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Limiting Off-Bench Expressions: Striking a Balance between Accountability and Independence

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COMMENT

LIMITING OFF-BENCH EXPRESSION: STRIKING A BALANCE BETWEEN ACCOUNTABILITY AND INDEPENDENCE

> What may now be seen as a past public faith in American judges may have been something quite different. It may have been mere apathy, aided by lack of communications and minimal contact with the courts as compared with today's litigious society. In any event, if it did previously exist here, a public presumption of impartiality cannot be expected to return as part of America's view of its judges. The problem now is to consider whether we are in danger of going, or may have gone, too far in the direction of a public presumption of partiality.[1]

The American Bar Association Special Committee on Standards of Judicial Conduct drafted the Model Code of Judicial Conduct[2] in response to a perceived loss of public faith in the impartiality and independence of the judiciary.[3] Canon 1 of the Code states, "A Judge Should Uphold the Integrity

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1. Chief Judge Howard T. Markey, *The Delicate Dichotomies of Judicial Ethics,* 101 F.R.D. 373, 381. Judge Markey examines in counterpoint the competing interests underlying the Code of Judicial Conduct for United States Judges. (The Judicial Conference of the United States adopted the Code in 1973; it is set out in appendix A of the article). Judge Markey explores the dichotomies of independence versus accountability, isolation versus involvement, presumption of impartiality versus presumption of partiality, and appearance versus reality.

2. MODEL CODE OF JUDICIAL CONDUCT (1972) [hereinafter CODE]. Before the 1972 Code, judges were guided by the American Bar Association CANONS OF JUDICIAL ETHICS of 1924. The Canons of 1924 did not provide the necessary guidance for judges when faced with difficult questions. This led to the development of the 1972 Code of Judicial Conduct.

3. *See* Weistart, *Symposium on Judicial Ethics, Foreword,* 35 LAW & CONTEMP. PROBS. 1 (1970). Weistart notes that the "recent revival" of public interest in unofficial activities, and the changes in public sentiment have rendered unacceptable behavior which previously went unscrutinized. He cautions that a revision of the ethical codes may only be a temporary stopgap, and may prove to be ineffective without a concomitant restoration of public confidence in judicial decisions themselves. *Id.* at 2. *See also* Thode, *The Development of the Code of Judicial Conduct,* 9 SAN DIEGO L. REV. 793, 795-96 (1972) (purpose of Code is to aid judiciary in establishing standards of conduct for judges). In *In re* Greenberg, 442 Pa. 411, 280 A.2d 370 (1971), the Pennsylvania Supreme Court summed up its sentiment with regard to charges of judicial misconduct:

> The place of justice is a hallowed place . . . and ought to be preserved without scandal and corruption. So spoke Sir Francis Bacon in the 16th Century. For generations before and since it has been taught that a judge must possess the confidence of the community; that he must not only be independent and honest, but, equally important, believed by all men to be independent and honest. [J]ustice must not only be done, it must appear to be done. Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy . . . . [T]he nation is experiencing a deep crisis of confidence in its judiciary. [There is a] widespread impression that the courts are falling far short of discharging their duty to provide both justice and the appearance of justice.

Id. at 415-16, 280 A.2d at 372 (footnotes omitted).

and Independence of the Judiciary"[4] and Canon 2 admonishes, "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities."[5] The principles embodied in Canons 1 and 2 are intended to provide the judiciary with basic, fundamental ideals from which judges may pattern their behavior.[6] But as Judge Markey noted, "Ethical principles . . . may themselves be unchallengeable. It is in their application to specific conduct that discomforting issues are present."[7] Conflicts and a degree of inconsistency are inevitable whenever an ethical code is interpreted and applied to specific instances of conduct. Yet, some continuity in standards is needed if the Code is to function as a practical guide for judicial behavior.[8]

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4. CODE, *supra* note 2, Canon 1. The text of Canon 1 reads as follows:

> 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.

The Code is comprised of nine Canons which describe general standards of conduct. Each Canon is followed by text, which sets out more specific rules, and commentary where necessary, to aid in applying the Canons and text. *See* E.W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 1, 43 (1972). Thode sets out the Code, recounts the process through which it developed, and provides additional background, commentary, and analysis for each Code provision.

5. CODE, *supra* note 2, Canon 2. The text and commentary of Canon 2 provide in pertinent part:

> 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 or judgment. He should not lend the prestige of his office to advance the private interests of others . . . .
>
> Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He 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.

6. *See* Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics,* 35 LAW & CONTEMP. PROBS. 3 (1970). Judge Kaufman notes that an independent judiciary is part of our historical ideal, and impartiality is but another facet of judicial independence. Judge Kaufman trusts judges to act ethically and perceives mandatory ethical codes as a threat to independence. *Id.* at 4-5. *See, e.g.,* Kaufman, *Chilling Judicial Independence,* 88 YALE L.J. 681 (1979) (even limited accountability to peers threatens independence). *But cf.* Kaufman, *The Essence of Judicial Independence,* 80 COLUM. L. REV. 671 (1980) (refuting Judge Kaufman's views; independence and accountability are compatible).

7. Markey, *supra* note 1, at 374.

8. For example, the Eighth Circuit Court of Appeals in United States v. Hollister, 746 F.2d 420, 425-26 (8th Cir. 1984), resolved ambiguities as to the required time that must pass before a judge's former law clerk could appear before that judge. The court adopted a circuit-wide rule that a minimum of six months must have elapsed since the clerk left the judge's employ. The court held that the judge should have disqualified himself because only three months had passed since the prosecutor in the case in question had been the judge's law clerk.

