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JUDICIAL ETHICS AND PRIVATE LIVES

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I. INTRODUCTION

The term "judicial ethics" immediately evokes its opposite image: black robed figures receiving under-the-table payoffs from shady lawyers or crooked litigants.[1] While it is true that corrupt judging represents the greatest possible threat to the integrity of the legal system, bribery and extortion do not present particularly difficult issues of judicial ethics. It is wrong, unethical, and criminal for judges to solicit or accept favors in return for their decisions.[2] Dishonest judges should be tried and punished; there is no need for extended debate on the appropriateness of disciplining judges who allow themselves to be bought or sold.[3]

The truly complex questions in judicial ethics arise in the realm of private conduct. To what extent should or may judges be subject to discipline for activities that do not involve dishonesty or conflict of interest? The Code of Judicial Conduct,[4] which has been adopted in whole or in part by the overwhelming majority of states and by the federal jurisdiction,[5] places restrictions, and in some cases prohibitions, on judges' business, civic, and charitable activities, as well as on aspects of their personal lives.[6] Sitting judges can and have been disciplined for such

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1 *See, e.g.*, N.Y. Times, June 7, 1984, at 12, col. 2; N.Y. Times, June 4, 1984, at 13, col. 4.

2 *See, e.g.*, N.Y. Times, June 15, 1984, at 10, col. 1 and *supra* note 1. *See also infra* notes 59-60.

3 MODEL CODE OF JUDICIAL CONDUCT (1972) [hereinafter cited as MODEL CODE].

4 *See* MODEL CODE, *supra* note 3, Canons 1, 2A, 2B, 3A(1), 3C(1) (1972).

5 The Model Code has been adopted in full by 45 states. These states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Five states have adoped the code in part, or have enacted their own standards to govern judicial conduct. These states are: Illinois, Maryland, Montana, Rhode Island, and Wisconsin. For a detailed guide to the minor modifications of the Model Code made by the various states, see D. FRETZ, R. PEEPLES, & T. WICKER, ETHICS FOR JUDGES 6 (1982).

6 *See* MODEL CODE, *supra* note 3, Canons 2B, 5A (personal lives), 5B (civic and charitable activities), and 5C (business activities). For an extended discussion of restrictions on judges' business, civic, and charitable activities, see S. LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS

"honest" conduct as moonlighting as a construction laborer,[7] raising funds for a religious organization,[8] and attending a lecture by a controversial speaker.[9]

In some cases, of course, nonofficial conduct has direct implications upon the judging process. For example, participation in certain business concerns, such as banking or insurance, may suggest that a judge will approach related areas of law with a less than open mind.[10] Similarly, membership in even the most laudable organization, such as Mothers Against Drunk Drivers, may call into question a judge's ability to preside fairly over certain prosecutions.[11] As the conduct in question becomes more private, however, the relationship to the judicial process recedes. If the actual judging is fair, impartial, and competent,[12] why should matters such as a judge's social acquaintances,[13] choice of language,[14] or

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ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES (American Judicature Society, 1984).

[7] *See In re* Daley, 2 Ill. Cts. Com. 38 (1983). Judge Daley was charged with having worked three or four hours a day for a contracting company in violation of Illinois Supreme Court Rule 65. Rule 65 provides:

> RULE 65. COMPENSATION FOR NONJUDICIAL SERVICE
> A judge shall not accept compensation of any kind, whether in the form of loans, gifts, gratuities or otherwise for service hereafter performed or to be performed by him except as provided by law for the performance of his judicial duties or as provided by the Illinois constitution; however, a judge may accept reasonable compensation for lecturing, teaching, writing or similar activities. This rule shall become effective January 1, 1971.

While the language of this rule varies from Canon 5C, its content, when read in tandem with Illinois Supreme Court Rule 63, is essentially the same. Rule 63 reads as follows:

> RULE 63. BUSINESS ACTIVITIES
> A judge shall not assume an active role in the management of any business or serve as an officer or director of any for-profit corporation. The rule is not intended to prohibit personal investments. If a judge does not neglect his judicial duties in so doing, he may engage in the activities usually incident to the ownership of investment property and may also serve as an officer or director of a not-for-profit corporation. This rule shall become effective January 1, 1971.

[8] *See In re* Kaplan, Unreported Determination (N.Y. Comm'n on Judicial Conduct, May 17, 1983) (Judge Kaplan's charitable fundraising included face-to-face solicitation of practicing lawyers in his chambers which could not but place pressure on the lawyers who appeared before the judge). *Cf. In re* Dunbar, Unreported Determination (N.Y. Comm'n on Judicial Conduct, July 3, 1979) in which the State of New York Commission on Judicial Conduct formally admonished a village court justice for disposing of cases by requiring defendants to contribute stated amounts to charities named by the justice. In one of the cases, the required contribution was in lieu of a fine.

[9] *See In re* Bonin, 378 N.E.2d 669 (Mass. 1978)(the Chief Justice of the Massachusetts Superior Court was charged with purchasing tickets and attending a public meeting held in support of criminal defendants where the key lecture was delivered by Gore Vidal and entitled "Sex and Politics in Massachusetts"); *see also supra* notes 169-84 and accompanying text.

[10] *See In re* Babineaux v. Judiciary Comm'n, 346 So. 2d 676, 679-80 (La. 1977).

[11] *See* Florida Committee on Standards of Conduct Governing Judges, Op. No. 82-18 (Dec. 13, 1982). *See also* Judicial Committee of the United States Judicial Conference, Op. No. 78-4 (1978) (membership in an "antishoplifting" organization); State of New York Office of Court Administration, Op. No. 17 (April 8, 1975) (membership on the legal committee of an organization engaged primarily in legal activites).

[12] *See generally* Martineau, *Disciplining Judges for Nonofficial Conduct: A Survey and Critique of the Law*, 10 BALT. L. REV. 225 (1981).

[13] *See In re* Mann, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1980 Supp.,

even sexual conduct[15] raise any ethical concern? The purpose of this article is to explore the limitations which the Code of Judicial Conduct places on the most private aspects of judges' lives: What is the need to oversee judges' friendships, social associations, and romances? Does the Code of Judicial Conduct draw the right lines? What are the limits of regulation concerning personal or private activity?

II. THE PURPOSE OF JUDICIAL REGULATION

The Code of Judicial Conduct places limitations on judges' personal lives in both general and specific terms. Canon 1 of the Code calls upon judges to observe "high standards of conduct"[16] and Canon 2 requires judges to avoid impropriety and the appearance of impropriety.[17] With regard specifically to social and private activities, Canon 2B cautions that a judge should not allow family or social relationships to influence judicial conduct,[18] and Canon 5A permits a judge to engage in the arts, sports, and other social and recreational activities only if they "do not detract from the dignity of his office or interfere with the performance of his judicial duties."[19] Other Canons govern the related issues of disqualification and conflict of interest,[20] topics that are beyond the scope of this discussion.

The policy justifications for placing restrictions on off-the-bench activities generally fall into the following three broad categories: (1) the

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at 19, No. 50982 (Minn. Bd. on Judicial Standards, March 4, 1980) (prostitute); *In re* Haggerty, 257 La. 1, 241 So. 2d 469 (1970) (bookie); *In re* Troy 369 Mass. 15, 306 N.E.2d 203 (1973) (bailbondsman); *In re* DeSaulnier, 360 Mass. 787, 279 N.E.2d 296 (1972) (bailbondsman).

[14] *See In re* Stevens, 31 Cal. 3d 403, 645 P.2d 99, 183 Cal. Rptr. 48 (1982) (racial epithets); Geiler v. Comm'n on Judicial Qualifications, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973), *cert. denied*, 417 U.S. 932 (1974); (vulgar, profane remarks); *In re* Cerbone, 61 N.Y.2d 93, 460 N.E.2d 217, 472 N.Y.S.2d 76 (1984) (profanity, racial epithets); *In re* Kuehnel, 49 N.Y.2d 465, 403 N.E.2d 167, 426 N.Y.S.2d 461 (1980); *In re* Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485 (1980), *cert. denied sub nom.* Seraphim v. Wisconsin, 449 U.S. 994 (1980) (vulgarity; sexist remarks).

[15] *See In re* Inquiry Concerning a Judge (J. Cail Lee), 336 So. 2d 1175 (Fla. 1976); Cincinnatti Bar Ass'n v. Heitzler, 32 Ohio St. 2d 214, 291 N.E.2d 477 (1972), *cert. denied*, 411 U.S. 967 (1973).

[16] MODEL CODE, *supra* note 3. The Canon reads as follows:

> A Judge Should Uphold the Integrity and Independence of the Judiciary.
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

[17] MODEL CODE, *supra* note 3. Canon 2 reads as follows:

> A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct of judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

[18] MODEL CODE, *supra* note 3, Canon 2B.

[19] MODEL CODE, *supra* note 3, Canon 5A.

[20] *See* MODEL CODE, *supra* note 3, Canons 3C & 3D.

need to avoid the appearance of partiality or favoritism;[21] (2) the need to maintain public confidence in the women and men who comprise the judiciary;[22] and (3) the need to ensure that judges will not be distracted by nonjudicial activities.[23] An assessment of these policies is necessarily the starting point of our inquiry.

