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Is Judicial Discipline in New York State a Threat to Judicial Independence?

Gerald Stern

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Articles

Is Judicial Discipline in New York State a Threat to Judicial Independence?

Gerald Stern†

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I. Introduction

In the 100 years prior to 1975, sixteen judges in the New York State court system were removed from office,¹ seven were

1. The 16 decisions in which judges were removed from 1875 to 1974 were: *In re Quigley*, 32 N.Y.S. 828 (Sup. Ct. 2d Dep't 1895); *In re Bolte*, 97 A.D. 551, 90 N.Y.S. 499 (1st Dep't 1904); *In re Droege*, 129 A.D. 866, 114 N.Y.S. 375 (1st Dep't), *appeal dismissed*, 197 N.Y. 44, 90 N.E. 340 (1909); *In re Vitale*, 228 A.D. 800 (1st Dep't 1930); *In re Norris*, 233 A.D. 842 (1st Dep't 1931); *In re Silberman* (A.D. 1st Dep't July 2, 1931) (The *Vitale*, *Norris* and *Silberman* decisions are discussed in H. MITGANG, *THE MAN WHO RODE THE TIGER, THE LIFE AND TIMES OF JUDGE SAMUEL SEABURY* 189, 191-96 (1963), an excellent chronicle of the famous Seabury investigation in the early 1930's of corruption in New York City government.); *Voorhees v. Kopler*, 239 A.D. 83, 265 N.Y.S. 532 (4th Dep't 1933); *Kane v. Rudich*, 256 A.D. 586, 10 N.Y.S.2d 929 (2d Dep't 1939); *In re Capshaw*, 258 A.D. 470, 17 N.Y.S.2d 172 (1st Dep't), *mot. denied*, 258 A.D. 1053, 18 N.Y.S.2d 741 (1st Dep't 1940); *In re Friedman*, 12 N.Y.2d (a),(d) (Ct. on the Judiciary 1963), *mot. denied*, *id.* at (e), *appeal dismissed*, 19 A.D.2d 120, 241 N.Y.S.2d 793 (3d Dep't 1963), *appeal dismissed*, *Friedman v. Court on the Judiciary*, 375 U.S. 10 (1963); *In re Osterman*, 13 N.Y.2d (a),(l) (Ct on the Judiciary 1963); *In re Sarisohn*, 26 A.D.2d 388, 275 N.Y.S.2d 355 (2d Dep't 1966), *lv. to appeal denied*, 19 N.Y.2d 689, 27 A.D.2d 466, 280 N.Y.S.2d 237 (2d Dep't), *rev'd on other grounds*, 21 N.Y.2d 36, 233 N.E.2d 276, 286 N.Y.S.2d 255, *on remand* 29 A.D.2d 91, 286 N.Y.S.2d 336 (2d Dep't 1967), *aff'd*, 22 N.Y.2d 808, 239 N.E.2d 649, 292 N.Y.S.2d 907, *mot. to amend remittitur granted*, 22 N.Y.2d 910, 242 N.E.2d 76, 295 N.Y.S.2d 37, *cert. denied*, 393 U.S. 1116 (1968); *In re Pfingst*, 33 N.Y.2d (a),(ii) (Ct on the Judiciary 1973); *In re Hayes*, 43 A.D.2d 872, 351

publicly censured,² and fourteen were mildly rebuked in re-

N.Y.S.2d 30 (3d Dep't 1974), *appeal dismissed*, 35 N.Y.2d 755 (1974); *Bartlett v. Enea*, 45 A.D.2d 471, 359 N.Y.S.2d 364 (4th Dep't 1974); *In re Schamel*, 46 A.D.2d 236, 362 N.Y.S.2d 39 (3d Dep't 1974), *appeal dismissed*, 36 N.Y.2d 713 (1975); *In re Schamel (II)*, 49 A.D.2d 786, 372 N.Y.S.2d 742 (3d Dep't 1975), *appeal dismissed*, 38 N.Y.2d 826 (1975). Two other removal decisions in the mid-1970's were unrelated to proceedings of the Commission on Judicial Conduct. They were: *Bartlett v. Bedient*, 47 A.D.2d 389, 366 N.Y.S.2d 735 (4th Dep't 1975); and *Bartlett v. Flynn*, 50 A.D.2d 401, 378 N.Y.S.2d 145 (4th Dep't), *appeal dismissed*, 39 N.Y.2d 942 (1976).

The only judge ever removed after an impeachment proceeding was Supreme Court Justice George G. Barnard. The court that convicted Justice Barnard in 1872 was comprised of the judges of the Court of Appeals, the State Senate and the Lieutenant Governor, who presided. IV C. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 605-07 (1906); 6 ALB. L.J. 121 (1872). The only judge removed by the State Senate on charges brought by the Governor was John H. McCunn, a New York City Superior Court Justice. By a vote of 28-0 Justice McCunn was removed in 1872. *Id.* at 585-86. Charges against two other judges were dismissed by the state senate. The judges were Horace G. Prindle and George M. Curtis. *Id.* at 583-85, 586-87. The Appellate Division, Fourth Judicial Department, in *Newman v. Strobel*, 236 A.D. 371, 375, 259 N.Y.S. 402, 406-07 (4th Dep't 1932), in discussing the issue whether a public official may be disciplined for misconduct in a prior term of office, inaccurately stated that Judge Prindle had been removed from office.

2. Six formal censures by the Appellate Divisions were reported in: *In re Roosevelt*, 232 A.D. 23, 25, 248 N.Y.S. 312, 314 (2d Dep't 1931) (court referred to a prior censure of Magistrate Rudich, who, eight years later, was removed in *Kane v. Rudich*, 256 A.D. 586, 10 N.Y.S.2d 929 (2d Dep't 1939)); *Murtagh v. Maglio*, 9 A.D.2d 515, 195 N.Y.S.2d 900 (2d Dep't 1960); *In re Van Brocklin*, 26 A.D.2d 299, 274 N.Y.S.2d 57 (4th Dep't 1966); *In re Suglia*, 36 A.D.2d 326, 320 N.Y.S.2d 352 (1st Dep't 1971); *In re DiLorenzo*, 38 A.D.2d 401, 330 N.Y.S.2d 394 (2d Dep't 1972); *In re Maidman*, 42 A.D.2d 44, 345 N.Y.S.2d 82 (2d Dep't 1973) (Judge Maidman subsequently was suspended for four months for ticket-fixing in *In re Maidman*, 47 N.Y.2d (a), (cccc) (Ct. on the Judiciary 1979)). Unrelated to Commission proceedings was a 1976 censure in *In re Hopeck*, 54 A.D.2d 35, 386 N.Y.S.2d 717 (3d Dep't 1976); Judge Hopeck subsequently was censured for ticket-fixing, authorizing his wife to preside in court in his absence, engaging in ex parte communications with a prosecutor, presiding over a criminal case in which his wife was related to the defendant's wife, and leaving the bench while court was in session "to argue with an attorney outside the courthouse." *In re Hopeck*, 1981 Annual Report 133 (Comm'n on Judicial Conduct Aug. 15, 1980). The Commission stated that if it had the authority to suspend the judge as an alternative to censure, it would have done so. *Id.* at 137. Five Commission members voted to remove the judge. *Id.*

In 1944 the Governor urged the Assembly to investigate allegations that Gilbert V. Schenck, a Supreme Court Justice of the Appellate Division, Third Judicial Department, had discussed pending court matters with the Albany Democratic leader and had attempted to influence his fellow judges on the Appellate Division to reach a decision favorable to the Albany County Democratic party. A special Assembly committee found the judge's conduct "highly improper, inexcusable and unjustifiable" but recommended only that the judge be severely reprimanded. The Assembly censured Judge Schenck in January 1946, a disciplinary matter that was believed to be the impetus for the Governor's proposal to establish a Court on the Judiciary to discipline superior court judges. Gasperini, Anderson & McGinley, *Judicial Removal in New York: A New Look*, 40

ported decisions that closed, dismissed or otherwise terminated disciplinary proceedings.³ By contrast, in the twelve years since 1975, more than 300 judges have been publicly disciplined, including seventy-five who have been removed.⁴ While opinions

FORDHAM L. REV. 1, 13-15 (1971).

3. The 14 public, mild rebukes were: *In re Watson*, Brooklyn Daily Eagle, Feb. 20, 1895, at 12, col. 1-2 (Sup. Ct. 2d Dep't Feb. 20, 1895); *In re Hirschfield*, 229 A.D. 654, 241 N.Y.S. 601 (2d Dep't 1930); *In re Tompkins Square Holding Co. v. Gerson*, 255 A.D. 48, 5 N.Y.S.2d 813 (1st Dep't 1938); *In re Barlow*, 141 A.D. 640, 127 N.Y.S. 542 (1st Dep't 1910); *In re Snitkin*, 161 A.D. 516, 146 N.Y.S. 560 (1st Dep't 1914); *In re Levy*, 198 A.D. 326, 190 N.Y.S. 383 (1st Dep't 1921); *In re Bridges*, 222 A.D. 696, 225 N.Y.S. 226 (2d Dep't 1927); *In re Seelman (Troy)*, 277 A.D. 116, 98 N.Y.S.2d 669 (2d Dep't 1950); *In re Diserio*, 285 A.D. 690, 140 N.Y.S.2d 478 (1st Dep't 1955); *In re Sobel and In re Leibowitz*, 8 N.Y.2d (a),(h) (Ct. on the Judiciary 1960); *In re Furey*, 17 A.D.2d 983, 234 N.Y.S.2d 174 (2d Dep't 1962); *In re Schmidt*, 31 A.D.2d 214, 296 N.Y.S.2d 49 (2d Dep't 1968); *In re Elias*, 37 A.D.2d 316, 325 N.Y.S.2d 302 (3d Dep't 1971).

In addition, an informal disciplinary system existed in which judges were privately cautioned and sometimes chastised for unethical conduct. The Appellate Divisions, First and Second Judicial Departments, formed "Judiciary Relations Committees," which investigated allegations of misconduct and admonished judges when appropriate. The Judiciary Relations Committee in the First Judicial Department, formed in 1968, is mentioned in the decision of *In re Waltemade*, 37 N.Y.2d (a),(nn) (Ct. on the Judiciary 1975), as having conducted an "extensive investigation" and then, in an eight-member vote, "divided evenly" in recommendations to the Appellate Division. Court of Appeals Chief Judge Charles Breitel convened the Court on the Judiciary, *id.* at (b), which eventually determined that the judge had engaged in misconduct serious enough to warrant his removal if he had been renominated for judicial office. *Id.* at (III). Since he was not renominated, the Court censured him. *Id.*

4. From 1975 to March 31, 1978, the Commission had authority to file disciplinary charges in other courts and, for part of that time, to censure judges. Four judges were removed by Courts on the Judiciary on charges filed by the Commission and on evidence presented by Commission counsel. *In re Jones*, 47 N.Y.2d (a), (mmm) (Ct. on the Judiciary), *lv. to appeal denied*, 48 N.Y.2d 603, *rearg. denied*, 48 N.Y.2d 882 (1979); *In re Altman*, 49 N.Y.2d (a),(i) (Ct. on the Judiciary), *lv. to appeal denied*, 50 N.Y.2d 803 (1980); *In re Gaiman*, 49 N.Y.2d (a), (m) (Ct. on the Judiciary), *lv. to appeal denied*, 50 N.Y.2d 803 (1980); *In re LaCarrubba*, 49 N.Y.2d (a),(p) (Ct. on the Judiciary), *lv. to appeal denied*, 50 N.Y.2d 804 (1980). Two judges were removed by the Appellate Division, Second Judicial Department, on evidence presented by Commission counsel. *In re Perry*, 53 A.D.2d 882, 385 N.Y.S.2d 589 (2d Dep't 1976); *In re MacDowell*, 57 A.D.2d 169, 393 N.Y.S.2d 748 (2d Dep't 1977).

Since April 1, 1978, the Commission has had authority to render "determination[s]" that judges be removed, censured or admonished, subject to review in the Court of Appeals upon the request of the judge who is the subject of the proceedings. N.Y. CONST. art. 6, § 22(a). From April 1, 1978, to December 31, 1986, the Commission determined that 75 judges be removed; five of these were modified upon review by the Court of Appeals. See *infra* note 135. In two matters in which the Commission determined that judges be censured, the judges sought review in the Court of Appeals, which reviewed the records, considered briefs, heard oral argument and removed the judges. *In re Shilling*, 51 N.Y.2d 397, 415 N.E.2d 900, 434 N.Y.S.2d 909 (1980); *In re Sims*, 61 N.Y.2d 349, 462

may differ as to the significance of these statistics, it is clear that the establishment in 1975 of a State Commission on Judicial Conduct, with jurisdiction over all judges within the state court system, was a major factor in the dramatic increase in judicial discipline.⁵ For the first time, a single state agency was empow-

N.E.2d 370, 474 N.Y.S.2d 270 (1984). Of 146 censures, 120 have been by the Commission and 26 by the courts on cases presented by Commission counsel. In addition, five judges were censured by the Court of Appeals in proceedings in which Commission determinations for removal were not accepted. The Commission publicly admonished 75 judges. The Court of Appeals admonished two judges upon review of censure determinations filed by the Commission. These two cases are: *In re Dixon*, 47 N.Y.2d 523, 393 N.E.2d 441, 419 N.Y.S.2d 445 (1979); *In re Lonschein*, 50 N.Y.2d 569, 408 N.E.2d 901, 430 N.Y.S.2d 571 (1980).

5. A Temporary State Commission on Judicial Conduct was created by legislation in June 1974, effective August 15, 1974. Ch. 739 [1974] N.Y. Laws 1907. The nine-member Temporary Commission appointed an Administrator in December 1974 and opened its principal office in New York City in January 1975. Thereafter, the Commission began receiving complaints and initiating investigations, pursuant to Article 2-A of the Judiciary Law. Removal proceedings were commenced by the Commission through the then existing channels: charges were filed in the Court on the Judiciary for higher court judges and in the respective Appellate Divisions for lower court judges. First passage of a constitutional amendment establishing the State Commission on Judicial Conduct occurred in 1974, the same year the temporary Commission was established. Second passage occurred in 1975, and later that year the resolution was approved by referendum. The (first) permanent Commission, which became effective September 1, 1976, initiated removal proceedings in the Courts on the Judiciary, which were given power to remove judges of all courts in the state unified court system. Then, by another constitutional amendment (first passage by the legislature in 1976, second passage in 1977, and approved by the voters in 1977), a newly-constituted State Commission on Judicial Conduct became effective on April 1, 1978. N.Y. CONST. art. 6, § 22; N.Y. JUD. LAW §§ 40-48 (McKinney 1978). The Courts on the Judiciary were abolished, except for cases already pending in such courts, and the new Commission was given power to determine, following due process hearings, that judges be admonished, censured or removed from office, subject to review in the Court of Appeals at the request of the judge facing discipline. If a judge who is the subject of a Commission determination does not seek review within 30 days of being served with the determination, the determination becomes final. If within that period the judge does seek review, the Court of Appeals has jurisdiction, with full authority to render discipline. It may, after consideration of the existing record, briefs and oral argument, take any action available under the law. The Constitution specifically provides that in reviewing a Commission determination, the Court of Appeals "may impose a less or more severe sanction. . . than the one determined by the commission" N.Y. CONST. art. 6, § 22(d).

The 1978 constitutional amendment provided for an 11-member Commission. The Governor appoints four members; each of the four legislative leaders appoints one member; and the Chief Judge of the Court of Appeals appoints three members. The Governor's appointees must be: a judge, a lawyer, and "two [persons who are] not. . . members of the bar, justices or judges or retired justices or judges of the unified court system." N.Y. CONST. art. 6, § 22(b)(1). The legislative leaders may appoint any person except a

ered to receive complaints against judges and to conduct investigations; and, most importantly, sufficient resources were made available to implement these powers. The establishment of the Commission did not diminish the constitutional authority of the legislature to conduct judicial disciplinary proceedings and remove judges. The Assembly has "the power of impeachment by a vote of a majority of all the members elected thereto,"⁶ and a "court for the trial of impeachments"⁷ consists of the lieutenant governor, at least a majority of the Senate and "the judges of the court of appeals, or the major part of them."⁸ Another legislative method of removal of judges of the Court of Appeals and Supreme Court is by concurrent resolution of the Senate and Assembly "if two-thirds of all the members elected to each house concur thereto."⁹ Judges of the Court of Claims, County Court, Surrogate's Court, Family Court, Civil and Criminal Courts of the City of New York, and District Court may be removed on the recommendation of the Governor with the concurrence of two-thirds of the Senate.¹⁰

Only one judge, a Supreme Court Justice, was removed after an impeachment trial.¹¹ That was in 1872, the same year the Senate removed a New York City judge on the recommendation of the governor.¹²

Prior to the establishment of a State Commission, judges of the Court of Appeals, Supreme Court, Court of Claims, Surrogate's Court, County Court and Family Court were subject to removal by specially-convened Courts on the Judiciary, which

judge or retired judge. The Chief Judge's appointees must be judges, one an Appellate Division Justice. *Id.* The members serve four-year staggered terms. N.Y. CONST. art. 6, § 22(b)(2). The Commission appoints an administrator, who serves at the pleasure of the Commission. The administrator appoints and supervises staff. N.Y. JUD. LAW § 41(7) (McKinney 1978).

6. N.Y. CONST. art. 6, § 24. For a discussion of the only case of a judge removed by impeachment, see *infra* notes 192-95 and accompanying text.

7. *Id.*

8. *Id.* See also N.Y. JUD. LAW § 240 (McKinney 1971).

9. N.Y. CONST. art. 6, § 23. For a discussion of an unsuccessful attempt to remove a Supreme Court Justice by concurrent resolution, see *infra* note 270 and accompanying text.

10. *Id.*

11. See IV C. LINCOLN, *supra* note 1, at 605-07.

12. *Id.* at 585-86.

had no staff and no central office.¹³ Generally, Courts on the Judiciary were convened after scandals erupted, when the need for a trial forum was obvious. From 1948 to 1975, only seven judges — including two who were charged with criticizing each other¹⁴ — faced charges in the Courts on the Judiciary.¹⁵ The Courts on the Judiciary were abolished by constitutional amendment in 1978.¹⁶

The removal of lower court judges was less complex, but equally ineffective. Although state law enabled individuals to petition the appellate divisions for the removal of "inferior court" judges,¹⁷ relatively few petitions were successful. Most single acts were insufficient to remove a judge, and generally the only petitioners who conducted comprehensive investigations to support their removal petitions were district attorneys, other public officials, and bar associations. Although an appellate division could grant a petition and order either an investigation or a hearing to be held, at times the appellate divisions seemed reluctant to authorize investigations because granting a petition, even to the limited extent of an investigation, created a public stigma for the judge named in the petition. In a reported, 1931 decision (*In the Matter of the Answer to the Communication of His Excellency Governor Franklin D. Roosevelt*),¹⁸ the Appellate Divi-

13. N.Y. CONST. art. 6, § 9-a (Jan. 1, 1948 repealed Sept. 1, 1962); N.Y. CONST. art. 6, § 22 (amended April 1, 1978) (provides for the current powers of the State Commission on Judicial Conduct and the Court of Appeals to discipline judges).

14. *In re Sobel and Leibowitz*, 8 N.Y.2d (a),(h) (Ct. on the Judiciary 1960). Both judges were publicly rebuked before the Court was convened. By today's standards, the convening of the first Court on the Judiciary for such harmless conduct seems curious, especially since the court's only disciplinary power was to remove judges from office. Judge Sobel's criticism of Judge Leibowitz was in defense of a youth's rights.

15. During that 27-year period the court heard seven cases, the first two being combined. *Id.* The seven were: *In re Sobel and Leibowitz*, 8 N.Y.2d (a),(h) (Ct. on the Judiciary 1960); *In re Friedman*, 12 N.Y.2d (a),(d) (Ct. on the Judiciary 1963); *In re Osterman*, 13 N.Y.2d (a),(l) (Ct. on the Judiciary 1963); *In re Schweitzer*, 29 N.Y.2d (a) (Ct. on the Judiciary 1972); *In re Pfingst*, 33 N.Y.2d (a),(ii) (Ct. on the Judiciary 1973); *In re Waltemade*, 57 N.Y.2d (a),(nn) (Ct. on the Judiciary 1975).

16. See *supra* note 13.

17. N.Y. CONST. art. 6, § 17 provided for the removal of lower court judges. Effective September 1, 1962, N.Y. CONST. art. 6, § 22(i) provided for the removal of lower court judges. Prior to that time, N.Y. CONST. art. 6, § 17, CODE OF CRIMINAL PROCEDURE § 132 and INFERIOR CRIMINAL COURTS ACT § 162 provided for the removal "for cause" of judges of "inferior courts."

18. 232 A.D. 23, 248 N.Y.S. 312 (2d Dep't 1931).

sion, Second Judicial Department, rejected a request by the Governor for an investigation based upon a petition signed by 533 persons. The allegations of misconduct concerned eight Brooklyn magistrates who had been the subject of "wide [adverse] publicity" in the media.¹⁹

The Appellate Division held that the petition presented "no ground for ordering an investigation of a general character, since no one of the cases involved moral turpitude or corruption."²⁰ The court said that it "is under a judicial duty to refrain from ordering an investigation improvidently"; to do otherwise "would give a basis for unjust criticism of the magistrates and loss of confidence in their courts, to the public confusion."²¹ The court said it should "not be moved to investigate upon mere hue and cry, without either facts or information justifying a belief in the existence of facts indicating wrongdoing."²² Four Appellate Division Justices voted not to investigate; two dissented, and another justice who was not present for the vote "advised that he is inclined to favor an inquiry."²³ The dissent, while agreeing with the majority's view that the facts in the petition did not demonstrate misconduct, concluded that because of the "unfavorable public attention" devoted to the Magistrates' Courts, an investigation was warranted, if for no other reason than to vindicate the magistrates.²⁴

Remarkably, the refusal of the Appellate Division, Second Judicial Department, to honor the Governor's request for an investigation of Brooklyn magistrates was announced at the same time as the widely publicized Seabury investigation was identifying egregious misconduct, ineptitude, and open political influences in judicial decisions by magistrates in Manhattan and the Bronx.²⁵ It seems fair to say that, except for isolated investiga-

19 *Id.* at 26, 248 N.Y.S. at 315.

20 *Id.* at 25, 248 N.Y.S. at 314.

21 *Id.* at 25, 248 N.Y.S. at 315.

22 *Id.* at 25-26, 248 N.Y.S. at 315.

23 *Id.* at 27, 248 N.Y.S. at 316.

24 *Id.* at 26, 248 N.Y.S. at 316.

25. See H. MITGANG, *THE MAN WHO RODE THE TIGER, THE LIFE AND TIMES OF JUDGE SAMUEL SEABURY 194-96* (1963) (describing the political nature of one judicial appointment and the many *ex parte* communications made by political leaders to judges about pending matters). See FINAL REPORT OF SAMUEL SEABURY, REFEREE, IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATES' COURTS IN THE FIRST JUDICIAL DEPART-

tions and the period from 1930 to 1931 when Judge Seabury and his staff were conducting their thorough investigation, the means did not exist before 1975 to investigate judicial misconduct.

The establishment in 1975 of a more active and more efficient judicial disciplinary system, with broader powers and more disciplinary alternatives, has not been without controversy. Some judges and lawyers have maintained that the current system impairs "judicial independence" by intruding upon judges' discretion and privacy, by compelling them to account for their conduct, and by subjecting them to overly broad investigations (i.e. "fishing expeditions").²⁶

MENT AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS-AT-LAW PRACTICING IN SAID COURTS 44-49 (March 28, 1932) [hereinafter FINAL REPORT OF SAMUEL SEABURY] (on file in the Appellate Division, First Judicial Department). Harold J. Reynolds, Clerk of the Appellate Division, First Judicial Department, located and made available to the author of this Article the original Seabury report and related materials.

26. The activity of the Commission in its earliest days provoked a torrent of criticism by judges, including some who were the subject of investigation and others who were not. The Commission's "tactics" were described in dark terms, and ominous predictions were made concerning the future of the judiciary. Warned one Town Justice in an article in *The Magistrate*:

[T]o remain silent in the face of witch hunts and purges does not protect those who fail to speak out. Whether it be the fear of the brown shirts, McCarthy, Nadjari or the Judicial Commission, the failure to speak out against injustice has, and always will compound the harm that is done.

Gersten, *One Man's View of the Ticket Probe*, *The Magistrate*, Mar. 1978, at 4.5. An editorial in *The Magistrate* warned judges of the "menace" facing them: "We must fight and destroy this menace which appears to be the most desperate and savage attack on our court system and on our individual honesty and integrity as well." *Legislative Report*, *The Magistrate*, July 1977, at 1.

The colorful epithets used by critics of the Commission reflect the intensity of the criticism. A State Senator stated that the Commission was conducting a "witch hunt" against town justices. Safranek, *Justices Taking State to Court on 'Ticket-Fix' Investigation*, *Niagara Gazette*, Nov. 27, 1977, at 1B, col. 4. Another State Senator said of Commission proceedings: "This smacks of a kangaroo court." *Senate Raps Probe of Justices*, *Evening News (Newburgh)*, Jan. 21, 1978, at 3A, col. 1. The Commission's activities were compared to those of Nazi Germany; frequent references were made to "Gestapo tactics." See *Town Justices Unite To Check State's Investigative Tactics*, *Union-Sun Journal (Lockport)*, Nov. 14, 1977, at 9, col. 4; *A Judge Who Didn't Fix a Ticket*, *Albany Times-Union*, Feb. 7, 1978, at 6B, col. 4; Bor, *Town Judge Calls Agency 'Gestapo-Like'*, *Poughkeepsie Journal*, Nov. 16, 1977, at 47, col. 3. One attorney stated that the Commission's investigation of a judge he was representing "makes the Gestapo look like altar boys." *Probed Justices May Disclose Names To Press*, *Buffalo Evening News*, Feb. 3, 1978, at 3, col. 7. Analogies were also made to another era: the Commission's rules were described as "a codified star chamber system," and the Commission as "a star chamber" that "practices procedural pollution." See *Bar Head Urges Jurist Protection*, *Buffalo Courier-Express*, Jan. 31, 1979, at 2, col. 1; Ackermann, *High Court Hears Kuehnel Ap-*

This Article, in addressing the concern that the present dis-

peal, Buffalo Courier-Express, Feb. 5, 1980, at 3, col. 1. A Town Justice, president of a county Magistrates Association, described the Commission as "a big brother bureaucratic agency" and stated that its procedures are "similar to those practiced by the red-baiters during the McCarthy era in the 1950's." Bor, *Banner: Town Justice System May Be On The Way Out*, Poughkeepsie Journal, May 30, 1978, at 15, col. 1. Another judge stated of the Commission: "They're just a bunch of ambulance chasers." Village Justice, 79, *Vows Fight to Keep His Post*, Times-Union (Rochester), July 26, 1979, at 1, col. 4.