This Comment will examine the Code's application to situations in which a judge's impartiality has been questioned because of off-bench involvement with political or controversial issues.[9] An explanation of the scope of the Code's provisions will be followed by a discussion of the need for enforceable standards that can be applied to specific instances of conduct. Inherent in any discussion of regulating judicial behavior is the effect such regulation has upon judicial independence. Indeed, the judge's role in society and as an integral element in our system of government is shaped by the latitude of activities that are sanctioned by the Code. This Comment proposes that the delicate balance between judicial independence and judicial accountability may be refined by combined amendments to the Code, as well as judicial promulgation of tangible definitions of permissible off-bench judicial activity.

I. IMPETUS FOR THE REVISION OF JUDICIAL ETHICS

The perceived lack of enforceable standards of conduct under the Code's predecessor, the Canons of Judicial Ethics,[10] prompted the drafters to set enforceable "mandatory standards."[11] The Canons of Judicial Ethics, although adopted by a majority of jurisdictions,[12] were rendered largely ineffective as a limit on judicial conduct by courts that refused to sanction

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Id. at 426.

The defendant's motion to disqualify the judge was brought pursuant to 28 U.S.C. § 455 (1982), which "effectively enacted Canon 3(C) of the . . . Code . . . into law." United States v. Olander, 584 F.2d 876, 882 (9th Cir. 1978). Canon 3(C) provides: "A judge . . . should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . ." CODE, *supra* note 2, Canon 3(C).

The *Hollister* decision is an uncommon instance where a rule was adopted pursuant to a Code provision in lieu of a case specific ruling. The Eighth Circuit's rule assists judges in applying the Code to a recurring situation.

9. A judge's off-bench speech and associational activities may align a judge with controversial issues. Partisan political activities, such as campaign conduct and activities on behalf of elected officials, are beyond the scope of this Comment. Canon 7 addresses both partisan and nonpartisan political activities. The limitations on campaign conduct in judicial elections and the required resignation of judges before running for other elective office have been the focus of most of the commentary on Canon 7. *See, e.g.*, Ashman, Lee & Rosenbaum, *Judges In An Age of Mistrust: Morial And The Policy of Required Resignation*, 54 TUL. L. REV. 382 (1980) [hereinafter Ashman] (Fifth Circuit upheld Canon 7(A)(3) and denied judge's request for leave of absence during his campaign for public office); Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L.J. 201 (1986) (discussing effect of judicial conduct decisions on attorneys' comments concerning judicial performance).

10. The Canons of Judicial Ethics were adopted by the American Bar Association in 1924. *See* McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391.

11. E.W. THODE, *supra* note 4, at 43. *See also* Thode, *supra* note 3, at 793 (discussing development of the Code and the relationship between its provisions and the Canons of Judicial Ethics).

12. E.W. THODE, *supra* note 4, at 5.

activities that clearly violated its provisions.[13] For example, in *Nix v. Standing Committee,*[14] the Oklahoma Supreme Court held that the Canons of Judicial Ethics were merely advisory and not a binding restriction on judicial conduct.[15] Accordingly, the Oklahoma court granted the writ of prohibition that a judge sought to prevent the Oklahoma bar from investigating or disciplining him for political activities which likely were a violation of Canon 30.[16] Chief Justice Halley, in a dissenting opinion, argued that if the Canons were merely "hortatory" there would have been no point in adopting them.[17]

The "moral posturing"[18] and generalized exhortations which beset the Canons of Judicial Ethics were rejected for "enforceable mandatory standards"[19] which would provide tangible guidance to proper judicial behavior, and protect and preserve the public trust accorded to judicial officers.[20] In order to implement these new standards, state and federal judicial conduct organizations were established to investigate and discipline judicial misconduct.[21] These judicial disciplinary commissions responded to complaints that a judge violated the Code, statutes, constitutional provisions, or any other applicable restrictions on judicial conduct.[22]

As the drafters realized, the full potential of the Code's standards of conduct could only be achieved through an effective system of procedures and penalties in each jurisdiction that adopted the Code.[23] However, many of the Code's mandatory standards are qualified by general admonitions that a judge "may" and "should" rather than "must" refrain from certain activities.[24] Consequently, interpretations of the Code by disciplinary com-

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13. *See* Ashman, *supra* note 9, at 398. The provisions of the Code were also reluctantly enforced in its early years, if it was enforced at all. The reluctance or refusal by courts to enforce restrictions on judicial conduct have largely vanished in the past twenty years. *Id.* at 399.

14. 422 P.2d 203 (Okla. 1966).

15. *Id.* at 205.

16. Canon 30 of the Canons of Judicial Ethics is an ambiguously phrased predecessor to Canon 7(A)(3) of the Code. *See* Ashman, *supra* note 9, at 398. Canon 7(A)(3) provides in part: "A judge should resign his office when he becomes a candidate . . ." for a nonjudicial office . . ." CODE, *supra* note 2, Canon 7(A)(3).

17. 422 P.2d 203, 208 (Okla. 1966) (Halley, C.J., dissenting).

18. McKay, *supra* note 10, at 391.

19. The Code's drafters rejected a suggestion that the provisions be hortatory as opposed to binding. E.W. THODE, *supra* note 4, at 43.

20. McKay, *supra* note 10, at 391.

21. *See generally* I. TESTITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS (2d ed. 1980) (comprehensive tables listing judicial disciplinary organizations, structures, and procedures); Note, *A First Amendment Right of Access to Judicial Disciplinary Proceedings,* 132 U. PA. L. REV. 1163, 1165-66 n.26 (1984) (list of all state statutes and constitutional provisions establishing judicial conduct organizations).

22. I. TESTITOR & D. SINKS, *supra* note 21, at 1-9.

23. E.W. THODE, *supra* note 4, at 43.

24. *See supra* notes 4-5 and accompanying text.

missions and state and federal courts which review or enforce judicial discipline have often failed to establish consistent or discernable standards to address controversial conduct.