The need for the judiciary to avoid the appearance of partiality exists even in the absence of actual wrongdoing or favoritism. In a democracy, the enforcement of judicial decrees and orders ultimately depends upon public cooperation. The level of cooperation, in turn, depends upon a widely held perception that judges decide cases impartially.[24] This is one meaning of the frequently used phrase "confidence in the judiciary."[25] If this confidence were lost, the judicial system could not function. Should the citizenry conclude, even erroneously, that cases were decided on the basis of favoritism or prejudice rather than according to law and fact, then regiments would be necessary to enforce judgments.[26] Consequently, judges are called upon to avoid all activity that so much as suggests that their rulings are tempered by favoritism or self-interest. This is a prophylactic measure that goes beyond the need for judges to recuse themselves from cases in which they actually have a stake or interest.[27] Rather, the goal of the policy is to prohibit judges from engaging in certain activities that are deemed inherently inconsistent with the appearance of impartiality.

Closely related to the appearance of partiality or self-interest is the issue of collateral misuse of the judicial office. Although the integrity of the judging process may not be directly compromised, it is considered improper for a judge to take advantage of his or her position and title in order to advance an economic, political, social, or other interest.[28] Fur-

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21 *See In re* Morrissey, 366 Mass. 11, 313 N.E.2d 878 (1974); Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A. J. 919, 920 (1969); *Judicial Ethics*, 50 A.B.A. J. 840, 841 (1964); Note, *Extrajudicial Activities of Judges*, 47 IOWA L. REV. 1026, 1029 (1962). *Judicial Ethics*, 50 A.B.A. J. 840, 841 (1964).

22 *See* Cribbet, *The Public Activities of a Judge*, 51 CHI. B. REV. 78, 79 (1969); Hall, *Judicial Removal for Off-Bench Behavior: Why?*, 21 J. PUB. L. 127, 146 (1972).

23 *See In re* DeSaulnier, 360 Mass. 787, 279 N.E.2d 296 (1972); Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 5 (1970); McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 19 (1970); Stern, Comment [on Judicial Ethics], 19 UNIV. OF CHI. LAW SCHOOL CONFERENCE SER. 17 (1964).

24 *See* Rifkind, *The Public Concern in a Judge's Private Life*, 19 UNIV. OF CHI. LAW SCHOOL CONFERENCE SER. 25 (1964); Wright, Comment [on Judicial Ethics], 19 UNIV. OF CHI. LAW SCHOOL CONFERENCE SER. 39 (1964).

25 *See In re* Fuchsberg, 426 N.Y.S.2d 639, 648 (1978); MODEL CODE, *supra* note 3, Canon 2 Commentary.

26 Fuchsberg, 426 N.Y.S.2d at 667 (Simons, J., dissenting). *See also* Martineau, *supra* note 12.

27 MODEL CODE, *supra* note 3, Canon 3C(1) (requiring recusal in cases where the judge's impartiality might reasonably be questioned).

28 *Id.*, Canon 2B; *In re* Foster, 271 Md. 449, 318 A.2d 523 (1974); Shilling v. State Comm'n on Judicial Conduct, 51 N.Y.2d 397, 415 N.E.2d 900, 434 N.Y.S.2d 909 (1980), *appeal dismissed*, 451 U.S. 978 (1981).

thermore, it is considered improper for a judge even to appear to do so.

It is true that such conduct does not always appear to result in unfair judging, but at least two aspects of collateral misuse do implicate the decisionmaking process. A judge, by obtaining a favor through the use of his or her position, creates the reasonable inference that the favor may be returned. Thus, the first issue is one of, at least apparent, partiality. The second aspect of the collateral misuse rationale is its relationship to the character or personal integrity of the judge. We expect our judges to obey the law, and misuse of office which amounts to a crime clearly ought to be disciplined. A judge who cannot obey the law cannot be expected to apply it. The collateral misuse rationale, however, extends far beyond law breaking to activities that are quite legitimate when conducted by ordinary citizens, including solicitation for charities,[29] appearance before public bodies,[30] and obtaining social favors.[31] The reason for restricting these otherwise harmless activities is that they are considered unseemly or undignified for a judge.[32] The fear is not only that a future decision will be tainted, but also that the public will lose confidence in the character of a judge who seeks, takes or appears to take any advantage of his or her office.

The question of individual character forms the second broad justification for restrictions on nonjudicial activities. In order to maintain public confidence, the judiciary must appear to be not only impartial, but also, at least in a certain sense, moral. Although there may be no coldly rational relationship between individual morality or integrity and the ability to apply the law fairly, the act of judging one's fellows implies the need to be morally unstained.[33] It is, of course, out of fashion to speak in terms of the enforcement of morality, and the modern view of the first amendment provides a shelter of privacy to many activities which previously were open to moral censure.[34] Nonetheless, Canon 1 calls upon judges to maintain "high standards of conduct"[35] even in their daily lives, and Canon 2 counsels judges to avoid even the appearance of impropriety in all activites.[36] These admonitions can be seen, and have been interpreted, as an injunction to adhere to the most broadly accepted norms of social conduct.

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29 *See* MODEL CODE, *supra* note 3, Canon 5B(2).

30 *Id.*, Canons 4B, 7A(1), 7A(2).

31 *See In re* Bonin, 375 Mass. 680, 378 N.E.2d 669 (1978) (reserving special seats at a public lecture).

32 *Cf.* MODEL CODE, *supra* note 3, Canons 3A(3), 5A, 7B(2)(a) (all referring to the dignity of the judge or of the judicial office).

33 "[H]e that is without sin among you, let him first cast a stone." *John* 8:7.

34 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484-45 (1965) (right of privacy protects married couple's use of contraceptives); Roe v. Wade, 410 U.S. 113, 152-53 (1972) (right of privacy includes qualified right to abortion).

35 MODEL CODE, *supra* note 3, Canon 1.

36 *Id.*, Canon 2.

The need to maintain public confidence in the judiciary definitely requires judges to obey the law and to avoid using their positions for personal gain.[37] These are values that few would question. Beyond these norms, however, there are more questions than answers: what constitutes conduct beyond reproach in the spheres of social relationships,[38] personal behavior,[39] and intellectual expression?[40] Should these matters be judged according to national, state, or local standards? What is the interplay between these character-oriented restrictions and the associational freedoms guaranteed by the first amendment?

The third rationale for the restrictions placed on judges is the need to ensure that they will not be distracted from their duties by extraneous activities.[41] The reasoning behind this principle is self-evident: judges should spend their time judging and not in pursuit of other goals, no matter how harmless or even beneficial. It does not appear that any judge has ever been disciplined on this basis for engaging in social activities, although the rationale has been fairly widely used regarding business involvement, investments, and even charitable and civic work.

Given the numerous dangers associated with judges' off-the-bench activities, it is tempting to conclude that judges ought only to judge, avoiding all nonjudicial activities other than those centered around home and family.[42] Such a drastic measure would no doubt insulate most judges from charges of bias, self- interest, or distraction, but ultimately it would not be beneficial either to judges or to the public.

It has often been said that it is undesirable to isolate judges from the society in which they live.[43] Professor Robert McKay has pointed out that it is functionally impossible truly to isolate a judge from opinion-

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37 *See, e.g., In re* Durr, 1 Ill. Cts. Comm. 13 (1973). *In Re* Sobeck, Unreported Determination (N.Y. Comm'n on Judicial Conduct July 2, 1979); *In re* Napolitano, 1 Ill. Cts. Comm. 9 (1970).

38 *See, e.g., In re* DeSaulnier, 360 Mass. 787, 812, 279 N.E.2d 296, 310 (1972)(judge suspended and disbarred, in part because of his social friendship with a bailbondsman whose official conduct the judge was charged with regulating); *see also* Kaufman, McKay, Stern, *supra* note 23.

39 *Compare, In re* Dalessandro, 483 Pa. 431, 397 A.2d 743 (1979) (censure of married judge not warranted for maintenance of intimate relationship with a married woman, regardless of whether that relationship is open and notorious) *with* Cincinnatti Bar Ass'n v. Heitzler, 32 Ohio St. 2d 214, 291 N.E.2d 477 (1972) (judge, separated from his wife, was not acting beyond reproach when he took his "girl friend" on vacation, although they occupied separate rooms).

40 *See, e.g.*, Morial v. Judiciary Comm'n of La., 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978) (canon and statute requiring judge to resign from the bench before announcing candidacy for non-judicial office upheld against first amendment challenge); *In re* Bonin, 375 Mass. 680, 378 N.E.2d 669 (1978) (judge censured and suspended in part for attending a partisan meeting held in support of criminal defendants. The court found great significance in the presence of Gore Vidal as a speaker at the meeting). *See generally* Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633 (1962).

41 *See* MODEL CODE, *supra* note 3, Canon 3 (judicial duties take precedence over all other activities).

42 *See* McKay, *supra* note 23, at 12.

43 *See id.*; Kaufman, *supra* note 23, at 5.

shaping influences[44] unless, perhaps, the jurist is actually sequestered like a juror. McKay also argued that a "judge is likely to be a better dispenser of justice if he is aware of the currents and passions of the time, the developments of technology, and the sweep of events."[45]

Not only is it impossible to isolate a judge from opinion-shaping forces, it is undesirable to give the impression that this has been accomplished. Assuming that judges are not to be sealed hermetically in their homes after working hours, they will continue to form opinions as a consequence of exposure to friends, colleagues, and the media. In the absence of nonjudicial activities that reflect the tenor of a judge's ideas, the public and the bar will have no way of knowing of the jurist's proclivities. A ban on nonjudicial activities will not erase biases, it will simply hide them. A judge who loves animals will not lose this predisposition merely because membership in the A.S.P.C.A. has been prohibited. It will be a rare case where knowledge of a judge's activities will be relevant; nonetheless, public information on the judiciary is valuable in and of itself.