Specific concerns were also articulated, particularly the fear that the Commission intrudes upon a judge's discretion and has a chilling effect on judicial independence. A Supreme Court Justice expressed a common theme, stating: "A deep chill has settled over the judiciary by virtue of what the Commission does under its authority." Freedman, *Keeping New York's Judges Honest*, Empire State Report, Dec. 16-31, 1980, at 418, 424. A Town Justice, speaking before a meeting of the Association of Towns, described the Commission's activities as "a 'witch hunt' that must be stopped" and stated that unless some restraints were put on the Commission, "each town justice would remain in jeopardy every time he made a decision and might wind up defending himself in court." *Accused Town Judge Contends Judicial Unit On Witch Hunt*, Union-Sun Journal (Lockport), Feb. 21, 1978, at 11, col. 1. A news article, reporting the judge's speech, added that the judge "received a standing ovation for his comments on the commission." *Id.* A Supreme Court Justice warned: "[A] judge should not be put in a position where decisions that are unpopular should make them a target wherein the investigatory machinery of a Commission might proceed without good cause." Panel discussion, Ass'n of the Bar of the City of New York, *The New York System For Disciplining Judges: Should It Be Maintained, Reformed Or Scrapped?* 25 (Dec. 16, 1982). In 1977, 16 town justices sued to attempt to block the Commission's ticket-fixing investigation, claiming the inquiry "interferes with the exercise of their 'discretionary powers.'" Green, *State Cites 500 Cases of Ticket Fixing*, Times Herald Record (Middletown), Dec. 2, 1977, at 4, col. 1. An attorney representing a New York City judge, charged with bias in landlord-tenant cases and against a particular attorney, warned: "If the commission is permitted to proceed on its complaint. . . no judge will be able to enforce the law without fear of reprisal from the commission at the behest of a disgruntled litigant or counsel." Raab, *Judge Sues to Block Panel's Investigation of Him*, N.Y. Times, Nov. 13, 1983, at 53, col. 1 (The judge had sued to attempt to block the Commission from proceeding on charges against him; his effort was unsuccessful. *Wilk v. State Comm'n on Judicial Conduct*, 97 A.D.2d 716, 468 N.Y.S.2d 626 (1st Dep't 1983)).

Judges complained that defendants were threatening to initiate an investigation by the Commission if the defendants did not receive favorable treatment. Safranek, *Justices Taking State to Court on 'Ticket-Fix' Investigation*, Niagara Gazette, Nov. 27, 1977, at 1B, col. 4. A Supreme Court Justice expressed the view that a judge now had to "tread warily" and "be concerned lest the person he turned out of court yesterday turns around and files some sort of complaint which will initiate an investigation." Panel discussion sponsored by Fund for Modern Courts, Inc., Ass'n of the Bar of the City of New York, *Does the Commission Impair the Independence of the Judiciary?* 12 (Oct. 9, 1980). According to a former president of the Erie County Bar Association, the Commission "intimidates" judges; he stated: "Judges are now afraid to say anything to people before them." Freedman, *Keeping New York's Judges Honest*, Empire State Report, Dec. 16-31, 1980, at 418, 424. Warned a newsletter: "Even an anonymous complainant may require a judge to prove his innocence of a charge he knows nothing about. . . . An independent judiciary is the first line of defense against tyranny." *The Attack On The Judi-*

ciplinary system may impair judicial independence, will analyze judicial disciplinary decisions in New York over a 100-year pe-

ciary Continues, F.Y.I., N.Y. State Trial Lawyers Ass'n, Oct. 1980, at 1.

Concerns were also expressed that the Commission was "making judgment" on judge's private lives, unrelated to their judicial duties. Ryan, *Hamburg Justice Kuehnel Denies Removal Charges*, Buffalo Courier-Express, Sept. 25, 1979, at 1, col. 3. A Supreme Court Justice, now an Appellate Division Justice, described the Commission as "a monster run amuck," going beyond its mandate to investigate on-bench conduct and delving into judges' personal lives, by, for example, scrutinizing their tax payments. Gryta, *WNY Judges Oppose Revamping State Courts*, Buffalo News, Mar. 30, 1980, at 6A, col. 5.

Another criticism is that Commission proceedings deprive judges of their rights and that judges "have become second-class citizens." *The Attack On The Judiciary Continues*, F.Y.I., N.Y. State Trial Lawyers Ass'n, Oct. 1980, at 1. A President of the Supreme Court Justices Association expressed the view that a judge in disciplinary proceedings before the Commission "does not have the rights of due process that any common criminal would expect in one of our courts of law." Panel discussion sponsored by Fund for Modern Courts, Inc., Ass'n of the Bar of the City of New York, *Does the Commission Impair the Independence of the Judiciary?* 14 (Oct. 9, 1980). Another Supreme Court Justice stated that judges' "due process is not observed" in disciplinary proceedings and warned: "I can think of no greater threat to our way of life in these United States than encouraging and having a continuous stream of unwarranted criticism and the loss of due process by the judiciary." Panel Discussion, Ass'n of the Bar of the City of New York, *The New York System For Disciplining Judges: Should It Be Maintained, Reformed Or Scrapped?* 24 (Dec. 16, 1982). An attorney who represented several judges before the Commission sounded the same theme, criticizing the Commission for everything from squelching judges' rights to selecting a "super-annuated" referee to conduct a hearing. *Id.* at 13.

The criticism that the Commission improperly conducted "illegal fishing expedition[s]" was related to a charge that the Commission, with its "astronomical" budget, had "to justify its existence somehow" by conducting widespread investigations. *Judge Says He's Being Picked On*, Rochester Democrat and Chronicle, Feb. 16, 1978, at 4A, col. 1; Witerski, *Ticket-Fix Charges Called 'Wrong'*, Buffalo Courier-Express, Feb. 7, 1978, at 1, col. 3; Mulvaney, *'Harassed' Judges Defend System*, Daily Freeman (Kingston), Nov. 17, 1977, at 3, col. 1. Said other critics: "[The Commission's administrator] had to have to do something with the money"; "[H]e has to come up with something." Witerski, *Ticket-Fix Charges Called 'Wrong'*, Buffalo Courier-Express, Feb. 7, 1978, at 1, col. 3; Green, *State Cites 500 Cases of Ticket Fixing*, Times Herald Record (Middletown), Dec. 2, 1977, at 4, col. 1.

In 1982, a committee of the American Bar Association conducted a national survey of judges concerning disciplinary commissions; 340 responses were received. A majority of New York judges who responded to the survey were critical of the Commission and believed it failed to properly safeguard judges' rights. ABA Comm. on Ethics and Professional Responsibility of the National Conference of State Trial Judges, *Report Of The Questionnaire Re: Judicial Disciplinary Commissions*, at 2. The percentage of New York judges critical of New York's Commission was greater than the percentage of judges of any other state critical of their own disciplinary body. *Id.* at 3, 4. Only 17 percent of the judges from all states responding to the survey were critical of their respective commissions. *Id.* at 4.

riod under four major subheadings:

A. Disciplining judges for on-bench conduct: Can "legal error" constitute misconduct?

B. Disciplining judges for off-bench conduct: Does the system intrude into a judge's private life?

C. Disciplining judges for on-bench or off-bench conduct: Does an "appearance of impropriety" standard impair judicial independence?

D. Obtaining evidence of misconduct: Do comprehensive investigations impair the independence of the judiciary?

As the relevant court decisions over the past 100 years demonstrate, judges have been disciplined for conduct relating to both their official duties and their private lives. A fair review of these decisions discloses that (a) courts reviewing judges' conduct traditionally have been sensitive to the delicate balance between judicial discipline and judicial independence and (b) recent improvements in the disciplinary system have not resulted in either the loss or impairment of judicial independence. Prior to the establishment of the Commission on Judicial Conduct in 1975, two major factors saved a number of judges from public discipline: the absence of formal disciplinary sanctions less severe than removal and the lack of an integrated, comprehensive investigative capability.

Making the system more efficient resulted in exposing more misconduct, but as the reported disciplinary cases reveal, a more efficient and perhaps more aggressive system does not necessarily result in a concomitant loss of judicial authority (unless that term is defined to include inappropriate conduct). Perhaps the most dramatic development has been the disciplining of judges for extreme violations of undisputed civil liberties or statutory rights. Several recent decisions disciplining judges reflect the growing sensitivity of the courts to civil rights and liberties.²⁷

Judges today are also held to stricter standards than in earlier years with respect to their courtroom demeanor; lack of courtesy is less acceptable today than it was in past years, especially the use of demeaning language towards certain classes of litigants. Expression of racial bias, for example, is intolerable, whereas in the past, when racism was more accepted by our soci-

27. See *infra* notes 136-56 and accompanying text.

ety, our culture, and even our laws, racist comments by judges may not have been regarded as especially egregious. Similarly, gender bias is far less apt to go unnoticed today than in years past, and judges who employ insulting language toward women will likely find themselves in difficulty with the disciplinary authorities. Notwithstanding these changes, judicial independence and respect for judges' privacy rights are very much intact.

II. The Issues Raised in the Disciplining of Judges

A. *Disciplining Judges for On-Bench Conduct: Can "Legal Error" Constitute Misconduct?*

1. *Determining Generally When "Error" is Misconduct*

When judges abuse their discretion and overlook and misinterpret statutes, ordinances and appellate court decisions, their rulings and decisions are subject to review within the courts, and the universal view is that judges should not be disciplined for acting in good faith within a wide range of discretion. Yet legal error and judicial misconduct are not mutually exclusive; a judge is not immune from being disciplined merely because the judge's conduct also constitutes legal error. From earliest times it has been recognized that "errors" are subject to discipline when the conduct reflects bias, malice or an intentional disregard of the law.²⁸ These standards have been refined in recent years to remove from office or otherwise discipline judges who abuse their power and disregard fundamental rights.²⁹ Clearly, no sound argument can be made that a judge should be immune from discipline for conduct demonstrating lack of fitness solely because the conduct also happens to constitute legal error.³⁰

28. See *In re Quigley*, 32 N.Y.S. 828 (Sup. Ct. 2d Dep't 1895); *In re Capshaw*, 258 A.D. 470, 17 N.Y.S.2d 172 (1st Dep't), *mot. denied*, 258 A.D. 1053, 18 N.Y.S.2d 741 (1st Dep't 1940).

29. See *In re Sardino*, 58 N.Y.2d 286, 448 N.E.2d 83, 461 N.Y.S.2d 229 (1983); *In re McGee*, 59 N.Y.2d 870, 452 N.E.2d 1258, 465 N.Y.S.2d 930 (1983); *In re Reeves*, 63 N.Y.2d 105, 469 N.E.2d 1321, 480 N.Y.S.2d 463 (1984).

30. Despite clear authority to discipline judges for conduct that may also be subject to appellate review, the mistaken belief persists that disciplinary authorities have no jurisdiction over an event or series of events that may be "reversible error." See, e.g., Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 CHI[-]KENT L. REV. 59, 65-66 (1977) ("In the absence of fraud or a corrupt motive, a commission must avoid taking action against a judge for reaching an erroneous

Determining whether legal error constitutes misconduct often depends on the procedures and resources made available for investigations. Only a comprehensive investigation can reveal whether the misconduct was an isolated event or part of a pattern. The primary failing of the system for most of New York State's history was the absence of uniform and efficient investigations.

From the latter part of the nineteenth century through the 1960's, the courts that had jurisdiction to discipline judges were likely to conclude that judicial acts in violation of law and abuses of judicial discretion did not constitute misconduct because they were not the result of improper motives or an intentional disregard of law.³¹ Without evidence of a pattern of violations of law or numerous abuses of discretion, doubts about the judges' conduct were resolved in favor of the judge. Another impediment to the development of an appropriate disciplinary system was the absence of disciplinary sanctions other than removal from office. In at least some of the cases, the courts seemed willing to criticize the questionable conduct but apparently were reluctant to do so because of the absence of clear statutory authorization.

Over the past few years, a major contribution by the Commission on Judicial Conduct and the Court of Appeals has been the development of a body of case law condemning tyrannical conduct by judges.³² Providing the right to appellate review for egregious violations of rights was simply an inadequate deterrent. Moreover, the right to appeal does not address the possible misconduct of the trial court and does not grant the appellate court the power to discipline the judge. Judicial "independence" encompasses making mistakes and committing "error," but was not intended to afford protection to judges who ignore the law or

egal conclusion or misapplying the law.") (footnote omitted). Obviously, a disciplinary body must avoid being in conflict with court decisions in the interpretation of law, and if a matter is under appeal, it is the wiser, more prudent course to await the outcome of the appeal. Close questions of law are not the proper subject of disciplinary proceedings. Nor is it the function of a disciplinary body to determine whether the judge misapplied the law. A Commission on Judicial Conduct that disciplines judges for egregious errors (e.g., ignoring clear law to the serious detriment of an individual's basic rights) is unlikely to be in conflict with the courts' interpretations of law.

31. See *infra* notes 37-44, 64-73 and accompanying text.

32. See *infra* notes 136-56 and accompanying text.

otherwise pose a threat to the administration of justice.

The recent disciplinary decisions do not support the view that the Commission on Judicial Conduct has exceeded its authority or unduly inhibited judges from exercising their discretion. In fact, the persuasiveness of some dissenting opinions by Commission members indicates that the Commission may have been too lenient in some of its sanctions for on-bench misconduct.

2. *Bias*

Extreme leniency by judges toward defendants in criminal cases has occasionally created doubts about whether the judges' decisions were on the merits. Ascertaining from judges' decisions that they are biased obviously is fraught with danger. Judges must be free to act within a wide range of discretion without having their motives questioned. Yet, at times, judges' motives have been questioned when their decisions have been inconsistent with the overwhelming evidence in the case. In earlier years, a number of judges were charged with misconduct for being partial toward certain defendants in criminal proceedings.

In the 1890's the Mayor of the City of Brooklyn filed a petition for the removal of James F. Quigley, a City Police Justice.³³ The petition charged the judge with exhibiting bias in favor of three striking trolley car workers who allegedly had assaulted a motorman, pelted the trolley car with stones, and forcibly removed two passengers. Judge Quigley dismissed criminal charges despite substantial evidence against the strikers, and, apparently portraying pro-labor sentiments, he announced that they had a clear right to remove passengers from the trolley car in an orderly manner. In justifying Judge Quigley's removal from office in 1895, the Supreme Court (which then had jurisdiction to remove lower court judges) stated that the judge had engaged in a pattern of biased conduct in which he ignored clear evidence of criminal charges and expressed sympathy with the defendants' goals.

The court took cognizance of the "great latitude" given to judges and "the discretion the law gives to a magistrate on mat-

33. *In re Quigley*, 32 N.Y.S. 828 (Sup. Ct. 2d Dep't 1895).

ters of law.”³⁴ The clear implication in the court’s opinion is that, while no single action would have justified a finding that Judge Quigley “intended to violate his duty,” the totality of his conduct supported such a conclusion.³⁵ In each of three criminal cases discussed, the court demonstrated that Judge Quigley’s decisions not only were against the weight of the evidence, but were inconsistent with most of the evidence and, in some respects, contrary to law. Judge Quigley had dismissed charges against one defendant for throwing a stone at the trolley car and hitting a passenger in his back. The only disagreement in the testimony was whether the passenger was hit by the stone thrown by the defendant. Since throwing the stone was the essence of the crime, stated the Supreme Court, the defendant should have been held for trial. Similarly, a second defendant was “discharged” for the curious reason that a motorman’s testimony that he had been assaulted by the defendant was not corroborated. Another defendant denied being present at the place where two of the passengers had been taken after they were removed from the trolley car. He was not held for trial despite the testimony of numerous witnesses that he had been present. As to an assault charge that Judge Quigley had postponed indefinitely, the court said: “We would not pay so much attention to this case if we did not take the other cases into account. . . [which] indicate[s] an intention on the part of the magistrate to violate his official duty.”³⁶

The *Quigley* decision raises interesting issues concerning a judge’s discretion and the conclusions that may fairly be drawn as to the judge’s motives. Was Judge Quigley biased in favor of the strikers, as the court concluded, or did the judge in good faith believe the testimony of each defendant and disbelieve the testimony of numerous witnesses who contradicted the defendants’ testimony? What standards may reasonably be employed to determine when a judge’s decisions as to the credibility of witnesses are based on improper motives? Does the *Quigley* decision pose the threat that judges might be removed from office if they decide issues of credibility against the weight of the evi-

34. *Id.* at 829.

35. *Id.*

36. *Id.* at 830.

dence or contrary to how higher courts would decide the factual disputes? In this instance, the judge made the controversial comment in court, totally unsupported in law, that the peaceful removal of trolley car passengers by strikers is lawful conduct. Moreover, since he was an arraignment judge in these cases, his duty was simply to determine whether there was sufficient evidence to hold the defendants for trial. And of primary importance, the court properly took into account a series of acts to justify removal even though no single act would have resulted in such a sanction.

Obviously, determining the point at which a course of totally unjustified conduct is viewed as an intentional disregard of the law may be difficult; great caution must be exercised by a disciplinary body to avoid substituting its judgment for that of the judge. Judicial philosophies differ, most notably in criminal cases. Some judges tend to be harsher than others on sentencing and bail decisions. Some are reputed to favor the prosecution while others are believed to be defense oriented, perhaps reflecting a different interpretation of law or of the purposes and goals of the criminal justice system. The strength of the American court system is that judges, within a reasonably wide range of judicial philosophy and discretion, may enforce the law as they see fit without being subject to the threat of discipline. Generally, good faith decisions by a judge are not subject to discipline.

Two 1904 disciplinary proceedings against New York City Magistrates who had dismissed charges for possession of "policy" slips demonstrate that legal error alone, even a series of legal errors, does not justify a judge's removal from office, and that judges have been free to act within a broad range of judicial decisionmaking.³⁷ Both judges seemed to be unduly lenient towards defendants charged with gambling offenses. Obviously, there must have been some suspicion that "policy" operators may have had some influence with judges hearing gambling cases — a suspicion that lingered for many decades.³⁸

37. *In re Baker*, 94 A.D. 278, 87 N.Y.S. 1022 (1st Dep't 1904); *In re Tighe*, 97 A.D. 28, 89 N.Y.S. 719 (2d Dep't 1904).

38. See *In re Capshaw*, 258 A.D. 470, 17 N.Y.S.2d 172 (1st Dep't), *mot. denied*, 258 A.D. 1053, 18 N.Y.S.2d 741 (1st Dep't 1940) (judge removed for favoritism to defendants in gambling cases).

Evidence in one of the disciplinary cases was that a grand jury indicted the defendants on the same evidence that had been rejected by the Magistrate, and the defendants ultimately were convicted. There was no doubt that the defendants had been in possession of "policy" slips, which appears to be the nub of the Penal Code violation.³⁹ The judge's decision not to hold the defendants for trial was based on a novel interpretation of the law: the prosecution failed in its burden to establish that the "policy" slips possessed by the defendants "were in some way connected with a lottery."⁴⁰ Was this the judge's good faith interpretation of the statute, or was it the judge's means to achieve an improper end? The Appellate Division, First Judicial Department, dismissed the disciplinary charges, stating:

Certainly . . . we cannot say that the decision in these cases was so clearly wrong that it exhibited a corrupt intent or showed that the magistrate was incompetent to perform the duties of his office; and this is all that is necessary or proper for us to say in disposing of these charges.⁴¹

In the second disciplinary case involving suspiciously lenient treatment of defendants who possessed "policy" slips, the Appellate Division, Second Judicial Department, dismissed charges notwithstanding the referee's finding that the Magistrate's actions were so clearly against the weight of the evidence that his conduct constituted an obstruction of the due administration of law.⁴² The Appellate Division held that more than errors of judgment must be shown to remove a judge from office, notwithstanding that "many, if not most, of the decisions in question were wrong, and that the offenders should have been held by the magistrate upon the proof presented to him . . ."⁴³ The record did not indicate that the judge's conduct "was prompted by fraud, corruption, a deliberate intent to violate the

39. The court stated that the crime, as defined by section 344a of the Penal Code, "consisted of the possession of a writing, paper or document, representing or being a record of a chance, share or interest in numbers sold, drawn or to be drawn or in what is commonly called 'policy.'" *Baker*, 94 A.D. at 281, 87 N.Y.S. at 1024.

40. *Baker*, 94 A.D. at 280, 87 N.Y.S. at 1024.

41. *Id.* at 281, 87 N.Y.S. at 1024.

42. *Tighe*, 97 A.D. at 29, 89 N.Y.S. at 720.

43. *Id.* at 30, 89 N.Y.S. at 721.

law, or a conscious and corrupt bias."⁴⁴

A third 1904 case did lead to a judge's removal for biased rulings.⁴⁵ The District Attorney petitioned the Appellate Division, First Judicial Department, for the removal of New York City Municipal Court Justice Herman Bolte for rulings and decisions that favored certain attorneys. The case against Judge Bolte grew out of a painstakingly thorough investigation by the District Attorney's office and a civic organization that had sent an observer into the judge's court to monitor the proceedings. The result of the investigation was a massive case presented in support of the charges, which overcame the Appellate Division's stated reluctance to remove a judge for the exercise of discretion. Responding to a motion to dismiss the charges on the ground that, even if proven, the charges would not warrant the judge's removal, the Appellate Division observed: "Many of the charges are connected and have a material bearing upon one another. One, therefore, taken by itself might be wholly insufficient, but, taken with others, might be convincing evidence that the respondent was unfit to hold a judicial office."⁴⁶

Although evidence was presented of Judge Bolte's "tyrannical" behavior,⁴⁷ opening and adjourning "his court at hours that suited his own convenience,"⁴⁸ permitting persons who were not attorneys to practice law in his court, and moving his residence to White Plains, New York, clearly the most damaging evidence established favoritism toward certain attorneys: "Judicial action and discretion were frequently arbitrarily exercised favorably to particular attorneys and suitors with no consideration of the claims or rights of the adverse party or opposing attorney."⁴⁹

The Appellate Division found that the judge disregarded appellate court decisions and ruled on cases as he saw fit. The following episode was highlighted:

In one instance, after a case had been twice tried and twice reversed on appeal and the law of the case had been settled against the party whom the respondent was favoring and after the parties

44. *Id.*

45. *In re Bolte*, 97 A.D. 551, 90 N.Y.S. 499 (1st Dep't 1904).

46. *Id.* at 567-68, 90 N.Y.S. at 507.

47. *Id.* at 577, 90 N.Y.S. at 514.

48. *Id.* at 571, 90 N.Y.S. at 510.

49. *Id.* at 573, 90 N.Y.S. at 511.

had been required to attend upon the trial on almost innumerable adjournments, the respondent stated from the bench that he was in a better position than the Appellate Term to determine the law of the case and openly declared that he could not give a judgment for the party who was clearly entitled thereto under the decision of the Appellate Term; and arbitrarily and without authority and against objection transferred the case to another district.⁵⁰

Favoritism towards "particular attorneys and particular parties was manifested by repeated adjournments. . . without necessity or cause shown as required by the court rules."⁵¹ Often, the judge refused to permit a record of objections or exceptions to be made, by "arbitrarily controlling the action of the stenographer," which denied unsuccessful litigants the opportunity to appeal to higher courts.⁵² He granted *ex parte* orders in cases pending in other courts, added cases to his calendar without the notice required by court rule, accepted jurisdiction of matters despite a showing that process had not been served, refused to grant default judgments, and held improper *ex parte* meetings with parties and attorneys. The absence of any evidence of corruption did not save the judge's job. Said the Appellate Division in removing the judge: "Favoritism in the performance of judicial duties constitutes corruption as disastrous in its consequence as if the judicial officer received and was moved by a bribe."⁵³

Five years later, the Appellate Division, First Judicial Department, considered charges of bias in criminal cases by a New York City Magistrate.⁵⁴ The Mayor of New York City had filed a grievance against the judge with the Association of the Bar of the City of New York, which investigated the allegations and subsequently petitioned the Appellate Division for the judge's removal. The Appellate Division concluded that not only had the judge made erroneous rulings, but his motives were improper. The judge's discharge of prostitutes from the "work-house" after they began serving their sentences expressly vio-

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 574, 90 N.Y.S. at 512.

54. *In re Droegge*, 129 A.D. 866, 114 N.Y.S. 375 (1st Dep't), *appeal dismissed*, 197 N.Y. 44, 90 N.E. 340 (1909).

lated state law; and, in granting one such discharge, the judge acted upon a request of a lawyer with whom the judge had shared offices.⁵⁵ Most of the discharges had been ordered under suspicious circumstances, and the judge did not provide cogent explanations for his conduct. He discharged two prostitutes, for example, because, on a tour of the workhouse, he and a friend noticed the two women reading a "French classic," leading the Appellate Division to conclude that "the French classic procured their discharge."⁵⁶ He discharged another prisoner solely because her family, on a visit to his chambers, asked for her release.⁵⁷ His intent not to discharge her was reflected by a notation he had made on the commitment order: "This woman is a colored prostitute; please refer any application of bond to me."⁵⁸

The Appellate Division, in discussing the limited circumstances that would warrant removal for official acts, stated that "much more is required than erroneous rulings."⁵⁹ Interestingly, the court said that the "nature of his rulings" may indicate such a "lack of professional knowledge or a lack of judicial temperament or appreciation of the duties of the office as will be sufficient cause for removal."⁶⁰ Expressing a standard for removal still cited in removal proceedings, the court declared that a judge may be removed when the judge's "future retention of office is inconsistent with the fair and proper administration of justice."⁶¹ And when the conduct is based on "unworthy or illegal motives" or is the result of "ignorance . . . a perverted character, or . . . a lack of judicial qualities," the judge should be removed.⁶² Even a correct decision would justify removal when it is "based upon improper motives and not upon a desire to do justice."⁶³

Thus, even during the period from the late 1880's to the very early 1900's, judges were accountable for their official acts

55. *Id.* at 869, 114 N.Y.S. at 377.

56. *Id.* at 878, 114 N.Y.S. at 384.

57. *Id.*, 114 N.Y.S. at 383.

58. *Id.*

59. *Id.* at 881, 114 N.Y.S. at 386.

60. *Id.* at 881-82, 114 N.Y.S. at 386.

61. *Id.* at 882, 114 N.Y.S. at 386.

62. *Id.* at 882, 114 N.Y.S. at 386-87.

63. *Id.*

in a disciplinary forum and, to remove a judge for bias, it was not essential to produce independent evidence of unworthy motives. The disciplinary courts were not precluded from drawing reasonable inferences from the judge's official acts, although clearly they would not hastily draw negative conclusions simply because they disagreed with a judge's decisions or discretion.

In 1910, the Appellate Division, First Judicial Department, denied a petition for the removal of a New York City Magistrate who had exceeded his powers in setting bail on three out-of-state fugitives, who fled after being released on low bail.⁶⁴ The judge had accepted inadequate collateral notwithstanding warnings that if the fugitives, who faced serious charges in three other states, were released on bail, they would flee. The judge lacked authority to set bail in extradition cases, but even if he had such authority, the Appellate Division considered that the procedures he employed were highly irregular.⁶⁵ The Appellate Division adopted the view expressed in the earlier cases that a single mistake, inadvertence, erroneous decision, or improper exercise of power would not justify removal. The failure by the judge to follow regular procedures in setting bail may have raised suspicions that he had been improperly influenced, a conclusion reinforced by his lack of statutory authority to set bail in such cases. But other factors in the case weighed heavily against a conclusion that the judge acted from improper motives. Because the law of extradition was complex, it was understandable that he did not know that he lacked jurisdiction to set bail. As to the irregular bail procedures, the attorney who represented the three fugitives used heavy-handed tactics and persuaded the judge that the procedures were appropriate.⁶⁶

Interestingly, the record before the Appellate Division included only the petition, accompanying papers, and a statement by the judge. No searching inquiry had been undertaken to determine the judge's intent and frame of mind when he acted without authority and employed irregular bail procedures. No hearing had been held. As the concurring opinion stated: "We

64. *In re Barlow*, 141 A.D. 640, 127 N.Y.S. 542 (1st Dep't 1910).

65. *Id.* at 645, 650, 127 N.Y.S. at 546, 550.