II. Scope Of Conduct Regulated By The Code

The Code has been widely adopted[25] and affects almost all aspects of a judge's public and private life.[26] Much of the emphasis of the Code is on off-bench,[27] nonofficial behavior.[28] Canon 1 sets the tone of the Code; it is a general admonition applicable to all conduct. Canon 2's concern with the "appearance of impropriety" serves as the ultimate standard by which all off-bench activities are gauged.[29] Canon 3 establishes the priority of official

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25. The Model Code has been adopted essentially in full by forty-six states. Four states have adopted the Code in part, or have adopted their own standards to govern judicial conduct. Those states are Maryland, Montana, Rhode Island, and Wisconsin. Lubet, *Judicial Ethics and Private Lives,* 79 Nw. U.L. Rev. 983, 983 n.5 (1985). *See* D. Fretz, R. Peoples & T. Wicker, Ethics for Judges 6 (1982) (detailed guide to the modifications of the Model Code made by the various states). Illinois is the most recent state to adopt the Model Code. *See* Ill. Rev. Stat. ch. 110A, paras. 61-67 (1987). Illinois was one of the few states that revised or adopted new rules of judicial conduct prior to the promulgation of the Model Code by the ABA. *See* Law of March 15, 1970, ch. 110A, paras. 61-67, 1970 (repealed 1987). The committee commentary accompanying the adoption of the Model Code in Illinois explained that the adoption of the ABA Canons (Code) would work no substantive changes in existing law, but would ease the administration of judicial discipline in two ways: (1) by achieving uniformity with rules in effect in other states, and (2) by providing a body of interpretative decisions to assist in the application of the rules in particular factual situations. Committee Commentary, Ill. Sup. Ct. & App. Ct. Combined Advance Sheets, Dec. 10, 1986 - No. 24, 9, 10.

26. *See* Lubet, Beyond Reproach: Ethical Restrictions On The Extrahydicial Activities Of State And Federal Judges (1984); Goldstein, *Fundraising by Judges: Ethical Restrictions on Assisting Civic, Charitable, and Other Organizations,* 8 Jud. Conduct Rep. 1 (1986); Lubet, *supra* note 25; Martineau, *Disciplining Judges for Non-Official Conduct: A Survey and Critique of the Law,* 10 Balt. L. Rev. 225 (1981); Shaman, *Off-The-Bench Conduct,* 54 Pa. Bar A.Q. 24 (1986); Shaman & Reiter, *Off-The-Bench Speech,* 8 Jud. Conduct Rep. 1 (1986).

In *In re* Troy, 364 Mass. 15, 71, 306 N.E.2d 203, 234-35 (1973), the Massachusetts Supreme Court defined the scope of conduct that could be reached under an ethical code as follows:

> It is to be remembered that [a judge's] service and its quality are to be gauged not only by their scholarship in the law . . . but in their public utterances . . . , and in their strict adherence to the Code of Judicial Conduct. . . . [Even in his private life] subjected as he is to constant public scrutiny in his community and beyond . . . [m]ore is expected of him and, since he is a judge, rightfully so . . . . He cannot thus . . . engage in some public expressions, some pleasurable diversions, and in some social contacts which are open to others.

27. This Comment will use the term off-bench to refer generally to quasi-judicial, extrajudicial, and political activity. Any conduct not directly related to a judge's official duties is off-bench conduct. Other writers have found the on/off bench distinction workable as well. *See supra* note 26.

28. E.W. Thode, *supra* note 4, at 44.

29. *See* Canons 1 & 2, *supra* notes 4-5 and accompanying text.

duties and is the only provision which exclusively governs on-bench conduct.[30] Canon 3 describes proper courtroom decorum, limits out-of-court commentary on pending cases and other publicity, requires diligent attention to administrative duties, cautions against nepotism or favoritism, and broadly advises disqualification where impartiality might be questioned under a nonexclusive list of circumstances.[31] Canon 4 regulates quasi-judicial activities such as lecturing and writing on legal topics.[32] Canon 4 broadly condones service, membership, and fund-raising for organizations; lecturing, writing, speaking, and public appearances before executive and legislative agencies, if related to the law, legal system, or administration of justice.[33] Canon 5 extensively limits vocational, civic, charitable, financial, fiduciary, and other related activities.[34] Overall, Canon 5 seeks to prevent the exploitation of judicial office by judges, family members, business associates, and any nonlegal organization.[35] Canon 6 requires disclosure of income derived from the activities governed by Canons 4 and 5.[36] Finally, Canon 7 governs the political activities and campaign conduct of elected judges.[37]

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30. CODE, *supra* note 2. Canon 3 reads in part as follows:

> A Judge Should Perform the Duties of His Office Impartially and Diligently.
>
> The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law.

Canon 3 addresses some off-bench conduct. Canon 3(A)(6) limits off-bench conduct through its prohibition on public commentary about pending or impending proceedings in any court, with only a narrow exception for public explanation of court procedures. *Id. See, e.g., In re* Sheffield, 465 So. 2d 350 (Ala. 1984) (judge disciplined for comments to newspaper regarding contempt proceedings in his court). The Alabama Supreme Court noted that "judges walk a fine line between the duties and prohibitions of Canon 3(A)(6) . . . the risk of being misquoted . . . tilt(s) the balance in favor of 'no comment.' " *Id.* at 355.

31. *See* CODE, *supra* note 2, Canon 3.

32. *Id.* Canon 4 reads in part as follows:

> A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.
>
> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:
>
> A. He may speak, write, lecture, teach, and participate in other activities . . . .