Similarly, judges' knowledge of the public is essential to the dispensation of justice. It is not enough to say that a judge is enriched by knowledge of the real world; rather, the nature of modern law absolutely requires that judges "live, breathe, think and partake of opinions in that world."[46] It is probable that a majority of legal tests and rules which a judge is called upon to apply call for judgments which involve common experience.[47]

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44 McKay, *supra* note 23, at 12.

45 *Id. See also* Grossman, *A Political View of Judicial Ethics*, 9 SAN DIEGO L. REV. 803, 815 (1972); MODEL CODE, *supra* note 3, Canon 5A Commentary.

46 McKay, *supra* note 23, at 12.

47 In the area of obscenity, for example, judges are expected to apply "contemporary community standards" in determining whether a work appeals solely to the prurient interest. Miller v. California, 413 U.S. 15, 25 (1973); Roth v. United States, 354 U.S. 476, 489 (1957). In nuisance law, the standard of unreasonableness is judged "according to simple tastes and unaffected notions generally prevailing among plain people." Rose v. Chaiken, 187 N.J. Super. 210, 216, 453 A.2d 1378, 1381 (1982) (quoting Stevens v. Rockport Granite Co., 216 Mass. 486, 489, 104 N.E. 371, 373 (1914)). In contract law, the plain meaning rule calls upon judges to interpret contract provisions according to "their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them." Bass v. Dalton, 213 Neb. 360, 362, 329 N.W.2d 115, 117 (1983); *accord* THQ Venture v. SW, Inc., 444 N.E.2d 335, 338 (Ind. Ct. App. 1983). Other areas of law which presuppose a judge's knowledge of community standards of average conduct include negligence, *see* Massachusetts Lobstermen's Assoc. v. United States, 554 F. Supp. 740, 742 (1982); Trapani III v. State Farm Fire & Casualty Co., 424 So. 2d 449, 454 (La. Ct. App. 1982), *cert. denied*, 430 So. 2d 76 (La. 1983), verbal assault, *see* State v. Chaplinsky, 91 N.H. 310, 320-321, 18 A.2d 754, 762, *aff'd sub nom.* Chaplinsky v. New Hampshire, 315 U.S. 568 (1941), intentional infliction of emotional distress, *see* Slocum v. Food Fair Stores of Fla. 100 So. 2d 396 (Fla. 1958), privacy, *see* Forts v. Ward, 471 F. Supp. 1095 (S.D.N.Y. 1978) *vacated in part*, 621 F.2d 1210 (2d Cir. 1980), products liability, *see* New Meadows Holding Co. v. Washington Water Power Co., 34 Wash. App. 25, 659 P.2d 1113, 1117 (1983); *approving* RESTATEMENT (SECOND) OF TORTS, § 520 (1965), disorderly conduct, *see* United States v. Woodard, 376 F.2d 136 (7th Cir. 1967), and many others. It should be obvious that a judge who is completely detached from the business, civic, and social life of the community will simply be unable

In short, the impulse to protect judges from adverse influences by cutting them off from the life of the community is not only "intellectually lazy,"[48] but is also self-defeating. The dispensation of justice is advanced by the institution of a judiciary that is ethnically, socially, ideologically, and economically diverse.[49] The goal of a system of judicial restrictions should be to draw the line between those nonjudicial activities that enrich, or at least are harmless to, the judiciary and those that actually detract from or interfere with the business of judging. This line should not be drawn so as to eliminate all perceivable evils and temptations. Rather, the delineation should give the women and men of the judiciary every reasonable degree of latitude, barring activities only where they do measurable damage to the court's dignity, available time and energy, or appearance of impartiality.[50]

III. Social Expression, Associations, and Activities

The old Canons of Judicial Ethics contained a requirement that judges' conduct, both on and off the bench, be "beyond reproach."[51] While this phrase does not appear in the Code of Judicial Conduct, judges are still expected to conduct their personal lives so as not to detract from their dignity or impartiality.[52]

A. *Undignified or Offensive Conduct*

Judicial dignity is a relative term, and it is difficult to arrive at precise standards for determining the integrity of a judge's personal life. Requiring adherence to the law even in strictly private matters is a given. Judges rightly have been disciplined following convictions for violating firearms statues,[53] driving while intoxicated,[54] purchasing stolen goods,[55]

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accurately to apply these standards. Indeed, judges who are isolated from the community will not even be able to dispense judicial discipline over their colleagues, since these proceedings regularly call for determinations concerning public perceptions of the judiciary. *See In re* Fuchsberg, 426 N.Y.S.2d 639, 648 (1978).

48 McKay, *supra* note 23, at 12.

49 Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 Rec. A.B. City N.Y. 694 (1973); *see* Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Eng'rs, 388 F. Supp. 155 (E.D. Pa. 1974).

50 McKay, *supra* note 23, at 12.

51 Canons of Judicial Ethics, Canon 4 (1924).

52 *See supra* notes 16-20 and accompanying text.

53 *In re* McDonnell, 1 Ill. Cts. Comm. 16 (1973); *In re* DuPont, 322 So. 2d 180 (La. 1975); West Virginia Judicial Inquiry Comm'n v. Dostert, 271 S.E.2d 427 (W. Va. 1980); *In re* Archuleta, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1980 Supp., at 18, Order No. 13,282 (N.M., Sept. 17, 1980).

54 *In re* Sweeney, 1 Ill. Cts. Comm. 86 (1975); *In re* Law, 1 Ill. Cts. Com. 23 (1974); *In re* Barr, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1980 Supp., at 19-20 (N.Y. Comm'n on Judicial Conduct, Oct. 3, 1980).

55 *In re* Wireman, 270 Ind. 344, 367 N.E.2d 1368 (1977), *cert. denied*, 436 U.S. 904 (1978).

gambling,[56] breaking and entering,[57] and income tax evasion.[58] Judges have also been disciplined for crimes of judicial misconduct, such as bribery[59] and ticket fixing.[60]

The jurisprudence has not sufficiently developed to determine the extent to which an actual conviction is necessary in order to discipline a judge for criminal conduct. In *Matter of Dalessandro*,[61] the Supreme Court of Pennsylvania declined to discipline a judge who had been charged with battery for slapping a female acquaintance (and who had admitted committing the act) because the criminal complaint had been dismissed.[62] The Pennsylvania court regarded the slapping incident as a tort, not a crime, and thus concluded that it had no jurisdiction over such matters.[63] On the other hand, the New York Court on the Judiciary did discipline a judge for engaging in "two frenzied displays of overt physical violence" against two adolescents, even though neither display resulted in criminal charges.[64] It considered these actions to be violations of the "high standards of conduct" required by Canon 2 rather than crimes.[65] While it appears likely that a criminal acquittal will be viewed as an impediment to disciplinary proceedings,[66] the more difficult question of the treatment of unprosecuted criminal conduct may never be reached. This is the case because most episodes of serious criminal conduct, including "frenzied displays of overt violence," are sufficiently egregious that they detract from public confidence in the integrity of the judiciary, even in the absence of prosecution or conviction.[67]

Intemperate or offensive personal conduct that does not violate the

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56 *In re* Haggerty, 257 La. 1, 241 So. 2d 469 (1970).

57 *In re* Duncan, 541 S.W.2d 564 (Mo. 1976).

58 *In re* Horton, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1960-1978, at 44, Order No. 37-a, Docket No. 39 (Pa. Judicial Inquiry and Review Bd., 1974); *In re* Etheridge, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1960-1978, at 4 (Judicial Qualifications Comm'n, 1975).

59 Napolitano v. Ward, 457 F.2d 279 (7th Cir. 1972); *In re* Kaye, 1 Ill. Cts. Comm. 36 (1974); State *ex rel.* Gremillion v. O'Hara, 252 La. 540, 211 So. 2d 641 (1968).

60 *In re* Sollie, 292 Ala. 606, 298 So. 2d 601 (1974); *In re* Robson, 500 P.2d 657 (Alaska 1972); Spruance v. Comm'n on Judicial Qualifications, 13 Cal. 3d 778, 532 P.2d 1209, 119 Cal. Rptr. 841 (1975).

61 483 Pa. 431, 397 A.2d 743 (1979).

62 *Id.* at 462, 397 A.2d at 758.

63 *Id.*

64 *In re* Kuehnel, 49 N.Y.2d 465, 469, 403 N.E.2d 167, 169, 426 N.Y.S.2d 461, 463 (1980).

65 *Id.* (quoting 22 N.Y. Civ. Prac. R. 33.1 (McKinney 1982)). Interestingly, one of the offended parties appears to have regarded the event as a tort. He accepted a $100 payment from the judge and executed a release. *Id.* at 468, 403 N.E.2d at 168, 426 N.Y.S.2d at 462.

66 *See, e.g., In re* McDonnell, 1 Ill. Cts. Comm. 16 (1973). It should be noted, however, that in most cases a finding of not guilty in a criminal prosecution will not bar disciplinary proceedings as a matter of law. This is the case because disciplinary procedures characteristically involve different elements and utilize the lower "clear and convincing evidence" standard of proof.

