants to those on society at large, perceptions that lawyers exert special influence over judges may exacerbate existing mistrust of lawyers. Some commentators have attributed this mistrust to an understanding of the profession as an antidemocratic force in society. Professor Rana recently explained that, “[w]hile all citizens are supposed to have an equal voice in controlling public policy, lawyers seemingly embody a separate caste, able to manipulate elected representatives and assert undue pressure on political life.”<sup>161</sup> Offering support for this theory, a 2002 ABA study concluded that declining public perceptions of the profession are tied to discomfort “with the connections that lawyers have with politics, the judiciary, government, big business, and law enforcement,”<sup>162</sup> as well as to fears that these connections allow lawyers “not only to play the system, but also to shape that very system.”<sup>163</sup> The bar's success in drafting and securing adoption of the preferential access provisions could be viewed as a vivid and troubling illustration of the bar using its connections to shape the legal system to its own advantage.

Through the reform process, the bar undoubtedly increased its own power at the expense of judicial power. But the resulting integration of interests proved problematic for both institutions. It weakened the checks that more independent judiciaries and a more independent profession could exercise over each other. And it lessened the ability of each to mobilize in the face of threats to political liberalism. The bar's role in judicial conduct reform

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160. See Michael C. Krikava & Charlann E. Winking, *The Right of an Indigent Criminal Defendant To Proceed Pro Se on Appeal: By Statute or Constitution, a Necessary Evil*, 15 WM. MITCHELL L. REV. 103, 119 n.76 (1989) (noting instances of mistrust of public defenders by criminal defendants).

161. Rana, *supra* note 146, at 1665; see also WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* 313-14 (2003) (arguing that while the democratic process is flawed, the right of self-governance should not be turned over to a new ruling class of unaccountable lawyers).

162. Leo J. Shapiro & Assocs., *Public Perceptions of Lawyers: Consumer Research Findings*, 2002 A.B.A. SEC. LITIG. 4.

163. *Id.*



therefore harmed its own institutional position along with the positions of state judiciaries.

### III. PROPOSALS FOR REFORM: MOVING TOWARD COLLABORATIVE GOVERNANCE

In this concluding Part, I offer preliminary suggestions for reform, addressing both the ABA's drafting of the Model Codes and states' adoption of them. I begin by describing characteristics of an ideal bench-bar relationship, in which close ties allow judges and lawyers to cooperate, collaborate, and together mobilize in furtherance of political liberalism. I then examine the challenges of broad-based reform and offer a series of predicate steps that may address these challenges in order to enable reform. I suggest a flexible model of collaborative governance, which will bring existing relationships into closer alignment with the ideal, and I close by proposing specific reforms to the codes of conduct, aimed at reshaping the profession's relationships with state judiciaries.

#### A. *An Ideal Model*

That the bar's role in judicial conduct regulation gave rise to problematically tight relationships, which opened the door to interested outcomes, does not mean that close ties are never desirable. Nor does it suggest that lawyers should not participate in judicial conduct regulation. Designed appropriately, close ties play a central role in an ideal model of the bench-bar relationship. They allow the profession and judiciaries to participate in a natural and desirable community of interests.<sup>164</sup> They enable judges and lawyers to work together in the litigation process and the administration of justice, and in promoting the values of political liberalism.

The most fundamental tie between our country's judiciaries and the legal profession, which an ideal model will necessarily accept, is the shared training of judges and lawyers. Most judges, and virtually all judges of federal and state constitutional courts, were trained as lawyers.<sup>165</sup> As a result, lawyers and judges share a legal education and similar professional experiences. Judges are often drawn from among the bar's most competent and respected members,<sup>166</sup> and, following their judicial tenure, often rejoin the practicing bar either in government positions or private practice.

Shared legal training ensures that judges and lawyers have the necessary expertise to understand, shape, and apply doctrines of procedural and substantive law. This training also prepares them to work together effectively through the litigation process. Lawyers support the work of judges by, among other things, bringing claims and disputes before the courts while filtering out base-

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164. See Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1709 (2004).

165. PROVINE, *supra* note 38, at 1.

166. Barton, *Institutional Analysis*, *supra* note 17, at 1197.

less or clearly frivolous claims, developing their arguments through discovery and research, and advancing their positions through briefing and oral advocacy.<sup>167</sup> Judges, for their part, provide leadership and guidance in matters of substantive law and procedure.