33. *See id.*

34. CODE, *supra* note 2, Canon 5. Canon 5 reads in part as follows:

> A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties.

35. *Id.*

36. CODE, *supra* note 2.

37. *Id.* Most of Canon 7 is directed toward campaign activities by judges, undertaken for their benefit or the benefit of other candidates for political office. Canon 7(A)(4) makes an allowance for political activities under the same circumstances as Canon 4. Canon 7 varies from state to state depending upon whether judges are elected or appointed, or variations thereon. Canon 7 is probably the only Canon that has been substantively evaluated on an empirical basis. *See* Volcansek, *Codes of Judicial Ethics: Do They Affect Judges' Views of Proper Off-the-Bench Behavior?*, 17 AM. BUS. L.J. 493 (1980) (analysis of Canon 7's impact since its adoption in 1974 on ethical viewpoints of Texas judges as reflected in responses to questionnaires).

The policy justifications for regulating off-bench behavior are outlined in the Code itself. Among the reasons offered are: (1) protecting judicial independence,[38] (2) maintaining the appearance of impartiality and propriety,[39] (3) avoiding distractions from judicial duties and conflicts of interest that may cause frequent disqualification,[40] and (4) avoiding unfair exploitation of the judicial office.[41] Conduct which has been sanctioned under the Code in furtherance of these goals includes: comments and letters to the press,[42] activities on behalf of charitable, civic, or legal organizations,[43] use of offensive language,[44] sexual affairs,[45] business activities,[46] and partisan political activity.[47]

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38. CODE, *supra* note 2, Canons 1, 5(G).

39. *Id.* Canons 2, 2(A), 3, 3(C), 4, 5(C)(1), 7.

40. *Id.* Canons 3, 4 (commentary), 5(A), 5(C)(1), 5(G).

41. *Id.* Canons 2, 5(A)(2), 5(C)(1).

42. *See In re* Tschirhart, Formal Complaint No. 32 (Mich. Jud. Ten. Comm'n June 28, 1985) (defiant and flippant comments to press); *In re* Mandeville, 144 Vt. 608, 481 A.2d 1048 (1984) (comments to newspaper regarding disposition in criminal trials violates Canon 7(A)); *In re* Fromer, Unreported Judgment (N.Y. Comm'n Jud. Conduct Oct. 25, 1984) (comment on pending rape case violated tenets of fairness and justice); State *ex rel.* Williams v. Graham, No. CJTD 76-1 (Okla. Ct. Jud. 1976) (letter to press brought fellow judges into disrepute and fostered controversy); *In re* DeSaulnier, 360 Mass. 787, 279 N.E.2d 296 (1972) (interview to counter bad press reports held improper).

43. *See In re* A Charge of Judicial Misconduct or Disability, No. 86-2 (Jud. Council D.C. Cir. June 26, 1986) (recruiting for bar association discouraged); *In re* Kaplan, Unreported Determination (N.Y. Comm'n Jud. Conduct May 17, 1983) (face-to-face solicitation of lawyers for charitable contributions); 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) (improper to seek preferential treatment for animal shelter); *see also* Goldstein, *supra* note 26 (state and federal advisory opinions on soliciting funds and members for varied organizations).

44. *See In re* Cerbone, 61 N.Y.2d 93, 460 N.E.2d 217, 472 N.Y.S.2d 76 (1984) (ethnic epithets and slurs); *In re* Stevens, 31 Cal. 3d 403, 645 P.2d 99, 183 Cal. Rptr. 48 (1982) (racial slurs and epithets in chambers); *In re* Kuehnel, 49 N.Y.2d 465, 403 N.E.2d 167, 426 N.Y.S.2d 461 (1980) (demeaning comments to ethnic group); Matter of Potter, No. 82 (Jud. Inquiry & Rev. Bd. Docket No. 63 Pa. 1977) (racial slurs in statements to press); Canon v. Comm'n on Judicial Qualifications, 14 Cal. 3d 678, 537 P.2d 898, 122 Cal. Rptr. 778 (1975) (profanities shouted at apartment manager and police).

45. *See In re* Hyland, No. ACJC 83-25 (N.J. Comm'n Jud. Conduct Sept. 25, 1985) (sexual harassment and affair with secretary); Geiler v. Comm'n on Judicial Qualifications, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973) (offensive sexual gestures to women in chambers and elsewhere), *cert. denied,* 417 U.S. 932 (1974). *See infra* note 55.

46. *See* Inquiry Concerning a Judge, DeFoor, 494 So. 2d 1121 (Fla. 1986) (use of office to market electronic device and assist political campaigns); *In re* Babineaux, 346 So. 2d 676 (La. 1977) (service on board of directors of financial institutions), *cert. denied,* 434 U.S. 940 (1977); *In re* Fuchsberg, 426 N.Y.S.2d 639, 642-43 (N.Y. Ct. Jud. 1978) (judges held interests in securities subject to current litigation); *In re* Foster, 271 Md. App. 449, 318 A.2d 523 (1974) (use of office to advance real estate deals, obtaining license in office).

47. *See* Morial v. Judiciary Comm'n of State of La., 565 F.2d 295 (5th Cir. 1977), *cert. denied,* 435 U.S. 1013 (1978) (failure to resign judicial office before seeking election to nonjudicial governmental office); *In re* Davis, 249 Ga. 428, 291 S.E.2d 547 (1982) (participation in mayoral election and recall campaign); Matter of Briggs, 595 S.W.2d 270 (Mo. 1980)

Given the breadth of conduct which can be reached under the Code, it is imperative that the Code provide practical and comprehensive standards which judges, disciplinary bodies, and the public may apply when judicial conduct is questioned.[48] Additionally, the underlying aim of the Code to maintain an independent and honorable judiciary[49] may be undercut if judges are given insufficient guidance with respect to permissible conduct.[50] Finally, in the absence of tangible standards, the Code could be surreptitiously manipulated by person seeking to control or gain influence over unpopular or controversial judges.[51] The control of controversial judges may occur internally through the courts, or externally through complaints brought by special interest groups.