67 *See e.g., In re* Cerbone, 61 N.Y.2d 93, 460 N.E.2d 217, 472 N.Y.S. 2d 76 (1984) (a judge was removed from office on the basis of conduct for which he previously had been tried and acquitted).

criminal law may nonetheless give rise to judicial discipline. In *Geiler v. Commission on Judicial Qualifications*,[68] the California Supreme Court removed a judge from office, citing his "crude and offensive conduct in public places."[69] The court noted that the judge in question repeatedly had used vulgar language in public and had, in his chambers and elsewhere, made offensive sexual gestures to individuals, including touching them.[70] The court concluded that "the ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office. It is immaterial that the conduct concerned was probably lawful, albeit unjudicial, or that petitioner may have perceived his offensive and harassing conduct as low-humored horseplay."[71] Similarly, the New York Court of Appeals has stated that a judge must behave in public with the "sensitivity or self-control so vital to the demands of his position" because a display of injudicious temperament is "demeaning to the processes of justice."[72]

There can be no quarrel over the disciplining of judges who engage in demeaning, insulting, or abusive conduct toward members of the public. The related problem of what might be called private "sexual misconduct" is more difficult. May judges be censured or removed from office for personal transgressions, such as adultery, of which society, at least rhetorically, disapproves?

In some instances, sexual misconduct is also criminal. Thus, judges who engage in activities such as bigamy,[73] prostitution,[74] and "unprivileged and nonconsensual physical contact with offensive sexual over-

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[68] 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973).

[69] *Id.* at 274, 515 P.2d at 3, 110 Cal. Rptr. at 203.

[70] *Id.* at 277, 515 P.2d at 5, 110 Cal. Rptr. at 205; *see also In re* Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485 (1980), *cert. denied sub nom.* Seraphim v. Wisconsin, 449 U.S. 994 (1980).

[71] *Geiler*, 10 Cal. 3d at 281, 515 P.2d at 8, 110 Cal. Rptr. at 208.

[72] *In re* Kuehnel, 49 N.Y.2d 465, 469, N.E.2d 167, 169, 426 N.Y.S.2d 461, 463 (1980). Reliance on the probable lawfulness of the questioned conduct

> fails to comprehend the basic maxim that a Judge may not so facilely divorce behavior off the Bench from the judicial function. 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 [citation omitted].

Id.

[73] *See In re* Evrard, 263 Ind. 435, 333 N.E.2d 765 (1975).

[74] *See In re* Mann, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1980 Supp., at 19, Order No. 50982 (Minn. Bd. of Judicial Standards, March 4, 1980); *In re* King, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1980 Supp., at 26, Op. No. COJ-6 (Ala. Ct. Jud. 1977). In *In re* Winton, 350 N.W.2d 337 (Minn. 1984), the Minnesota Supreme Court disciplined a trial judge for patronizing homosexual prostitutes. The court based its opinion solely on the violation of the prostitution statute and specifically declined to reach the issue of Minnesota's prohibition against sodomy.

tones"[75] are obviously subject to discipline. Some courts, however, have gone further and have disciplined judges for private, consensual sexual conduct. The Ohio Supreme Court, for example, disciplined a judge who

> admitted that he, while still married to, but separated from, his first wife, took his "girl friend" (now his second wife) with him, at his expense, on the trip to Majorca and on the two trips to Mexico, but he testified [sic] that they did not occupy the same room on any of the trips.[76]

The court held that it was irrelevant whether the judge's conduct was no different from that of the "ordinary person," since

> [i]mproper conduct which may be overlooked when committed by the ordinary person, or even a lawyer, cannot be overlooked when committed by a judge. By accepting his office, a judge undertakes to conduct himself in both his official and personal behavior in accordance with the highest standard that society can expect.[77]

Although the Ohio case was decided under the old Canons, the Florida Supreme Court subsequently reached a substantially similar conclusion under the Code of Judicial Conduct in reprimanding a judge for engaging "in sexual activities with a member of the opposite sex not his wife in a parked automobile."[78]

In a more permissive vein, however, the Supreme Court of Pennsylvania declined to discipline a judge who had engaged in an extramarital sexual relationship that included overnight trips and a one-week vacation in Puerto Rico.[79] The court noted that neither adultery nor fornication constituted a crime in Pennsylvania and, as a consequence, concluded that there was no basis for discipline "regardless of the private views" of the court.[80] Going further, the court commented on the public nature of the judge's affair as follows:

> We reject any implication that an intimate relationship provides a basis for discipline even if it becomes open and notorious. The law of the Commonwealth makes no such distinction between intimate relationships which are kept secret and those which are not and there is no legitimate basis for us to do so.[81]

These cases are nearly impossible to reconcile. It may be that since the Code of Judicial Conduct does not contain language requiring a

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[75] *In re* Seraphim, 97 Wis. 2d 485, 503, 294 N.W.2d 485, 495 (1980), *cert. denied sub nom.* Seraphim v. Wisconsin, 449 U.S. 994 (1980).

[76] Cincinnati Bar Ass'n v. Heitzler, 32 Ohio St. 2d 214, 221, 291 N.E.2d 477, 482 (1972).

[77] *Id.*

[78] *In re* Inquiry Concerning a Judge (J. Cail Lee), 336 So. 2d 1175, 1176 (Fla. 1976).

[79] *In re* Dalessandro, 483 Pa. 431, 456-57, 397 A.2d 743, 755- 56 (1979).

[80] *Id.* at 462, 397 A.2d at 758.

[81] *Id.* at 463, 397 A.2d at 759. *But cf. In re* DeSaulnier, 360 Mass. 787, 279 N.E.2d 296 (1972) (Supreme Judicial Court of Massachusetts, considering a judge's lawful gambling activities in Las Vegas, stated that "public gambling and being a judge are completely incompatible"). *See also In re* Tschirhart, Michigan Judicial Tenure Comm'n Formal Complaint No. 32 (Judge censured not for visit to legal Nevada brothel, but for subsequent "defiant, flippant and disparaging" remarks to the media in defense of his action).

judge's conduct to be "beyond reproach," the Supreme Court of Ohio would now take a different view, but this is unlikely given the adamant language of the court's original position. Furthermore, the Code of Judicial Conduct does require judges to observe "high standards of conduct" in their personal lives,[82] and this language was virtually anticipated by the Ohio court's observation that the judge in question had failed to conduct his "personal behavior in accordance with the highest standard that society can expect."[83] Nor does it appear that Pennsylvania will retreat from its view that lawful sexual conduct at most raises a "ballot box"[84] issue for the citizenry to decide.[85]

It is likely that different states will continue to exact differing standards of personal behavior from their judges. While this author believes that private, consensual sexual conduct between adults should not subject a judge (or anyone else) to discipline, the Code of Judicial Conduct does appear to contain sufficient latitude to allow a contrary conclusion, at least as a matter of statutory construction. This conclusion is troublesome, since it seems to leave judges at the mercy of local social conventions.

Although there may be little general sympathy for a judge who is discovered in a traditional pecadillo, the problem becomes more serious with regard to sexual minorities: If philandering judges may be disciplined for impropriety, may the same rule be applied to homosexual judges?[86] May states require that unwed mothers or women who have chosen abortion be removed from the bench? In each of these examples the conduct involved is lawful, at least in a significant number of states,[87] or even constitutionally protected,[88] but is still morally unacceptable to a large number—perhaps even a majority—of citizens.

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82 MODEL CODE, *supra* note 3, Canon 1.

83 *Heitzler*, 32 Ohio St. at 221, 291 N.E.2d at 482.

84 *Dalessandro*, 483 Pa. at 460, 397 A.2d at 757.

85 *See Pennsylvania High Court in Turmoil*, Nat'l L.J., June 27, 1983, at 1 (use of racial epithets may be a ballot box issue, but no disciplinary action taken against a judge alleged to have made such a remark).

86 *See In re* Winton, 350 N.W.2d 337 (Minn. 1984).

87 *See, e.g.*, CAL. PENAL CODE § 286 (West 1970) (decriminalizing homosexual conduct); 1961 Ill. Laws 1983 § 11-2 (repealing ILL. REV. STAT. ch. 38 § 141 (1959)) (decriminalizing homosexual conduct); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947, *cert. denied*, 451 U.S. 987 (1980) (declaring N.Y. PENAL LAW § 130.38 (McKinney 1975) unconstitutionally overbroad, violative of the equal protection clause, and without a rational relationship to a legitimate state interest). *See also*, Anchorage, Alaska Ordinance AO77-75 (January 20, 1976); ANN ARBOR, MICH., CODE ch. 112 §§ 9-151-9-155 (1972); DETROIT, MICH., CODE ch. 10 § 7-1004-7-1005 (1976); MINNEAPOLIS, MINN., CODE ch. 945 (1975); Seattle, Wash., Ordinance 102, 562 (Sept. 18, 1973); and Washington, D.C., Human Rights Law (Nov. 16, 1973). *Cf.* MICH. COMP. LAWS ANN. §§ 750.150, 750.338, 750.338a (West Supp. 1984)(criminalizing homosexual conduct); 18 PA. CONS. STAT. ANN. § 3124 (Purdon 1983) (criminalizing homosexual conduct); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (statutes prohibiting certain consensual sexual behavior are prima facie constitutionally valid).