Common training and experience creates the potential for judges and lawyers to work together in promoting competent and ethical conduct. Judges bring to the regulation of attorney conduct an understanding of the realities of legal practice. They can also serve as a valuable check on lawyer self-interest.<sup>168</sup> Lawyers bring to the regulation of judicial conduct understanding of the critical importance of decisional and institutional independence, as well as sensitivity to the ever-changing realities of legal practice. They can also check self-interested judicial behavior and promote public accountability through mechanisms such as judicial performance evaluations.<sup>169</sup> The involvement of lawyers in the regulation of the bench, and courts in the regulation of the bar, can therefore increase public confidence in both institutions, which in turn promotes their legitimacy and independence.

Ideally, judges' and lawyers' shared expertise and training, and shared commitment to high ethical and competency standards, would allow bench-bar cooperation to move beyond the litigation process and to facilitate the development of the law and the legal system more broadly. As Professors Halliday, Karpik, and Feeley have theorized, close bench-bar ties confer political efficacy, which judges and lawyers can use to promote political liberalism in a number of ways.<sup>170</sup> Judges and lawyers frequently and fruitfully collaborate on initiatives to increase access to justice and to improve the efficiency of the courts.<sup>171</sup> Lawyers advance claims, and courts provide forums, to establish and protect core procedural rights and political freedoms.<sup>172</sup> Lawyers advocate for the independence of judiciaries, and independent judiciaries can then moderate state power and check overreaching by the political branches.<sup>173</sup> By protecting political freedoms and limiting state power, lawyers and judges together facilitate and encourage

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167. *Id.* at 1191.

168. Judges can ensure that admissions standards and the rules governing practice prioritize the public's interests over the profession's interests. They can also ensure that individual lawyers accept and balance their roles as officers of the court with their roles and duties as representatives of clients. See Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 745 (1926) (explaining that the organized bar is "unable to look at procedural problems with the detachment the public interest demands").

169. See Geyh, *Paradise Lost*, *supra* note 111, at 1212-19.

170. See Halliday, Karpik & Feeley, *supra* note 8, at 7-8.

171. *Id.*

172. *Id.*

173. *Id.*

an engaged civil society, which holds all branches of government accountable.<sup>174</sup> Fulfilling their separate roles but working together in these ways, the profession and the judiciary would ideally rely on close ties to bolster the legitimacy and independence of both institutions, thereby promoting the values of political liberalism.

### *B. Predicates to Reform*

Before proposing reforms to foster this ideal relationship, some important caveats and preliminary steps are in order. I have focused largely on problems created by bar interests centralized through the ABA, but a number of other variables, such as state governance structures and politics, also promote and constrain the regulation of bench-bar relationships. The degree to which governance of state judiciaries is constitutionally or customarily left to the judiciaries themselves varies widely from state to state.<sup>175</sup> In some states, governance has long been shared between judiciaries and the coordinate branches of government, but in others, judiciaries have had almost exclusive autonomy in structuring their own governance. All states have unique political and professional resources<sup>176</sup> and cultures<sup>177</sup> that bear on bench-bar relationships. Accordingly, any model for reform needs to be general and flexible enough to accommodate a wide degree of state variation.

In addition to the difficulties presented by diverse legal systems, barriers to reform may be posed by the balance of power between bench and bar in many states. The state and territorial judiciaries comprise a panoply of distinct institutions, with little unity and significant turnover.<sup>178</sup> With reference to the creation

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174. *Id.*

175. See Charles Gardner Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMP. L. REV. 1041, 1051-54 (1995); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1871-75 (2001).

176. See Hershkoff, *supra* note 175, at 1891-92 (describing the relative lack of legislative resources at the state level as compared to the federal level).

177. New York provides an example of a state where bench and bar have made notable efforts to preclude problematic lawyer influence on judicial decision making. See, e.g., Press Release, N.Y. State Unif. Court Sys., Stringent Assignment Rule Aims To Protect Judicial Neutrality (June 28, 2011), [http://www.courts.state.ny.us/press/pr2011\\_03.shtml](http://www.courts.state.ny.us/press/pr2011_03.shtml) (announcing a new rule requiring recusal in any case where any lawyer or party contributed \$2500 or more to the judge's campaign in the preceding two years).

178. In addition to the state courts and District of Columbia courts, territorial courts exist in the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Independent State of Samoa.

of model codes, they are at a distinct disadvantage when facing the ABA, which unifies and coordinates state bar associations and acts as an authoritative voice of the profession.<sup>179</sup> Moreover, the majority of state judges depend on the support and favor of the practicing legal community for their careers—both for retaining their judicial office and for opportunities following their judicial tenure.<sup>180</sup> As a result, many state court judges lack incentives to temper the ABA's influence. They may be inclined to foster rather than to weaken ties with the bar. And the ties themselves are reinforcing. To the extent that they foster a normative community of lawyers and judges that values close relationships between bench and bar, state court judges are less likely to think that it is necessary to reform those relationships.