66. *Id.* at 651, 127 N.Y.S. at 551. The concurring opinion was also highly critical of the defendants' attorney. *Id.* at 653, 127 N.Y.S. at 552 (Laughlin, J., concurring).

are not informed how the magistrate came to assume jurisdiction to admit to bail in extradition cases; but if it appeared that he *knowingly* acted without jurisdiction I would vote for removal.”⁶⁷ On the imperfect record before the court, no such conclusion could fairly be drawn.

Evidence of “unjudicial language”⁶⁸ and bias toward tenants (the judge “went somewhat beyond the bounds of discretion in trying to get more time for unfortunate tenants”⁶⁹) was not sufficient to remove a New York City Municipal Court Justice in 1914, although his conduct was “censurable.”⁷⁰ The disciplinary proceedings had been initiated by the presentation of charges by the Association of the Bar of the City of New York. Proceedings were dismissed by the Appellate Division, First Judicial Department, which held that the judge was not unfit to hold judicial office and, therefore, he should not be removed.

The Appellate Division, First Judicial Department, in 1938, decided not to bring charges against a New York City Municipal Court Justice for having filed, in an action for rent, an opinion with a fictitious name for the defendant and for “speaking to his colleague concerning a matter with which he had no official connection.”⁷¹ Apparently, the purpose of the fictitious name was to assist the defendant in avoiding embarrassment. Finding the conduct of the judge “subject to criticism,”⁷² the court concluded that because the judge had no “improper motive,”⁷³ he should not be removed, and, therefore, he should not be charged with misconduct.

Although trial judges have considerable discretion in determining the credibility of witnesses, occasionally their decisions are reversed because they are against the weight of the evidence. Among those reversed decisions are many — undoubtedly, the overwhelming majority — in which no sinister implications could possibly be drawn against the trial court. Trial judges in

67. *Id.* at 652, 127 N.Y.S. at 552.

68. *In re Snitkin*, 161 A.D. 516, 146 N.Y.S. 560 (1st Dep’t 1914).

69. *Id.* This was the referee’s finding, which was adopted by the court.

70. *Id.* at 518, 146 N.Y.S. at 561.

71. *In re Tompkins Square Holding Co. v. Gerson*, 255 A.D. 48, 49, 5 N.Y.S.2d 813, 814 (1st Dep’t 1938).

72. *Id.* at 49, 5 N.Y.S.2d at 814.

73. *Id.*

good faith may overlook certain evidence or, for reasons not apparent in records on appeal, may give what appears to be undue weight to certain evidence. Although a judge who decides an issue against the weight of the evidence may do so for improper reasons, that conclusion generally cannot be fairly drawn. Thus, investigations of judges are not warranted merely because the judges abused their discretion or otherwise committed judicial error; more must be shown to question a judge's integrity or fitness for judicial office.

In 1940, New York City Magistrate Hulan Capshaw was removed from office for such obvious leniency to defendants charged with possession of "policy" slips as to justify the conclusion that the judge was motivated by factors other than the evidence.⁷⁴ The evidence of guilt in the criminal cases had been overwhelming, and no reasonable justification was apparent for Judge Capshaw's decisions not to hold the defendants for trial. The Appellate Division stated:

In the light of the clear and convincing testimony adduced against the defendants . . . we are unable to perceive how the magistrate could have decided that the crime specified in the complaint had not been committed, or, if it had been committed, that sufficient evidence had not been presented to cause him to believe that the defendants were guilty thereof and should be held to answer for the same.⁷⁵

Thus, once again the courts removed a judge largely because the judge's decisions were contrary to the overwhelming evidence presented to the judge. Although a judge could be unfairly susceptible to a disciplinary body's disagreement with the judge's decision, in an extreme case the judge's decision may be so contrary to the evidence that a conclusion may fairly be drawn that the judge had been improperly influenced. It is noteworthy that in *Quigley* and *Capshaw* the judges were especially vulnerable to attack because they dismissed cases that had been

74. *In re Capshaw*, 258 A.D. 470, 17 N.Y.S.2d 172, *lv. to appeal denied*, 258 A.D. 1053, 18 N.Y.S.2d 741 (1940).

75. *Id.* at 475, 17 N.Y.S.2d at 177. Two other factors were considered. Judge Capshaw's questioning of witnesses indicated (to the Appellate Division) a pro-defendant bias, and at the trial of a major racketeer, who had been charged with fixing gambling cases, Judge Capshaw was named as one of the corrupt judges. His testimony as a defense witness was found lacking.

presented to them solely for determinations as to whether the evidence was sufficient to hold the defendants for trial.

Twenty years later, in 1960, the Appellate Division, Second Judicial Department, declined to draw any adverse inference against a New York City Magistrate who was charged with a series of improper procedures and rulings favorable to defendants in a criminal case.⁷⁶ Interestingly, the petition for the judge's removal had been filed by his administrative judge. The judge had held an informal preliminary hearing, heard testimony without having witnesses sworn, released one defendant on parole although he was ineligible because of a prior felony conviction, reduced felony charges without consent of the prosecutor, and berated the complainant-police officer. Inexplicably, he was found to have simply misunderstood the scope of his authority. The Appellate Division censured the judge for discourtesy to the police officer but concluded that the judge's rulings and procedures, although improper, were not based on corrupt motives and thus were not subject to discipline.

The Appellate Division was reluctant to determine that the judge's motives were improper even though the judge distorted simple procedures that were, or should have been, familiar to him. Either he regularly distorted the procedures, in which event a pattern of misconduct and obvious unfitness to hold office would be evident, or his misuse of established procedures was unique to the one case that formed the basis of the charges. It is unclear how a judge could reasonably explain such a distortion of routine procedures if in the majority of cases he acted properly. Censuring the judge for rudeness to a police officer, in light of the other evidence of distorted rulings in favor of the defendants, appears to have been a compromise verdict.

Good motives did not save a Justice of the Peace from being censured, in 1966, for undue leniency in intentionally not scheduling two misdemeanor charges of operating an unregistered and uninsured automobile.⁷⁷ The judge was found to have been motivated by concern for the defendant, and he apparently believed he could achieve a just result by not proceeding with the criminal case. The Appellate Division, Fourth Judicial Department,

⁷⁶ *Murtagh v. Maglio*, 9 A.D.2d 515, 195 N.Y.S.2d 900 (2d Dep't 1960).

⁷⁷ *In re Van Brocklin*, 26 A.D.2d 299, 274 N.Y.S.2d 57 (4th Dep't 1966).

held that the judge had no authority to intentionally delay or suspend the criminal proceedings and that his failure to act violated the law.

Judges have broad — but not unlimited — discretion to determine whether they should be disqualified in particular cases. A judge may be disciplined for presiding over a case in which the judge's "impartiality might reasonably be questioned."⁷⁸ In 1976, in a case initiated by the Commission on Judicial Conduct, a City Court Judge was censured for, among other things, presiding over a traffic case in which the defendant was his former client.⁷⁹ The Appellate Division, Second Judicial Department, used the occasion to warn judges that they did not have discretion to determine whether they could preside over their former clients' cases and "[h]ereafter any such conduct by a judicial officer, whether full or part-time, may well be met with removal of the offender from office."⁸⁰

Several part-time judges who practiced law had difficulty separating their judicial positions from their law practices. One Town Justice presided over his client's case and advised his client about that matter.⁸¹ Two Town Justices permitted their respective law partners to appear in their courts.⁸² A Town Justice who practiced law set bail and presided over the case of a defendant who, in an unrelated matter, owed money to the judge's client.⁸³ The judge later accepted part of the cash bail that had been posted in payment of that debt. The disciplining of these judges indicates that judges are not entirely free to decide whether they are sufficiently impartial to preside over cases.

A Supreme Court Justice was censured for failing to disqualify himself from a civil case in which the plaintiffs alleged that public officials and political leaders had participated in an

78. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. § 100.3(c)(1) (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canon 3C(1) (N.Y. JUD. LAW app. at 522) (McKinney 1975).

79. *In re Filipowicz*, 54 A.D.2d 348, 388 N.Y.S.2d 920 (2d Dep't 1976).

80. *Id.* at 350, 388 N.Y.S.2d at 922.

81. *In re Jacon*, 1984 Annual Report 99 (Comm'n on Judicial Conduct Nov. 28, 1983); *See In re Pickett*, 47 N.Y.2d (a),(iii) (Ct. on the Judiciary 1979).

82. *In re Darby*, 1985 Annual Report 115 (Comm'n on Judicial Conduct Aug. 30, 1984); *In re DeVaul*, 1986 Annual Report 83 (Comm'n on Judicial Conduct Mar. 22, 1985).

83. *In re Pritchard*, 1983 Annual Report 153 (Comm'n on Judicial Conduct June 10, 1982).

illegal insurance commission-sharing plan. The judge dismissed the complaint notwithstanding that years earlier, as a town official, he had attended meetings at which the plan was discussed and had named several persons who would share in the illegal fees generated by the plan.⁸⁴

Judicial independence should not give a judge the prerogative of making judgments for reasons other than the merits of the case. Determining in advance not to consider the merits resulted in a public admonition of a City Court Judge in 1979.⁸⁵ Fulfilling a promise he had made to himself before becoming a judge, he dismissed the first criminal charge that he heard. It happened to be a Driving While Intoxicated charge. "You hit the jackpot," he told the surprised defendant.⁸⁶ Another judge was removed after he decided between a 20-day and 30-day jail sentence in a criminal case on the flip of a coin (the defendant won and received the lesser sentence) and polled the audience in another case on whether to grant a request to file a criminal complaint.⁸⁷

In several matters, Commission sanctions concerning judges' bias seemed to be so unduly lenient that some Commission members dissented and expressed sharp disagreement with the majority.

A Town Justice who owned a sporting goods business threatened, on his judicial stationery, to have one of his customers arrested for refusing to pay for goods purchased from the judge. In an apparent excess of compassion, the Commission dismissed the complaint and privately cautioned the judge to avoid such conflicts.⁸⁸ A few years later the judge went into the real

84. *In re Roncallo*, 1983 Annual Report 169 (Comm'n on Judicial Conduct Nov. 12, 1982).

85. *In re DeRose*, 1980 Annual Report 181, 183 (Comm'n on Judicial Conduct Nov. 13, 1979).

86. Subsequently, the defendant who "hit the jackpot" was convicted of two alcohol-related traffic offenses. Judge DeRose's largesse thus kept a dangerous driver on the highways longer than he should have been. Eventually, the defendant's license was revoked.

87. *In re Friess*, 1984 Annual Report 84 (Comm'n on Judicial Conduct Mar. 30, 1983).

88. See *In re DelPozzo*, 1986 Annual Report 77 (Comm'n on Judicial Conduct Jan. 25, 1985). The private caution would not have been disclosed but for a subsequent disciplinary proceeding. The prior matter is referred to in the January 25, 1985 determination and in the dissenting opinion. *Id.* at 78; *Id.* at 81 (Bower, Member, dissenting) (advocat-

estate brokerage business. While showing a house for sale to a prospective purchaser, one of the judge's employees was confronted by the former wife of the seller. Based upon the complaint of the seller and a supporting deposition of the judge's employee, the judge issued an arrest warrant for the alleged trespasser. This time the Commission publicly admonished the judge for his conflict of interest, with one member dissenting because admonition was too lenient.⁸⁹

Another Commission determination, regarded as too lenient by some Commission members, concerned a Town Justice who had signed thirty-seven summonses on civil claims brought by his employer, made all thirty-seven matters returnable before himself, and thereafter disposed of all thirty-seven cases, in most instances granting judgments for his employer.⁹⁰ Finding that the judge's "bias was so obvious and his courtroom decorum so unjudicial that one defendant thought respondent was representing the [plaintiff] and was unaware he was the judge,"⁹¹ the Commission concluded that the judge "has compromised the integrity and independence of the judiciary."⁹² Despite the Commission's strong conclusions and the large number of cases involving the judge's employer, the Commission only censured the judge for what it called "a single episode."⁹³ (Why thirty-seven cases, disposed of on different days within a one-month period, would be called "a single episode" is not readily apparent.)

One member filed a dissenting opinion, in which two other members joined.⁹⁴ The dissenting opinion found little to suggest that the judge should be retained in office:

ing censure).

89. *Id.* at 81 (Bower, Member, dissenting). The dissent, by Commission member John J. Bower, underscored the connection between the prior caution for the judge's use of his judicial position to further his business and the majority's admonition for similar misconduct. The caution, said Mr. Bower, "should have sensitized" the judge against conflicts between judicial duties and business activities. Mr. Bower voted to censure the judge so that the judge would have "a clear expression of [the Commission's] disapproval."

90. *In re Whalen*, 1984 Annual Report 157 (Comm'n on Judicial Conduct Jan. 20, 1983).

91. *Id.* at 162.

92. *Id.*

93. *Id.*

94. *Id.* at 163 (DelBello, Bower & Robb, Members, dissenting).

Unfitness for judicial office should be a primary consideration in determining sanction. *See, Matter of Kane v. State Commission on Judicial Conduct*, 50 NY2d 360 (1980). If unfitness is established, then removal from office is clearly warranted. A lesser discipline as censure or admonition is in order when unfitness has not been established.

In this case, respondent presided over thirty-seven cases brought by his employer. He virtually turned his courtroom into a collection agency and did so even after a question was raised by an involved party as to his conflict of interest. To further compound his actions, respondent's testimony at the hearing was found by the referee to be lacking in credibility in several key areas.

Respondent has exhibited his unfitness for office by the manner in which he used his courtroom and by not acknowledging the impropriety of presiding over thirty-seven cases in which he had an interest due to his employment and by his lack of candor at the hearing in this matter. He has exhibited an affront and insensitivity to judicial ethical standards.

For these reasons, I believe that the integrity of respondent's court has been irreparably compromised and that removal from office is appropriate.⁹⁵

The same Commission member opposed the undue leniency of the Commission in another recent disciplinary matter in which a Town Justice, who was also an insurance agent for a major insurance company, presided over the traffic cases of his automobile insurance clients.⁹⁶ In censuring the judge, the Commission found that his conduct "cast doubt on the impartiality of his decisions and undermined public confidence in the integrity and independence of the judiciary as a whole."⁹⁷ His failure to disqualify himself gave him a "financial interest in the parties since he received commissions from his work on their insurance policies."⁹⁸ The Commission went further:

His disposition of their traffic cases may have directly affected their insurance rates and may have determined whether or not the insurance company canceled their policies. Thus, respondent

95. *Id.* The dissenting opinion was filed by Dolores DelBello.

96. *In re Latremore*, 1987 Annual Report 97 (Comm'n on Judicial Conduct May 30, 1986).

97. *Id.* at 101.

98. *Id.*

may have had a substantial interest in the outcome of the court proceedings since, if the policies were canceled, he would no longer receive a commission for servicing them. This conflict tainted his every action in his clients' cases.⁹⁹

Despite this particularly strong condemnation, the Commission determined that the judge should not be removed. The censure prompted this strong dissent:

Respondent should be removed from office because he engaged in clear and serious conflicts of interest. Serving simultaneously as a local judge with jurisdiction over traffic cases and as an agent for a major auto insurance company, he acted on numerous traffic matters with the clients he had insured. I find it incomprehensible that he did not recognize these conflicts. The facts reveal that it was in his best interest that the clients who came before him for a traffic infraction were not convicted. As an agent, dependent solely upon commissions for his business, respondent saw to it that his clients did not lose either their driving privileges or licenses, for such loss would be a loss of his commissions as well.

There was little if any distinction between his two roles. Respondent's insurance personnel were his court personnel. Some court proceedings were conducted in the very office where insurance policies were written for the traffic violators. For example, respondent reduced three of his clients' Driving While Intoxicated cases; two of them were handled in the privacy of his insurance office.

I cannot accept respondent's professed lack of knowledge of impropriety in his official dealings with his clients. Any responsible person could recognize such a blatant conflict. Certainly, we can expect such basic recognition from a judge entrusted to uphold the highest of standards of conduct.¹⁰⁰

In another case, *In re Sims*,¹⁰¹ all but one Commission

99. *Id.*

100. *Id.* at 103 (DelBello, Member, dissenting).

101. *In re Sims*, 1984 Annual Report 140, 151 (Comm'n on Judicial Conduct May 16, 1983) (Kovner, Member, dissenting) (Mr. Kovner urged that censure was too severe.). Commission member Dolores DelBello was unwilling to accept the judge's explanation of why she had not recognized her son's name on the complaint attached to the arrest warrant. Ms. DelBello said: "It is unconvincing that a mother would not recognize the name she gave her own son when it was placed before her in connection with a summons she was about to sign, and it is also incredible that she would not recognize her own address [on the supporting papers attached to the warrant]." *Id.* at 149 (DelBello, Member, dissenting). The Court of Appeals was equally skeptical.

member found no misconduct where a judge had signed a warrant for the arrest of a person involved in an automobile accident with the judge's son. But when the judge, censured for other misconduct, sought review in the Court of Appeals, the Court reinstated the arrest-warrant charge, sustained it, and removed the judge from office.¹⁰² The judge had testified that when she signed the warrant, she was unaware that her son, Frank, was the complaining witness or that he had signed the complaint that was attached to the warrant. She testified that: (a) it was the clerk's responsibility, not hers, to refer the matter to another judge; (b) since her son was not a "party," she did not have to disqualify herself; and (c) she would not have recognized her son's name even if she had seen it because he is known at home by the name "Billy." The Court of Appeals rejected all three defenses, finding that they were based on an "appalling insensitivity to the responsibilities of her office and a lack of diligence in performing her judicial duties."¹⁰³

Supporting the Court's sanction of removal was the judge's failure to disqualify herself from signing orders releasing certain defendants from jail following their arrest. One of those released had been her law client; others were clients or former clients of her husband, an attorney; and some were represented by her husband on the day following their release from jail. The judge's husband had assisted the judge by preparing some of the release forms, including some for defendants who then retained him. The impression conveyed, concluded the Court of Appeals, was that the judge and her husband "were acting as a team"¹⁰⁴ and because of her husband's relationship to her, "special favor and consideration could be obtained in the courts through retention of the judge's husband."¹⁰⁵

Compounding the judge's misconduct was her "serious failure to appreciate the obligations of judicial office and the necessity for Judges to maintain, by their conduct, public confidence in the courts and in judicial office by avoiding situations which

102. *In re Sims*, 61 N.Y.2d 349, 462 N.E.2d 370, 474 N.Y.S.2d 270 (1984).

103. *Id.* at 355, 462 N.E.2d at 373, 474 N.Y.S.2d at 273.

104. *Id.* at 355, 462 N.E.2d at 374, 474 N.Y.S.2d at 274.

105. *Id.*

cast doubt on their independence and impartiality.”¹⁰⁶

The Court gave short shrift to the judge’s claim that the ethical mandate that judges avoid even the appearance of impropriety is unconstitutionally vague and would result in her punishment for acts that she could not know were prohibited.¹⁰⁷

The Court held that:

When a Judge acts in such a way that she appears to have used the prestige and authority of judicial office to enhance personal relationships, or for purely selfish reasons, or to bestow favors, that conduct is to be condemned whether or not the Judge acted deliberately and overtly¹⁰⁸

3. *Egregious Deprivation of Rights*

For most of the past ten decades, arbitrary conduct in court that deprived litigants or other persons of their guaranteed rights, with few exceptions, has not been a basis for discipline. When a judge violated an individual’s rights, the judge’s motives were not questioned. Isolated abuses of this kind were either viewed as mere errors of law or simply were not sufficient to justify removal from office; and there is no sense of outrage in the disciplinary decisions against tyrannical, arbitrary behavior that ignored the law. The dearth until recently of judicial disciplinary charges regarding the violation of rights reflects the low priority given to this form of misconduct.

In 1888, the Supreme Court, Second Judicial Department, dismissed judicial misconduct charges initiated by a defendant in a criminal proceeding who had been deprived of the right to bail.¹⁰⁹ The defendant had been arrested on a warrant issued by a Justice of the Peace for using a steam dredge to take oysters from a planted bed, an act prohibited by statute. The judge failed to set bail at the arraignment. The Supreme Court held that the denial of bail in a single case, while unauthorized, did not justify the judge’s removal. Whether the judge had failed to set bail in other cases is not known because of the absence of

106. *Id.* at 356, 462 N.E.2d at 374, 474 N.Y.S.2d at 274.

107. *Id.* at 358, 462 N.E.2d at 375, 474 N.Y.S.2d at 275.

108. *Id.*

109. *In re Thomas*, 2 N.Y.S. 38 (Sup. Ct. 2d Dep’t 1888).

any official investigation.

Failing to set bail in a misdemeanor case was again held to be an insufficient reason to discipline a judge in 1930.¹¹⁰ A petition by the American Civil Liberties Union alleged that New York City's Chief City Magistrate, William McAdoo, unlawfully deprived five defendants of their liberty. The judge testified that while the Information¹¹¹ technically charged the misdemeanor of unlawful assembly, for which bail was required by state law, he had discretion to deny bail because the allegations formed a basis for a felony (riot). Furthermore, he explained, the prosecutor was not familiar with the charges. Curiously, the Appellate Division, First Judicial Department, implied that by merely alleging that the judge violated state law, the petition for the judge's removal was lacking in that it did not allege bias, malice or willful disregard of defendants' rights. It is doubtful that the Appellate Division would have acted any differently if there had been a specific allegation in the petition that the judge had willfully disregarded the defendants' rights. The petition certainly was based on that premise and it provided sufficient notice to the judge to defend against such a charge. Moreover, the judge defiantly defended his conduct by saying he could ignore state law if the alleged conduct would also support an uncharged felony. The absence of any criticism by the Appellate Division of Judge McAdoo's conduct, notwithstanding that he had no discretion to deny bail in a misdemeanor case, compels the conclusion that the courts were less sensitive to defendants' rights in 1930 than they are today. The court apparently intended to underscore its exoneration of Judge McAdoo by holding that there was no basis for "censure" — an unusual term, since the petition, pursuant to law, was for the judge's removal. One Appellate Division Justice dissented, noting that the serious violation of the defendants' rights was sufficient reason to admonish the judge.¹¹²

Arbitrarily committing litigants "for observation as to . . . [their] sanity" and other (off-bench) conduct by a New York City Magistrate caused the Brooklyn Bar Association to petition

110. *In re McAdoo*, 229 A.D. 511, 242 N.Y.S. 696 (1st Dep't 1930).

111. The "Information" was the accusatory instrument charging the defendant with a violation of the criminal law.

112. *Id.* at 514, 242 N.Y.S. at 699 (McAvoy, J., dissenting).

the Appellate Division, Second Judicial Department, for the judge's removal in 1930.¹¹³ In a three-to-two decision, the Appellate Division held that the petition was insufficient as a matter of law to justify removal. The majority held that even if the judge were guilty of an erroneous exercise of discretion or judgment, removal from office would not be warranted. The dissent reasoned that "if it be the fact that these persons were committed arbitrarily and willfully, then, in our opinion, the respondent is not fit to continue as a city magistrate."¹¹⁴

Violating the constitutional rights of a defendant "in an inexcusable manner"¹¹⁵ was one of several grounds in 1931 upon which Jean Norris, the first woman judge in the New York City courts, was removed from office.¹¹⁶ The defendant, a 20-year-old woman who had been summarily arrested for cohabiting with a man, was brought to court within two hours of her arrest. Without counsel and without even being advised of her right to counsel, she was convicted on hearsay evidence of being a wayward minor.¹¹⁷ The Appellate Division, First Judicial Department, did

113. *In re Hirshfield*, 229 A.D. 654, 241 N.Y.S. 601, 602 (2d Dep't 1930). The decision to file charges against the judge seems inconsistent with the broad discretion given to judges several decades ago and the tendency to overlook violations of defendants' rights. The judge apparently angered the Brooklyn Bar Association, judges and public officials by his vehement criticism of the Mayor of the City of New York and Tammany Hall. See *infra* notes 300-04 and accompanying text.

114. *Id.* at 656, 241 N.Y.S. at 603 (Lazansky, P.J. & Hagarty, J., dissenting).

115. FINAL REPORT OF SAMUEL SEABURY, *supra* note 25, at app. 247.

116. *In re Norris*, 233 A.D. 842 (1st Dep't 1931). In the most interesting and scholarly work on the professional career of Judge Samuel Seabury, the author, Herbert Mitgang, refers to Judge Norris as

the first woman judge in New York City history . . . a fiery suffragette . . . [who, as a judge] immediately gained a reputation for harshness, in spite of her pledge that the prostitutes and 'poor unfortunate members of the weaker sex who appear before me will be dealt with in kindness; they will be handled with gloves of velvet rather than fingers of steel.'

H. MITGANG, *THE MAN WHO RODE THE TIGER, THE LIFE AND TIMES OF JUDGE SAMUEL SEABURY* 191-92 (1963). Mitgang observes: "Her record showed many severe jail sentences and few acquittals." *Id.* at 192.

117. FINAL REPORT OF SAMUEL SEABURY, *supra* note 25, at app. 247. See OPINION AND REPORT OF SAMUEL SEABURY, REFEREE, IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATES' COURTS IN THE FIRST JUDICIAL DEPARTMENT AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS-AT-LAW PRACTICING IN SAID COURTS, IN RE: MAGISTRATE JEAN H. NORRIS 41-44 (May 28, 1931) [hereinafter OPINION AND REPORT OF SAMUEL SEABURY, IN RE: NORRIS]. Judge Seabury's report is on file at the Appellate Division, First Judicial Department.

not sustain a charge that Judge Norris' unfitness for office was established "by her severity, her unjudicial conduct and her callous disregard of the rights of defendants."¹¹⁸ Although the evidence established that the judge had directed a defendant to testify contrary to the wishes of the defendant and her attorney, the incident had not been specifically charged and, therefore, the judge's misconduct was not considered by the court.¹¹⁹

The charge that the judge had violated defendants' rights was the last in a series of charges alleging both on-bench and off-bench misconduct. The judge had modified an official court transcript of a case on appeal for the obvious purpose of making her rulings and comments seem less harsh than they were.¹²⁰ For example, the court reporter's original transcript showed the judge saying to the defendant: "Take the stand." The judge changed the transcript to read: "Will you put the defendant on or not?"¹²¹ She also presided over the forfeiture of bail bonds that had been issued by a corporation in which she owned shares of stock.¹²² And, on an even more colorful note, she received money to extol the virtues and the benefits to her digestive system of Fleischmann's Yeast.¹²³ In an advertisement for that product that appeared in numerous national magazines, she was shown in her robes and identified as a judge. The court found that the judge's conduct exploited her judicial position "contrary to the essential dignity of judicial office."¹²⁴

The condemnation in 1931 of Judge Norris' disregard of the constitutional and statutory rights of a defendant in a criminal proceeding did not set a precedent for disciplining other judges

118. FINAL REPORT OF SAMUEL SEABURY, *supra* note 25, at app. 245. The allegation is set forth in the court's order of removal as a charge only; the "grounds" for the judge's removal omit reference to this allegation.

119. *Id.* at app. 248.

120. *Id.* at app. 246. The court found that Judge Norris had modified the transcript "in an endeavor to eliminate from the record on appeal remarks and rulings by her as a magistrate which presented evidence of unjudicial and unfair conduct at the trial and thus to prevent the substantiation in the appellate court as to what had in truth occurred." *Id.*

121. OPINION AND REPORT OF SAMUEL SEABURY, IN RE: NORRIS, *supra* note 117, at 6-9.

122. *Id.* at 13-15; FINAL REPORT OF SAMUEL SEABURY, *supra* note 25, at app. 247.

123. OPINION AND REPORT OF SAMUEL SEABURY, *supra* note 117, at 16-17, app. 65 (copy of advertisement); FINAL REPORT OF SAMUEL SEABURY, *supra* note 25, at app. 247.