88 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1972)(right of privacy includes qualified right to

It is evident that some method of analysis is called for in order to strike a balance between public expectations and the individual rights of judges. The Pennsylvania Supreme Court, in adopting a pure "legality" test, has drawn a bright and enforceable line. Most jurisdictions, however, are unwilling to adopt so liberal an approach and require judges to meet a higher standard of conduct than simple obedience to the law.[89] Such a standard is necessary in order to preserve the option of disciplining judges for objectionable, although legal, acts such as using racial slurs[90] and repeatedly making offensive and aggressive sexual advances.[91]

Judges' personal conduct should be governed neither by the overly permissive standard of mere legality nor by the rigid approach of strict moralism. Rather, the permissibility of any particular act should be determined by balancing the nature of the act itself against its implications for the judging process. Factors to be considered in striking this balance include: (1) the public or private nature of the conduct, (2) the degree to which the act is protected as an individual right,[92] (3) the potential for the conduct directly to harm or offend others, (4) the degree to which the conduct is indicative of bias or prejudice,[93] (5) the degree to which the conduct is indicative of the judge's lack of respect for members of the public, and (6) where possible, the judge's level of discretion.

Application of these standards in the sexual conduct area should protect the rights of insular minorities such as homosexuals and unwed parents, while retaining for society sufficient latitude to insist that judges refrain from overtly offensive activities. Under this approach, the decision to have an abortion would not result in discipline, but nonconsensual physical contact would. Activities that fall midway on the continuum, such as bringing pornographic movies to a stag party,[94] would still be subject to local moral conventions, depending upon the value that the particular jurisdiction placed on the various factors.[95]

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abortion); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965)(right of privacy protects a married couple's use of contraceptives).

89 *See* Martineau, *supra* note 12, at 229-36.

90 *See In re* Del Rio, 400 Mich. 665, 718-24, 256 N.W.2d 727, 750-52 (1977) *appeal dismissed*, 434 U.S. 1029 (1978); *see also infra* notes 111-16 and accompanying text.

91 *In re* Seraphim, 97 Wis. 2d at 501-03, 294 N.W.2d at 494-95.

92 Conduct that is generally protected as an individual right may nonetheless give rise to disciplinary action. See the discussion of racial slurs, *infra* notes 113-18 and accompanying text.

93 *See infra* notes 96-184 and accompanying text.

94 *In re* Haggerty, 257 La. 1, 241 So. 2d 469 (1970).

95 In *In re* Del Rio, 400 Mich. 665, 256 N.W.2d 727 (1977), the Michigan Supreme Court declined to discipline a judge merely for bragging to two police officers that he had spent the night with a former criminal defendant and calling her a "foxy little bitch" and a "good piece of ass." *Id.* at 712, 256 N.W.2d at 747. The court noted cryptically that "the distasteful language speaks for itself." *Id.* at 712 n.18, 256 N.W.2d at 747 n.18.

Note that the legal determination of obscenity is subject to local definition. Jenkins v. Georgia, 418 U.S. 153 (1974)(a state may, but need not, define obscenity in more precise geographical terms than "contemporary community standards"); Kaplan v. California, 413 U.S. 115, *reh'g denied*, 414

B. *Conduct Evidencing Partiality or Favoritism*

In the same manner that judges' activities must not detract from their dignity, so must their personal lives be free from the suggestion that their judging will be tainted by bias. This is not to say that judges need refrain from forming and expressing opinions. There is no reason to insulate judges from normal human discourse, and there surely is no way to prevent intelligent human beings from developing what Justice Rehnquist calls "an inclination of temperament or outlook."[96] Furthermore, in most cases where a judge's life actually has evidenced a "tendency or inclination to treat a particular litigant more or less generously than a different litigant raising the identical legal issue,"[97] the appropriate remedy is recusal, not prohibition of the conduct that gives rise to the favoritism. It is expected and natural for a judge to be "biased" in favor of his or her children; this bias is resolved by disqualifying the judge from sitting in cases involving the children,[98] not by forbidding procreation.

In some circumstances, however, the nature of the bias may be so general as to make recusal impractical. Thus, judges have been counseled to avoid membership in such uncontroversial undertakings as an "antishoplifting" organization and Mothers Against Drunk Driving, lest they cast doubt on their ability to preside fairly over theft and drunk driving prosecutions.[99]

Judges' friendships and social associations also have been scrutinized for evidence of a particularized sort of bias. Judges have been disciplined for associating with known felons,[100] bookies,[101] bailbondsmen,[102] and insurance company representatives.[103] Although cases such as these are often cast in terms of conduct that brings the judicial office into disre-

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U.S. 883 (1973)(contemporary community standards of the state rather than of the nation are applicable); Mishkin v. State of New York, 383 U.S. 502, *reh'g denied*, 384 U.S. 934 (1966)(when the alleged pornographic materials are directed toward an identifiable deviant sexual group, appeal to the prurient interests of that group, rather than of the community, may determine whether such materials are obscene); United States v. Roth, 354 U.S. 476, *reh'g denied sub nom.*, Alberts v. California, 355 U.S. 852 (1957)("appeals to the prurient interest" standard).

96 Rehnquist, *supra* note 49, at 709.

97 *Id.*

98 *See* MODEL CODE, *supra* note 3, Canon 3C(1)(d).

99 Judicial Conduct Committee of the United States Judicial Council, Op. 78-4 (1978); Florida Committee on Standards of Conduct Governing Judges, Op. 82-18 (Dec. 13, 1982). *See also In re* McDonough, 296 N.W.2d 648, 663 (Minn. 1979) (judge disciplined for using foul language in an attempt to insure the availability of the courthouse for use as a meeting room for an alcohol abuse project meeting).

100 *See* State *ex rel.* Gremillion v. O'Hara, 252 La. 540, 211 So. 2d 641 (1968); Schoolfield v. Tennessee Bar Ass'n, 209 Tenn. 304, 353 S.W.2d 401 (1961); *In re* Caldwell, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1960-1978, at 327, COJ-8 (Ala. Ct. Jud. 1975).

101 *See In re* Haggerty, 257 La. 1, 241 So. 2d 469 (1970).

102 *See In re* Troy, 364 Mass. 15, 306 N.E.2d 203 (1973); *In re* DeSaulnier, 360 Mass. 787, 279 N.E.2d 296 (1972).

103 *See In re* D'Auria, 67 N.J. 22, 334 A.2d 332 (1974).

pute,[104] they are better understood in the context of bias or favoritism. That is, a judge who regularly is a luncheon guest of insurance company lawyers and representatives[105] creates an appearance that his hosts may receive favorable treatment in return, and judges who take favors from bailbondsmen[106] give rise to an inference that business may be directed to the solicitious bondsmen in return.

The question of association with known criminals can be more difficult. The discipline of judges for purely social contacts, even with convicted felons, raises both privacy and vagueness issues. In a number of cases the charges included, among other things, what might be called noncriminal association with criminals, such as associating with "known law violators, gamblers and racketeers at shady and questionable places."[107] In virtually every reported case, however, actual discipline was meted out only for conduct that went beyond mere socializing. In some instances, the judges' own activities—such as meeting with a fugitive[108] or alerting a bootlegger to an impending raid[109]—bordered on criminality. In other cases, some of the conduct was more social and less culpable—primarily involving the receipt of gifts, meals, or other favors from known criminals[110]—but nonetheless suggested the possibility of reciprocal favoritism.

Although numerous dicta indicate that judges may be disciplined merely for "close and intimate association" with criminals,[111] there is no reported instance of punishment ever being imposed in the absence of more palpable misconduct.[112] Cynics may take this as proof of smoke

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104 *See, e.g.*, State *ex rel.* Gremillion v. O'Hara, 252 La. 540, 211 So. 2d 641 (1968); *In re* Caldwell, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1960-1978, at 327, COJ-8 (Ala. Ct. Jud. 1975). *Cf. In re* Murphy, 1 Ill. Cts. Comm. 3 (1973); *In re* Mann, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1980 Supp., at 126, No. 50982 (Minn. 1980).

105 *See In re* D'Auria, 67 N.J. 22, 334 A.2d 332 (1974); *see also In re* Haggerty, 257 La. 1, 241 So. 2d 469 (1970) (Judge Haggerty was found guilty of willful misconduct in part for openly participating in poker games with attorneys who practiced before him).

106 *See In re* DeSaulnier, 360 Mass. 787, 279 N.E.2d 296 (1976); *In re* Troy, 364 Mass. 15, 306 N.E.2d 203 (1973).

107 Schoolfield v. Tennessee Bar Ass'n, 209 Tenn. 304, 353 S.W.2d 401 (1961). *See also In re* Haggerty, 257 La. 1, 31, 241 So. 2d 469, 481 (1970)(criminal contact was described as "a purported under-world character").

108 *In re* Robson, 500 P.2d 657 (Alaska 1972).

109 *In re* Long, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1980 Supp., at 126 (Ky. Comm'n, 1980).

110 *See Gremillion*, 252 La. at 540, 211 So. 2d at 641; *In re* Caldwell, Am. Judicature Soc., Judicial Discipline and Disability Digest, 1960-1978, at 327, COJ-8 (Ala. Ct. Jud., 1975).