Given these realities, state judiciaries may need to recapture a certain amount of power in relation to the profession if reform is to be possible. To this end, reform efforts should pursue three preliminary lines of change. The first would address the structure of judicial service. Through election reform<sup>181</sup> and increased judicial pay,<sup>182</sup> state court judges could be relieved of their dependence on the practicing bar for judicial office and subsequent career

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179. See SCHEINGOLD & SARAT, *supra* note 22, at 26, 33; Burbank, *supra* note 164, at 1709-10.

180. In states with elected judiciaries, judges frequently rely on lawyers for campaign donations and votes. In states with merit selection plans, judges frequently rely on endorsements from state and local bar associations. See Barton, *Institutional Analysis*, *supra* note 17, at 1198-99.

181. New York is at the forefront of these efforts with a new rule, effective July 2011, which requires a judge to recuse herself in any case where a lawyer or party contributed \$2500 or more to the judge's campaign in the preceding two years. See *supra* note 177. Although the ABA appears to support such a rule following the Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), it has done little to facilitate actual change. See ABA STANDING COMM. OF JUDICIAL INDEPENDENCE, REPORT TO THE HOUSE OF DELEGATES Resolution 107 (2011), available at <http://www.abajournal.com/files/Resolution107.pdf>.

182. The ABA and other bar groups have played a vocal role in advocating for increased judicial pay. See ABA, *Statement of the American Bar Association on Federal Judicial Compensation* (2007), [http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/judiciary/2007apr19\\_judpayh\\_t.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/judiciary/2007apr19_judpayh_t.authcheckdam.pdf) (submitted for the Hearing Record of the Subcommittee on the Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary); Debra Cassens Weiss, *ABA Urges Supreme Court To Accept Case on Lack of Judicial Pay Raises*, A.B.A. J. (June 18, 2010), [http://www.abajournal.com/news/article/aba\\_urges\\_supreme\\_court\\_to\\_accept\\_case\\_on\\_lack\\_of\\_judicial\\_pay\\_raises/](http://www.abajournal.com/news/article/aba_urges_supreme_court_to_accept_case_on_lack_of_judicial_pay_raises/). Increased judicial pay would certainly ameliorate the dependency of many state judges on the practicing bar, but the ABA's efforts are not necessarily desirable. They have not been effective and are frequently dismissed as self-serving. Moreover, by emphasizing pay comparators from private practice rather than government, they underline and support the profession's position that judiciaries are a part of the profession rather than independent institutions.

opportunities. These steps are long-term and require significant political engagement and funding. Important work in these areas is ongoing.<sup>183</sup>

A second predicate line of change would seek to establish a countervailing normative community among state judges, capable of checking ABA influence. Many state judiciaries undoubtedly possess distinct and laudable professional judicial cultures. Taking steps to promote these communities—and to connect the many communities of judges across jurisdictions—could act as a powerful check on bar norms. It would also promote the effective administration of justice across jurisdictions by fostering communication among diverse judiciaries and court systems. If centrally coordinated, state judiciaries could effectively work to develop their own identity, norms, and sense of judicial professionalism, set apart and distinct from those of the practicing bar. Such organizations could also foster important interchanges among judiciaries to share knowledge and experiences of court management and judging, taking advantage of the fact that although our diverse legal systems create challenges to reform, they also offer opportunities for experimentation.<sup>184</sup> As examples, the Conference of Chief Justices,<sup>185</sup> the National Judicial College,<sup>186</sup> and the National Center for State

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183. Justice Sandra Day O'Connor has been heavily involved in reform initiatives since retiring. *See, e.g.*, Inst. for the Advancement of the Am. Legal Sys., *O'Connor Judicial Selection Initiative*, U. DENVER, [http://www.du.edu/legalinstitute/judicial\\_selection.html](http://www.du.edu/legalinstitute/judicial_selection.html) (last visited Oct. 20, 2011); Sandra Day O'Connor Project on the State of the Judiciary, *Sandra Day O'Connor Project on the State of the Judiciary*, GEORGETOWN LAW, <http://www.law.georgetown.edu/judiciary> (last visited Oct. 20, 2011). She has also made numerous speeches and been involved in numerous studies supporting these initiatives and proposing specific courses of reform. *See, e.g.*, Sandra Day O'Connor, Earl F. Nelson Lecture at the University of Missouri School of Law Symposium: The Essentials and Expendables of the Missouri Plan (Feb. 27, 2009), in 74 MO. L. REV. 479 (2009); ABA, JUSTICE IS THE BUSINESS OF THE GOVERNMENT: REPORT OF THE 2009 SUMMIT ON THE CRITICAL ROLE OF FAIR AND IMPARTIAL STATE COURTS (2009), available at <http://www.lwv.org/Content/ContentGroups/Projects/JudicialIndependence/Miscellaneous/summitreport.pdf>.
184. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 398-99 (2004); Sunderland, *supra* note 168, at 744.
185. The Conference of Chief Justices was established in 1949 to “provide an opportunity for the highest judicial officers of the states to meet and discuss matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems,” and to “make recommendations and bring about improvements on such matters.” *About CCJ*, CONF. CHIEF JUSTICES, <http://ccj.ncsc.dni.us/about.html> (last visited Oct. 20, 2011).
186. *See* Robert Payant, *Ethical Training in the Profession: The Special Challenge of the Judiciary*, 58 LAW & CONTEMP. PROBS. 313, 313-15 (1995) (describing the establishment and purposes of the National Judicial College).