124. FINAL REPORT OF SAMUEL SEABURY, *supra* note 25, at app. 247.

for similar misconduct. Even as late as the 1960's, judges appeared to be immune from discipline for violating fundamental rights by the abuse of their power. In the mid-1960's, the "President Judge"¹²⁵ of the Suffolk County District Court engaged in a series of improper acts and "irregularities,"¹²⁶ which resulted in the "disapproval"¹²⁷ of his acts by the Appellate Division, Second Judicial Department, and the dismissal of the proceedings.¹²⁸ He violated the Judiciary Law by signing a criminal complaint and issuing a warrant for the arrest of his brother-in-law. He also had the owner of a truck arrested and handcuffed in court without any justification in law. The driver of the truck had been charged with several traffic offenses. When the defendant's lawyer asked to withdraw from the case because of a fee dispute, the judge consented and gave the driver two hours to obtain another lawyer. When the case was called again, the truck's owner appeared and advised the judge that he had sent the defendant home because he was ill. In anger, the judge had the owner arrested and handcuffed; the judge later explained that he intended to transfer the traffic charges from the driver to the owner. He reluctantly freed the truck's owner after being advised by an assistant district attorney that such charges would be improper.

The Appellate Division concluded that because none of the judge's acts had been motivated by venality, pecuniary gain, or other improper motives, there was no basis for his removal. In dismissing the proceedings against the judge, the Appellate Division made only passing reference to a shocking procedure in his court: "[I]n cases involving traffic violations and other minor infractions, defendants should not be handcuffed and placed in detention cells either during a recess of the trial or while waiting for complaints to be drawn."¹²⁹

In 1976, the Appellate Division, Second Judicial Depart-

125. *In re Schmidt*, 31 A.D.2d 214, 215, 296 N.Y.S.2d 49, 51 (2d Dep't 1968).

126. *Id.* at 221, 296 N.Y.S.2d at 56.

127. *Id.* at 220, 296 N.Y.S.2d at 55.

128. The court's opinion is a classic illustration of a reluctance to impose formal discipline (e.g., censure) that was not explicitly provided for by law. Some courts were reluctant to exercise the implied power to censure as a lesser sanction of the power of removal.

129. *Id.* at 221, 296 N.Y.S.2d at 56.

ment, on charges filed by the Temporary Commission on Judicial Conduct, removed William Perry, a Suffolk County District Court Judge who had had a coffee vendor arrested and handcuffed because the judge, during a court break, did not like the taste of the vendor's coffee.¹³⁰ Interestingly, the Appellate Division implied that if the judge had not lied during the Commission's investigation, he would not have been removed.¹³¹

A City Court Judge, Hubert Richter, was censured in 1977 by a Court on the Judiciary for his physically aggressive behavior on the bench and for sentencing defendants to make contributions to charities of the judge's choice in lieu of paying fines.¹³² In determining that removal from office would be too severe, the court noted the absence of "corrupt or venal conduct."¹³³ Remarkably, the court did not discipline the judge or even sustain a charge for his setting as a condition of probation that a defendant convicted of a misdemeanor attend church on Sundays — any church, the judge ruled, except for the Unitarian Church, because it did not accept his concept of God.¹³⁴

With the abolition of Courts on the Judiciary on April 1, 1978, except for pending disciplinary proceedings in such courts, the Court of Appeals began to play a more important role in determining the seriousness of judicial misconduct.¹³⁵ In the

130. *In re Perry*, 53 A.D.2d 882, 385 N.Y.S.2d 589 (2d Dep't 1976).

131. *Id.* at 882, 385 N.Y.S.2d at 590.

132. *In re Richter*, 42 N.Y.2d (aa) (Ct. on the Judiciary 1977).

133. *Id.* at (ii). The Court's criticism was strong, unlike its sanction:

This violent verbal reaction was unseemly, injudicious, and inexcusable. Further, it was a form of bullying . . . This was compounded two days later in the Schiskie matter where, again, uninstructed instinct took over, and the earlier episode was virtually repeated without change . . . The sentencing irregularities . . . are part of the same pattern . . . His pattern was that of the traditional country squire. . . .

Id. at (jj)-(kk)

134. *Id.* at (hh). The defendant was ordered to "report to the court on the sermons"; the Court on the Judiciary held that the judge's conduct "involved no judicial impropriety." *Id.* The judge testified that he "wanted a church where you had the religion as I know it, with the Savior and, well, not just humanity, but where you had a God and where you had a relationship there . . ." *In re Richter*, hearing transcript 834-35, on file at the Commission on Judicial Conduct.

135. N.Y. CONST. art. 6, § 22; N.Y. JUD. LAW, §§ 40-48 (McKinney 1978). In its first review of a Commission determination, *In re Spector*, 47 N.Y.2d 462, 392 N.E.2d 552, 418 N.Y.S.2d 565 (1979), the Court made it clear that it would exercise a comprehensive review in judicial disciplinary cases and would use the opportunity to educate judges on

years since 1978, when the Court of Appeals was given authority to review determinations of the Commission on Judicial Conduct, the Court has shown special sensitivity to the civil rights and liberties of litigants. Judges who abuse their power by disregarding rights of litigants are no longer immune from discipline.

In 1983, the Court of Appeals in *In re Sardino*¹³⁶ found that a City Court Judge "consistently failed (in 62 cases) to inform

their ethical obligations, and it has done so in every matter reviewed since that time.

Of the 33 Commission determinations reviewed as of December 31, 1986, the Court has accepted 24 determinations, of which 20 were for removal, in expansive per curiam opinions: *In re Spector*, 47 N.Y.2d 462, 392 N.E.2d 552, 418 N.Y.S.2d 565 (1979) (admonition); *In re Bulger*, 48 N.Y.2d 32, 396 N.E.2d 192, 421 N.Y.S.2d 45 (1979) (censure); *In re Dier*, 48 N.Y.2d 874, 400 N.E.2d 299, 424 N.Y.S.2d 358 (1979) (censure); *In re Kuehnel*, 49 N.Y.2d 465, 403 N.E.2d 167, 426 N.Y.S.2d 461 (1980) (removal); *In re Kane*, 50 N.Y.2d 360, 406 N.E.2d 797, 428 N.Y.S.2d 941 (1980) (removal); *In re Steinberg*, 51 N.Y.2d 74, 409 N.E.2d 1378, 431 N.Y.S.2d 704 (1980) (removal); *In re Cooley*, 53 N.Y.2d 64, 422 N.E.2d 814, 440 N.Y.S.2d 169 (1981) (removal); *In re Petrie*, 54 N.Y.2d 807, 427 N.E.2d 945, 443 N.Y.S.2d 648 (1981) (removal); *In re Harris*, 56 N.Y.2d 365, 437 N.E.2d 1125, 452 N.Y.S.2d 368 (1982) (removal); *In re Scacchetti*, 56 N.Y.2d 980, 439 N.E.2d 345, 453 N.Y.S.2d 629 (1982) (removal); *In re Aldrich*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983) (removal); *In re Sardino*, 58 N.Y.2d 286, 448 N.E.2d 83, 461 N.Y.S.2d 229 (1983) (removal); *In re Lobdell*, 59 N.Y.2d 338, 451 N.E.2d 742, 464 N.Y.S.2d 999 (1983) (removal); *In re McGee*, 59 N.Y.2d 870, 452 N.E.2d 1258, 465 N.Y.S.2d 930 (1983) (removal); *In re Boulanger*, 61 N.Y.2d 89, 460 N.E.2d 216, 472 N.Y.S.2d 75 (1984) (removal); *In re Cerbone*, 61 N.Y.2d 93, 460 N.E.2d 217, 472 N.Y.S.2d 76 (1984) (removal); *In re Reeves*, 63 N.Y.2d 105, 469 N.E.2d 1321, 480 N.Y.S.2d 463 (1984) (removal); *In re Reedy*, 64 N.Y.2d 299, 475 N.E.2d 1262, 486 N.Y.S.2d 722 (1985) (removal); *In re Agresta*, 64 N.Y.2d 327, 476 N.E.2d 285, 486 N.Y.S.2d 886 (1985) (censure); *In re Fabrizio*, 65 N.Y.2d 275, 480 N.E.2d 733, 491 N.Y.S.2d 144 (1985) (removal); *In re Seiffert*, 65 N.Y.2d 278, 480 N.E.2d 734, 491 N.Y.S.2d 145 (1985) (removal); *In re Wait*, 67 N.Y.2d 15, 490 N.E.2d 502, 499 N.Y.S.2d 635 (1986) (removal); *In re Bailey*, 67 N.Y.2d 61, 490 N.E.2d 818, 499 N.Y.S.2d 899 (1986) (removal); *In re Myers*, 67 N.Y.2d 550, 496 N.E.2d 207, 505 N.Y.S.2d 48 (1986) (removal).

Of the remaining nine matters: five removal determinations were not accepted and the judges were censured instead: *In re Rogers*, 51 N.Y.2d 224, 414 N.E.2d 382, 433 N.Y.S.2d 1001 (1980); *In re Quinn*, 54 N.Y.2d 386, 430 N.E.2d 879, 446 N.Y.S.2d 3 (1981); *In re Cunningham*, 57 N.Y.2d 270, 442 N.E.2d 434, 456 N.Y.S.2d 36 (1982); *In re Kelso*, 61 N.Y.2d 82, 459 N.E.2d 1276, 471 N.Y.S.2d 839 (1984); *In re Edwards*, 67 N.Y.2d 153, 492 N.E.2d 124, 501 N.Y.S.2d 16 (1986). In *In re Quinn*, the Court held that the judge should not be retained in office and, in view of his resignation, a censure would be appropriate. Two censures were not accepted and the judges were publicly admonished instead: *In re Dixon*, 47 N.Y.2d 523, 393 N.E.2d 441, 419 N.Y.S.2d 445 (1979); *In re Lonschein*, 50 N.Y.2d 569, 408 N.E.2d 901, 430 N.Y.S.2d 571 (1980). Two judges who were the subject of censure determinations by the Commission were removed by the Court: *In re Shilling*, 51 N.Y.2d 397, 415 N.E.2d 900, 434 N.Y.S.2d 909 (1980); *In re Sims*, 61 N.Y.2d 349, 462 N.E.2d 370, 474 N.Y.S.2d 270 (1984).

136. 58 N.Y.2d 286, 448 N.E.2d 83, 461 N.Y.S.2d 229 (1983).

the accused of the right to counsel and failed to conduct even a minimal inquiry to determine whether they were entitled to assigned counsel."¹³⁷ The Court also found that the judge "regularly abused his authority with respect to setting bail."¹³⁸ The judge's purpose in setting bail, the Court found, was to act "punitively with little or no interest in the only matter of legitimate concern, namely whether any bail . . . was necessary to insure the defendant's future appearance in court."¹³⁹ The judge had ordered defendants held without bail in cases where bail was required as a matter of law and ordered that some defendants be held for "mental examination" without "apparent legal or rational justification."¹⁴⁰ Also, the judge often "assumed an adversarial role"¹⁴¹ at arraignments by expressing disbelief as to defendants' claims, questioning defendants about the crime charged, and displaying animosity towards defendants.

Addressing the judge's claim that he was not biased, the Court said that whether the judge was actually biased was not the point. The judge's "course of conduct . . . could only create the impression in the mind of the public that he was predisposed against those defendants."¹⁴² The Court rejected the judge's contention that the record unfairly focused on a small percentage of his cases. The record, said the Court, established that the conduct "can hardly be viewed as an isolated incident"¹⁴³ and if the judge did not act in that manner in other cases, "his behavior was erratic, which itself is inconsistent with a Judge's role."¹⁴⁴ Upholding the Commission's determination that the conduct showed "a shocking disregard for due process of law,"¹⁴⁵ the Court found Judge Sardino unfit to remain in judicial office and removed him.

In *In re McGee*,¹⁴⁶ the Court of Appeals removed a Town Justice from office in 1983 for coercing guilty pleas, conducting

137. *Id.* at 289, 448 N.E.2d at 84, 461 N.Y.S.2d at 230.

138. *Id.*

139. *Id.*

140. *Id.* at 290, 448 N.E.2d at 84, 461 N.Y.S.2d at 230.

141. *Id.*

142. *Id.* at 291, 448 N.E.2d at 85, 461 N.Y.S.2d at 231.

143. *Id.*

144. *Id.*

145. *Id.*

146. 59 N.Y.2d 870, 452 N.E.2d 1258, 465 N.Y.S.2d 930 (1983).

improper ex parte conferences with arresting officers, failing to advise defendants of their rights, and finding defendants guilty without a trial or guilty plea. The Court upheld the Commission's determination that the judge had abused the power of his office "in a manner that has brought disrepute to the judiciary and has irredeemably damaged public confidence in the integrity of his court."¹⁴⁷

In *In re Reeves*,¹⁴⁸ a Family Court Judge had failed to properly advise litigants of their rights, failed to require litigants to submit sworn financial disclosure statements as required by law, and entered dispositional orders in cases in which the court lacked jurisdiction over litigants. A former Presiding Justice of the Appellate Division, designated as referee to hear evidence and report findings of fact and conclusions of law, found that the charge had not been sustained. He concluded that the judge had only "technically"¹⁴⁹ violated the Family Court Act because the mistakes were made either in good faith or in misapprehension of the legal issues involved, due to poor judgment or lack of judicial experience. In support of the referee's conclusion, the judge argued before the Commission that any errors of law could be corrected on appeal and do not constitute judicial misconduct. The Commission disagreed and determined that the judge should be removed. The Court of Appeals in 1984 accepted the Commission's determination, citing *In re Sardino* for the principle that "[a] repeated pattern of failing to advise litigants of their constitutional and statutory rights . . . is serious misconduct."¹⁵⁰ After summarizing the violations of law, the Court held:

Although these were errors of law, they cannot be excused on that basis. The errors were fundamental and the pattern of repeating them, coupled with an unwillingness to recognize their impropriety, indicate that petitioner poses a threat to the proper administration of justice.¹⁵¹

Even isolated instances of egregious judicial errors that

147. *Id.* at 871, 452 N.E.2d at 1259, 465 N.Y.S.2d at 931.

148. 63 N.Y.2d 105, 469 N.E.2d 1321, 480 N.Y.S.2d 463 (1984).

149. *In re Reeves*, referee's report, Record on Appeal at 1019.

150. *Id.* at 109-10, 469 N.E.2d at 1323, 480 N.Y.S.2d at 465.

151. *Id.* at 110-11, 469 N.E.2d at 1323, 480 N.Y.S.2d 465.

abused judicial power and ignored basic rights have been subject to charges and public discipline in recent years by the Commission on Judicial Conduct. In *In re Wordon*,¹⁵² a Town Justice was publicly admonished for threatening to issue an arrest warrant against a person who had stopped payment on a check given to the owners of a hotel in the judge's town. Because of the judge's threat, the alleged debtor paid the hotel bill and, in effect, waived his right to dispute the bill in the judge's court. The Commission concluded that the judge improperly used the power and prestige of his judicial office to settle a civil dispute. In *In re Sharpe*,¹⁵³ a Supreme Court Justice was admonished after he arbitrarily held a prosecutor in contempt of court because a witness was late for a hearing in a homicide case. The prosecutor had engaged in no contumacious conduct and had made reasonable efforts to have the witness in court on time. Holding the prosecutor responsible for the witness' lateness was entirely unjustified and a "gross abuse of power,"¹⁵⁴ according to the Commission. In *In re Maxon*,¹⁵⁵ a Town Justice was admonished for finding a defendant guilty of speeding, without a trial, even though the defendant had pled not guilty. In rejecting the defendant's not guilty plea, the judge expressed his personal knowledge that drivers tend to speed on the road on which the defendant had been given a summons.

A Family Court Judge ordered the arrest of a respondent in a support proceeding based on a rumor that he was about to flee the jurisdiction. The respondent had not missed a single court appearance, and he was represented by counsel. After the respondent was arrested and arraigned before a Town Justice who set \$500 bail, the judge concluded that the bail was not sufficient to ensure the respondent's return to court for a hearing on the non-support petition and so, one day after the arrest, the judge issued a second arrest warrant. In *In re Mullen*,¹⁵⁶ the judge was

152. 1981 Annual Report 145 (Comm'n on Judicial Conduct April 1, 1980).

153. 1984 Annual Report 134 (Comm'n on Judicial Conduct June 7, 1983). One member, John J. Bower, voted to censure the judge. *Id.* at 139.

154. *Id.* at 139.

155. 1986 Annual Report 143 (Comm'n on Judicial Conduct Dec. 17, 1985).

156. 1987 Annual Report 129 (Comm'n on Judicial Conduct May 22, 1986). Three members dissented, stating that issuance of the first warrant did not constitute misconduct and a public sanction was unwarranted. *Id.* at 132.

admonished for issuing the first warrant solely on a rumor and for issuing the second warrant solely because he was displeased with the bail set by the Town Justice.

A comparison of pre-Commission decisions with the more recent decisions of the Commission and the Court of Appeals establishes that misconduct which deprives persons of fundamental rights is no longer excused as a mistake, an error of law, or an abuse of discretion. Nor is the absence of a "corrupt or venal" motive an excuse, as it was just a few years ago, when the conduct demonstrates lack of fitness for office. A judge who is not motivated by corruption or venality may have a valid defense to a criminal indictment, but much more should be required of judges to maintain the high positions of trust they hold. When a judge's conduct shows lack of fitness (for whatever reason) the judge should be removed from office. That is the sense of the recent decisions removing judges for disregarding litigants' rights.

4. *Receiving Improper Ex Parte Communications*

Receiving and acting upon unauthorized ex parte communications may distort and corrupt the administration of justice. Accordingly, except for the most innocuous of private communications, the misconduct should be treated as a serious problem. Only recently has the problem been addressed in the disciplining of judges.

Judges have been disciplined for receiving ex parte communications from witnesses, experts and legal advisors.¹⁵⁷ Town and village justices seem especially vulnerable to this practice. Because they lack staff, these justices accept filing fees, maintain records, and, generally, are in close communication with litigants. Some judges have shown a tendency to resolve factual conflicts by conducting their own out-of-court inquiries.¹⁵⁸ Town and village justices, many of whom are not lawyers, seem espe-

157. *In re Hopeck*, 1981 Annual Report 133 (Comm'n on Judicial Conduct Aug. 15, 1980); *In re Racicot*, 1982 Annual Report 99 (Comm'n on Judicial Conduct Feb. 6, 1981); *In re Loper*, 1985 Annual Report 172 (Comm'n on Judicial Conduct Jan. 25, 1984); *In re Lombardi*, 1987 Annual Report 105 (Comm'n on Judicial Conduct Jan. 2, 1986).

158. *In re Edwards*, 1987 Annual Report 85 (Comm'n on Judicial Conduct Nov. 21, 1986).

cially prone to obtaining advice from prosecutors.¹⁵⁹ Too often, they are "briefed" by police officers in traffic and criminal cases.¹⁶⁰

In a hearing that resulted in a Town Justice's removal for depriving defendants of basic rights, the judge testified that he routinely received legal advice from the District Attorney and he would even ask the District Attorney to obtain a lawyer for an indigent defendant.¹⁶¹

A Town Justice was censured recently after defense counsel noticed that the typed decision he received from the court, denying his motion for discovery and to suppress certain evidence and the defendant's statements, was similar in style, typing and print to the answering affidavit submitted by the District Attorney's office.¹⁶² Defense counsel requested the judge to disqualify herself. In response to defense counsel's motion, the prosecutor acknowledged that the judge's decision had been typed by a secretary in the District Attorney's office. An investigation by the Commission disclosed that, in an *ex parte* conversation with the prosecutor, the judge had accepted the prosecutor's offer to prepare the decision denying defense counsel's motion. The judge admitted that she accepted every word of the prosecutor's "draft" (including typographical errors). The judge explained that she often relied on the District Attorney's office for *ex parte* advice.¹⁶³ She testified during the investigation that in the future she would continue to consult *ex parte* with the prosecutor (a position she ultimately changed) but would do her own typing.¹⁶⁴ One member of the Commission voted for the judge's removal.¹⁶⁵

159. 1986 Annual Report 40-41 (Comm'n on Judicial Conduct).

160. See 1986 Annual Report 40-41 (Comm'n on Judicial Conduct) (the Commission condemns the practice of *ex parte* communications between judges and prosecutors or other law enforcement personnel). See *infra* note 167 and accompanying text.

161. Record on Appeal at 360-62, *In re McGee*, 59 N.Y.2d 870, 452 N.E.2d 1258, 465 N.Y.S.2d 930 (1983).

162. *In re Rider*, unreported determination (Comm'n on Judicial Conduct Jan. 30, 1987).

163. *In re Rider*, hearing transcript 162, 192-93, 203, 274-75, and Exhibit 4 on file at the Commission on Judicial Conduct.

164. *Id.* at 161.

165. Commission member David Bromberg dissented only as to the sanction. He voted for removal.

In another case, an *ex parte* conversation between a Town Justice and state troopers, following the trial of a defendant on a charge of Passing In A No-Passing Zone, resulted in a bizarre letter received by the defendant.¹⁶⁶ The court clerk overheard the *ex parte* conversation, in which one of the participants said that the defendant had lied. When the time came to advise the defendant that he had been found guilty of the traffic charge, the clerk's enthusiasm apparently exceeded her knowledge of the jurisdiction of the town court. After advising the defendant that "the court finds you guilty of section 1126A" (the traffic charge), the clerk added: "The court also, finds you guilty of perjury [sic] on the witness stand"¹⁶⁷

The problem of receiving *ex parte* communications is not exclusive to part-time judges. The Seabury investigation of the Magistrates' Court of the First Judicial Department in the early 1930's disclosed numerous instances of visits to judges by their political leaders who sought leniency for defendants charged with minor offenses.¹⁶⁸ More recently, a full-time attorney-judge of the Syracuse City Court met routinely with an assistant district attorney before court sessions commenced to discuss each case on the calendar that day.¹⁶⁹ Decisions were made in chambers in the absence of defense counsel. Interestingly, until the prosecutor testified as a defense witness, there had been no evidence that the judge, charged with many instances of pro-prosecution misconduct, had received *ex parte* communications. The prosecutor, attempting to show how competent and concerned the judge was in disposing of his cases, described these meetings, which took place in chambers at 8:30 every morning. When asked on cross-examination whether he knew of any canon, statute or rule prohibiting such meetings, the witness replied: "If I was aware, don't you think I would have followed it?"¹⁷⁰

166. *In re Jutkofsky*, 1986 Annual Report 111 (Comm'n on Judicial Conduct Dec. 24, 1985).

167. *In re Jutkofsky*, Exhibit 19C, on file at the Commission on Judicial Conduct. The judge was removed for numerous abuses of defendants' rights. *In re Jutkofsky*, 1986 Annual Report 111, 131-32 (Comm'n on Judicial Conduct Dec. 24, 1985).

168. FINAL REPORT OF SAMUEL SEABURY, *supra* note 25, at 44-49.

169. Record on Appeal at 7, 31-40, *In re Sardino*, 58 N.Y.2d 286, 448 N.E.2d 83, 461 N.Y.S.2d 229 (1983).

170. Record on Appeal at 39-40, *In re Sardino*.

A Nassau County District Court Judge removed for asserting influence in traffic cases testified that he never knew of the rule against *ex parte* communications although he had served for "many years" on an attorney grievance committee and for ten years as a judge.¹⁷¹

A New York City Civil Court Judge, sitting as an Acting Supreme Court Justice, made stylistic and substantive changes in a decision about to be filed while a lawyer for the victorious party stood outside the judge's chambers questioning the draft decision and dictating the changes.¹⁷² He was censured. And a Supreme Court Justice, who heard that one of his colleagues had doubted the defendant's veracity concerning an adjournment of a sentence, following a felony conviction, decided that he should advise his fellow judge of some favorable information about the defendant's family.¹⁷³ He arranged a meeting for that purpose with his judicial colleague on the side of a busy highway, miles from the courthouse where they both worked. He was publicly admonished. At a more sophisticated level of *ex parte* communications, a Court of Appeals Judge was disciplined by a Court on the Judiciary for obtaining advice and draft opinions from law professors without disclosing the practice to the litigants.¹⁷⁴

5. *Judicial Patronage*

Judges have broad discretion in making appointments that generate fees to their appointees. As one Court of Appeals Judge stated: "The system governing the selection of referees, guardians ad litem, and other ad hoc functionaries essential to the conduct of court business for a long time was one subject to the personal preferences of the appointing Judges."¹⁷⁵

Despite widespread belief that judges have appointed their friends and associates to cases generating lucrative fees, not

171. Record on Appeal at 605-06, *In re Seiffert*, 65 N.Y.2d 278, 480 N.E.2d 734, 491 N.Y.S.2d 145 (1985).

172. *In re Klein*, 1985 Annual Report 167 (Comm'n on Judicial Conduct Aug. 30, 1984).

173. *In re DeLuca*, 1985 Annual Report 119 (Comm'n on Judicial Conduct July 2, 1984).

174. *In re Fuchsberg*, 43 N.Y.2d (a),(j),(u) (Ct. on the Judiciary 1978).

175. *In re Spector*, 47 N.Y.2d 462, 470-71, 392 N.E.2d 552, 556, 418 N.Y.S.2d 565, 569 (1979).

much has been done to stop judicial patronage. No discipline of judges who engaged in this practice was reported prior to the establishment of the Commission, and even the Commission has failed to forge an impressive record in this regard. The major problem confronting the Commission is the difficulty in enforcing vague rules barring "favoritism" within a system that authorizes judges to appoint capable receivers, referees, guardians ad litem and others with fiduciary responsibilities to the court.

Under Canon 12 of the American Bar Association's Canons of Judicial Ethics, since replaced by the Code of Judicial Conduct, judicial appointees were to "be selected with a view solely to their character and fitness."¹⁷⁶ The judge's discretion, advised Canon 12, "should not be exercised by [the judge] for personal or partisan advantage," and the judge was expected to "avoid nepotism and undue favoritism in his appointments."¹⁷⁷

The sense of Canon 12 was carried forward into the Code of Judicial Conduct, which bars "unnecessary appointments," "nepotism," "favoritism," and any compensation of appointees "beyond the fair value of services rendered."¹⁷⁸ A judge is supposed to exercise the power of appointment "only on the basis of merit."¹⁷⁹

Yet, favoritism in appointments has not been eliminated either by the Code or by the establishment of the Commission on Judicial Conduct.¹⁸⁰ Judges argue persuasively that they are not prohibited from appointing persons they know, since they are required to appoint persons who are trustworthy and competent. Does a judge engage in prohibited "favoritism" when he or she appoints a friend, former law associate, politician, the judge's former campaign manager, or other person who seems to have influence with the judge? Answers are not readily available. Only two decisions of the Court of Appeals address the subject of im-

176. CANONS OF JUDICIAL ETHICS Canon 12 (adopted by the New York State Bar Ass'n Jan. 29, 1909), replaced by the CODE OF JUDICIAL CONDUCT (adopted by the New York State Bar Ass'n March 3, 1973) (N.Y. JUD. LAW app. at 517) (McKinney 1975).

177. *Id.*

178. CODE OF JUDICIAL CONDUCT Canon 3B(4) (N.Y. JUD. LAW app. at 521) (McKinney 1975). (A judge "should exercise his [or her] power of appointment only on the basis of merit, avoiding nepotism and favoritism.")

179. *Id.*

180. See 1983 Annual Report 39-42 (Comm'n on Judicial Conduct).

proper appointments, both of which relate primarily to prohibited "nepotism," clearly an easier term to define. Both decisions also deal with the "appearance of impropriety" that may be conveyed by certain appointments, and if that concept were applied more aggressively, it would be possible to enforce the favoritism provision.