(contributions to and attendance at fundraising for governor, also encouraging other court personnel to contribute time and funds); *In re* Larkin, 368 Mass. 87, 333 N.E.2d 199 (1975) (repeated attempts to make illegal campaign contributions); *In re* Schamel, 46 A.D.2d 236, 362 N.Y.S.2d 39 (1974) (repeated failure to resign judicial position before seeking other elective governmental office); *In re* Troy, 364 Mass. 15, 306 N.E.2d 203 (1973) (serving as toastmaster at dinner to honor candidate). *See generally* AM. JUDICATURE SOC., JUDICIAL DISCIPLINE AND DISABILITY DIGEST (1960-1978, 1979 Supp., 1980 Supp., and 1980-1985 Supp.) (comprehensive, cross-indexed digest of judicial disciplinary decisions, listings by subject matter, Canons, activities, and topics).

48. *See* Volcansek, *supra* note 37, at 505 (concluding that codification of more explicit standards under the Code will resolve problem areas now left to judge's discretion). In the Foreword to a *Symposium on Judicial Ethics,* 1972 UTAH L. REV. 391, John Weistart observed judges can reasonably demand that the prevailing formal statements of ethics assist judges in structuring their lives. The decision to revise the Code was an admission that prior standards were inadequate since they did not provide the guidance needed by judges. *Id.* at 391. The Symposium was published just prior to the formal adoption of the Code by the American Bar Association and includes articles by many of those persons involved in drafting the Code.

The Honorable Frank J. Battisti, Chief Judge of the United States District Court, Northern District of Ohio, contends that federal judicial councils "are applying standards unknown or unannounced beforehand to either the judge or the lawyers. [L]awyers and judges are being evaluated on what are represented as legitimate standards. In reality they are not standards at all, but merely arbitrary, personal or vague notions." Battisti, *Remarks to the Akron Bar Association,* 18 AKRON L. REV. 353, 360 (1985).

49. Canon 1, *supra* note 4.

50. *See* Schoenbaum, *A Historical Look at Judicial Discipline,* 54 CHI[-]KENT L. REV. 1, 23 (1977) (concluding that an independent judiciary will not be attained so long as judges are subject to removal on insubstantial or capricious grounds); Martineau, *supra* note 26, at 245.

51. Former U.S. Supreme Court Justice Douglas once voiced his concern over the potential loss of judicial independence through the use of judicial discipline to ride roughshod over unpopular judges. *See* Chandler v. Judicial Council of Tenth Circuit of United States, 398 U.S. 74, 136-41, *reh'g denied,* 399 U.S. 937 (1970) (Douglas, J., dissenting). Judge Chandler had been suspended from all judicial duties for a failure to discharge the duties of his office and the Supreme Court affirmed this sanction. *Id.* at 89. Judge Chandler refused to disqualify himself from cases where there was a conflict of interest and engaged in litigation before the court. Justice Black also dissented and expressed his fear that unless judicial discipline is carefully controlled, "[t]he hope for an independent judiciary will prove to have been no more than an evanescent dream." *Id.* at 143 (Black, J., dissenting).

Definitive standards which address judicial misconduct have proven elusive and difficult to attain.[52] Blanket statements, rather than tangible, workable standards are commonly offered by the courts as reasons for subjecting judges to punishment. For example, the Michigan Supreme Court disciplined a judge for his defiant and inappropriate "public comments regarding . . . controversial incidents concerning him . . ." to a news reporter.[53] The court declared that the need to avoid even the appearance of impropriety, "requires that a judge behave as if he were always on the bench."[54] On the other hand, the Pennsylvania Supreme Court refused to discipline a judge charged with, among other matters, a battery, and held that discipline is appropriate only where off-bench conduct affects a judge in his official capacity or is prohibited by law.[55] The positions adopted by these courts are irreconcilable. Each exemplifies opposing ends of the spectrum in the regulation of judicial conduct. The first establishes a standard which leaves little room for off-bench expression by imposing a rigid application of the Code. The second approach places so few limits on off-bench conduct that judges may act largely at their own discretion.[56]

III. LIMITS ON JUDICIAL INDEPENDENCE

Like other public servants, judges may be required to sacrifice rights they would otherwise enjoy.[57] As the Supreme Court of Florida recently noted:

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52. *See generally* Yankelewitz, *State Judicial Disciplinary Commissions and Proceedings: Developing Administrative and Legal Standards for Evaluating Judicial Misconduct*, 10 RUT.-CAM. L.J. 685, 698-704 (1979) (examination of various standards and their development through application to instances of misconduct).

53. *In re* Tschirhart, 422 Mich. 1207, 1209, 371 N.W.2d 850, 852 (1985).

54. *Id.* at 1210, 371 N.W.2d at 852 (quoting *In re* Bennet, 403 Mich. 178, 199, 267 N.W.2d 914, 922 (1979)). Judge Tschirhart commented on challenges to his visit of a Nevada brothel, criticized the local prosecutor's handling of a rape case, and promised to run for re-election so he could raise a little hell.