111 *Gremillion*, 252 La. at 55, 211 So. 2d at 647.

112 On June 21, 1985, Chief Justice Joseph Bevilacqua of the Rhode Island Supreme Court agreed to a four month suspension from the bench and an official censure for conduct bringing his office "into serious disrepute." The charges that resulted in these sanctions included associating with convicted felons and "organized crime" figures. As a consequence of the negotiated conclusion of this case, no public hearings were held and no official decision will be issued. Moreover, the record of the proceedings is not available to the public. It is therefore impossible to know the precise nature of the

evidencing fire; judges who keep company with criminals also take improper favors and violate the law. However it may also be that disciplinary bodies are unwilling to test the limits of their authority with regard to associational freedom. In either event, the question of forbidden friendships remains a relatively open one. The bias that such friendships suggest may be so inchoate as to preclude significant regulation.

There is some generalized bias, however, that may be the subject of discipline even in the absence of other demonstrable misconduct. The chief example is racial prejudice. Judges who freely use racial epithets, on or off the bench, create, at the very least, a public perception that they will not fairly decide cases involving minorities.[113] The New York Court of Appeals, for example, removed from office a judge who, among other things, "uttered particularly demeaning comments concerning an identifiable ethnic group."[114]

In a case that presents this problem in a more distilled form, the California Supreme Court publicly censured a judge who "repeatedly and consistently used racial and ethnic epithets," notwithstanding the fact that he had performed his judicial duties "free from actual bias against any person regardless of race, ethnicity or sex."[115] Justice Kaus, in a concurring opinion, concluded that "[t]he administration of justice is prejudiced by the public perception of racial bias, whether or not it is translated into the court's judgments and orders."[116]

In a strong dissent, Justice Mosk contended that the racial epithets were protected speech under the first amendment and that censure was therefore impermissible.[117] Although expressing his own personal offense at the particular language, Justice Mosk argued that "when judges at any level are to be disciplined for their manner of expression, however primitive, then we no longer have an independent judiciary in California."[118]

Justice Mosk's literal and blanket application of the first amendment proves too much. There are many first amendment protections that are

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proven evidence against Justice Bevilacqua, and particularly whether his associations included the acceptance of gifts or favors. Rhode Island Commission on Judicial Tenure v. Bevilacqua, No. 85-3. *See Rhode Island Chief Justice is Suspended for 4 Months*, N.Y. Times, June 22, 1985, at 11, col. 1; *RI. Chief Justice Agrees to Censure*, Nat'l L.J., July 8, 1985, at 3, col. 1.

113 *See In re* Stevens, 31 Cal. 3d 403, 645 P.2d 99, 183 Cal. Rptr. 48 (1982).

114 *In re* Kuehnel, 49 N.Y.2d 465, 468, 403 N.E.2d 167, 168, 426 N.Y.S.2d 461, 462 (1980). *See also In re* Cerbone, 61 N.Y.2d 93, 460 N.E.2d 217, 472 N.Y.S.2d 76 (1984).

115 *In re* Stevens, 31 Cal. 3d 403, 645 P.2d 99, 183 Cal. Rptr. 48 (1982)(the judge's comments, most of which occurred in chambers, insulted or stereotyped Blacks, Filipinos, Mexicans and other Hispanics). *Id.* at 403-04, 645 P.2d at 99, 183 Cal. Rptr. at 48.

116 *Id.* at 405, 645 P.2d at 100, 183 Cal. Rptr. at 49 (Kaus, J., concurring).

117 *Id.* at 405-08, 645 P.2d at 100-02, 183 Cal. Rptr. at 49-51 (Mosk, J., dissenting). Justice Mosk subsequently set forth his views at greater length in Mosk, *Judges Have First Amendment Rights*, 2 CAL. LAW. 30 (1982).

118 *Stevens*, 31 Cal. 3d at 408, 645 P.2d at 101, 183 Cal. Rptr. at 50.

available to ordinary citizens but that judges must forego upon assuming office. For example, judges are prohibited from endorsing political candidates, a practice that lies at the very heart of the first amendment.[119] They also may not solicit charitable contributions,[120] hold office in certain organizations,[121] or discuss pending or impending litigation.[122] All of these activities would be protected by the Constitution if undertaken by members of the public, but they are prohibited to judges for the purpose of insuring the dignity, integrity, and impartiality of the judiciary. Justice Mosk's absolutist position would eviscerate Canons 4, 5, and 7 of the Code of Judicial Conduct. The fact is, however, that in order to foster the proper functioning of our courts, it is necessary for those who take the bench to covenant to adhere to "standards of conduct more stringent than those acceptable for others."[123] Viewed in this light, it is more than reasonable to expect judges to refrain from public expressions of racism and to discipline those who do not.[124]

Although the racial slurs condemned by the California Supreme Court left little room for interpretation,[125] such will not always be the case. Statements of opinion on public issues may be offensive to certain minorities while still falling within the ambit of protected discourse, particularly where the statements are ambiguous or context-dependent. Therefore, to say that judges may be disciplined for racist expression does not answer the question of how the term "racist" is to be defined.

The Judicial Council of the Sixth Circuit recently faced this dilemma when it considered the disciplinary charges brought against District Judge John Feikens for statements he made during a newspaper interview.[126] Specifically, Judge Feikens responded to one question con-

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119 MODEL CODE, *supra* note 3, Canon 7A(1)(b).

120 *Id.*, Canon 5B(2).

121 *Id.*, Canon 5B(1).

122 *Id.*, Canon 3A(6).

123 *In re* Kuehnel, 49 N.Y.2d 465, 469, 403 N.E.2d 167, 169, 426 N.Y.S.2d 461, 463 (1980) (quoting opinion of lower court); *see also In re* Troy, 306 N.E.2d 203, 235, 364 Mass. 15, 71 (1973)(a judge "must adhere to standards of probity and propriety higher than those deemed acceptable for others"); MODEL CODE, *supra* note 3, Canon 2B Commentary (a judge "must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.").

124 The appropriate discipline in each case may be tempered by recognition of the special treatment given to matters of speech by our legal system, and certainly no judge should be disciplined for a slip of the tongue or the use of an inadvertent phrase.

125 *Stevens*, 31 Cal. 3d at 403-04, 645 P.2d at 99, 183 Cal. Rptr. at 48.

126 *In re* Complaints of Judicial Misconduct, Nos. 84-6-372-08, 84-6-372-10 (6th Cir. Judicial Council Mar. 11, 1985).

Pursuant to 28 U.S.C. § 372 (1982) the Wolverine Bar Association and a private citizen each filed a complaint against Judge Feikens with the Judicial Council of the Sixth Circuit. The Judicial Council referred the complaints to an investigating committee which was appointed pursuant to 28 U.S.C. § 372(c)(4)(A) (1982). The committee reported back to the Judicial Council, the members of which then voted on whether or not to approve its report.

The precise charge against Judge Feikens was that he engaged in "conduct prejudicial to the

cerning the apparently controversial receivership of the Detroit Waste Water Treatment Plant (DWWTP) with the following: "One of the things that we have to give black people the time to learn to do is to learn how to run city governments, to run projects like the water and sewage plant."[127] This appeared in a "box" on the front page of the Detroit Free Press. The complaining parties alleged that the statement was "'racially patronizing and biased; [and could] reasonably be interpreted as stating that black people generally are not qualified to govern municipalities and municipal projects such as the DWWTP.'"[128]

The investigating committee appointed by the Judicial Council agreed that the quote, viewed alone, supported the complainants' contention.[129] However, upon examining the entire (and lengthy) text of the interview, the committee concluded that the offending passage, notwithstanding public perception, did not reflect Judge Feikens' true intent.[130] Rather, the committee determined that the Judge's comments were directed at a discrete group of untrained employees and not at an entire race of people.[131] The statement examined within its context, coupled with Judge Feikens' long-standing support for the civil rights movement,[132] led the committee to conclude that while the Judge made "an untrue and regrettable statement," he had no intention of denigrating black people generally.[133] Accordingly, the committee recommended that the complaints be dismissed.[134]

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effective and expeditious administration of the business of the courts" in violation of 28 U.S.C. § 372 (C)(1) (1982).

127 Report of the Investigating Committee to the Judicial Council of the Sixth Circuit, *In re* Complaints Nos. 84-6- 372-08, 84-6-372-10, Dec. 5, 1984, at 2 [hereinafter cited as Investigating Committee Report]. A longer extract from the interview, which included the "boxed" quote, was included in the investigating committee's report:

> Q. When you started out, I assume you were not much of an expert on how to run a sewage treatment plant. . . . How educated did you become?
>
> A. Oh, I found some things as I went along. . . . But that isn't what made the success. . . . What made for success is knowing how to get from A to B. There are some people, I don't care how good they are, that just don't know how to do it. . .[Walter] DeVries said to [Theodore] White one day, 'Why didn't Romney make it?' And White said, 'because he couldn't climb the hill.' Now I know what that means. I've seen a lot of people who can't climb hills. One of the things that we have to give black people the time to learn to do is to learn how to run city governments, to run projects like the water and sewage plant. Unfortunately, they're still in an era of development, many of them, in which they think all you have to do is talk about this thing. So you hear a lot of rhetoric. Talking is important; words are important. But you have to do more than talk about it. . . . and I think that as the black people come into political power in all the big cities of the United States, they have to learn how to climb hills. Some won't. Some will not understand how to run government. Some will not understand leadership.