Courts<sup>187</sup> could expand their programs and activities to promote socialization and mutual support among the state judiciaries and to play a meaningful role in conduct regulation. Efforts along these lines are already bearing fruit.<sup>188</sup> Academic centers, such as the Dwight D. Opperman Institute of Judicial Administration at New York University School of Law<sup>189</sup> and the Duke Law Center for Judicial Studies,<sup>190</sup> could play a similar role in facilitating exchanges and fostering distinct judicial cultures.<sup>191</sup>

A third and final predicate step would be to require the profession to take greater responsibility in prioritizing its civic responsibilities over its private interests. The profession should recognize the obligations conferred by its monopoly status and take the position that it, like its lawyers, has a “special responsibility for the quality of justice.”<sup>192</sup> This position should manifest itself in a number of ways. The profession should advocate a more detached and professional stance on judicial conduct regulation. The ABA should step away from rhetoric painting judiciaries as a part of the profession and should instead promote a discourse and reality of the profession dedicated to service of judiciaries, clients, and the public at large. The ABA should recognize that including judicial identity and culture in its regulation activities, as distinct from bar identity and culture, is necessary to restore legitimacy to the process.

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187. The National Center for State Courts was established in 1971 to encourage state court collaboration to further efficiency in court administration. See NAT'L CENTER ST. COURTS, <http://www.ncsc.org> (last visited Oct. 20, 2011).

188. In a 2007 resolution, the Conference of Chief Justices opposed the ABA's proposal to eliminate from the Model Code the requirement that judges avoid the appearance of impropriety as an enforceable standard. James Podgers, *Judging Judicial Behavior*, 93 A.B.A. J. 61 (2007). The Conference's efforts were ultimately successful in persuading the ABA to retain the enforceable standard. See *id.*

189. *Dwight D. Opperman Inst. of Judicial Admin.*, NYU LAW, <http://www.law.nyu.edu/centers/judicial/index.htm> (last visited Oct. 20, 2011). The Institute hosts an annual lecture series addressing state judiciaries and, last summer, hosted a conference titled “Florence Conference: Judicial Cooperation Among State Courts in Europe and the U.S.: A Comparative Approach.” *Id.*; see also *Florence Conference: Judicial Cooperation Among State Courts in Europe and the U.S.*, NYU LAW, <http://www.law.nyu.edu/centers/judicial/programs/florenceconference/index.htm> (last visited Oct. 20, 2011).

190. *Duke Law Ctr. for Judicial Studies*, DUKE LAW, <http://www.law.duke.edu/judicialstudies/index> (last visited Oct. 20, 2011).

191. Cf. Halliday, Karpik & Feeley, *supra* note 8, at 8-9 (discussing the role of the legal academy as an “integral component[] in the modern legal complex”).

192. MODEL RULES OF PROF'L CONDUCT pmb1. (1983).

### C. *Theoretical Contours of Reform*

If the core obstacles to reform are addressed through these predicate steps, the process of judicial conduct regulation could be structured to harness the synergies between bench and bar while checking the possibility of interested outcomes. With this as a goal, I propose voluntary reforms to move the process of code revision and enactment toward a model of collaborative governance. Collaborative governance is directed toward building consensus among stakeholders to balance competing public and private interests through a process of engaged negotiation.<sup>193</sup> Both at the ABA level and the state level, this type of deliberative problem-solving approach<sup>194</sup> could provide a flexible model, adaptable to the needs of different states. It will require reforms guided by the four principles of voluntariness, broad-based stakeholder participation, problem-solving engagement, and transparency.

#### 1. Voluntariness

A proposal for voluntary reform may initially appear unrealistic, but it will become far more realistic as lawyers and judges recognize that the likely alternative is a forced reorientation of the relationship through increased external regulation.<sup>195</sup> Increased external regulation of one or both institutions may be advantageous in decreasing problematic appearances and better aligning professional interests with public interests<sup>196</sup>—certainly, the specter of external regulation plays an important role in maintaining checks and balances on insti-

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193. See generally Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982-1983) (proposing this approach to administrative rulemaking).