55. *See In re* Dalessandro, 483 Pa. 431, 462, 397 A.2d 743, 758 (1979). Judge Dalessandro gained notoriety for an extra-marital affair as well. The court noted that none of the conduct was criminal under Pennsylvania law, and that moral beliefs and social norms were not appropriate subjects of judicial discipline — they were matters for the ballot box. *Id.* at 460, 397 A.2d at 758-59. *But cf.* Cincinnati Bar Ass'n v. Heitzler, 32 Ohio St. 2d 214, 291 N.E.2d 477 (1972), *cert. denied*, 411 U.S. 967 (1973) (judge disciplined for extra-marital affair since his conduct, both official and personal, must conform to highest standard). *See also In re* DeSaulnier, 360 Mass. 787, 812, 279 N.E.2d 296, 310 (1972) ("public gambling and being a judge are incompatible," therefore, discipline appropriate even where judge legally gambled in Las Vegas).

56. A middle ground between these extremes, but one that probably offers little guidance, is the definition of misconduct offered by the New York Court of Appeals: "[A]ny conduct, on or off the bench, inconsistent with proper judicial demeanor [which] 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." Kuehnel v. State Comm'n of Judicial Conduct, 49 N.Y.2d 465, 469, 403 N.E.2d 167, 168, 426 N.Y.S.2d 461, 463 (1980) (Judge Keuhnel physically and verbally abused four youths he encountered in a parking lot and suspected of vandalism).

57. The United States Supreme Court has repeatedly upheld reasonable restrictions on

> Judges serve on the bench in order to further the interests of justice, not their own personal interests. [A judge] must be willing to forego many of the financial and political activities that otherwise might be available to him. If an individual is unwilling to forego such opportunities, he should not be a judge.[58]

This statement reflects a widely accepted proposition that judges are in a class by themselves, set apart from other public officials, and the public has a "legitimate" and "proper" concern with regard to a judge's private life.[59]

The Code's restrictions on extrajudicial activities seek to strike a balance between the competing interests of judicial accountability and judicial independence.[60] In order to achieve this goal, the Code prohibits conduct which would be deemed acceptable if engaged in by the average citizen.[61] These limitations are based on the belief that the public often fails to distinguish between a judge's on-bench and off-bench conduct.[62] However, strict limitations on judicial behavior can have detrimental effects. Too many restrictions on a judge's off-bench life risks placing him in an ivory tower which may diminish judicial ability.[63] Justice Frankfurter once voiced an objection

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the active participation of federal and state employees in partisan political activity. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1976) (upheld constitutionality of statute restricting state employees' participation in partisan political activities); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (upheld federal statutes which prohibited federal employees from taking part in political management or in political campaigns). Likewise, the Supreme Court has upheld restrictions on governmental employees' speech. *See, e.g.*, Connick v. Meyers, 461 U.S. 138 (1983) (upheld limitations on public employees' rights to free speech to effectuate the state's efficiency of public services through its employees); Pickering v. Board of Educ., 391 U.S. 563 (1968) (held that in determining rights of public employees, it is necessary to balance the interest of the employee as a citizen and the interest of the state or federal government).

58. Inquiry Concerning A Judge, DeFoor, 494 So. 2d 1121, 1123 (Fla. 1986). The court reprimanded the judge for actively campaigning for local politicians, a violation of Canon 7, and for promoting through his court an electronic device in which he had a financial interest, a violation of Canons 2, 3 and 5.

59. *See, e.g.*, Rifkind, *A Judge's Nonjudicial Behavior*, 38 N.Y. STATE B.J. 22 (1966) (adapted from an address to the American Bar Association Section of Judicial Administration, Aug. 9, 1965). Judge Rifkind examines the benefits and detriments of political, nonpartisan political, and community activity by judges, and offers some guidelines: extrajudicial activity should be as circumscript as possible and devoted to the highest ideals, the higher the court the tighter the restrictions, and the occasions a judge takes to participate should be rare. He concludes that a sufficient degree of isolation is necessary to avoid suspicion that judicial decisions are corrupted by passion, partisanship, or partiality. *Id.* at 28.

60. *See* Markey, *supra* note 1, at 375-77.

61. As the Supreme Court of Vermont noted: "[T]he Canons . . . are standards measuring fitness for judicial office and they therefore embrace tests of behavior relating to integrity and propriety that condemn actions in which the average citizen can freely indulge without consequence." *In re* Mandeville, 144 Vt. 608, 608, 481 A.2d 1048, 1049 (1984) (citing *In re* Douglas, 135 Vt. 585, 592, 382 A.2d 215, 219 (1977)). *Accord In re* Troy, 364 Mass. 15, 71, 306 N.E.2d 203, 234-35 (1973).

62. *See* Kuehnel v. State Comm'n of Judicial Conduct, 49 N.Y.2d 465, 469, 403 N.E.2d 167, 168, 426 N.Y.S.2d 461, 464 (1980).

63. Shaman, *Off-The-Bench Conduct*, 54 PA. BAR A. Q. 24, 26 (1986).

to regulations which served "to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed."[64]

The control of judicial conduct is grounded in a desire to secure public respect and confidence in the judiciary.[65] Alexander Hamilton once stated that "the judiciary is beyond comparison the weakest of the three departments of power . . . all possible care is necessary to enable it to defend itself . . . ."[66] The perception of the judiciary as the weakest and most vulnerable branch of government has led to the imposition of strict restrictions on judicial conduct. The argument proceeds that any power the judiciary holds derives from respect given its decisions,[67] and that respect derives from public trust in the impartiality of the court's decisions.[68] Therefore, even the appearance of impropriety erodes confidence in a judge's impartiality.[69] The result, as Judge Markey has noted, is that "[t]he appearance of justice is seen today not as separate, but as an integral part of justice itself."[70]

In order to maintain the appearance of justice and assure public confidence in the judiciary, many courts demand strict adherence to ethical codes.[71] For example, the Wisconsin Supreme Court rejected a judge's constitutional challenge to Rule 17 of the Wisconsin Judicial Code of Ethics[72] and stated: "A lack of confidence in the integrity of the courts rocks the very foundations of organized society, promotes unrest and dissatisfaction, and even encour-

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64. Bridges v. California, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting). *See* Ashman, *supra* note 9, at 409.