In *In re Spector*,¹⁸¹ a Supreme Court Justice was admonished in 1979 for appointing the sons of two other Supreme Court Justices who had appointed his son. No evidence of a quid pro quo had been presented, but Judge Spector acknowledged that he was aware that his son had received appointments.

The Court's condemnation was precise:

First, nepotism is to be condemned, and disguised nepotism imports an additional component of evil because, implicitly conceding that evident nepotism would be unacceptable, the actor seeks to conceal what he is really accomplishing. Second, and this is peculiar to the judiciary, even if it cannot be said that there is proof of the fact of disguised nepotism, an appearance of such impropriety is no less to be condemned than is the impropriety itself.¹⁸²

The Court reasoned that because the appointment by Judge Spector of his own son would be "unthinkable and intolerable, . . . an arrangement for cross appointments would not only offend the antinepotism principle; it would go a step further, seeking to accomplish the objectives of nepotism while obscuring the fact thereof."¹⁸³ Further, if the judge's conduct reasonably conveyed "an appearance of impropriety," he had violated the applicable standards.

With these words, the Court stated its willingness to draw obvious conclusions and impose sanctions on judges for conduct that conveys the appearance of impropriety: "Reluctance to impose a sanction in this case would be taken as reflecting an attitude of tolerance of judicial misconduct which is all too often popularly attributed to the judiciary."¹⁸⁴ The strength of the Court's condemnation has special significance because *Spector*

181. 47 N.Y.2d 462, 392 N.E.2d 552, 418 N.Y.S.2d 565 (1979).

182. *Id.* at 466, 392 N.E.2d at 553, 418 N.Y.S.2d at 566.

183. *Id.* at 467, 392 N.E.2d at 554, 418 N.Y.S.2d at 567.

184. *Id.* at 468, 392 N.E.2d at 555, 418 N.Y.S.2d at 568.

was the first case heard under the new system that gave to the Commission on Judicial Conduct the authority to render determinations of discipline and to the Court of Appeals the authority to review and finally decide each matter presented. Equally significant in this first decision is the weight given to the "appearance of impropriety" standard. Responding to the dissenting judge's view that such a standard is too subjective to be meaningful, the Court said that such a position "fail[s] to comprehend the principle."¹⁸⁵ Both the community and the judiciary "are entitled to insist on a more demanding standard."¹⁸⁶ The Court stated:

It would ill befit the courts and the members of the judiciary to suggest that Judges are to be measured against no higher norm of conduct that may at times and in some places unhappily have been perceived as reflecting the mores of a judicial marketplace.¹⁸⁷

Addressing the dissent's view that such judicial practices were common, the Court said: "To the extent that such a practice may have existed in certain areas, it has been aberrant; certainly it has had the support and approval only of its practitioners."¹⁸⁸

Lastly, the Court held that the qualifications of the appointees do not modify the proscription against concealed nepotism or the appearance of impropriety, even when the appointments are with the consent of all parties.¹⁸⁹

*In re Kane*¹⁹⁰ presented the Court of Appeals with a situation it had said (in *Spector*) would be "unthinkable and intolerable": the appointment by a judge of his son. Supreme Court Justice James L. Kane did not have much of a chance to overturn the Commission's removal of him in view of the Court of Appeals' strong dictum in *Spector*. Judge Kane had appointed his son and his son's law partner, generating fees shared by the judge's son. He also appointed another judge's brother on nu-

185. *Id.*

186. *Id.*

187. *Id.* at 469, 392 N.E.2d at 555, 418 N.Y.S.2d at 568.

188. *Id.*

189. *Id.*

190. 50 N.Y.2d 360, 406 N.E.2d 797, 428 N.Y.S.2d 941 (1980).

merous occasions while the other judge was making appointments of Judge Kane's son. So, because he engaged in nepotism and conduct that conveyed the appearance of impropriety, Judge Kane was removed.

6. *Courtroom Demeanor*

The single largest category of complaints against judges concerns their courtroom demeanor.¹⁹¹ From the latter part of the nineteenth century through the early 1970's, the reported disciplinary decisions made only occasional reference to judicial rudeness in court. The subject, when addressed, was part of other, more serious misconduct.

An 1872 impeachment proceeding concerned charges that Supreme Court Justice George Barnard received loans and gifts from friends who were successful litigants in his court.¹⁹² Among the articles of impeachment voted by the Assembly was one that alleged fifteen specifications of "unseemly and indecorous conduct."¹⁹³ One such specification alleged that the judge made a comment that mocked the proceedings. While on the bench, the judge agreed to disqualify (colorfully called "scratch") himself, and, in so doing, he sarcastically expressed the view that his decision would probably constitute the "hundred and first article of impeachment or the thousand and first article."¹⁹⁴ On motion of the judge's lawyer, the charge was dismissed by the Court on Impeachment. The court declined to dismiss another charge that while on the bench the judge, in explaining why he would not appoint a particular person as referee, said that he "favored his friends and not his enemies."¹⁹⁵ Judge Barnard was the only judge in New York State to be convicted in an impeachment proceeding.¹⁹⁶

In 1904, the Appellate Division, First Judicial Department,

191. 1987 Annual Report 160 (Comm'n on Judicial Conduct). From January 1, 1975 to December 31, 1986, of 8568 complaints received by the Commission, 1255 concerned demeanor on the bench. The next highest category is conflict of interest (586 complaints).

192. 5 ALB. L.J. 315, 316 (1872).

193. *Id.*

194. *Id.*

195. 6 ALB. L.J. 79 (1872).

196. IV C. LINCOLN, *supra* note 1, at 605.

considered what appears to be one of the few disciplinary cases concerning discourteous treatment of parties and lawyers in the first half of the twentieth century.¹⁹⁷ And it appears unlikely that the judge's demeanor, described by the court as "tyrannical,"¹⁹⁸ would have resulted in charges if not for a barrage of evidence marshalled by the District Attorney of New York County showing gross abuse of power in connection with favoritism bestowed on certain attorneys. The Appellate Division referred to the judge's statements in court "showing prejudice against classes of attorneys and litigants on account of their nationality"¹⁹⁹ and "despotically and willfully refusing to accord to parties or their attorneys their clear constitutional and statutory rights."²⁰⁰ Such conduct standing alone, said the Appellate Division, would warrant a reprimand.²⁰¹

The use of "unjudicial language"²⁰² by a Municipal Court Justice in New York City was held to be "censurable"²⁰³ in 1914, although proceedings were dismissed because of lack of evidence that the judge was unfit or "guilty of a violation of his duty as a judicial officer."²⁰⁴ Interestingly, the Appellate Division, First Judicial Department, stated in dictum that it would not hesitate to remove a judge for "the lack of . . . judicial temperament"²⁰⁵ if the problem reached the level of administering justice "without respect to persons or the nature of the actions he was called upon to determine."²⁰⁶

Harsh courtroom behavior, including subjecting litigants and lawyers to insults and unfounded accusations, resulted in the censure of two New York City judges in the 1970's.²⁰⁷ One of

197. *In re Bolte*, 97 A.D. 551, 90 N.Y.S. 499 (1st Dep't 1904).

198. *Id.* at 577, 90 N.Y.S. at 514.

199. *Id.* at 576, 90 N.Y.S. at 514.

200. *Id.*

201. *Id.* at 577, 90 N.Y.S. at 514. Under present standards, a judge who showed prejudice against classes of attorneys and litigants because of their nationality would be found unfit for judicial office. See *infra* notes 318-23 and accompanying text.

202. *In re Snitkin*, 161 A.D. 516, 146 N.Y.S. 566 (1st Dep't 1914) (Referee's finding adopted by Appellate Division).

203. *Id.* at 518, 146 N.Y.S. at 561.

204. *Id.*

205. *Id.* at 517, 146 N.Y.S. at 561.

206. *Id.*

207. *In re Waltemade*, 37 N.Y.2d (a),(nn) (Ct. on the Judiciary 1975); *In re Mertens*, 56 A.D.2d 456, 392 N.Y.S.2d 860 (1st Dep't 1977). See also *In re Sena*, 1981 Annual

the two, Civil Court Judge William Mertens, had also been charged, along with numerous acts of intemperate conduct, with unreasonably denying requests for adjournments — charges that the Appellate Division, First Judicial Department, held should not be sustained because they pertained to rulings that were within the judge's discretion.²⁰⁸ As to the other judge, Supreme Court Justice Wilfred Waltemade, the Court on the Judiciary held that removal from office would have been appropriate, if the judge were seeking re-election. Because he had failed to obtain nomination for his judgeship due to the pending disciplinary proceeding, the court held that "removal in this unfortunate case would accomplish no useful purpose."²⁰⁹

Other judges have been publicly disciplined by the Commission on Judicial Conduct for their rudeness to persons appearing in their courts. A Family Court Judge was censured for referring to persons who appeared before him by their first names, lecturing to juveniles in a derogatory manner, and being "impatient, temperamental and unfair."²¹⁰ In one case, to demonstrate his annoyance with objections by counsel, he "deliberately made conflicting rulings simultaneously."²¹¹

Report 117 (Comm'n on Judicial Conduct Jan. 18, 1980) (censure).

208. *In re Mertens*, 56 A.D.2d 456, 464, 392 N.Y.S.2d 860, 866 (1st Dep't 1977). The Court found the judge to be "an extremely effective, able, hard-working Judge." *Id.* at 471, 392 N.Y.S.2d at 870. One Appellate Division Justice dissented for removal (Murphy, J., dissenting).

209. *In re Waltemade*, 37 N.Y.2d (a),(III) (Ct. on the Judiciary 1975).

210. *In re Pilato*, 1979 Annual Report 75 (Comm'n on Judicial Conduct Jan. 25, 1978).

211. *Id.*

Another judge was censured in 1984 for injudicious conduct in one case in his questioning of a four-year-old child during a divorce proceeding in which the parties were vying for custody. During a series of interviews with the four-year-old boy, the judge:

- (a) Called the child a liar or stated that he was not telling the truth more than 200 times;
- (b) told the child approximately 40 times that he had given contradictory testimony;
- (c) admonished the child to tell the truth more than 200 times;
- (d) asked the child approximately 150 times who had told the child to testify as he had;
- (e) told the child more than ten times that he had "better remember" or "must remember" after the child had indicated that he did not know the answer to a question;
- (f) told the child on four occasions that he might go to jail if he did not tell the truth;

The reluctance of disciplinary authorities to find misconduct in judges' arbitrary calendaring decisions gives judges considerable — but not unlimited — discretion. New York City Civil Court Judge Margaret Taylor, in seeking to persuade a lawyer to waive a jury, directed her to sit in court for most of two days because of her continued refusal to agree to a non-jury trial.²¹² On another occasion, after an attorney complained about the order in which cases were being called, the same judge adjourned the lawyer's case for a subsequent "call" later that day, then adjourned it at the end of the day until the following day, when the case was called last.

Judge Taylor's demeanor was the subject of a disciplinary proceeding not because of emotional outbursts or screaming, which had been characteristic of earlier demeanor cases. Her anger was controlled. She retaliated against the two attorneys and their clients by keeping the attorneys in court. For her abusive conduct toward the attorneys, the judge was publicly admonished in 1982 by the Commission on Judicial Conduct.²¹³ One

(g) pointed out to the child that handcuffs worn by the court officer were used for people who did not tell the truth; and,

(h) told the child more than 50 times that there would be "serious trouble" or "serious consequences" if he did not tell the truth, including that the child would be punished by God, that he could not leave the court, that he would have to return repeatedly to court, that lies would "hurt" the child's mother, that the child might be handcuffed by a court officer, that the child would have to live with his father against his expressed wishes, that respondent would "call the man in and that's the end," and that "it will be the end of you, anyway."

In re Grossman, 1985 Annual Report 144, 146-47 (Comm'n on Judicial Conduct Nov. 20, 1984). The judge did not suspend or terminate his "rapid-fire" questioning when the child cried or protested that he was tired and wanted to leave. *Id.* at 147. On Commission counsel's motion to remove the judge from office, the Commission voted to censure by a vote of six to five. *Id.* at 149. Of the dissenting members, two voted to admonish (Kovner and Sheehy, Members, dissenting); three voted to dismiss the charges with a confidential letter of dismissal and caution (Alexander, Bower and Cleary, Members, dissenting). *Id.* The three who dissented for dismissal of charges with a confidential letter of caution emphasized the judge's "exemplary" and "unblemished" record. *Id.* at 151 (Alexander, Member, dissenting). Two months after the Commission's determination of censure, according to the Appellate Division, First Judicial Department, the judge in another case made "numerous hostile and demeaning comments" in response to the defendant's requests for additional charges to the jury, resulting in reversal of the judgment for plaintiff. *Cummings v. Consolidated Edison Co., N.Y.L.J.*, Dec. 15, 1986, at 13, col. 2 (1st Dep't Dec. 11, 1986).

212. *In re Taylor*, 1983 Annual Report 197 (Comm'n on Judicial Conduct Jan. 13, 1982).

213. *Id.* at 201.

Commission member in a dissenting opinion cited the "very broad discretion"²¹⁴ of judges in the control of calendars. The dissenting opinion also found insufficient evidence that the judge's actions had been prompted by a motive to retaliate against one of the lawyers. As an additional reason not to admonish Judge Taylor, the dissent also cited the judge's "impressive achievements on the bench,"²¹⁵ a conclusion apparently gleaned from the supportive testimony of Judge Taylor's Administrative Judge. (Administrative Judges often testify in support of full-time judges under charges.)

The discipline of a judge carries with it a value judgment that the conduct is unacceptable. Value judgments change with time, and what was acceptable at the turn of the century may be regarded today as repugnant and subject to discipline. Forty to fifty years ago, for example, racist comments were not unusual in literature and in everyday conversations. At that time, a judge's use of such language in court would probably not have created a stir. Today, such language by a judge would be totally unacceptable.

A judge who harbors racist views and believes that members of a particular race have certain negative traits cannot possibly function as an impartial arbiter and should not retain judicial office. During an investigation of certain procedures, a Town Justice, while explaining why he believed he must accept jurisdiction over a matter from another town, used a racial epithet. He was then asked to explain why he imposed high bail in relatively minor cases; he replied, in part, that he is "inclined to . . . have less than a favorable opinion of colored people."²¹⁶ He explained that "they don't pay fines, they're almost impossible to find. . . once they get away from you, as I say, they always give you the wrong telephone number and many times the wrong address, and when you release them, you generally lose them"²¹⁷

In removing the judge, the Commission referred to a pattern

214. *Id.* at 203 (Kovner, Member, dissenting).

215. *Id.* at 206 (Kovner, Member, dissenting).

216. *In re Cook*, 1987 Annual Report 75, 81 (Comm'n on Judicial Conduct Nov. 19, 1986).

217. *Id.* at 81-82.

of abuses, but it also stated: "Moreover, respondent's racist remarks on and off the bench, standing alone, demonstrate his unfitness for judicial office."²¹⁸

Judges today must also be more sensitive to society's changing mores regarding sexist statements that reflect gender bias. What was once unobjectionable may now be subject to discipline. Thus, when a Supreme Court Justice, in open court, referred to a woman lawyer as "little girl" after she had expressed her disapproval of that term and requested to be called "counselor" if he could not remember her name, he engaged in conduct unacceptable by current standards and subject to public criticism.²¹⁹ He was publicly admonished in a 1983 determination. Another judge, in a public statement explaining his sentence of a rapist, demeaned the rape victim by suggesting that she enjoyed the experience.²²⁰ He, too, was chastised by the Commission in a public censure. And in 1985, a District Court Judge was publicly admonished for making a variety of patronizing, sexist statements to women attorneys "referring to their appearance and physical attributes."²²¹ Clearly, judicial indepen-

218. *Id.* at 82.

219. *In re Jordan*, 1984 Annual Report 104 (Comm'n on Judicial Conduct Jan. 26, 1983). Two of three members who dissented voted for a private letter of dismissal and caution. The other dissenting member, John J. Bower, voted to dismiss with no caution. *Id.* at 107-08 (Bower, Member, dissenting). He reasoned that frank, sometimes impolite exchanges occur in court, and "in the heat of argument," an "innocuous remark" such as "little girl" might inadvertently be made by a judge. *Id.* at 107. He added:

It is unthinkable to me that this trivial matter evoked the oversensitive response from the attorney in that she made the complaint in the first place. Law is an adversarial process and its practitioners are not swathed in cotton. A certain amount of give-and-take and bruising is expected. There would have been nothing wrong, in my opinion, in the attorney engaging in a bit of give-and-take in the courtroom on this point. I am sure that respondent would have apologized again and the matter would have been simply forgotten. Instead, the awesome machinery of this Commission geared up to prosecute with ability and zeal the respondent, a capable judge with a previously unblemished record, in order to hold him up to public opprobrium. I find this more shocking than the trivial incident which gave rise to the complaint.

Id. at 107-08 (Bower, Member, dissenting)

For a different approach to the problem, see dissenting opinion cited *infra* note 221.

220. *In re Fromer*, 1985 Annual Report 135 (Comm'n on Judicial Conduct Oct. 25, 1984).

221. *In re Doolittle*, 1986 Annual Report 87, 87 (Comm'n on Judicial Conduct June 13, 1985). In a dissenting opinion, Commission member Felice K. Shea expressed the view that the majority was too lenient:

dence has limits, and, by contemporary standards, judges are not empowered to insult or demean litigants or lawyers. Even when a judge does not intend to be insulting, the use of language that may be insulting or patronizing may be sufficient basis for discipline.

B. Disciplining Judges for Off-Bench Conduct: Does the System Intrude into a Judge's Private Life?

1. Determining Values in Balancing Privacy Rights and the Proper Role of a Judge

Being a judge entails surrendering rights. For example, judges may not engage in political activity, except to a limited extent during a period in which they are candidates for elected judicial office;²²² they may not participate in fund-raising activities, even for the most worthy causes;²²³ and full-time judges may not operate or be employed by for-profit businesses.²²⁴ Restrictions on judges' political, charitable and business activities are clear, enforceable and not subject to varying interpretations by the Commission on Judicial Conduct. Judges know the rules and take the risk of being disciplined if they break them.

More problematic are certain general rules, often criticized as being "vague,"²²⁵ that are subject to varying interpretations

I believe the majority underrates the seriousness of respondent's misconduct. Respondent's statements to women attorneys were not only discourteous, undignified, irrational, unjust and demeaning as pointed out by the majority. In addition, respondent's offensive remarks bring the judiciary into disrepute. Worse still, conduct such as respondent's has a deleterious effect on the administration of justice. Respondent's sexist and vulgar comments give the message that women attorneys need not be treated professionally, and the ability of those attorneys to serve their clients is thus compromised. A pattern of such behavior on the part of a judge is intolerable and, in my view, ordinarily should result in removal. Because there are mitigating factors, as noted by the majority, I vote for censure.

Id. at 91 (Shea, Member, dissenting)

For a different approach to the problem, see dissenting opinion cited *supra* note 219.

222. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. § 100.7 (Aug. 1, 1972).

223. *Id.* at § 100.5(b); CODE OF JUDICIAL CONDUCT Canon 5B (N.Y. JUD. LAW app. at 526) (McKinney 1975). See 8 Judicial Conduct Reporter (The American Judicature Society Spring 1986) (covers fund-raising and off-bench speech).

224. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. § 100.5(c)(1), (2) (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canon 5C(1), (2) (N.Y. JUD. LAW app. at 526-27) (McKinney 1975).

225. See *In re Sims*, 61 N.Y.2d 349, 462 N.E.2d 370, 474 N.Y.S.2d 270 (1984).

and, arguably, may provide too much discretion to examine the private lives of judges. Judges are obliged to "observe high standards of conduct," both on and off the bench, "so that the integrity and independence of the judiciary may be preserved."²²⁶ Judges may not even engage in activities that are expressly sanctioned if their participation detracts from the dignity of their office,²²⁷ interferes with the performance of their judicial duties,²²⁸ or reflects adversely upon their impartiality.²²⁹ Judges must also "respect and comply with the law"²³⁰ and conduct themselves "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."²³¹ And judges are obliged not to "advance the private interests of others."²³²

The ethical standards governing judges' off-the-bench conduct recognize that judges play a unique role in society. Respect for those who serve as judges and for their integrity and independence is essential if the public is to believe that justice is being done in the courts.²³³ Restrictions on judges' extra-judicial conduct are necessary to avoid both conduct and relationships that convey the appearance that judges will not be impartial in their judicial functions. The role of judge is incongruous with

226. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. § 100.1 (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canon 1 (N.Y. JUD. LAW app. at 517) (McKinney 1975).

227. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. § 100.5(a) (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canon 5A (N.Y. JUD. LAW app. at 525) (McKinney 1975).

228. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. § 100.5(a), (c) (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canon 5A, C (N.Y. JUD. LAW app. at 525, 526) (McKinney 1975).

229. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. §§ 100.4, 100.5(c)(1) (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canons 4, 5C(1) (N.Y. JUD. LAW app. at 524, 526) (McKinney 1975).

230. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. § 100.2(a) (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canon 2A (N.Y. JUD. LAW app. at 518) (McKinney 1975).

231. *Id.* The reference to "at all times" obviously refers to off-bench and on-bench conduct, but the Commission recognizes that not all aspects of a judge's private life are subject to discipline.

232. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. § 100.2(c) (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canon 2B (N.Y. JUD. LAW app. at 518) (McKinney 1975).

233. S. LUBET, *BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES* 3-9 (The American Judicature Society 1984). Professor Lubet's book is a valuable, scholarly contribution to the subject of judges' off-bench conduct. Especially useful is his critical analysis of ethical standards governing such conduct.

the role of fund-raiser, politician and active participant in a business. Some of these influences would place judges in serious conflicts of interest, making it difficult for them to be impartial. Whether they could overcome the conflicts is not the point, for the *appearance* of a conflict of interest is as damaging to the administration of justice as the conflict itself.²³⁴

The ethical standards also discourage judges from using their judicial positions to advance private, financial or political interests or to obtain economic benefits from persons who might come before the courts.²³⁵ Because lawyers appear as advocates in the courts, they are prohibited, with minor exceptions, from giving gifts, loans and other benefits to judges,²³⁶ and judges are prohibited from receiving them from lawyers.²³⁷

Although the ethical mandates set high standards for judges in their personal lives, not every transgression or display of human frailties need trigger the enforcement mechanism of the judicial disciplinary system. Disciplining judges for private conduct that is unrelated to valid policy objectives would constitute an improper intrusion into a judge's private life.²³⁸ Similarly, recognized policy objectives, as reflected by the general ethical standards, should not be so broadly interpreted as to give disciplinary authorities a mandate to inspect every facet of a judge's life. The Commission on Judicial Conduct has an important responsibility to strike a balance between protecting judges' right to privacy and disciplining judges for off-the-bench conduct that impinges in some recognizable manner on their judicial role.

It seems obvious that judges should respect and comply with the law in their private lives, as the ethical standards re-

234. The Court of Appeals made this point in *In re Spector*, 47 N.Y.2d 462, 466, 392 N.E.2d 552, 553, 418 N.Y.S.2d 565, 566 (1979): "[A]nd this is peculiar to the judiciary, even if it cannot be said that there is proof of the fact of disguised nepotism, an appearance of such impropriety is no less to be condemned than is the impropriety itself."

235. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. §§ 100.2(c), 100.5(c)(3) (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canons 2B, 5C(4) (N.Y. JUD. LAW app. at 518, 527) (McKinney 1975).

236. CODE OF PROFESSIONAL RESPONSIBILITY DR7-110(A) (N.Y. JUD. LAW app. at 165) (McKinney Supp. 1987).

237. Rules Governing Judicial Conduct, 22 N.Y.C.R.R. § 100.5(c)(3) (Aug. 1, 1972); CODE OF JUDICIAL CONDUCT Canon 5C(4) (N.Y. JUD. LAW app. at 527) (McKinney 1975).

238. See S. LUBET, *supra* note 233. Professor Lubet makes compelling arguments for avoiding unnecessary restrictions on judges' private lives.

quire, if they are to administer the law fairly and independently, determine lack of compliance by others, and make important judgments affecting the economic and physical well-being of litigants and defendants charged with crimes. Occasionally, judges do not comply with the law. An important purpose of the disciplinary system is to consider the illegal acts of judges in the context of their fitness to hold judicial office. To take an easy case, a judge who commits a serious crime has demonstrated a lack of fitness for judicial office by destroying his or her effectiveness as a judge and by tarnishing the image of the judiciary.

Not every violation of law by a judge should be the basis for disciplinary action. A judge who has violated minor traffic laws should not be subject to discipline in the absence of other misconduct (such as trying to assert judicial influence or authority to avoid the consequences of the traffic violations). However, a series of traffic convictions or a single Driving While Intoxicated conviction (a misdemeanor) may provide adequate justification for discipline. A judge's violation of the Penal Law ordinarily should raise an issue of his or her fitness to serve as a judge. Clearly, crimes that suggest a lack of integrity, such as fraud, shoplifting and other forms of larceny, would result in discipline. However, certain unenforced crimes of immorality (e.g. adultery) have not been regarded as misconduct. They are relics of a more puritanical society and enforcement in disciplinary proceedings would be widely viewed as contrary to contemporary standards and criticized as selective prosecution.

Anti-social conduct that is not the basis of a criminal charge may raise similar issues. At times, the most intimate details of a judge's private life become public, to the embarrassment of the judge and the judiciary. Divorce proceedings may generate allegations of aberrant, irresponsible or even violent behavior, and such allegations against a judge would be newsworthy. Although these matters often fall within the protected zone of privacy, under certain circumstances they may raise questions about the judge's impartiality. A Family Court Judge's adjudicated failure to support his or her family, for example, might create doubts as to whether the judge was presiding fairly over support cases in court. One judge who had been convicted twice of alcohol-related driving offenses agreed to a District Attorney's request that the judge not preside over the trial of such offenses in his

court.²³⁹ That voluntary disqualification was an indication that his conduct had diminished his effectiveness as a judge.

Arguably, any "private" conduct that reasonably conveys the appearance that a judge would not be impartial would be a sufficient basis for discipline.²⁴⁰ Accordingly, a judge's right to free speech may not be as broad as that of other citizens.²⁴¹ A judge who uses racist language, even while not acting in an official capacity, reasonably conveys the impression that he or she will not be impartial toward members of the race the judge has demeaned. Similarly, a judge who presides over specialized matters has to avoid taking public positions, even in an educational setting, that could reasonably be interpreted as a bias in the cases that will be heard by the judge. Drawing the line between acceptable and unacceptable speech is difficult. Serious questions would be raised about judges' impartiality if they were to publicly comment about certain social issues. If a judge who presides over criminal cases were to publicly condemn police officers, if a judge who presides over landlord-tenant cases were to condemn landlords, if a judge who presides over medical malpractice cases were to speak for or against physicians, serious questions would be raised as to their lack of impartiality and, consequently, their public remarks might constitute improper conduct.

Off-the-bench conduct may have a public quality to it although it is part of a judge's private life. A judge's statements reflecting adversely on the judge's impartiality or integrity may be sanctionable if made in a public setting, but may be protected by fundamental privacy rights if made to the judge's spouse in the privacy of their home. The same should be true of a broad range of private morality. Certain "immoral" conduct would be protected if it occurred in a private setting.

The rule prohibiting a judge from "advancing the private interests of others" generates questions as to how literally it should be interpreted. May a judge write a reference letter on

239. *In re Barr*, 1981 Annual Report 139 (Comm'n on Judicial Conduct Oct. 3, 1980).