194. See Lobel, *supra* note 184, at 377-78.

195. See Barton, *Institutional Analysis*, *supra* note 17, at 1168 (arguing against courts as the appropriate regulator of the legal profession); Martha Neil, *100 Law Profs Lobby Congress To Apply Ethics Code to US Supreme Court Justices*, A.B.A. J., Feb. 23, 2011, available at [http://www.abajournal.com/news/article/100\\_law\\_prof\\_lobby\\_congress\\_to\\_apply\\_ethics\\_code\\_to\\_us\\_supreme\\_court\\_justi/](http://www.abajournal.com/news/article/100_law_prof_lobby_congress_to_apply_ethics_code_to_us_supreme_court_justi/) (asking Congress to apply an ethics code to U.S. Supreme Court Justices); Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301, 325 (2010) (arguing for outside regulation of the judiciary through the creation of an inspector general position).

196. The profession is already subject to certain forms of outside regulation. For example, administrative agencies promulgate and enforce rules governing lawyers who practice before them, and private parties can hold lawyers liable for professional malpractice and breach of fiduciary duty. See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1147 (2009) (arguing that “[l]aw in the United States is a heavily regulated industry”). But on the whole, as compared to other systems, the American legal profession retains a high degree of autonomy. See BARTON, *THE LAWYER-JUDGE BIAS*, *supra* note 17, at 131-32.

tutional power.<sup>197</sup> But actualized and extensive external regulation could also infringe upon the independence of one or both institutions and diminish their ability to mobilize in furtherance of political liberalism, particularly in future moments of crisis.<sup>198</sup> In light of the uncertain implications of increased external regulation, the profession and judiciaries should preempt a forced reorientation through voluntary reform, which could also help restore public trust and confidence in both bench and bar.<sup>199</sup> Both institutions should recognize that reforms need not advantage one at the expense of the other.<sup>200</sup> A reshaped relationship could be mutually beneficial, increasing the legitimacy and independence of both institutions.<sup>201</sup>

## 2. Stakeholder Participation

Through a process of consensus building, the collaborative governance model harnesses the benefits that diverse interests may bring to the negotiation table.<sup>202</sup> It acknowledges the frequent intertwinement between public and private interests, of which the bar's dual orientations toward public and private interests is a salient example.<sup>203</sup> In order for the model to work properly, however, interested stakeholders must play an active role in the negotiation process.<sup>204</sup>

In the context of judicial conduct regulation, the stakeholders include judiciaries, the practicing bar, other private interest groups, and legislatures. As demonstrated, the bar has already taken an active role, but the role for judicial

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197. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 647 (2000).

198. See Halliday, Karpik & Feeley, *supra* note 8, at 34; *supra* notes 159-161 and accompanying text.

199. Lobel, *supra* note 184, at 395.

200. See *id.* at 458; see also Gad Barzilai, *The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent*, in *FIGHTING FOR POLITICAL FREEDOM*, *supra* note 7, at 247, 264-67 (describing how, in Israel, even despite a relationship occasionally marked by opposition, bench and bar successfully increased the prestige of both institutions).

201. Notably, continued involvement of the bar in the reform process need not entirely preempt other forms of governance. Substantive statutory and case law beyond the conduct codes, such as criminal law, would continue to apply to the conduct of both judges and lawyers.

202. Lobel, *supra* note 184, at 380; Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 421-22 (2000).

203. Freeman, *supra* note 197, at 547-48; Philip J. Harter, *Collaboration: The Future of Governance*, 2009 J. DISP. RESOL. 411, 412 (2009); Lobel, *supra* note 184, at 374.

204. See sources cited *supra* note 202.



input in the standard-setting process should be expanded. This could be facilitated through ABA cooperation with state judicial organizations<sup>205</sup> and other judicial groups.<sup>206</sup> The ABA should also seek participation by a wide variety of individual judges from as many different federal and state courts as possible. These judges should be encouraged to scrutinize bar positions on appropriate conduct standards and to resist those that would cast a pall on judicial legitimacy or that would undermine judicial independence.