65. Miller, *Public Confidence in the Judiciary: Some Notes and Reflections,* 35 LAW & CONTEMP. PROBS. 69, 69-70 (1970); Canon 2 commentary, *supra* note 5.

66. THE FEDERALIST No. 78, at 465-66 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton observes that "[t]he judiciary, on the contrary, has no influence over either the sword or the purse . . . . It may truly be said to have neither FORCE nor WILL but merely judgment . . . ." *Id.* at 465 (emphasis in original). Judge Kaufman notes that the late Professor Bickel relied on the foregoing observations of Hamilton in his theory of judicial restraint as set out in A. BICKEL, THE LEAST DANGEROUS BRANCH (1962). Kaufman, *Chilling Judicial Independence, supra* note 6, at 684 n.18.

67. *See* Rifkind, *supra* note 59, at 23.

68. *Id. See In re* Fuchsberg, 426 N.Y.S.2d 639, 667 (N.Y. Ct. Jud. 1978) (Simons, J., dissenting); Lubet, *supra* note 25, at 986.

69. *See* Canon 2, *supra* note 5, commentary.

70. Markey, *supra* note 1, at 380. *See* J. MACKENZIE, THE APPEARANCE OF JUSTICE (1972).

71. *See In re* Morrissey, 366 Mass. 11, 16-17, 313 N.E.2d 878, 881-82 (1974); *In re* Mandeville, 144 Vt. 608, 609, 481 A.2d 1048, 1049 (1985).

72. *In re* Kading, 70 Wis. 2d 508, 235 N.W.2d 409 (1975). Rule 17 requires that judges file an annual report of assets and liabilities. WIS. STAT. ANN. § 256-4 (West 1978). The *Kading* court rejected the argument that the law was overbroad and an invasion of privacy. The court found the rule reasonable in light of the compelling state interest of informing the public of economic interests which could reflect adversely on a judge's impartiality. *Kading*, 70 Wis. at 525-30, 235 N.W.2d at 416-19.

ages revolution."[73] Although the Wisconsin court's language is extreme, it reflects the prevailing response to charges of judicial misconduct.[74] Perhaps, interpretations of the Code consistent with this perspective have extended the Code to conduct not contemplated by its drafters.

A. Intermeddling With Legislative And Executive Branches As A Threat To Judicial Independence

The justification for the separation of judges from much of the social and political sphere is derived from the important state interest in an independent judiciary.[75] An independent judiciary is necessary to secure the separation of powers on which our government is founded.[76] Likewise, separation may assure the independence of the judiciary.[77] The authors of the *Federalist Papers* argued that when judicial power is joined with the executive or legislative power, life and liberty would be exposed to arbitrary control under the former, and the judge might behave as an oppressor in the latter.[78] The Federal Constitution does not limit a judge's involvement with the other

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73. *Kading*, 70 Wis. at 524, 235 N.W.2d at 416 (quoting *In re* Stolen, 193 Wis. 602, 620, 214 N.W. 379, 385 (1927)). *See In re* Kelly, 238 So. 2d 565, 569-70 (Fla. 1970) (variation on the same warning), *cert. denied*, 401 U.S. 962, *reh'g denied*, 403 U.S. 940 (1971).

74. *See* Volcansek, *supra* note 37, at 505; Markey, *supra* note 1, at 374; Shilling v. State Comm'n on Judicial Conduct, 51 N.Y.2d 397, 409, 415 N.E.2d 900, 905, 434 N.Y.S.2d 909, 915 (1980) (Fuchsberg, J., dissenting) (majority's decision goes beyond post-Watergate public image syndrome), *cert. dismissed*, 451 U.S. 978 (1981).

75. In Babineaux v. Judiciary Comm'n, 341 So. 2d 396 (La. 1976), the court rejected a first amendment challenge to the Canon 5(C)(2) limitation on financial activities. In stressing the compelling state interest, the court referred to former Supreme Court Chief Justice Parker's statement that:

> [t]he judge must not only be independent - absolutely free of all influence and control so that he can put into his judgments the honest, unfettered and unbiased judgment of his mind but he must be so freed of business, political and financial connections and obligations that the public will recognize that he is independent.

Id. at 402-03 (quoting Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703, 705-06 (1949)).

76. Public remarks in November, 1981 by Justice Berger of the Supreme Court of British Columbia expressing his opposition to proposed constitutional amendments led to public criticism and official investigations. Mr. Berger was eventually censured for his remarks. *See* Webber, *The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger*, 29 MCGILL L.J. 369, 371-72 (1984). Jeremy Webber explores the balance of power between the branches of government and the effect of judicial commentary on the separation of powers doctrine. He concludes that the threat to the separation of powers is insignificant in comparison to the benefits from judicial speech. *Id.* at 375-89. The article is valuable in that the Canadian and American judiciary have shared historical and doctrinal underpinnings. Webber relies on United States Supreme Court cases as well as the writings of Alexander Hamilton in his analysis.

77. McKay, *supra* note 10, at 391.

78. J. Madison, quoting Montesquieu's *De L'Espirit Des Lois* in THE FEDERALIST No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961).

branches of government while acting outside his official duties,[79] but many state constitutions have specific provisions prohibiting judicial involvement with the executive or legislative branches.[80] However, even these provisions do not address the myriad of activities a judge may undertake which may indirectly, yet substantially, influence political and social issues.