240. See *In re Cerbone*, 61 N.Y.2d 93, 460 N.E.2d 217, 472 N.Y.S.2d 76 (1984).

241. See Gross, *Judicial Speech: Discipline And The First Amendment*, 36 SYRACUSE L. REV. 1181 (1986).

behalf of a person seeking employment or acceptance to a law school? May a judge on behalf of a defendant in a criminal proceeding write a post-conviction letter to be considered with other letters by the sentencing judge? May a judge give a character reference to a municipal agency about an applicant who is seeking a license from the agency? If the license application has been delayed, may the judge inquire of a friend who works at the agency about the cause of the delay? Some of this conduct is clearly prohibited. Some may be either permitted or prohibited, depending on the facts of each case.

Disciplinary decisions in New York do not shed much light on the gray areas, primarily because judges have not been charged with the gray-area misconduct. In some respects, the early decisions may appear to have given greater freedom to judges in their private lives, but such a message may be misleading since: (a) disciplinary authority was more circumscribed than it is today — the choice often was removal or the dismissal of charges; and (b) the ethical standards were less clear and less demanding.

The claim that either the Commission on Judicial Conduct or the Court of Appeals has intruded into the private lives of judges is unsubstantiated. The “private” conduct of judges that has formed the basis for charges and discipline has been inextricably related to the judicial office. Nor is there a basis for concern, based upon the record of the Commission and the Court of Appeals, that the general standards of conduct applicable to judges’ off-bench conduct give inadequate notice as to the conduct that is deemed unacceptable. Clearly, there are gray areas, but every judge disciplined over the past twelve years knew or should have known that his or her conduct was highly improper. That is the true test of a fair disciplinary system.

2. Business and Financial Activities

The business activities of judges have been the subject of disciplinary proceedings from earliest times, but not much was done until recent years to enforce clear disciplinary standards that prohibit full-time judges from engaging actively in business.

Interpreting a provision in the New York City Charter that barred judges from managing or operating businesses, the Appellate Division, First Judicial Department, in 1908, held that

serving as an officer of a publishing company was not cause for discipline when no evidence was submitted to demonstrate that the judge had actively participated in the publishing business.²⁴²

Thirteen years later, the Appellate Division, First Judicial Department, came to a similar conclusion with respect to the activities of a Municipal Court Judge who had appeared to be engaging actively in a business venture.²⁴³ The judge allegedly had violated a New York City Charter provision that prohibited judges from "carrying on any business" and required every judge to "devote his whole time and capacity, so far as the public interest demands, to the duties of his office."²⁴⁴ Judge Aaron Levy, a major stockholder in H. Milgrim & Brothers, Inc., which was "engaged in the business of ladies' tailoring and dressmaking," established his judicial chambers (rent-free) in the "Milgrim Building," where the business was located and where he acknowledged spending "a considerable part of [his] time."²⁴⁵ The judge acknowledged that he met with various union officials, Milgrim employees, and the principals of the business "for the purpose of bringing about peace and harmony in the trade."²⁴⁶ He also acknowledged being assisted "in his labors" by a court attendant.²⁴⁷ He was apparently so active in the garment business that he attended numerous meetings of the National Garment Retailers' Association and was elected as an officer to one of the Association's divisions.

The Appellate Division said it was "unfortunate"²⁴⁸ that the judge had established his judicial chambers in the Milgrim Building, which "gave color, together with his activity in attempting to settle the labor disputes, to the charge that he was running the Milgrim's business."²⁴⁹ The proceedings, however, were dismissed. Over the next fifty years, no judge was publicly disciplined for business-related activity.

An investigation of the New York City Magistrates' Court

242. *In re Deuel*, 127 A.D. 640, 111 N.Y.S. 969 (1st Dep't 1908).

243. *In re Levy*, 198 A.D. 326, 190 N.Y.S. 383 (1st Dep't 1921).

244. *Id.* at 330-31, 190 N.Y.S. at 386.

245. *Id.* at 327, 329, 190 N.Y.S. at 384, 385.

246. *Id.* at 330, 190 N.Y.S. at 385.

247. *Id.* at 329, 190 N.Y.S. at 385.

248. *Id.* at 330, 190 N.Y.S. at 386.

249. *Id.*

in the 1930's by Judge Samuel Seabury led to charges against Magistrate Louis B. Brodsky for substantial business dealings in real estate and investments in the stock market.²⁵⁰ Although the judge was "president and director of six real estate corporations and an officer in several more,"²⁵¹ the Appellate Division, First Judicial Department, with the Presiding Justice dissenting, found no cause to remove Judge Brodsky.²⁵²

Among charges against Supreme Court Justice Mitchell D. Schweitzer in 1972 were borrowing substantial sums at favorable interest rates and re-lending the funds at substantially higher rates to moneylenders, and making false statements in the applications for the loans as to the purpose of such loans.²⁵³ These undoubtedly were the least serious of the filed charges. The judge resigned and disciplinary proceedings were discontinued by a Court on the Judiciary.

Four years later, in *In re Feinberg*,²⁵⁴ a County Court Judge was censured for continuing, after his election to judicial office, as president, director and sole stockholder of a printing company that did business with government agencies, including his court. His efforts to sell the business were a major mitigating factor in his retaining his judicial office.

In *In re Steinberg*,²⁵⁵ a New York City Civil Court Judge acted as a broker between borrowers and lenders of large sums of money, some for usurious rates. He also failed to report some of his earnings as income on his income tax returns. The Court of Appeals, in removing the judge, addressed the effect of a judge's private life on his or her public life. The Court stated:

Contrary to petitioner's assertions, a Judge cannot simply cordon off his public role from his private life and assume safely that the former will have no impact upon the latter Wherever he travels, a Judge carries the mantle of his esteemed office with

250. FINAL REPORT OF SAMUEL SEABURY, *supra* note 25, at app. 230-37.

251. H. MITGANG, THE MAN WHO RODE THE TIGER, THE LIFE AND TIMES OF JUDGE SAMUEL SEABURY 190 (1963).

252. FINAL REPORT OF SAMUEL SEABURY, *supra* note 25, at 230-37; *In re Brodsky*, 232 A.D. 675 (1st Dep't 1931).

253. *In re Schweitzer*, 29 N.Y.2d (a) (Ct. on the Judiciary 1972). For other aspects of the charged misconduct, see *infra* note 336 and accompanying text.

254. 39 N.Y.2d (a) (Ct. on the Judiciary 1976).

255. 51 N.Y.2d 74, 409 N.E.2d 1378, 431 N.Y.S.2d 704 (1980).

him, and, consequently, he must always be sensitive to the fact that members of the public, including some of his friends, will regard his words and actions with heightened deference simply because he is a Judge. It takes little imagination to visualize the persuasive and perhaps even subtly coercive effect that occurs when a Judge solicits an unsecured loan for a friend and backs up his request with his personal guarantee.²⁵⁶

The Court of Appeals rejected Judge Steinberg's contention that off-bench conduct may result in removal only where the conduct was illegal or constituted extreme "moral turpitude."²⁵⁷ The Court saw "no sound reason" to distinguish conduct "off the Bench" since any conduct "inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function."²⁵⁸ The Court said that Judge Steinberg's "complete insensitivity to the special ethical obligations of Judges rendered him unfit for judicial service."²⁵⁹

A Supreme Court Justice's serving as a general partner in three businesses and owning and operating rental property was held to be improper, and the judge was publicly admonished by the Commission on Judicial Conduct in 1983.²⁶⁰ The Commission concluded that the business activities "cannot be excused by the assertion that [such activities] did not interfere with the performance of his duties as a judge."²⁶¹

Not all questionable financial transactions have been condemned by the Commission on Judicial Conduct. One series of transactions, by County Court Judge Charles P. Garvey under strange circumstances, was found not to be improper, despite a conclusion by the Commission's designated referee that the conduct reflected adversely on the judiciary and constituted misconduct.²⁶² (Several other charges were sustained and the judge was

256. *Id.* at 81, 409 N.E.2d at 1382, 431 N.Y.S.2d at 707.

257. *Id.* at 83, 409 N.E.2d at 1384, 431 N.Y.S.2d at 709.

258. *Id.* at 83-84, 409 N.E.2d at 1384, 431 N.Y.S.2d at 709 (quoting *In re Kuehnel*, 49 N.Y.2d 465, 469, 403 N.E.2d 167, 168, 426 N.Y.S.2d 461, 463 (1980)).

259. *Id.* at 84, 409 N.E.2d at 1384, 431 N.Y.S.2d at 709.

260. *In re Bayger*, 1984 Annual Report 62 (Comm'n on Judicial Conduct Jan. 18, 1983).

261. *Id.* at 66.

262. *In re Garvey*, 1982 Annual Report 103 (Comm'n on Judicial Conduct June 23, 1981). Two members dissented: David Bromberg and Dolores DelBello. They voted in a

censured.)

Within a four-year period, the County Court Judge's court stenographer, who had been chosen for her job by the judge, made deposits totalling over \$53,000 in the judge's checking account.²⁶³ The judge explained that the deposits were for the following purposes: (a) the court stenographer was purchasing a fifty-percent interest in an office building owned by the judge; (b) the court stenographer was lending some of the money deposited to the judge; and (c) the court stenographer was contributing towards the maintenance of the building, in which she did not yet own an interest. Complicating this unusual arrangement, there was no written agreement or memorandum for the sale of any part of the judge's interest in the building, and some of the funds which were to be part of the payment for the stenographer's half-interest were later returned to the stenographer. Moreover, a record of hand-made entries of deposits by the court stenographer was held by the referee to be unreliable "because of numerous mathematical errors."²⁶⁴ According to the referee, a purported escrow deed (which conveyed to the stenographer a fifty-percent interest in the building and was to be delivered to the stenographer whenever the judge decided to do so) did not support the judge's explanation, and the escrow instructions protected neither party and did not reflect the existence of a purchase agreement. Of the funds supposedly deposited by the stenographer for maintenance of the building, more than one-third were used by the judge for his personal purposes, according to the referee. The bulk of the deposits were used by the judge for his business expenses.

The referee also found that during this four-year period the judge's total equity in the building never exceeded \$36,000, although the judge and his stenographer allegedly agreed that she would pay \$25,000 for a one-half interest. During the period the court stenographer made payments, she "had no rights in the

separate dissenting opinion for removal. *Id.* at 106. A third member, Michael M. Kirsch, dissented for removal in a separate opinion, although he agreed with the majority that the transfer of funds to the judge's checking account by a court stenographer hired by the judge did not constitute misconduct. *Id.* at 106.

263. Referee's Report at 2, *In re Garvey*. The referee's report is part of the Commission's public file. The two-member dissent relied heavily on the referee's report.

264. *Id.*

building and received no benefits from it,"²⁶⁵ although she was liable on loans obtained from banks to make the payments. Supporting the referee's conclusion that the judge had engaged in misconduct by accepting the payments from his court stenographer, the referee found that there was "no written evidence to support the existence of the alleged agreement"; that the judge's explanation of the transaction "is inadequate"; and that the judge "failed to maintain customary records and normal documentation, in a regular and businesslike manner, regarding business transactions with his court stenographer involving large sums of money."²⁶⁶

Only two of eleven Commission members voted to sustain the charge that the mysterious payments constituted misconduct.²⁶⁷ Obviously, the other members were influenced by the absence of any evidence that the payments were made for any purpose other than purchase of a half-interest in a building. The stenographer-employee had not complained and apparently was not a "victim." Without further evidence, the majority declined to find misconduct.

The question raised by the Commission's dismissal of that charge is whether its action was consistent with the policy that judges must abide by "high standards of conduct" and by related strictures on their private lives. When a judge engages in mysterious financial transactions, especially receiving payments from a court employee who is subject to being fired by the judge, at the very least the public and the Commission should expect the judge to explain fully such transactions. The referee's conclusion that the judge's explanation was "inadequate" was not explicitly rebutted by the majority. It was ignored. The dismissal of that charge, in the light of other improper activity by the judge, seems to have ignored both the general and specific ethical standards applicable to judges' business and financial dealings.

In the opinion of three Commission members, the Commission also overlooked other improper business dealings by this judge. The majority dismissed a charge that the judge had un-

265. *Id.* at 3.

266. *Id.*

267. *Garvey*, 1982 Annual Report at 106.

derstated debts and overstated assets in loan applications to banks, finding that although the statements to the bank "were not fully accurate," they were "negligently prepared" and met the requirements of the bank.²⁶⁸ The majority concluded that misconduct was not established because no evidence was presented that the judge intended to defraud the bank or induce the making of the loan through material misconduct. (The bank president was a strong defense witness, who testified that he valued "character" above financial statements.) One of the two dissents concluded that "[w]hether reckless or fraudulent, respondent's conduct in this regard is inexcusable. He has engaged in business dealings that reflect adversely on the judiciary."²⁶⁹ The judge was censured for signing his wife's name to an application for a license to race horses and then having the signature notarized by his court stenographer (the same person who had been giving large sums of money to the judge), and for accepting loans from attorneys who practiced law in his court. Three dissenting members voted for removal.

3. *The Assertion of Influence*

Judges have enormous prestige, influence and power and should exercise restraint in their private dealings to avoid even the appearance that they are asserting their judicial office to achieve some benefit or advantage for themselves or others.

In 1905 a Supreme Court Justice faced removal proceedings by concurrent resolution of the legislature for what appeared to be gross assertions of his judicial office. Judge Warren B. Hooker was charged with procuring a no-show job in a post office for an individual who used "nearly all of the sum so received . . . in reducing the amount of an obligation held against him by Justice Hooker's wife."²⁷⁰ Other persons also received the benefit of the judge's influence in securing no-show or seldom-show jobs. A two-thirds vote favoring removal in each house of the legislature was required to remove the judge from the bench. The Assembly's vote to remove the judge was seventy-six to sixty-seven,

268. *Id.* at 107.

269. *Id.* (Kirsch, Member, dissenting).

270. IV C. LINCOLN, *supra* note 1, at 572.

not enough for adoption.²⁷¹ In view of the Assembly vote, no vote was ever taken in the Senate.

Even in the 1930's, a judge was removed for his assertion of influence, combined with the violent use of judicial office in helping collect debts.²⁷² After a debtor had issued a check on an account that contained insufficient funds, a Justice of the Peace helped the creditor collect on the debt by accompanying the creditor to the debtor's home, where the judge drew his revolver. Undeterred by the proceeding, the judge testified that his conduct was proper and that he regularly supplemented his income by receiving fees from creditors on bad debts that he helped collect.

For many years, judges sought and obtained favors from other judges on behalf of friends and relatives in speeding and more serious traffic cases. In the late 1970's, the Commission on Judicial Conduct uncovered documentary evidence that hundreds of judges, mostly from the town and village courts, had requested or granted such favors.²⁷³ The practice became so ingrained that judges regularly filed letters they received requesting favors. Some judges brazenly indicated on their court records the names of influential persons who had requested the favored disposition. Driving While Intoxicated cases were also "reduced" because of requests by judges and other officials for favored treatment. Although the practice was condemned, most of the judges who were caught were merely admonished or censured, in large part because the practice had been so prevalent.²⁷⁴ More recently, "fixing" of traffic tickets — either by requesting or granting favors — has been dealt with in a more severe

271. *Id.* at 574.

272. *Voorhees v. Kopler*, 239 A.D. 83, 265 N.Y.S. 532 (4th Dep't 1933).

273. NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, TICKET FIXING: THE ASSERTION OF INFLUENCE IN TRAFFIC CASES (June 20, 1977) [hereinafter TICKET FIXING].

274. From 1978 to 1980, the Commission censured 74 judges and publicly admonished 22 judges for ticket-fixing, and filed charges against 30 judges in Courts on the Judiciary for ticket-fixing, of whom 21 were censured. Statistics compiled from files of the Commission on Judicial Conduct. In *In re Steria*, unreported determination (Comm'n on Judicial Conduct Nov. 13, 1981), two Commission members, Victor A. Kovner and Carroll L. Wainwright, Jr., dissented, calling for removal of any judge who makes "even a single request . . . for special consideration . . . with knowledge of the discipline previously imposed [on others] . . . for such conduct." *Id.* (Kovner & Wainwright, Members, dissenting.)

manner.²⁷⁵

In 1972, the Appellate Division, Second Judicial Department, censured New York City Civil Court Judge Ross J. DiLorenzo for his conduct in arranging a luncheon meeting with an Assistant Counsel of the Waterfront Commission, in which the judge discussed an investigation of his friend being conducted by the Waterfront Commission.²⁷⁶ The judge had never

275. See *In re Reedy*, 64 N.Y.2d 229, 475 N.E.2d 1262, 486 N.Y.S.2d 722 (1985) (holding that even a single act of ticket-fixing could lead to removal). Cf. *In re Edwards*, 67 N.Y.2d 153, 492 N.E.2d 124, 501 N.Y.S.2d 16 (1986) (Commission determination of removal not accepted; censure imposed for a judge's communication with another judge about a speeding charge).

In a dissenting opinion to the Commission determination of removal in *Edwards*, Commission member E. Garrett Cleary expressed the view that the sanction of removal was too harsh for a judge with "21 unblemished years as a town justice," who had "cooperated fully" in "admitting the impropriety of his conduct." The dissent distinguished *Reedy* by noting that Judge Reedy had been censured before his removal from office. Commission members Felice K. Shea and John J. Sheehy joined in Mr. Cleary's dissent. *In re Edwards*, 1986 Annual Report 97, 102 (Comm'n on Judicial Conduct Sept. 18, 1985) (Cleary, Shea & Sheehy, Members, dissenting). The Court of Appeals, in rejecting the Commission's determination, appears to have adopted the dissenting opinion's reasoning.

Whether weight should be given to "unblemished" records and contributions made by judges in their private lives has not been settled. In *In re Shilling*, 51 N.Y.2d 397, 415 N.E.2d 900, 434 N.Y.S.2d 909 (1980), the Court expressly rejected substantial evidence of the judge's excellent reputation. An "unblemished" record may be significant, but is not always a reliable standard of high standards of conduct. In a dissenting opinion to a Commission determination of censure of a judge who repeatedly threatened, excoriated and frightened a four-year-old child during a divorce-custody proceeding, three Commission members voted to dismiss the charges and privately "caution" the judge. They cited his previously "unblemished" and "exemplary" record. *In re Grossman*, 1985 Annual Report 144, 151 (Comm'n on Judicial Conduct Nov. 20, 1986) (Alexander, Bower & Cleary, Members, dissenting). The Appellate Division, First Judicial Department, recently reversed a judgment of the same judge for "numerous hostile and demeaning comments." *Cummings v. Consolidated Edison Co.*, N.Y.L.J., Dec. 15, 1986, at 13, col.2 (1st Dep't Dec. 11, 1986).

How much of a judge's background should be considered in mitigation, given the fact that all judges have made contributions to their communities? Should a judge's war record be considered? In *In re Aldrich*, 1983 Annual Report 75 (Comm'n on Judicial Conduct Sept. 17, 1982) (removal determination accepted in *In re Aldrich*, 58 N.Y.2d 279, 447 N.E.2d 1276, 460 N.Y.S.2d 915 (1983)), in which the misconduct concerned intoxication while presiding over cases, racial statements, and other verbal abuse, Commission member E. Garrett Cleary observed in a dissenting opinion that the judge's record of disposition of cases compared favorably with that of other judges in his court. Mr. Cleary added: "I also note that during World War II, respondent participated in the invasions of Africa, Sicily, Salerno, Anzio and Normandy." *Id.* at 81 (Cleary, Member, dissenting).

276. *In re DiLorenzo*, 38 A.D.2d 401, 330 N.Y.S.2d 394 (2d Dep't 1972).

met or spoken to the Assistant Counsel before but had arranged the meeting through a mutual friend of the two men. The judge testified that his purpose for the meeting was to enlist the attorney's assistance "in screening applicants who desired to join a membership corporation"²⁷⁷ in which the judge was interested. The court criticized the judge for holding the meeting, discussing the pending investigation, and arguing with the Assistant Counsel at the meeting (presumably on the matter of the investigation of the judge's friend). The court dismissed charges that the judge had given false testimony during the investigation as to the purpose of the meeting.

A Town Justice, who used his influence to persuade a retail store to withdraw a petty larceny charge against the judge's law partner and then supervised a stipulated settlement of the matter, was censured in 1973 by the Appellate Division, Second Judicial Department, in *In re Maidman*.²⁷⁸ In mitigation of his conduct, the court said that the judge had been motivated out of concern for his new partner's well-being and mental health. The court found the judge's actions to be "understandable, if not excusable" and, thus, ruled out the harsher sanction of removal.²⁷⁹

New York City Civil Court Judge Louis Kaplan, who assisted his wife in fund-raising by distributing pledge forms to several attorneys who had agreed to contribute, engaged in improper conduct notwithstanding his claim that he had simply acted as a "messenger."²⁸⁰ The Commission on Judicial Conduct, in publicly admonishing the judge, said that the prohibition against soliciting funds applies to judges who assist others in fund-raising activities. The judge had also engaged in misconduct by using his influence to obtain an adjournment in a small claims court case on behalf of the defendant, a friend of the judge.²⁸¹ The fact that he believed his friend deserved the adjournment was not a valid defense.

277. *Id.* at 403, 330 N.Y.S.2d at 395.

278. 42 A.D.2d 44, 345 N.Y.S.2d 82 (2d Dep't 1973).

279. *Id.* at 48-49, 345 N.Y.S.2d at 87.

280. *In re Kaplan*, 1984 Annual Report 112 (Comm'n on Judicial Conduct May 17, 1983).

281. *Id.* at 114. The Commission stated: "Such interventions by a judge cloaked in the authority of his office have in the past met with public sanction, even when done for understandable reasons." *Id.*

In 1984, Supreme Court Justice Joseph S. Calabretta was publicly admonished for interfering in a pending Supreme Court case by trying to obtain an adjournment for his cousin, an attorney, who had not succeeded in doing so.²⁸² The admonished judge believed that the application should have been granted because the attorney was scheduled to be in another court, but the merits of his interference were not at issue. Several judges have been publicly disciplined for the improper assertion of influence in communicating with judges concerning matters pending in court.²⁸³ In what may have been a surprise to the offending judges, the judges to whom the improper communications had been made reported the misconduct.²⁸⁴

A judge who is arrested may be disciplined for the conduct leading to the arrest and for seeking special treatment. A County Court Judge was censured for asserting his judicial office upon being arrested for Driving While Intoxicated,²⁸⁵ and a Town Justice was publicly admonished for referring to his judicial office during his arraignment on a Driving While Intoxicated charge.²⁸⁶

Even a simple inquiry by a judge may be viewed as an attempt to seek special consideration. In *In re Lonschein*,²⁸⁷ a Supreme Court Justice asked a friend who worked for a municipal licensing agency why another friend's application for a license was being delayed by the agency. In admonishing the judge in 1980, the Court of Appeals reasoned that even when a judge does not explicitly assert his judicial office in either seeking an advantage for a friend or simply making an inquiry, the likely perception is that the judge is asserting his judicial office. Dis-

282. *In re Calabretta*, 1985 Annual Report 112 (Comm'n on Judicial Conduct April 11, 1984).

283. See *In re Figueroa*, 1980 Annual Report 159 (Comm'n on Judicial Conduct Nov. 1, 1979); *In re Steria*, unreported determination (Comm'n on Judicial Conduct Nov. 13, 1981); *In re Calabretta*, 1985 Annual Report 112 (Comm'n on Judicial Conduct April 11, 1984); *In re McGee*, 1985 Annual Report 176 (Comm'n on Judicial Conduct April 12, 1984).

284. For a citation of cases, see *supra* note 283.

285. *In re Barr*, 1981 Annual Report 139 (Comm'n on Judicial Conduct Oct. 3, 1980).

286. *In re Kremenick*, 1986 Annual Report 133 (Comm'n on Judicial Conduct June 28, 1985).

287. 50 N.Y.2d 569, 408 N.E.2d 901, 430 N.Y.S.2d 571 (1980).

agreeing with the Commission as to a second charge, the Court found no misconduct where the judge had asked a member of the New York City Council to meet with the judge's friend to assist him "in clearing up administrative difficulties encountered with various administrative agencies."²⁸⁸ The Court found no impropriety in that conduct, even if the City Council member had met with the judge's friend as a favor to the judge. Why the Court distinguished between the judge's request to the person who worked at the agency and his request to the City Council member, an influential political leader, is puzzling, given the rationale that when a judge makes such a request, he or she does so as a judge. As the Court said with respect to the sustained charge:

Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. Thus, any communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office. That is not to say, of course, that Judges must cloister themselves from the day-to-day problems of family and friends. But it does necessitate that Judges must assiduously avoid those contacts which might create even the appearance of impropriety.²⁸⁹

In *In re Shilling*,²⁹⁰ a New York City Civil Court Judge aggressively sought to assist an animal shelter to obtain a license and, in doing so, screamed at a city Health Department official after identifying himself as a judge, demanded to know why the license had not been granted, said that he had more political clout than the Health Department official, and, in vulgar language, told him that he should stop impeding the application for the license. Thereafter, Judge Shilling, in a threatening voice, told another Health Department official that the agency was abusing its authority and then attempted to persuade two

288. *Id.* at 571, 408 N.E.2d at 902, 430 N.Y.S.2d at 572.

289. *Id.* at 572, 408 N.E.2d at 902, 430 N.Y.S.2d at 572-73.

290. 51 N.Y.2d 397, 415 N.E.2d 900, 434 N.Y.S.2d 909 (1980).

ASPCA officials to withdraw summonses that had been served on the animal shelter. The judge also sat in the courtroom on the return date for the summonses and, after the proceeding was over, spoke to the presiding judge and criticized the ASPCA for serving the summonses. Outside the courtroom, Judge Shilling angrily confronted ASPCA and Health Department officials, warning them that he was a judge and that he had friends in high places.

In removing the judge in 1980, the Court held: "A judge whose conduct off the Bench demonstrates a blatant lack not only of judgment but also of judicial temperament, and complete disregard of the appearance of impropriety inherent in his conduct, should be removed from office" ²⁹¹

The Court was unpersuaded by Judge Shilling's claim that his conduct had nothing to do with his judicial position. The Court stated that the judge's "insistence that because he was acting on behalf of a not-for-profit corporation his acts had 'nothing to do with my judicial position' is misguided." ²⁹² Reasoning that "the ultimate sanction of removal is not normally to be imposed for poor judgment, even extremely poor judgment," ²⁹³ the Court called attention to the evidence that suggested "a lack of judicial temperament." ²⁹⁴ Compounding his acts of off-bench misconduct was the judge's "continued insistence that his actions involved neither impropriety nor the appearance of impropriety." ²⁹⁵

Why a judge's off-bench conduct would justify removal was explained by the Court in terms of the qualities necessary to carry out the judicial role:

Judicial office, concerned as it is with concepts of reasonable care, arbitrariness, capriciousness, substantiality of evidence, excessiveness of discipline, involves a large measure of discretion. Public acceptance of the judicial product, however exemplary on a substantive level, cannot survive the acceptance of such invective and pressure politics as petitioner's conduct suggests. As in *Matter of Steinberg* . . . we conclude "that petitioner's complete insensitiv-

291. *Id.* at 399, 415 N.E.2d at 900, 434 N.Y.S.2d at 909.

292. *Id.* at 402, 415 N.E.2d at 902, 434 N.Y.S.2d at 911.

293. *Id.* at 403, 415 N.E.2d at 902, 434 N.Y.S.2d at 911.

294. *Id.* at 404, 415 N.E.2d at 903, 434 N.Y.S.2d at 912.