Although membership in the ABA or other bar organizations could create an appearance of improper influence,<sup>207</sup> judicial membership and leadership in such voluntary organizations alone need not be problematic if judges make clear that their role is to direct and engage with, rather than to be directed by, the profession. This is especially so if judges focus their participation and leadership on matters directly relevant to courts and judiciaries. Alternatively, bar associations could allow judges to participate in judicial and court reform efforts without requiring or actively seeking their membership. In all cases, the ABA and other associations must make the rhetorical concession to stop touting judge membership as a means of increasing their own organizational legitimacy.<sup>208</sup>

Judiciary and bar involvement in the revision of the Model Codes and in their enactment in the states, while critical, is insufficient. The involvement of public interest groups concerned with judicial administration is necessary in order to create adequate checks on interested outcomes.<sup>209</sup> In soliciting comments and suggestions on draft revisions, the ABA has taken important steps in this regard.<sup>210</sup> Through greater publicity and targeted efforts, it should solicit feedback from a wider range of public interest groups. It should also give public, reasoned responses to all submitted comments.

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205. See Lobel, *supra* note 184, at 395; see also, e.g., *About State Chapters*, AM. JUDICATURE SOC'Y, [http://www.ajs.org/ajs/statechapter/ajs\\_aboutsc.asp](http://www.ajs.org/ajs/statechapter/ajs_aboutsc.asp) (last visited Oct. 27, 2011); *About CJA*, CAL. JUDGES ASS'N, [http://www.caljudges.org/about\\_cja.vp.html](http://www.caljudges.org/about_cja.vp.html) (last visited Oct. 27, 2011); *CSJA Mission Statement*, CENT. STATES JUDGES ASS'N, <http://www.csja.net> (last visited Oct. 27, 2011); COUNTY JUDGES & COMMISSIONERS ASS'N TEX., <http://www.cjcat.org/assoc/cms> (last visited Oct. 27, 2011); KY. COUNTY JUDGE/EXECUTIVE ASS'N, <http://www.kcjea.org> (last visited Oct. 27, 2011); MICH. DISTRICT JUDGES ASS'N, <http://www.mdja.org> (last visited Oct. 27, 2011); WASH. ST. DISTRICT & MUN. CT. JUDGES ASS'N, <http://dmcja.org> (last visited Oct. 27, 2011).

206. See *supra* notes 185-188 and accompanying text.

207. See *supra* note 126.

208. Womble, Hazard & Moser, *supra* note 126, at 10.

209. See Seidenfeld, *supra* note 202, at 421-22 (noting that public interest group involvement is an important check on collusion).

210. Cynthia Gray, *The 2007 ABA Model Code: Taking Judicial Ethics Standards to the Next Level*, 90 JUDICATURE 284, 284 (2007).

The participation of legislative interests is also desirable. Encouraging this involvement would be a logical and relatively straightforward step in states in which legislatures already play a role in judicial administration. It would be equally desirable in states in which the legislature's role is limited. By involving legislatures as stakeholders in the process, the legitimacy of reform could be strengthened and the likelihood of involuntary regulation lessened.<sup>211</sup>

### 3. Problem-Solving Engagement

A collaborative governance approach would allow participating stakeholders to advocate their interests rather than obscuring them.<sup>212</sup> Judicial and bar interests would sometimes diverge, and, where they did, both institutions would need to faithfully represent their own interests while challenging and checking those of the other.<sup>213</sup> The conflict that would sometimes result would be a necessary aspect of healthy engagement, and it would signal that the compromises required by close institutional relationships were not being produced in informal and private settings, where the aligned self-interest of bench and bar could take precedence over the public's interest. Rather, negotiated compromises would represent the result of healthy, vigorous, and public opposition between the interests and orientations of bench and bar.<sup>214</sup>

Sometimes, this could lead to public conflict, but it need not lead to open hostility or interfere with agreeable and productive working relationships. Lawyers and judges share training in advocacy, which prepares them to engage in an adversarial process while maintaining a high level of collegiality in their working relationships. And the collaborative governance process itself often leads parties to work with, instead of against, one another.<sup>215</sup>

### 4. Transparency

Reforms should also require increased transparency in bench-bar relationships. If this transparency reveals fair dealing and desirable bench-bar cooperation, it would promote public trust and confidence.<sup>216</sup> Even if the transparency

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211. See Freeman, *supra* note 197, at 647, 665.

212. Harter, *supra* note 203, at 420-21; Lobel, *supra* note 184, at 453.

213. For example, Barzilai describes bar criticism of the Israeli Supreme Court, which ultimately was resolved by the creation of an Office of the Ombudsman within the judiciary to deal with public complaints and improve judicial accountability. See Barzilai, *supra* note 200, at 266.