Id.

128 *Id.*

129 *Id.* at 1.

130 *Id.* at 4.

131 *Id.*

132 *Id.* at 5.

133 *Id.*

134 *Id.*

A minority of the investigating committe, however, filed a dissenting report recommending that the Judicial Council issue a public reprimand.[135] The minority expressed its concern "that future black litigants assigned to Judge Feikens' courtroom will be apprehensive about his ability to preside impartially, solely because of the statements reported in the media."[136] Since "[r]easonable people could conclude that these comments [were] filled with discriminatory content," the minority concluded that Judge Feikens had gone sufficiently beyond the bounds of judicial rhetoric as to call for public reprimand.[137]

A 5-4 majority of the Sixth Circuit Judicial Council voted to adopt the investigating committee's report, and therefore dismissed the disciplinary complaints.[138] In addition to the majority and minority reports, five judges filed separate statements—two in concurrence and three in dissent.[139] The three dissenting judges emphasized the inappropriateness of Judge Feikens' remarks ("outrageously racist;"[140] "insulting, demeaning, and denigrating"[141]), but otherwise raised no new issues. The concurring judges, however, went beyond the analysis of the majority report of the investigating committee. One concurring judge argued that Judge Feikens' remarks were protected by the first amendment[142] and the other essentially agreed, although she focused on the need to safeguard judicial independence.[143]

Considered in their entirety, the various reports, opinions, and statements in the *Feikens* case frame a vexing and important issue: At what point does a judge's expression of opinion become impermissible? If a statement is offensive on its face, or even perceived to be offensive, should the judge's motives and personal history be considered? Are outspoken opinions simply to be protected, for the sake of either the first amendment or judicial independence, even if they might cause the judge's impartiality to be questioned? Recognizing the obvious difference between opinions and foul language, these questions can still be approached with reference to the analysis previously employed in the epithet cases.

The first inquiry is one of fact: Is the offending statement "prejudi-

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135 *See In re* Complaint of Judicial Misconduct Against Honorable John Feikens, Nos. 84-6-372-08, 84-6-372-10, Minority Report, Dec. 17, 1984, at 1 [hereinafter cited as Minority Report].

136 *Id.* at 2. *See also supra* notes 114-24.

137 Minority Report at 2.

138 Judges Kennedy, Krupansky, Lively, Merritt, and Rubin voted to dismiss the complaints. Judges Celebrezze, Jones, Keith, and McRae dissented.

139 Judges Kennedy and Krupansky field concurring statements. Judge Celebrezze field a Minority Report requesting that Judge Feinkens be reprimanded. Judges Keith, Jones and McRae filed separate statements in support of the Minority Report.

140 Jones, J., Personal Statement in Support of Minority Report of Senior Judge Celebrezze.

141 Keith, J., Dissenting Statement in Support of the Minority Report.

142 *See* Krupansky, J., Memorandum Concurring in Dismissal of Complaints.

143 Kennedy, J., Statement Concurring in Dismissal (independent judiciary is "essential to the American constitutional system" but is "obliterated if a disciplinary body is required to take account of the public's disagreement or unhappiness with a judge's opinion").

cial to the effective and expeditious administration of the business of the courts,"[144] or, in the language of the Code of Judicial Conduct, does it detract from "public confidence in the integrity and impartialty of the judiciary?"[145] This determination should not be made lightly. Statements that are ambiguous or mildly offensive should not be considered to violate the rules of judicial conduct, particularly in the absence of aggravating factors such as repetition or personal abuse. Even a statement that actually offends an identifiable group should be measured against the reasonableness of that reaction. With regard to epithets, this test raises no difficulties. The purpose of an epithet is to insult or belittle; doubts concerning the impartiality of a judge who intentionally denigrates, for example, a racial or religious group are fair and are to be expected.[146]

Statements of opinion, however, are harder to assess. Unless we simply ban all group references, virtually any comment on public issues concerning race or religion has the potential to offend. Thus, the next line of inquiry is a consideration of the broad context of any challenged comment. For example, a statement such as "minority children do poorly in school" could form part of a taunt or insult, but it could just as easily be part of an argument for affirmative action or increased educational spending. Even in the case of words more poorly chosen, the need for an objective standard requires contextual interpretation.

Finally, consideration of the judge's past record may be helpful in evaluating the context of a particular statement.[147] Parol evidence of this sort, however, should be reserved for truly ambiguous cases. If a statement clearly fails the "impartiality" test, no amount of history should have any bearing, other than with regard to sanctions. A judge's past commitment to civil rights cannot form the basis for a license to defame. Even where the judge's heart is pure, public confidence may be damaged by inappropriate public language.[148] Since the purpose of restrictions on public comment is to guard against even the mere *appearance* of bias or partiality, the words and context must be given substantially greater weight than noble intentions.

In the *Feikens* case, the Sixth Circuit Judicial Council was obliged to consider the full text of the published interview. To the extent that the majority report rested upon contextual analysis, it was obviously well-founded. The reference to Judge Feikens civil rights record, however, is surplusage. It should have no bearing if his comments as a whole were truly "outrageously racist,"[149] nor would the first amendment provide

144 28 U.S.C. § 372(c)(1) (1982).

145 MODEL CODE, *supra* note 3, Canon 2A.

146 *See supra* notes 115-24 and accompanying text.

147 *See* Investigating Committee Report at 5.

148 *See supra* note 5 and accompanying text and *infra* note 164 and accompanying text.

149 *See supra* note 140.

protection in such a case. As in the epithet cases,[150] neither freedom of speech nor the doctrine of judicial independence diminishes a judge's obligation to maintain a posture of impartiality. Judges are surely free to hold opinions,[151] but their freedom to give wide expression to those opinions is just as surely limited by the requirements of the judicial office.[152] Judge Feikens' comments were neither private nor incidental. Rather, they were made for the purpose of broad publication. As Judge Celebrezze noted in his minority report, judges cannot be "afforded the luxury of free associating [sic] with reporters without realizing that serious consequences may result from [their] statements."[153]

A substantial controversy also has been created by the membership of some judges in social clubs that exclude members on the basis of race, religion, or sex.[154] Opponents of such membership restrictions argue that discriminatory clubs are symbols of segregation and that therefore doubt is cast upon the member judges' impartiality.[155] The response is that a judge's social life is his own and that such memberships should not be prohibited, at least in the absence of actual bias in judging.[156] It appears that no court or disciplinary body has ever found private club membership to violate the Code of Judicial Conduct,[157] notwithstanding the admonition of Canon 2A that judges should conduct themselves in "a manner that promotes public confidence in the . . . impartiality of the judiciary."[158] Consequently, it has been urged that Canon 2 be amended specifically to preclude judges from membership in organizations that discriminate on the basis of race, religion, or sex.[159] These efforts have not met with great success, although the Judicial Conference of the United States has adopted, in the form of additional commentary to Canon 2, a recommendation that judges avoid membership in invidiously discriminatory organizations.[160]

At its 1984 Annual Meeting, the American Bar Association simi-

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150 *See supra* notes 113-24, and accompanying text.

151 *See* Kennedy, J., Statement concurring in Dismissal ("[A]n opinion alone cannot come within the rubric of 'conduct.' ").

152 It is worth noting that Judge Feikens' remarks concerned a matter that remained pending in court. This would appear to violate the prohibition against comment on pending litigation. *See* MODEL CODE, *supra* note 3, Canon 3A(6). Although one dissenting judge commented on this issue, the Judicial Conference as a whole did not consider it. See Keith J., Dissenting Statement in Support of the Minority Report.

153 Minority Report at 2.

154 *See generally* Bell, *Private Clubs and Public Judges: A Nonsubstantive Debate About Symbols*, 59 TEX. L. REV. 733 (1981).

155 *Id.* at 737-40, 743-44.

156 *Id.* at 744. *Cf. In re* Stevens, 31 Cal.3d 403, 645 P.2d 99, 183 Cal. Rptr. 48 (1982).

157 *See, e.g.*, Armmer v. Memphis Light, Gas & Water Div., No. C-74-17 (W.D. Tenn., filed Jan. 31, 1979) (Ruling on Motion to Disqualify Presiding Judge) *cited in* Bell, *supra* note 154, at 735-36.

158 MODEL CODE, *supra* note 3, Canon 2A. *See also id.*, Canon 5B.

159 Bell, *supra* note 154, at 737.

160 JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE

larly amended the Commentary to Canon 2, stating that it is "inappropriate for a judge to hold membership in any organization that practices invidious discrimination."[161] While noting that such membership may give rise to the perception that the judge's impartiality is impaired, the A.B.A. stopped short of requiring resignation and left the ultimate decision to "the judge's own conscience."[162] An alternative proposal that would have constituted an outright prohibition on such membership was soundly defeated.[163] As of this writing, no state has had the occasion to consider or adopt the A.B.A's revised commentary.

This approach addresses, but does not solve, the problem. Since both the Federal and American Bar Association commentaries depart from the otherwise mandatory nature of the Code, judges remain free to belong to discriminatory clubs. Furthermore, those judges who opt to maintain their memberships may give the appearance of even more purposeful discrimination, since they will have chosen to disregard the suggestion that membership is such clubs is unseemly.