295. *Id.*

ity to the special ethical obligations of Judges [renders] him unfit for judicial service.”²⁹⁶

In a dissenting opinion, one judge called the Court’s action a “judicial beheading”²⁹⁷ and contended that “there is here not even a suggestion that the acts on which these charges were based in any way or at any time interfered with the proper conduct of Judge Shilling’s judicial duties.”²⁹⁸ Calling Judge Shilling’s conduct merely “overzealous” and “misguided,” the dissent supported the sanction of public censure.²⁹⁹

The dissent’s observation that Judge Shilling’s off-bench misconduct did not interfere with the proper conduct of his judicial duties is not persuasive, especially in light of the Court’s discussion of the judge’s lack of discretion (e.g. threatening to use political influence) and temperament — qualities so important to judicial duties. Indeed, it is entirely irrelevant that a judge’s misconduct off the bench did not interfere with “the proper conduct of [a judge’s] judicial duties,” if the term means a direct connection between the two. The dissent’s rationale could be applied to the majority of disciplinary proceedings based upon off-bench misconduct. It might be equally applicable, for example, to a judge who is convicted of a serious crime indicating lack of integrity. By its nature, *off-bench* misconduct generally does not directly interfere with the judge’s official duties, except that it may demonstrate a lack of fitness for judicial office.

4. *Limitations on First Amendment Rights*

Judges do not have full first amendment rights. When their speech or associations interfere with their judicial duties and create serious doubts about their impartiality, they can be disciplined.

Whether a judge has the right to speak and write on controversial political subjects that do not relate to cases in the judge’s court has been addressed in disciplinary cases. Speeches and letters “in the nature of political propaganda” were the subject of

296. *Id.*

297. *Id.* at 405, 415 N.E.2d at 903, 434 N.Y.S.2d at 912 (Fuchsberg, J., dissenting).

298. *Id.* at 405, 415 N.E.2d at 903, 434 N.Y.S.2d at 913.

299. *Id.* at 405, 406, 415 N.E.2d at 904, 434 N.Y.S.2d at 913.

proceedings commenced by the Brooklyn Bar Association against a New York City Magistrate in the 1930's.³⁰⁰ The Appellate Division, Second Judicial Department, described the judge's statements in harsh terms: "scurrilous" and "in some instances, a pitiful, and in others an execrable exhibition of bad taste."³⁰¹ The Appellate Division denied the motion for the judge's removal although it observed that his conduct "properly subjects [him] to disapproval."³⁰² The Appellate Division called upon the authorities who appointed judges to office to avoid appointing "individuals who are likely to indulge in comments, observations and conduct of an objectionable character which militates against the seemingly administration of justice."³⁰³ Although two of the five Appellate Division Justices voted to remove the judge for his on-bench misconduct, they joined the majority in holding that the judge's letters and speeches should not be the basis of discipline.³⁰⁴

A judge's right of association under the first amendment is not absolute. The Appellate Division, Second Judicial Department, removed Judge Mark Rudich in 1939 for his association with a "notoriously unreliable, undependable and recklessly dishonest individual," named Louis Kassman.³⁰⁵ Judge Rudich, the

300. *In re Hirshfield*, 229 A.D. 654, 655, 241 N.Y.S. 601, 602 (2d Dep't 1930).

301. *Id.* The judge's "scurrilous" public comments consisted of criticism of the "wholesale grafting" by the Tammany Hall administration of Mayor James Walker. He criticized the city's transit policy, the Police Department, and the expenditure of large sums of money by Tammany Hall in Mayor Walker's election campaign. He alleged also that the Democrats and Republicans had conspired in 1926 to re-elect Governor Alfred E. Smith. N.Y. Times, April 2, 1930, at 21, col.4.

302. *Hirschfield*, 229 A.D. at 655, 241 N.Y.S. at 602.

303. *Id.*

304. *Id.* at 656-57, 241 N.Y.S. at 604 (Lazansky, P.J. & Hagarty, J., dissenting). The dissent stated:

We are of opinion that the letters and speeches of the respondent against which complaint is registered here do not come within this rule. Immoderate and ill-tempered attacks on public officials, especially where unsupported by facts, should not flow from the pen or fall from the lips of a judge, whose judgments always must be in deference to the facts. In this case we deem it wiser to overlook such offensive, though ineffective, effusions than to intrude upon the freedom of speech and the press, the limitation of which, in the criticism of public officials, would lead to greater evils than the generous and sometimes wanton use of these guaranteed privileges. As indicated in respondent's answer, the source of these attacks was probably the only place where they were considered of consequence. However, we heartily disapprove of these letters and statements.

305. *Kane v. Rudich*, 256 A.D. 586, 587, 10 N.Y.S.2d 929, 931 (2d Dep't 1939).

court found, "made himself unduly accessible to Kassman and indulged in co-operation with Kassman to an extent that enabled Kassman successfully to carry on his nefarious activities and bring the administration of the law under a cloud."³⁰⁶

The court said it was "unnecessary" to provide details of the charges or of the evidence.³⁰⁷ Judge Rudich's relationship with Mr. Kassman constituted "delinquency affecting his fitness for office" and indicated that "his retention in office is inconsistent with the fair, proper and wholesome administration of justice."³⁰⁸ Because the evidence against Judge Rudich came from Louis Kassman, a "confessed perjurer," the judge urged the court to apply the protection given to defendants in criminal proceedings that the evidence of perjurers must be corroborated.³⁰⁹ The court held that criminal law protections do not apply to judicial disciplinary proceedings and that it would determine in each disciplinary case the extent to which corroboration is necessary. Corroboration is necessary only "as satisfies the mind and conscience of the court."³¹⁰

Twenty years after upholding the first amendment right of a judge not to be removed for writing "scurrilous" letters and making objectionable speeches, the Appellate Division, Second Judicial Department, seemed less inclined to protect Judge Matthew J. Troy's right to participate in a peaceful demonstration against the Prime Minister of Northern Ireland.³¹¹ The disciplinary proceeding was based upon a newspaper article stating that Judge Troy had "led a picket line of people carrying offensive placards."³¹² The court accepted Judge Troy's statement that he had not engaged in picketing, but merely had been present to insure that the demonstration "would be conducted in an orderly and lawful manner."³¹³ The court made its view clear that a judge should not engage in a public demonstration, even one in which other citizens could lawfully participate. The court held

306. *Id.*

307. *Id.* at 586, 10 N.Y.S.2d at 930.

308. *Id.* at 588, 10 N.Y.S.2d at 931.

309. *Id.* at 587, 10 N.Y.S.2d at 931.

310. *Id.*

311. *In re Seelman (Troy)*, 277 A.D. 116, 98 N.Y.S.2d 669 (2d Dep't 1950).

312. *Id.* at 117, 98 N.Y.S.2d at 670.

313. *Id.*

that a judge "should refrain from participation in activities which may tend to lessen public respect for his judicial office, and avoid conduct which may give rise to a reasonable belief that he has so participated."³¹⁴

Assuming that the "issue" in such a public event is not before the courts or likely to be, it is at least questionable whether judges should be warned against participating in lawful picketing or demonstrations. It is likely that judges' free speech rights have expanded since the time of the Appellate Division's warning to judges in the *Troy* case.

The first Court on the Judiciary case, in 1960, concerned a free speech issue: two Supreme Court Justices had traded what was regarded as unseemly public criticism of each other. Their conduct was criticized and found to be a proper basis for disciplinary charges, but they were not removed.³¹⁵ More than a decade later, a Supreme Court Justice was charged in the Court on the Judiciary with "openly and publicly" accepting the entertainment and close friendship of a "professional influence peddler."³¹⁶ That charge was bolstered by several others that alleged on-bench and off-bench misconduct in dealings with the "professional influence peddler." Charges were dropped when the judge resigned in 1972. And a County Court Judge was admonished by the Court on the Judiciary (in a 1976 decision that also censured the judge for improper business activity) for making intemperate public statements about a state university official.³¹⁷

Racial and religious bigotry are intolerable for judges, so when a judge expresses bigoted thoughts, even when the judge is not acting in an official capacity, an appearance is conveyed that the judge will not be impartial in dealing with members of the race or religion the judge has impugned. In that respect the judge has far less of a first amendment right than a person who is not a judge.

In *In re Kuehnel*,³¹⁸ a Village Justice, who had been cen-

314. *Id.* at 117, 98 N.Y.S.2d at 671.

315. *In re Sobel and Leibowitz*, 8 N.Y.2d (a),(h) (Ct. on the Judiciary 1960).

316. *In re Schweitzer*, 29 N.Y.2d (a) (Ct. on the Judiciary 1972).

317. *In re Feinberg*, 39 N.Y.2d (a) (Ct. on the Judiciary 1976).

318. 49 N.Y.2d 465, 403 N.E.2d 167, 426 N.Y.S.2d 461 (1980).

sured for seeking favored treatment in traffic cases pending before other judges and granting such requests of others, used racist language and struck one youth after he had several youths detained because they were out late at night. The Court of Appeals again addressed the high standards expected of judges and the connection between a judge's public and private lives. The Court, in removing the judge in 1980, stated:

Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function As the Referee aptly noted, throughout this entire incident petitioner, "although off the bench remained cloaked figuratively, with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others."³¹⁹

In *In re Cerbone*,³²⁰ a Town Justice watching the World Series in a Mount Kisco bar objected to the presence of several Black patrons, used racist language, and told the Blacks that he would take severe action against them if they appeared in his court. The Court of Appeals removed the judge in 1984.

Another judge was removed for using a religious epithet. After defendant David Rosenblum stopped payment on a check he had sent to court in payment of a fine in a traffic case, a Town Justice, believing that Mr. Rosenblum was Jewish, wrote to him and ended the letter with the words, "So long Kikie."³²¹ In 1981, the Commission on Judicial Conduct voted to remove the judge (who had been disciplined on four prior occasions) for conduct that demonstrated religious prejudice.³²² The Commission observed: "When a judge demonstrates prejudice . . . public confidence in the integrity of the courts is diminished, and the ad-

319. *Id.* at 469, 403 N.E.2d at 168, 426 N.Y.S.2d at 463.

320. 61 N.Y.2d 93, 460 N.E.2d 217, 472 N.Y.S.2d 76 (1984).

321. *In re Bloodgood*, 1982 Annual Report 69, 70 (Comm'n on Judicial Conduct June 11, 1981).

322. *Id.* at 71.

ministration of justice is seriously compromised.”³²³

Two private letters written by one judge to another judge came to the attention of the Commission on Judicial Conduct, and the content of the letters became the subject of a disciplinary proceeding.³²⁴ Onondaga County Court Judge Patrick Cunningham wrote two letters to City Court Judge J. Richard Sardino after a newspaper article indicated that Judge Cunningham had criticized Judge Sardino. The first letter concerned three of Judge Sardino’s sentencing decisions that were to be heard on appeal in County Court. Judge Cunningham wrote: “There is no way I would change a sentence that you had imposed. You can do whatever you want to whenever you want to & I’ll agree with you . . . [Y]ou know the case and as sentencing judge you can do whatever you damn well please.”³²⁵

Judge Cunningham heard two of the appeals and affirmed. In a second letter, in the belief that Judge Sardino was angry because Judge Cunningham had signed an order to show cause in a case decided by Judge Sardino, Judge Cunningham wrote to Judge Sardino: “If I catch the appeal, I will affirm, as always, on a judge’s discretion.”³²⁶

Judge Cunningham “caught” the appeal but reversed Judge Sardino’s sentencing decision with a highly critical opinion. The Commission on Judicial Conduct, concluding that Judge Cunningham had impaired his effectiveness as a judge by his written assurances, determined that he should be removed.³²⁷ The Court of Appeals, in a four to three decision, noting that Judge Cunningham had not actually abrogated his appellate duty to review matters on the merits alone, rejected the sanction of removal and censured the judge in 1982.³²⁸ Fortunately for Judge Cunningham, he reversed the decision in the case that prompted his second letter. If he had decided to affirm, even if the affirmation were on the merits, it is unlikely that he would have been successful in the Court of Appeals.

323. *Id.*

324. *In re Cunningham*, 57 N.Y.2d 270, 442 N.E.2d 434, 456 N.Y.S.2d 36 (1982).

325. *Id.* at 273, 442 N.E.2d at 435, 456 N.Y.S.2d at 37.

326. *Id.*

327. *In re Cunningham*, 1983 Annual Report 93 (Comm’n on Judicial Conduct April 20, 1982).

328. *In re Cunningham*, 57 N.Y.2d 270, 442 N.E.2d 434, 456 N.Y.S.2d 36 (1982).

A curious rationale in the majority opinion was that the letters "were meant only for Judge Sardino's eyes and were not to be nor were they disseminated publicly."³²⁹ The majority noted that while that factor "does not excuse the improper conduct" it is "of some moment that the possible perception of this improper conduct was limited to the eyes of one person only. That it later came to public attention resulted from certain bizarre circumstances which could not have been anticipated, the responsibility for which cannot be attributed to Judge Cunningham."³³⁰

The dissent correctly responded to that rationale by observing that "the clandestine nature of the communication, exposed only by happenstance, is an aggravating factor, not only because it encouraged the Trial Judge . . . [in his misconduct] but also because there is no place in the decisional process for such secret understandings."³³¹

Given the clandestine nature of some of the most invidious forms of off-bench misconduct, such as *ex parte* communications, why the majority would view that as a factor favorable to Judge Cunningham is puzzling. The evil is the distortion of the administration of justice and, in particular, the appellate process. Whether the appellate judge wanted his letter burned or published should not matter; the issue of what sanction was appropriate clearly should not have turned on the fact that he did not want his letter seen by anyone other than the lower court judge. As the dissent noted, that made it worse, because it might have encouraged Judge Sardino's abusive conduct (which was the subject of a separate disciplinary proceeding). At least, a published letter of that type would put the litigants on notice and provide the basis for appropriate recusal motions.

5. *Conduct That Demonstrates Lack of Integrity*

At times, a judge's off-bench conduct is so inconsistent with the "judicial" attributes of honesty and integrity that removal from office seems essential to protect the credibility of the judi-

329. *Id.* at 275, 442 N.E.2d at 436, 456 N.Y.S.2d at 38.

330. *Id.* at 275-76, 442 N.E.2d at 436, 456 N.Y.S.2d at 38.

331. *Id.* at 276, 442 N.E.2d at 436, 456 N.Y.S.2d at 38 (Cooke, C.J., Jasen & Meyer, JJ., dissenting).

ciary. A judge's lack of integrity may be reflected by fraudulent business and financial dealings, violation of fiduciary responsibilities, concealment of evidence of misconduct, false testimony, or other conduct that would make retention of judicial office inconsistent with the lofty goals of the administration of justice.

In 1963, the Court on the Judiciary, in only the second time it was convened since its inception in 1948, removed Supreme Court Justice Louis L. Friedman for impeding an Appellate Division investigation of certain unethical practices of lawyers. Among the conduct found to be improper was his refusal to surrender his former law firm's files, which had been subpoenaed.³³³

In *In re Sarisohn*,³³³ a Suffolk County District Court Judge was removed in 1967 by the Appellate Division, Second Judicial Department, for a variety of improper acts occurring during his tenure as Justice of the Peace and District Court Judge. As a Justice of the Peace he had been permitted to practice law. In a wiretapped conversation he advised a prostitute that he was a judge, he knew the judge who was presiding over her case, and he could be of assistance to her. Subsequently, he advised the prostitute, who was awaiting sentencing, to "mislead the Probation Department by falsely pretending to have desisted from prostitution."³³⁴ In one of the more colorful aspects of judicial disciplinary proceedings, the Appellate Division found that he advised the prostitute "where and how she should carry on her activities as a prostitute, without getting caught again."³³⁵

In *In re Schweitzer*,³³⁶ the Court on the Judiciary, in 1972, discontinued proceedings against Supreme Court Justice Mitchell D. Schweitzer following his resignation and his representation that he would neither seek nor accept public office in the future nor seek back pay from the date of his suspension without pay. He had been charged with "openly and publicly" accepting the

332. *In re Friedman*, 12 N.Y.2d (a) (Ct. on the Judiciary 1963).

333. 26 A.D.2d 388, 275 N.Y.S.2d 355 (2d Dep't 1966), *lv. to appeal denied*, 19 N.Y.2d 689; 27 A.D.2d 466, 280 N.Y.S.2d 237 (2d Dep't), *rev'd on other grounds*, 21 N.Y.2d 36, 233 N.E.2d 276, 286 N.Y.S.2d 255, *on remand* 29 A.D.2d 91, 286 N.Y.S.2d 336 (2d Dep't 1967), *aff'd*, 22 N.Y.2d 808, 239 N.E.2d 649, 292 N.Y.S.2d 907, *mot. to amend remittitur granted*, 22 N.Y.2d 910, 242 N.E.2d 76, 295 N.Y.S.2d 37, *cert. denied*, 393 U.S. 1116 (1968).

334. 27 A.D.2d at 468, 280 N.Y.S.2d at 242.

335. *Id.*

336. 29 N.Y.2d (a) (Ct. on the Judiciary 1972).

entertainment and close friendship of Nathan Voloshen, a "professional influence-peddler";³³⁷ accepting a gift of shrubs from a person who had a case pending in court; meeting with lawyers who had cases pending (such meetings were arranged by Voloshen);³³⁸ intervening at Voloshen's request to obtain the release of an alleged organized crime associate and then ordering his release;³³⁹ resentencing and releasing another "notorious criminal," who had been serving consecutive sentences, following an *ex parte* meeting with defense counsel, arranged by Voloshen;³⁴⁰ borrowing substantial sums at favorable interest rates and re-lending the funds at substantially higher interest rates to moneylenders and making false statements in the applications for the loans as to the purpose of these loans;³⁴¹ investing in business enterprises that "were apt to be involved in litigation" in Supreme Court;³⁴² and giving conflicting and evasive testimony before a legislative committee, a grand jury, and counsel to the Court on the Judiciary (during counsel's investigation).³⁴³

In *In re Pfingst*,³⁴⁴ a Supreme Court Justice was removed in 1973 after he had been convicted for fraudulently transferring and concealing corporate assets in contemplation of bankruptcy, conduct that occurred two years prior to his first term of judicial office. The Court on the Judiciary rejected the judge's claim that he could not be removed for conduct preceding his election to office. The purpose of removal proceedings, said the court, is "to protect the integrity of judicial office," which encompasses not only "wrongdoing while in office but conduct affecting general character and fitness for office as well as acts which justify a finding that the Judge's retention of office is 'inconsistent' with the fair, proper and wholesome administration of justice."³⁴⁵

Some judges who have lied under oath in disciplinary pro-

337. *Id.* at (i).

338. *Id.* at (j).

339. *Id.*

340. *Id.*

341. *Id.* at (t).

342. *Id.* at (u).

343. *Id.* at (u)-(v).

344. 33 N.Y.2d (a),(ii) (Ct. on the Judiciary 1973).

345. *Id.* at (kk).

ceedings have seriously compounded their misconduct. In *In re Perry*,³⁴⁶ the Appellate Division, Second Judicial Department, clearly indicated that the judge's underlying misconduct — a single, egregious abuse of power that violated a person's rights — would not have been the basis for the sanction of removal. Arguably, the judge's false testimony, which sought to minimize his misconduct, was more serious than the original misconduct and warranted his removal.

In *In re Jones*,³⁴⁷ a judge tried to conceal evidence of his ticket-fixing by ordering his clerks to remove from his court records all inculpatory notations. The clerks sat in one room removing the evidence of ticket-fixing from the records before they were inspected by a Commission investigator in an adjoining room. The investigator began to notice obliterations and various holes and rips in the records, a result of the "screening" being done by the clerks. When confronted, the clerks testified that they acted on orders of the judge, who was eventually removed in 1979, not for ticket-fixing, but for lack of cooperation with the Commission. Ironically, because so many judges had been involved in ticket-fixing, they were censured, but Judge Jones was removed for the more serious misconduct of trying to cover-up his ticket-fixing.

In *In re Boulanger*,³⁴⁸ a part-time judge who practiced law transferred to himself assets totaling \$135,000 from his law client, a ninety-five-year-old, legally blind, nursing home patient, under a general power of attorney. The judge also had hidden assets from his former wife during their divorce proceeding. The Court of Appeals in 1984 removed the judge, concluding that he had violated his fiduciary duties to his client and otherwise engaged in serious misconduct.

In *Steinberg, Shilling and Boulanger*, the Court of Appeals presented the clearest possible message that a judge who demonstrates by his or her off-bench conduct lack of either integrity, discretion, or other quality fundamental to being a judge, is unfit to remain in judicial office. As the Court said so clearly in

346. 53 A.D.2d 882, 385 N.Y.S.2d 589 (2d Dep't 1976).

347. 47 N.Y.2d (a),(mmm) (Ct. on the Judiciary), *lv. to appeal denied*, 48 N.Y.2d 603, *rearg. denied*, 48 N.Y.2d 882 (1979).

348. 61 N.Y.2d 89, 460 N.E.2d 216, 472 N.Y.S.2d 75 (1984).

Steinberg, conduct may be inconsistent with the judicial role even if it does not constitute either a crime or "moral turpitude." Insensitivity to the special ethical obligations of judges rendered Judge Steinberg and Judge Shilling unfit to be judges. In *Boulanger*, the Court took appropriately severe action against a judge who, as an attorney, took advantage of a helpless client.

In *In re Kelso*,³⁴⁹ the Court of Appeals rejected the Commission's determination that a part-time judge, who practiced law, should be removed for repeatedly lying to his client over a four-year period concerning the progress of a lawsuit he never filed on his client's behalf. Four members of the Court voted to censure the judge and reject the Commission's determination that Judge Kelso's conduct was inconsistent with the qualities that are essential to being a judge. Three members of the Court dissented.³⁵⁰ Interestingly, not a single factual finding was minimized by the majority, who observed that Judge Kelso repeatedly lied to his client. The attorney-judge's misrepresentations over the course of four years were that a lawsuit had been filed and was progressing toward trial. "In fact, no papers had been filed at all" during that period, observed the Court.³⁵¹ Finally, eight years after he had been retained, the judge filed a lawsuit that was barred both by the Workers' Compensation Law and by the Statute of Limitations. The judge had never advised his client of these obstacles. Subsequently, the judge offered to pay his client \$10,000 "if he would not file a grievance for professional misconduct."³⁵² When the client filed a grievance, "the money was never paid as promised."³⁵³ The Court "condemned" this conduct but did not find it egregious enough to remove him from judicial office.

For his violations of the Code of Professional Responsibility, Judge Kelso had been suspended from the practice of law for one year, an event the Court apparently relied upon in rejecting the sanction of removal. "He has been punished for his

349. 61 N.Y.2d 82, 459 N.E.2d 1276, 471 N.Y.S.2d 839 (1984).

350. *Id.* at 88, 459 N.E.2d at 1279, 471 N.Y.S.2d at 842 (Jasen, Meyer & Simons, JJ., dissenting).

351. *Id.* at 84, 459 N.E.2d at 1277, 471 N.Y.S.2d at 840.

352. *Id.* at 85, 459 N.E.2d at 1277, 471 N.Y.S.2d at 840.

353. *Id.*

behavior," observed the Court.³⁵⁴ The majority reasoned that there were several mitigating factors. The judge had been suffering from depression; he was candid during the Commission proceedings; no other "professional improprieties" were alleged; the client did not lose anything since his claim was barred by reason of his having received a Workers' Compensation award; and the judge did not profit by his misconduct.³⁵⁵

The "most important" mitigating factor in *Kelso* is the most curious: the judge "has faithfully carried out his judicial duties and has never entangled his public office with this incident of his private practice."³⁵⁶ In prior decisions, the Court made it crystal clear that such claims by judges had no merit. And the Court has also made it clear that serious off-bench misconduct demonstrates that certain qualities necessary for judicial office are lacking in the judge. Obviously, when a judge is charged only with off-bench misconduct, there is no evidence of on-bench conduct, so what could the majority have meant by the observation that Judge Kelso "never entangled his public office with this incident of his private practice"?³⁵⁷ This reasoning appears to have been used by the dissent in *In re Shilling* to show that Judge Shilling had been unfairly removed. The majority of the Court in *Shilling* found these arguments unacceptable.

If the rationale of *Shilling* were applied to a case where the judge (a) has repeatedly lied to a client, especially about the status of a lawsuit that he never filed, and (b) then tried to influence the client not to file a grievance by offering him \$10,000, the conclusion should be that the judge has demonstrated (certainly more graphically than Judge Shilling did) that he lacks the qualities to be a judge. The Court's observation that Judge Kelso had already been "punished" is especially curious since "punishment" in another forum or the lack of it should never be a consideration in determining fitness for judicial office. Judge Boulanger also had been "punished" for transferring his client's funds to himself on the authority of a general power of attorney; he went to federal prison. In removing him, the Court did not

354. *Id.* at 87, 459 N.E.2d at 1279, 471 N.Y.S.2d at 842.

355. *Id.* at 87-88, 459 N.E.2d at 1279, 471 N.Y.S.2d at 842.

356. *Id.* at 88, 459 N.E.2d at 1279, 471 N.Y.S.2d at 842.

357. *Id.*

repunish Judge Boulanger. It properly decided that he should not be a judge.

In a brief dissenting opinion by Judge Jasen, joined by Judge Meyer and Judge Simons, the reasons why Judge Kelso should have been removed are set forth:

Petitioner's concededly repeated and intentional misconduct, which he knew at the time to have been wrong, can hardly be characterized as merely "improper", as the majority does. Apart from deceiving and "stalling" his client over a period of years, petitioner's attempt to dissuade his client from filing a grievance complaint by offering to pay him \$10,000 evinces an utter lack of sensitivity to his obligation, as a Judge, to avoid impropriety and the appearance of impropriety and to observe the high standards of conduct essential to insure public confidence in the integrity of the judiciary. Since I do not believe such a person should continue as a member of the judiciary, I would accept the determination of the Judicial Conduct Commission and order petitioner removed from office.³⁵⁸

In *In re Therrian*,³⁵⁹ a Town Justice who paid registered voters to vote was removed in 1986 for violating the Election Law and the ethical standards applicable to judges. The judge did not seek review in the Court of Appeals.

6. *Receiving Benefits Under Circumstances That Convey the Appearance of Impropriety*

Receiving favors, gifts, low interest loans, and similar benefits may convey the appearance of impropriety, even when the benefits are not intended to influence any judicial action. Receiving a free weekend stay at a resort hotel, paid for by a law firm of the judge's "long-time close personal friend" (who practiced law before the judge) led to a six-month suspension for a Supreme Court Justice in *In re Vaccaro*.³⁶⁰ Following the filing of charges by the Commission on Judicial Conduct, the Court on the Judiciary in 1977 held that

neither a Judge nor a member of his family . . . should accept a gift or favor from any attorney or from any person having or

358. *Id.* (Jasen, Meyer & Simons, JJ., dissenting).

359. 1987 Annual Report 141 (Comm'n on Judicial Conduct May 1, 1986).

360. 42 N.Y.2d (a),(e) (Ct. on the Judiciary 1977).

likely to have any official transaction with the court in which he presides, except for reasonable exchanges incident to family, social or recreational relationships or activities.³⁶¹

In three disciplinary proceedings in the early 1980's, it was established that some Supreme Court Justices received travel discounts through the influence of a person who had been appointed as receiver many times in the court in which the traveling judges presided. The judges were publicly admonished by the Commission for their misconduct.³⁶² Failing to repay loans and borrowing from a lawyer who practiced in the judge's court also constituted improper conduct that led to the judge's removal in *In re Katz*.³⁶³ Another judge was admonished in 1982 for accepting more than \$10,000 in cash and checks at a public testimonial for the judge.³⁶⁴ Many of the contributors were lawyers and local businesses. Shortly before the Commission decided on the appropriate sanction, the judge returned the funds. Also in 1982, a City Court Judge was removed for accepting a camera from a friend who asked the judge to assist a defendant in a pending criminal case.³⁶⁵

Favors and benefits that place a judge in a serious conflict of interest may be other than economic. Engaging in sexual relations with a defendant in a pending case led to a judge's removal.³⁶⁶ Another judge was censured for meeting in chambers with the mother of a defendant who was about to be arraigned, under circumstances that conveyed an appearance of impropriety.³⁶⁷ And a Family Court Judge was indicted for seeking sexual favors from litigants. Criminal charges were dismissed when the

361. *Id.* at (g).