214. See Lobel, *supra* note 184, at 380.

215. See *id.* at 379.

216. See Miller, *supra* note 4, at 468 (observing that secrecy in judicial discipline proceedings "exacerbate[s] the perception that judicial conduct commissions are too cozy with judges").

reveals actual or apparent impropriety, it would still have a desirable effect<sup>217</sup> by increasing pressure on judges and lawyers to reform their conduct and to think carefully about the appearances to which their interactions might give rise. In all cases, it would facilitate informed public discussion<sup>218</sup> and participation in the standard-setting and conduct regulation processes.<sup>219</sup>

Electronic media provide powerful tools for increasing transparency, but publication alone is not enough. Especially in a technical area such as procedural law, it is important that information be sorted, stripped of jargon, and presented in a readily intelligible way. The goal must be not only to disseminate relevant information, but also to do so in a manner that is readily accessible and easily digestible by non-experts.<sup>220</sup>

In holding public hearings during the revisions process and posting draft revisions and submitted comments on its website,<sup>221</sup> the ABA has made important efforts in this regard, but additional efforts are necessary. For example, both the ABA and state review committees should make all meeting minutes publicly available and easily accessible. This would prompt increased public interest and input in judicial conduct regulation, while also acting as an independent check on interested outcomes.<sup>222</sup>

Increased transparency should extend beyond the promulgation of the codes to their implementation and enforcement. In many states, complaints and resulting disciplinary proceedings remain permanently confidential unless and until formal discipline is recommended or imposed.<sup>223</sup> As a result, previous

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217. Cf. ABA CTR. FOR PROF'L RESPONSIBILITY, *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT* 33 (1992) (concluding that a desire to protect lawyers' reputations did not justify confidential disciplinary hearings, which contributed to public distrust of lawyer discipline, and that they should therefore be opened to public view).
218. See Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process*, 77 GEO. WASH. L. REV. 924, 927-28 (2009) (discussing the instrumental value of transparency in government processes in facilitating meaningful public participation).
219. The ABA revision process leading up to the 2007 Model Code entailed public hearings at which the drafting committee heard testimony and received comments, but participation was almost exclusively by lawyers, judges, and law-related organizations. Harrison, *supra* note 18, at 258. Increased transparency would increase the likelihood of broader public participation.
220. See Lobel, *supra* note 184, at 455-56.
221. Gray, *supra* note 210, at 284.
222. See generally AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (discussing the value of transparency and openness in deliberative democracy).
223. All fifty states keep judicial disciplinary proceedings confidential, at least until a judicial conduct commission brings formal charges. Twenty-two states make proceedings public once a commission, after a finding of probable cause, files formal

cases rarely offer guidance regarding the line between appropriate and inappropriate interactions and behaviors. To remedy this, state judicial conduct commissions should make public all complaints and their disposition. Where possible, they should offer sufficiently detailed explanations to provide information and guidance for other judges. States should also increase the availability of prospective guidance. States that do not currently issue advisory opinions should begin to do so,<sup>224</sup> and all states should consider more detailed code commentaries that illustrate and distinguish between permissible and impermissible behaviors and interactions.

Finally, states should track and make data available regarding the disposition of complaints. Some states currently track complaints, but many do not.<sup>225</sup> Those that do track complaints appear to record only limited data regarding numbers of complaints filed and pursued; they offer little information regarding complaints that are summarily dismissed, which represent the vast majority of complaints.<sup>226</sup> Transparent and meaningful data would provide important information regarding problematic behaviors and flawed enforcement mechanisms, which could in turn lead to useful recommendations for reform.

#### D. Proposed Code Revisions

I have proposed that a voluntary reorientation of bench-bar relationships toward a model of collaborative governance would preserve and promote judicial and professional legitimacy and independence. Specific reforms to the preferential access provisions themselves—particularly to those of the ABA model codes, used as a template in many states—can aid in the creation of these relationships. Regarding some issues, such as participation in fundraising activities, the revised provisions should treat law-related and non-law-related individuals and organizations equally. Regarding other issues, such as receipt of gifts and social hospitality, the revised provisions should hold lawyers and law-related organizations to a higher standard than other members of the public.

Starting with the former category, the ABA model codes and state-enacted codes should prohibit judges from soliciting funds and from directly participating in fundraising activities for all types of organizations.<sup>227</sup> Regardless of the

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charges; nineteen states make proceedings public once a commission makes a recommendation of discipline to the state supreme court; and nine states and the District of Columbia make proceedings public only when a supreme court orders a sanction. See SHAMAN, LUBET & ALFINI, *supra* note 135, § 13.15, at 470.

224. Thirty-four states issue advisory opinions. ALFINI ET AL., *supra* note 34, § 1.12.

225. See *Conduct Organizations Share Complaint and Budget Data*, 20 JUD. CONDUCT REP. 1 (1999); *Discipline—State Court Judges*, CITIZENS JUD. ACCOUNTABILITY, <http://www.judicialaccountability.org/judicialaccountability3.htm> (last visited Oct. 20, 2011).

226. *Discipline—State Court Judges*, *supra* note 225.