It is true that members of restrictive private clubs may be passionate defenders of public civil rights, and it is also true that the prejudiced-in-fact will not become impartial overnight for having resigned from certain organizations. Nonetheless, in a matter as sensitive to public perception as is judging, appearances and symbols take on an importance of their own.[164] Minorities have every reason to mistrust judges who belong to discriminatory clubs; the fact that this conduct is not specifically barred by Canon 2 does nothing to assuage the fear that the memberships are indicative of a deeper prejudice. If judges may be disciplined for speaking words that indicate bias,[165] then the conduct involved in organizational memberships may also be proscribed.[166] Notwithstanding the lack

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JUDICIAL CONFERENCE OF THE UNITED STATES 27 (1981). The additional commentary is as follows:

> The Judicial Conference of the United States has endorsed the principle that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination. A judge should carefully consider whether the judge's membership in a particular organization might reasonably raise a question of the judge's impartiality in a case involving issues as to discriminatory treatment of persons on the basis of race, sex, religion, or national origin. The question whether a particular organization practices invidious discrimination is often complex and not capable of being determined from a mere examination of its membership roll. Judges as well as others have rights of privacy and association. Although each judge must always be alert to the question, it must ultimately be determined by the conscience of the individual judge whether membership in a particular organization is incompatible with the duties of the judicial office.

161 MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT 135 (as amended Aug., 1984).

162 *Id.* at 136.

163 ABA House of Delegates, Report 120 (Aug. 8, 1984).

164 Bell, *supra* note 154 at 749-50.

165 *See supra* notes 114-24 and accompanying text.

166 *See* MODEL CODE, *supra* note 3, Canon 5B: "A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality. . ."; *see also supra* note 11 and accompanying text.

of a specific mandate from the Code, judges should not belong to invidiously discriminatory organizations.

The first amendment has its application to the judiciary, but a judge's right to freedom of expression and association must be balanced against the public's right to an impartial judiciary. In the "epithet" cases the judges' interest in using insulting language is extraordinarily low, while the public interest in preventing bias, or the appearance of bias, is correspondingly high. The less public nature of social memberships creates a situation where the balance is closer to equipoise, but again the interest in social discrimination ought to give way to the interest in the appearance of impartiality. There are, of course, other cases where a judge's right to freedom of expression and association outweighs the need to regulate the conduct in question.

In *In re Bonin*,[167] for example, the chief judge of the Massachusetts Superior Court was charged with the offense of purchasing tickets for and attending a public lecture by Gore Vidal entitled "Sex and Politics in Massachusetts."[168] The meeting was held as a benefit for the homosexual defendants in certain criminal cases then pending in the superior court, although not before Judge Bonin.[169] In summarizing the precise charges against the judge, the Supreme Judicial Court of Massachusetts noted that it was

> alleged that the respondent met with Gore Vidal at the end of the meeting and engaged in a friendly conversation with him, knowing that this was likely to be photographed and knowing that this would give the appearance that he endorsed the criticism at the meeting of the administration of justice and that he endorsed the raising of funds for the benefit of the defendants in the . . . cases.[170]

A photograph of the judge together with Vidal did, in fact, appear the next day in a Boston newspaper under the headline "Bonin at benefit for sex defendants."[171]

The Supreme Judicial Court unanimously found Judge Bonin's actions to be improper, ultimately resulting in his suspension and censure,[172] and stated that

> [b]y his attendance at the meeting the Chief Justice not only exposed himself to ex parte or one-sided statements and argumentation on matters before his court, but further compromised his position by seeming to favor

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167 375 Mass. 680, 378 N.E.2d 669 (1978).

168 *Id.* at 685, 378 N.E.2d at 672. The Appendix to the opinion also sets out this charge. *Id.* at 712, 378 N.E.2d at 685.

169 *Id.* at 685, 378 N.E.2d at 672. The criminal cases, known as the "Revere" cases, attracted much attention in Boston, and gave rise to the Boston/Boise Committee which styled itself "a committee of outrage at the recent handling of 24 indictments for alleged sex acts between men and boys in the Boston area." *Id.* at 696, 378 N.E.2d at 677.

170 *Id.* at 687, 378 N.E.2d at 672.

171 *Id.* at 701, 378 N.E.2d at 680.

172 *Id.* at 711-12, 378 N.E.2d at 685.

> or to have particular sympathy with the views of the partisan group which sponsored the affair.[173]

This case places in sharp conflict the judge's first amendment right to inform himself[174] about "contentious issues of social importance"[175] and the judicial duty to refrain from public displays of partiality. The Massachusetts court itself recognized that under ordinary circumstances "any judge would be entirely free to attend a public lecture about sex and politics whether or not sponsored by a 'gay' group."[176] The court distinguished Judge Bonin's situation, however, on the ground that the lecture concerned cases then pending in the superior court:

> The special factor or difficulty in the present case—the stone of stumbling—which did call for caution was that the Chief Justice had good reason to infer that the particular meeting would trench on matters pending in his court; and so it did in fact. That called for a measure of abstention on his part.[177]

It is true that a judge must refrain from commentary on pending litigation,[178] but here the Massachusetts court extended caution beyond the point of reasonable application. Judge Bonin did not comment on pending litigation beyond the fact of his attendance at a large meeting. The term "comment" is defined as a writing, a remark, a statement of opinion, or a talk,[179] and Judge Bonin did none of these. While it is true that his attendance at the meeting might cause some to infer that he supported the cause, it is at least equally likely that it would be inter- preted as being motivated by curiosity or interest in the remarks of the well-known featured speaker. If Judge Bonin had been assigned to hear the trial or trials in question, a stronger inference of impropriety would be possible, but here the judge had no substantive involvement in the cases,[180] and, indeed, he subsequently removed himself from any participation in the case.[181] Finally, it is irrelevant that Judge Bonin exposed himself to "one-sided argumentation."[182] Since Judge Bonin was to make no ruling in the case, there could be no possible adverse effect from

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173 *Id.* at 707, 378 N.E.2d at 683.

174 *See, e.g.*, Bd. of Educ., Island Trees Union Free Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976); Pell v. Procunier, 417 U.S. 817, 832 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

175 *In re* Bonin, 375 Mass. at 707, 378 N.E.2d at 683.

176 *Id.*

177 *Id.*

178 MODEL CODE, *supra* note 3, Canon 3A(6).

179 THE AMERICAN HERITAGE DICTIONARY 267 (1973) defines "comment" as follows: "1. A written note intended as an explanation, illustration, or criticism . . . 2.a. A remark, as in criticism or observation. b. A brief statement of fact or opinion, especially one that expresses a personal reaction or attitude."

180 *In re* Bonin, 375 Mass. at 669, 378 N.E.2d at 680-81.

181 *Id.* at 707, 378 N.E.2d at 683.

182 *Id.*

his infection by the statements made at the meeting. The very notion that judges, as opposed to jurors, can be contaminated by public discourse is questionable. In the words of Justice Rehnquist, concerning his exposure to a conversation during the Watergate era: "[I]f listening to this conversation were to render me damaged goods for the purpose of adjudication, it was at most harmless error in view of the damage I had already sustained by being exposed to the daily newspapers and television news programs."[183] In short, Judge Bonin should have been free to attend the public lecture, so long as he limited himself to the role of a spectator and refrained from making actual public statements concerning the matters at issue.[184]

IV. CONCLUSION

The drafters of the Code of Judicial Conduct broke new ground by creating a set of rules that were at once comprehensive, specific, and mandatory in nature.[185] Since there was no precedent for mandatory rules of judicial conduct,[186] many of the Code provisions, and particularly those dealing with nonjudicial activities, represented aspirations or projections as to how judges ought to act. With regard to private conduct, these strictures were informed by considerations of impartiality, public confidence, and judicial dignity.[187]

A considerable jurisprudence has developed concerning the regulation of judges' private lives. The basis for this regulation is the enforcement of the public expectation that judges always give the appearance that they are dignified and fair. It is necessary, however, to balance public concern against judges' legitimate rights to privacy, self expression, and freedom of association. Draconian restriction of judges' individual activities risks the creation of a narrow and nonresponsive judiciary, while the obverse tilt toward absolute individualism carries the danger of erosion of public confidence. The interplay between the first amendment

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183 Rehnquist, *supra* note 49, at 711.

184 It would be a tragic day for the nation and the judiciary if a myopic vision of the judge's role should prevail, a vision that required judges to refrain from participating in their churches, in their nonpolitical community affairs, in their universities. So long as Jewish judges preside over matters where Jewish and Gentile litigants disagree; so long as Protestant judges preside over matters where Protestants and Catholic litigants disagree; so long as white judges preside over matters where white and black litigants disagree, I will preside over matters where black and white litigants disagree.

Commonwealth v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 181 (E.D. Pa. 1974).

185 Whereas the Canons were characterized by moral posturing and generalized exhortation, McKay, *supra* note 23, the Code for the most part is mandatory and contains specific regulations and restrictions. The Code divides judges' activities into three conceptual areas—judicial, quasi-judicial, and extrajudicial—and deals with each area in a separate Canon. Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 796 (1972).

186 *See* Thode, *supra* note 185.

187 *See supra* notes 21-41 and accompanying text.

and restrictions on judges' private lives must be subject to continued examination, lest either the criminal law on one hand, or moral hegemony on the other, comes to form the boundary for acceptable off-the-bench conduct.