362. *In re DiFede*, 1983 Annual Report 99 (Comm'n on Judicial Conduct June 8, 1982); *In re Chananau*, 1983 Annual Report 89 (Comm'n on Judicial Conduct Sept. 10, 1982); *In re Klein*, 1982 Annual Report 117 (Comm'n on Judicial Conduct July 6, 1981).

363. 1985 Annual Report 157 (Comm'n on Judicial Conduct Mar. 30, 1984).

364. *In re Certo*, 1983 Annual Report 86 (Comm'n on Judicial Conduct Dec. 28, 1982).

365. *In re Scacchetti*, 56 N.Y.2d 980, 439 N.E.2d 345, 453 N.Y.S.2d 629 (1982). The "friend," facing punishment for his crimes, was cooperating with federal law enforcement officials. The "defendant" did not exist, because the pending "case" had been contrived.

366. *In re Mills*, 1985 Annual Report 196 (Comm'n on Judicial Conduct Aug. 30, 1984). Another judge offered to suspend a fine in a traffic case if he received sexual favors from the defendant's friend. The Commission referred the matter to a district attorney's office. The judge resigned. TICKET FIXING, *supra* note 273, at 2.

367. *In re Suglia*, 36 A.D.2d 326, 320 N.Y.S.2d 352 (1st Dep't 1971).

judge resigned from the bench.³⁶⁸

C. Disciplining Judges for On-Bench or Off-Bench Conduct: Does an "Appearance of Impropriety" Standard Impair Judicial Independence?

A seductively persuasive dissent to the Court of Appeals' first sanction of a judge under present law expressed the fear of judges that they may be disciplined solely on suspicion of, and without engaging in, impropriety. Because the dissent may be the most articulate marshalling of arguments against the "appearance of impropriety" standard, it is worthy of critical analysis.³⁶⁹ The dissent states:

The "appearance of impropriety" concept is beset by legal and moral complexity. The concern is with what can be a very subjective and often faulty public perception It would appear to follow that, absent an accompanying substantive breach, a mere appearance of impropriety should not automatically merit condemnation. * * *

Finally, it seems to me that appearance alone, in the main because it is so vague and unmapped, should not be permitted to reach out in disregard of all other considerations. Appearance, of course, is of moment only as suspicion attaches to an act. We like to think that no longer is condemnation to be meted out on mere suspicion. But "When we deal with what the public thinks, we must be careful not to accept the view of the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct" ³⁷⁰

The argument is alluring, but, on reflection, it does not withstand analysis. First, no code of conduct can possibly be as detailed in depicting all unethical acts as a penal law is in prohibiting conduct that triggers criminal penalties. Even the most comprehensive code would likely omit many of the acts

368. Gupte, *Suffolk Judge Accused of Soliciting Sex Was Warned Before on Court Conduct*, N.Y. Times, Mar. 29, 1975, at 27, col. 1; McDonald, *Ex-Judge Suspended From Law Practice*, Newsday, Feb. 25, 1981, at 20, col. 1.

369. *In re Spector*, 47 N.Y.2d at 470, 392 N.E.2d at 556, 418 N.Y.S.2d at 569 (Fuchsberg, J., dissenting).

370. *Id.* at 472, 475, 392 N.E.2d at 557, 559, 418 N.Y.S.2d at 570, 572 (quoting *International Elecs. Corp. v. Flanzler*, 527 F.2d 1288, 1294 (2d Cir. 1975)).

that have been the basis for disciplining judges. It would be unworkable and unenforceable except for specific conduct that could be envisioned and codified, and, in the final analysis, would not address conduct that reasonable persons would agree is, or should be, subject to discipline. No code of conduct can govern ethical conduct without some general prohibitions. In short, although government should not imprison individuals without specific, advance notice that certain conduct is wrong and punishable by imprisonment, society should expect from judges higher standards of conduct, including avoiding acts that are wrong but not easily codified.

Second, if "an accompanying substantive breach" were essential, as the dissent in *In re Spector* suggests, the "appearance of impropriety" standard would be a useless vestige, instead of the important addition to the ethical standards that it is.

Third, and most importantly, the dissent misconstrued the nature and use of the "appearance of impropriety" standard. It is not based on mere suspicion; it is not something less than an impropriety; it does not subject judges to the whims or personal predilections of the code's enforcers; and it does not cater to the demands of the public.

The dissenting judge's critical analysis of the "appearance" standard in the *Spector* case is based on false assumptions. Conduct that is not clearly wrong or is unavoidable is not subject to discipline, and a weak disciplinary case cannot be buttressed on mere "suspicions" or the second-guessing of disciplinary bodies.

Judges violate the appearance-of-impropriety standard when they know, or should know, that their conduct is improper. The impropriety is the underlying conduct. Judges must be accountable for what they know or should have known (by reasonable standards). Conversely, they are not accountable for their conduct if they did not know, and would have no reason to know, that fair and reasonable negative inferences may be drawn from such conduct. A judge who is regularly in the company of a person who is both a defendant in a pending criminal proceeding and a convicted corrupter of judges may not be disciplined for the appearance of impropriety if the judge (a) did not know he is in the person's company or (b) did not know the criminal background of the person. On the other hand, if the judge knew of the defendant's background, it is not unfair to conclude that

the judge's conduct in choosing to be with the defendant conveyed the appearance of impropriety (apart from any first amendment issues that may be raised).

The dissenter's attack on the standard stressed the need to have courageous and independent judges: "We need look no further than to two of the qualities we demand of our Judges — courage and independence — to see how ready jurists must be, if the need arises, to brook public clamor, or fear of criticism" ³⁷¹

It is true that judges must resist public clamor in deciding issues on the merits and render impartial decisions regardless of public criticism. It is a grave error to confuse this important principle, which in itself is an ethical standard, with the "appearance of impropriety" standard. Judges do not conform to the latter by substituting, for example, what the public or news media want in a criminal case for their own determination of the law. Indeed, a judge who allows his or her judgment to be decided by what the public wants engages in violations of a specific canon of the Code of Judicial Conduct, a specific rule of the Rules Governing Judicial Conduct, and the "appearance of impropriety" provisions of the Code and Rules.

Further, the dissenting opinion argues that "'appearances' are matters of perception rather than fact" and that the "lack of specificity as to what conduct makes a judge vulnerable to a charge of appearance of impropriety may bear serious due process implications." ³⁷² Appearances may indeed be "matters of perception rather than fact" but perceptions, unsupported by fact, could not possibly be subject to discipline in any rational disciplinary system. And the case law in New York clearly establishes the point.

For example, in *In re Lonschein*, ³⁷³ a case in which the dissenter in *Spector* dissented in favor of no sanction, Judge Lonschein asserted his influence, on behalf of an applicant for a license, by asking his influential friend at the licensing agency to inquire into the supposed delay in processing the license. Even in that context it was essential to apply a general standard of

371. *Id.* at 472-73, 392 N.E.2d at 557, 418 N.Y.S.2d at 570.

372. *Id.* at 473, 392 N.E.2d at 557, 418 N.Y.S.2d at 570-71.

373. 50 N.Y.2d 569, 408 N.E.2d 901, 430 N.Y.S.2d 571 (1980).

ethics that a judge should not assert influence. Presumably, a standard that prohibits the assertion of influence for friends is subject to the same criticism — that it does not give fair notice to judges. The point is that a code could not possibly be so detailed to say that judges should not call their friends at licensing agencies to inquire into pending applications. The assertion-of-influence section of such a code, in its attempt to detail every conceivable form such assertions might take, would be enormous; and, in the end, it would still be incomplete. Some act by a judge, which all reasonable persons would know is improper, would not be contained in the detailed code.

What the New York disciplinary system said in effect to Judge Lonschein was that he should have known without specific notice that it was wrong to make an inquiry on behalf of his friend. The governing ethical standards should have given him notice that to make such a call was an improper assertion of influence and conveyed the appearance of impropriety.

Similarly, Judge Spector, who knew that his son had been appointed by other judges whose relatives he was appointing, should have known that his appointments constituted the appearance of favoritism and, therefore, were improper. The dissenting judge in *Spector* argued that (a) it was a prevailing practice (presumably he referred to appointments of other judges' relatives and not the apparent trade-offs) and (b) Judge Spector would have had no notice that his conduct conveyed the "appearance of impropriety," in part because there was no specific rule in force barring the appointment of other judges' relatives. The majority responded crisply to the prevailing practice argument: "To the extent that such a practice may have existed in certain areas, it has been aberrant; certainly it has had the support and approval only of its practitioners."³⁷⁴

The majority's rejoinder was well put. Excusing misconduct, even if it is a prevailing practice, would lower the standards of judicial conduct to satisfy the ongoing practice and would create an unwelcome, unwholesome immunity for unethical judges. Moreover, an appearance of impropriety conveyed by judicial patronage is an objective, not a subjective, standard. A judge need not guess how a disciplinary body, empowered to enforce

374. *In re Spector*, 47 N.Y.2d at 469, 392 N.E.2d at 555, 418 N.Y.S.2d at 568.

the standard, will react. Judges should know they cannot trade appointments nor appear to trade appointments. The Court of Appeals in the *Spector* case, by its holding and reasoning, expressed confidence in the ability of judges to know that conduct is wrong when it conveys the appearance of impropriety. In disciplining Judges Cunningham and Sardino for their respective misconduct, the Court of Appeals, with the *Spector* dissenter joining in each of the Court's per curiam opinions, concluded that judges cannot avoid responsibility for the natural, obvious and foreseeable results of their conduct.³⁷⁵ Both judges claimed they were not biased. Judge Sardino acted in such a manner as to indicate that he was biased against unrepresented defendants in criminal proceedings. Similarly, by providing written assurance to Judge Sardino that he would uphold Judge Sardino's decisions, Judge Cunningham engaged in conduct that reasonably reflected bias. The appearance of bias was conveyed by each judge's conduct. It is not unfair to expect that a judge avoid conduct that the judge should reasonably foresee would lead to the impression that the judge is biased.

In removing Judge Sims from office, the Court of Appeals underscored the adverse consequences to the administration of justice of her conduct in ordering the release from jail of persons who were represented by her attorney-husband, or were about to be, and in some of these instances permitting her husband to draft the orders she signed.³⁷⁶ The Court properly concluded that the judge's conduct conveyed the appearance that the prestige and authority of her office were used to enhance personal relationships.

The dissenting opinion in *Spector* would be persuasive where the Commission unreasonably applied the appearance-of-impropriety standard. Then, such phrases as "mere suspicion" and the like would be appropriate. Since the fears expressed by the dissent have not been substantiated in any discipline imposed by the Commission, criticism of the standard is unfounded. Only the application of the standard, not the standard, should be of concern. And the Court of Appeals represents an

375. *In re Cunningham*, 57 N.Y.2d 270, 442 N.E.2d 434, 456 N.Y.S.2d 36 (1982); *In re Sardino*, 58 N.Y.2d 286, 448 N.E.2d 83, 461 N.Y.S.2d 229 (1983).

376. *In re Sims*, 61 N.Y.2d 349, 462 N.E.2d 370, 474 N.Y.S.2d 270 (1984).

imposing deterrent to an unreasonable use of any ethical standard governing judicial conduct.

D. Obtaining Evidence of Misconduct: Do Comprehensive Commission Investigations Impair the Independence of the Judiciary?

In its twelve years, the Commission on Judicial Conduct has successfully defended its procedures, authority and jurisdiction against numerous court challenges.³⁷⁷ Claims have been made that the Commission interfered with judicial discretion and with judges' rights to privacy, denied judges substantive and procedural due process, and exceeded its statutory authority and jurisdiction.

Six court proceedings — two in the Court of Appeals to review Commission determinations, one motion to quash a subpoena, and three Article 78 petitions — all challenged the Commission's authority to conduct comprehensive investigations.³⁷⁸

377. See *Polansky v. State Comm'n on Judicial Conduct*, No. 11641-77 (Sup. Ct. Albany County Dec. 30, 1977); *Anonymous Town Justice v. State Comm'n on Judicial Conduct*, 96 Misc.2d 541, 409 N.Y.S.2d 198 (Sup. Ct. Erie County 1978); *Cunningham v. Stern*, 93 Misc.2d 516, 404 N.Y.S.2d 241 (Sup. Ct. Erie and Niagara Counties 1978); *O'Connor v. State Comm'n on Judicial Conduct*, No. 2671-78 (Sup. Ct. Albany County Mar. 21, 1978); *Nicholson v. State Comm'n on Judicial Conduct*, N.Y.L.J., Aug. 2, 1978, at 6, col. 2 (Sup. Ct. N.Y. County July 28, 1978), 67 A.D.2d 649, 412 N.Y.S.2d 602, *on remand*, 68 A.D.2d 851, 414 N.Y.S.2d 550 (1st Dep't 1979); *Anonymous Town Justice v. State Comm'n on Judicial Conduct*, No. E61956 (Sup. Ct. Erie County Mar. 19, 1979); *Anonymous Town Justice v. State Comm'n on Judicial Conduct*, (index number not on file) (Sup. Ct. Erie County May 29, 1979); *Leff v. State Comm'n on Judicial Conduct*, No. 18586/80 (Sup. Ct. N.Y. County Oct. 8, 1980), *mot. for stay denied*, 78 A.D.2d 620 (1st Dep't 1980); *Leff v. State Comm'n on Judicial Conduct*, No. 80 Civ. 6074 (S.D.N.Y. Nov. 3, 1980); *Signorelli v. Evans*, No. 80 Civ. 0992 (E.D.N.Y. June 13, 1980), *aff'd*, 637 F.2d 853 (2d Cir. 1980); *Sims v. State Comm'n on Judicial Conduct*, 110 Misc.2d 181, 441 N.Y.S.2d 806 (Sup. Ct. Erie County 1981), *appeal dismissed*, 94 A.D.2d 946, 463 N.Y.S.2d 747 (1983); *Sims v. Comm'n on Judicial Conduct*, No. 92549 (Sup. Ct. Erie County June 8, 1981), *aff'd*, 94 A.D.2d 946, 463 N.Y.S.2d 747 (1983); *Friess v. State Comm'n on Judicial Conduct*, 91 A.D.2d 554, 457 N.Y.S.2d 33 (1st Dep't 1982); *Wilk v. State Comm'n on Judicial Conduct* (Sup. Ct. N.Y. County Feb. 22, 1983), *rev'd*, 97 A.D.2d 716, 468 N.Y.S.2d 626 (1st Dep't 1983); *Doe v. State Comm'n on Judicial Conduct* (Sup. Ct. Erie County Sept. 27, 1985), *rev'd*, 124 A.D.2d 1067, 508 N.Y.S.2d 724 (4th Dep't 1986).

378. The two cases in the Court of Appeals to review Commission determinations were: *In re Petrie*, 54 N.Y.2d 807, 427 N.E.2d 945, 443 N.Y.S.2d 648 (1981) and *In re Sims*, 61 N.Y.2d 349, 462 N.E.2d 370, 474 N.Y.S.2d 270 (1984). The motion to compel compliance with a subpoena was finally decided in the Court of Appeals, which estab-

The issue in each case was whether the Commission has the power to investigate matters not specifically set forth in the complaints. The theory advanced to attack the scope of the inquiry was that because a complaint is the predicate for an investigation the investigators must confine their search for information to the particular incidents set forth in the complaints.

In practical terms, when the Commission investigates a complaint alleging, for example, that a judge was rude in a particular case on a particular day, should the Commission investigate *only* that incident and not the judge's demeanor in other cases that day or on other days? And if the complaint alleged that the judge was rude on three days, would the Commission be exceeding its statutory authority if it sought to ascertain whether the judge was rude on other days? Would it be improper to send a staff investigator into the judge's court to observe court proceedings?

Similarly, when the Commission finds that Judge A sent a letter to Judge B asking for a favorable disposition in a criminal case, and Judge B complied, would it be a threat to judicial independence if the Commission investigated whether on other occasions Judges A and B either asserted their judicial influence or acceded to the influence of others? The answers to these questions would have a profound effect on how effective the judicial disciplinary process is and whether it would be an improvement over the process in the past.

The vast majority of the Commission's removal determinations were based on multiple incidents of misconduct that were established during comprehensive investigations. In almost every

lished that the Commission had been properly conducting comprehensive investigations into the subject matter of complaints. *In re John Doe*, 61 N.Y.2d 56, 459 N.E.2d 850, 471 N.Y.S.2d 557 (1984). The three Article 78 proceedings were: *In re Richter*, 106 Misc.2d 22, 430 N.Y.S.2d 796 (Sup. Ct. Albany County 1980), *rev'd.*, 85 A.D.2d 790, 445 N.Y.S.2d 307 (3d Dep't 1981), *lv. to appeal denied*, 56 N.Y.2d 508 (1982); *In re Darrigo*, N.Y.L.J., June 7, 1979, at 10, col. 3 (Sup. Ct. N.Y. County May 24, 1979), *aff'd*, 74 A.D.2d 801, 426 N.Y.S.2d 1006 (1st Dep't 1980); and *In re Nicholson*, 100 Misc.2d 62, 418 N.Y.S.2d 265 (Sup. Ct. N.Y. County), *modified*, 72 A.D.2d 48, 422 N.Y.S.2d 701 (1st Dep't 1979), *mot. denied*, 49 N.Y.2d 701, 426 N.Y.S.2d 268, *modified*, 50 N.Y.2d 597, 409 N.E.2d 818, 431 N.Y.S.2d 340 (1980). In *Nicholson*, Supreme Court, New York County said in dictum that if the Commission had investigated any matter not included in a filed complaint "suppression of evidence illegally obtained might lie. (CPLR 3103, subd [c])." *Id.* at 66, 418 N.Y.S.2d at 268.

case, the Commission found that the misconduct was more pervasive than the initial complaint had indicated. Thus, if challenges were successful to the Commission's authority to conduct comprehensive investigations, almost every removal proceeding would have been affected, to the advantage of the judge who was disciplined and to the disadvantage of the public.

In the three Article 78 proceedings challenging the scope of Commission investigations, Supreme Court Justices ruled against the Commission in a manner that, if applicable to all cases, would have sharply curtailed the Commission's authority and effectiveness:

Respondent commission pursued an investigation into an alleged act of misconduct on the part of petitioner. In doing so, it properly filed a complaint alleging the specific act of misconduct. Based upon said complaint, respondent now claims the right to conduct a limitless inquiry into all of petitioner's conduct. Such unwarranted and unfettered incursions into our judiciary would jeopardize its very independence and integrity.³⁷⁹

. . . a writ will issue to prohibit the respondent from investigating matters other than the specific allegations contained in the complaints presently before it.³⁸⁰

It is the complaint which triggers the exercise of the commission's power; and it is the complaint which sets the proper bounds to the exercise of that power. . . . [The investigation] was wide ranging, and, although based in part upon suspicions of the commission's investigation and in part upon information derived through the investigation, it was clearly beyond the scope of the original authority.³⁸¹

The *Richter* case demonstrates the problem. Judge Richter wrote a letter to a judge who had jurisdiction over a traffic case seeking favorable consideration on behalf of the defendant. The Commission found the letter, decided to investigate, and filed a complaint containing what it knew: Judge Richter tried to fix a traffic ticket. The Commission's intention was to investigate Judge Richter's involvement in ticket-fixing, seeking or granting favors, or both. Prior to an investigation, it could not file a com-

379. *In re Richter*, 106 Misc.2d at 24, 430 N.Y.S.2d at 797-98.

380. *In re Darrigo*, N.Y.L.J., June 7, 1979, at 10, col. 3.

381. *In re Nicholson*, 100 Misc.2d at 65, 66, 418 N.Y.S.2d at 267.

plaint that Judge Richter fixed tickets in his court; to do so would have been a fiction. Only after the Commission examined the judge's court files could it determine whether the judge had granted requests for favors.

Supreme Court, Albany County held that by examining the judge's *public* files after filing a complaint as to the one incident the Commission knew about (i.e. the letter Judge Richter had written to another judge), the Commission exceeded its authority. Such a "limitless inquiry" by the Commission, said the court, jeopardizes the "independence and integrity" of the judiciary.³⁸²

On appeal, the Appellate Division, Third Judicial Department, agreed with the rationale of the court below, but reversed on the grounds that, between the time Judge Richter commenced his lawsuit and the time the lawsuit was terminated in his favor, Judge Richter testified about the other ticket-fixing incidents, and hence he waived the protection that the court below had provided.³⁸³ Although the matter thus was moot, the Appellate Division reinforced the principle in both the majority and concurring opinions that, on the facts presented, the Commission exceeded its authority. The Commission's motion for leave to appeal to the Court of Appeals was denied, presumably because it had won the battle against Judge Richter, although it lost the war — temporarily.

Two years later the issue was again presented to the Appellate Division, Third Judicial Department, this time on a motion to compel compliance with a Commission subpoena, decided in the Commission's favor in the court below. The Appellate Division applied its rationale from the *Richter* case in reversing the decision of the court below and in quashing parts of the Commission subpoena because it sought evidence regarding matters not specifically alleged in the complaint.³⁸⁴

The case had begun with a complaint letter by an elderly couple who had loaned \$32,000 to a full-time judge who had not

382. *Richter*, 106 Misc.2d at 24, 430 N.Y.S.2d at 797-98.

383. *In re Richter*, 85 A.D.2d 790, 445 N.Y.S.2d 307 (3d Dep't 1981), *lv. to appeal denied*, 56 N.Y.2d 508 (1982).

384. *In re John Doe*, 96 A.D.2d 638, 465 N.Y.S.2d 74 (1983), *modified*, 61 N.Y.2d 56, 459 N.E.2d 850, 471 N.Y.S.2d 557 (1984).

repaid the debt, despite numerous promises to do so. They alleged that the judge used the loan for a failing business. The subjects of the Commission's investigation, pursuant to its usual procedures to investigate fully the *subject matter* of complaints, were the judge's outstanding loans and business activities. Questioned during the investigation about the complaint and matters related to it, the judge was asked whether he had other outstanding loans.

The issue then was presented squarely to the Court of Appeals, which would either uphold the Commission's policy of conducting comprehensive investigations of the *subject matter* of complaints or limit the Commission's authority to the specific allegations of complaints. The Court of Appeals supported the Commission's view of the law. "To hold otherwise," said the Court, "would sharply curtail the Commission's investigatory capabilities and render it ineffective as the instrument through which the State seeks to insure the integrity of its judiciary."³⁸⁵ The key to a challenge to a Commission subpoena or to the scope of an investigation is whether the Commission investigation is reasonably related to a proper "subject of inquiry." The issue, which threatened for three years to disable the Commission and render it less effective than disciplinary processes that were replaced by the Commission, was finally resolved. And the independence of the judiciary has not been impaired.

III. Conclusion

"Judicial independence" thrived with few restraints in the decades prior to the establishment of the Commission on Judicial Conduct because the investigation of alleged judicial misconduct was uneven and largely ineffective. Issues concerning judicial independence and judges' "rights" emerged only after the disciplinary system was improved. Of the more than 300 Commission determinations and thousands of charges filed in the past twelve years, few have been identified by critics as either harsh or indicative that the Commission has become a super-appellate court or a super-monitor of judges' private lives.

Although the system tries to strike a perfect balance be-

385. *Id.* at 61, 459 N.E.2d at 853, 471 N.Y.S.2d at 560.

tween fairness to judges and enforcement of standards, it errs on the side of leniency. Judges may be warned to abide by "high standards of conduct" and to lead lives above reproach, but these and other goals are unenforceable because too much enforcement would impair both judicial discretion and judges' privacy rights. Accordingly, those who enforce the lofty goals apply a sense of reasonableness in determining whether a judge engaged in misconduct. The gray areas make for stimulating discussions in a law school setting but generally are avoided by the Commission.

Under the present system, the Court of Appeals plays an important role in safeguarding judicial independence. No judge may be disciplined by the Commission without every aspect of the investigation, the hearing, and the potential sanction being subject to a comprehensive review. Only a judge who waives the right to have the Court of Appeals review the Commission's procedures and determination would be disciplined by the Commission.

Given the large number of decisions that have been made by the Commission over the past twelve years and upheld in the courts — to investigate, charge and discipline — it seems fair to conclude that the goals of an effective disciplinary system have been met. There have been disagreements among Commission members, among Court of Appeals judges, and between the Court and the Commission as to appropriate discipline in particular cases. On balance, however, the record of the Commission and the Court of Appeals, as reflected by the reported decisions, while subject to fair comment and analysis, demonstrates that judicial independence has been maintained.³⁸⁶ Neither on-bench

386. A warning against overreaching by the Commission was sounded by one Commission member, David Bromberg, in a dissenting opinion in *In re Leff*, 1983 Annual Report 119 (Comm'n on Judicial Conduct Aug. 20, 1982). Supreme Court Justice James J. Leff refused for six months to perform his assigned duties because he believed that his transfer from Criminal Term to Civil Term was in retaliation for his criticism of court administrators. He was censured. Mr. Bromberg dissented, warning that such sanctions threatened the independence of the judiciary. The Commission, he said, "has no warrant to render sanctions against judges [who] . . . have violated, or refused to obey, administrative orders or rules of the Office of Court Administration." *Id.* at 127 (Bromberg, Member, dissenting). The dissent viewed the censure of Judge Leff as a message to all judges that if they refuse to obey orders of their administrative judges, they will be subjected to discipline:

nor off-bench conduct has been unduly restricted, and judges' expressed concerns about "limitless" inquiries and other colorful epithets to describe the Commission³⁸⁷ are not supported by the record. New York State's judges may not be entirely "independent," but judicial independence within a system of judicial accountability has been preserved.

The individual judge now contemplates a system of judicial administration which can bring him before a disciplinary body to answer for disobedience of any of its rules or orders, bring to bear against him the resources of two governmentally financed agencies, and subject him to the financial, emotional and other strains of a disciplinary hearing and the threat of public discipline. In the face of this, there is cause to wonder whether the individual judge—and, in sum, the judiciary — will be made to feel — or will become — more like court employees subservient to the court administration system, rather than independent constitutional officers performing the judicial functions of government.

I do not believe that the joinder of disciplinary and administrative power in such fashion was foreseen or approved by the public or the legislature, or that it is implicit in the structure of the constitutional amendments and legislation establishing this Commission and the system of court administration. It swings the pendulum too far from the now-overcome extreme of judicial non-accountability toward the other potentially dangerous extreme of a too-controlled judiciary and, thus, threatens the independent functioning of the judiciary and the justice system.

Id. at 128-29 (Bromberg, Member, dissenting)

The dissent observed that if every "act of disobedience of an administrative order or rule — even if the order or rule is improper or illegal — is, without more, an act of judicial misconduct" the censure of Judge Leff has done a disservice to the administration of justice. *Id.* at 130. Mr. Bromberg has raised provocative and interesting issues, but there is no sign that the censure of Judge Leff would be extended to the automatic enforcement of all orders and directives of court administration. As is essential in all aspects of judicial discipline, because each case is different, projections may be interesting but unreliable. Each case must turn on its own facts. The dissent, however, serves as a reminder that any overreaching by a judicial disciplinary body could do harm to the judiciary and, therefore, to our system of law.

387. See *supra* note 26. The rhetoric apparently has subsided.