227. Cf. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(C) (2011).

type of organization, the risk that potential donors or participants will feel pressure to contribute is high, and the appearance of a judge using the prestige of office to procure donations is problematic. The codes should also require heightened disclosure requirements when judges attend fee-waived or reimbursed seminars, even if they are law-related or legal programs.<sup>228</sup> They should require not only that judges disclose attendance but also that program providers disclose detailed information regarding content and funding.<sup>229</sup> Disclosure should entail posting the information in a searchable format on the court's website in order to make it easily accessible, understandable, and reviewable by the public.<sup>230</sup> This step is of particular importance for jurisdictions that continue to use elections as a part of judicial selection or retention. Elections can be effective accountability mechanisms only if the electorate is provided with transparent and meaningful information regarding judicial conduct.

Receipt of invitations from both law-related and non-law-related nonprofit organizations should be subject to the same provisions that govern attendance at fee-waived seminars. More specifically, the determination of whether acceptance is permissible should be made by the individual judge, considering such factors as the source of funding, the mission of the sponsoring organization, the purpose of the event, and the appearance that will be created by attendance. Where a judge decides to accept an invitation from a law-related or other nonprofit group, the judge should be required to disclose acceptance, and the sponsoring group should be required to disclose detailed information regarding the amount and nature of the invitation's value and the schedule and purpose of the event.

Regarding the latter category, receipt of gifts and social hospitality, code provisions should be revised to treat lawyers and law-related organizations more strictly than non-lawyers and non-law-related organizations. Currently,

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228. See generally STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* (6th ed. 2006) (describing transparency as a cornerstone of accountable government); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (discussing the value of transparency and openness in deliberative democracy).
229. This would align with federal requirements. See *Judicial Conference Policy on Judges' Attendance at Privately Funded Educational Programs*, U.S. COURTS, <http://www.uscourts.gov/uscourts/RulesAndPolicies/SeminarDisclosure/judbrappc906c.pdf> (last visited Oct. 27, 2011). The ABA declined to adopt similar provisions on the sole and inadequate ground that they "would be . . . difficult to implement throughout all the state jurisdictions." 2007 REPORTER'S EXPLANATION, *supra* note 86, at 53.
230. This is all that is required under the three versions of the Model Code. See MODEL CODE OF JUDICIAL CONDUCT R. 3.15 (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 4H(1)-(2) (1990); CODE OF JUDICIAL CONDUCT Canon 6C (1972). The 2007 version provides for the information to be posted on the court's website "when technically feasible," but does not define or explain when it is and is not "technically feasible." MODEL CODE OF JUDICIAL CONDUCT R. 3.15 (2007).

the ABA's model codes and most state-enacted codes permit judges to accept gifts and things of value from all lawyers, including lawyers appearing before them, if the gifts are reported.<sup>231</sup> In recognition of the problematic appearances that can arise as a result of these provisions, the codes should be revised to prohibit a judge from accepting gifts or things of value from any lawyer or law firm unless the lawyer or firm is on the judge's recusal list.<sup>232</sup> New provisions should also prohibit a judge from accepting invitations to functions or events from individual lawyers or law firms—again, unless they are already on the judge's recusal list.

## CONCLUSION

The judicial conduct regulation reform movement, though of salutary purpose, exemplified ongoing efforts by the organized bar to regulate its regulator, favoring itself in the process. The bar promoted an inverted vision of the relationship between the profession and the judiciary—one in which judiciaries and judges fell under the purview of the profession—such that the already close relationships between the profession and the judiciary grew even closer. Integration of the profession and the judiciary can mean increased political efficacy, but in this case, it has come at too high of a cost to the profession and state judiciaries, as well as to core values of political liberalism. I have proposed that the public's interests may be best served by reorienting bench-bar relationships toward a model of collaborative governance, in which a strong, independent legal profession engages with strong, independent state judiciaries.

The contours of the judicial conduct regulation reform movement and the resulting codes of conduct mark only the beginning. Much work remains to be done to evaluate the precise nature and closeness of relationships between the legal profession and state judiciaries—including important comparative work that could lead to innovative solutions. In the meantime, it is incumbent upon the ABA, state professional groups, and state judiciaries to begin to restore independence to the profession and to judiciaries—and, in doing so, to restore public trust and to ensure that the profession and judiciaries are able to protect the values of political liberalism. We cannot know what shape future threats to our democratic values will take or when they will arise. But we can help ensure that judiciaries and the profession alike are independent and powerful enough to serve and protect each other, and in turn to serve and protect the democratic values upon which our legal system rests.

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231. See *supra* notes 106-107 and accompanying text.

232. *But see* Geyh, *supra* note 68, at 41-43 (discussing the problems with relying on disqualification as a means of addressing appearances of impropriety and bias).