The Code does not explicitly rely on the separation of powers doctrine, but Canon 5(g) does limit extrajudicial service in nonjudicial governmental positions.[81] The commentary following Canon 5(g) justifies the restriction as a means of preserving judicial energies and independence, and as a means to prevent judicial involvement in controversial matters.[82] Ultimately, the Code's all-encompassing admonition against even the appearance of impropriety in all activities has a broader reach than any constitutional limitation. Regardless of the accepted rationale, judges participation in legislative or administrative policy-making raises serious concerns about the impartial performance of judicial duties in later statutory interpretation or constitutional adjudication.[83] Of course, the separation of a judge from legislative and executive activities does not mean that judges will not have strong political views which are at odds with the law they must interpret and apply.[84]

The Florida Supreme Court's decision in *In re Gridley*[85] underscores the difficulty presented by the desire to maintain the appearance of impartiality. State Circuit Court Judge Gridley had expressed his opposition to Florida's

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79. *See* Slonim, *Extrajudicial Activities and the Principle of the Separation of Powers,* 49 CONN. B.J. 391, 408-10 (1975). Slonim persuasively discredits the principle of the separation of powers as a limit on, or basis for, judicial discipline of extrajudicial activities. He concludes that an individual's involvement with another branch of government does not violate the principle. Only when the court, as an institution, interferes with the other branches is the separation of powers principle operative. *See generally* Ervin, *Separation of Powers: Judicial Independence,* 35 LAW & CONTEMP. PROBS. 108 (1970) (historical discussion of judicial independence). *But see* Dalton, *Off the Bench and Into the Mire: Judging Extrajudicial Behavior* (Book Review), 91 YALE L.J. 1708, 1722-23 (1982). Dalton perceives a threat to the structure of our government when judges undertake active roles in legislative drafting and lobbying.

80. *See* PA. CONST. art. V, § 17(a), (b).

81. CODE, *supra* note 2. Canon 5(G) provides in part:

> Extra-judicial Appointments. A judge should not accept appointment to a governmental . . . position that is concerned with issues . . . other than the improvement of the law, the legal system, or the administration of justice.

82. Commentary to Canon 5(G) reads in part:

> The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower . . . and the need to protect the courts from [matters that may be] controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

83. *See* Nathanson, *The Extra-Judicial Activities of Supreme Court Justices: Where Should the Line be Drawn?* (Book Review), 78 NW. U.L. REV. 494, 521-25 (1983).

84. There is a significant difference between a statement that a judge will dismiss all divorce cases since he disagrees with the law, and a statement that the laws should be changed in the public interest. E.W. THODE, *supra* note 4, at 74.

85. 417 So. 2d 950 (Fla. 1982).

capital punishment laws through letters published in the local newspapers.[86] The court noted that although the conduct was close to the dividing line between appropriate and inappropriate conduct, the comments did not cause disrespect for the law or judicial office, interfere with official duties, or diminish public confidence in the judiciary.[87] Accordingly, the court found no violation of Canons 2(a) or 5(a) of the Code since the judge had been careful to make clear that he would follow the law as written.[88] The court refrained from disciplining Judge Gridley for publicly expressing an opinion which he had every right to hold.

The *Gridley* court's reasoning echoes the sentiment of Judge Edwards of the District of Columbia Circuit Court who asserts that judges can and do keep their personal views and their official duties separate.[89] Judge Edwards argues that "it is the law—and not the personal politics of individuals—that controls judicial decision making . . . ."[90] A final limit on judicial incursion into the other branches of government may be, as Justice Holmes once stated, that "judges do and must legislate, but they can do so only interstitially, they are confined from molar to molecular motions."[91]

Justice Douglas once expressed his fear that judicial independence would suffer when discipline is used to control nonconformist judges.[92] The control of controversial or politically active judges may be possible through application of specific Code restrictions to off-bench activity, but amorphous standards like the appearance of impropriety and the promotion of public confidence, which apply to all activities, often are the backbone of decisions to discipline judges.[93] The dilemma presented by these amorphous standards is that they are essentially subjective and immeasurable concepts. The question of whether or not conduct violates these standards can shift with time, public sentiment, the viewpoint of the parties bringing a complaint, the

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86. Judge Gridley expressed his views on Christian forgiveness and his disagreement with the imposition of the death penalty. Judge Gridley was disciplined though for other actions he took in response to a criminal defendant's mother's pleas for assistance. *Id.* at 954-55.

87. *Id.*

88. *Id.* Canon 5(A) provides that a judge may speak, write, lecture, and teach on nonlegal subjects so long as it does not detract from the dignity of his office or interfere in his duties. *See* CODE, *supra* note 2, Canon 5(A).

89. Edwards, *Public Misperceptions Concerning The "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit,* 56 U. COLO. L. REV. 619, 621 (1985).

90. *Id.* at 620.

91. O.W. HOLMES, THE PATH OF THE LAW, COLLECTED LEGAL PAPERS 167, 194 (1920).

92. *See supra* note 51 and accompanying text.

93. *See* Canon 2, *supra* note 5. In addition to the Code, many states have adopted statutory and constitutional provisions to regulate judicial conduct. A representative constitutional provision sanctions "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." CAL. CONST. art. 6, § 18(c) (1980). The similarity of such provisions to Canons 1 and 2 of the Code should be obvious. These provisions are applied concurrently with, and in much the same manner as, Canons 1 and 2. *See* Martineau, *supra* note 26, at 229.

composition of a judicial disciplinary board, and the segment of the public in our pluralistic society to be protected.[94]

B. *Judicial Uncertainty As To Permissible Conduct*

The courts have generally rejected judges' claims that they cannot be certain when they have violated vague and arbitrary ethical standards which are based on appearances alone. General or broad standards have been found neither improper nor unenforceable.[95] Courts have espoused reliance on an objective standard[96] and case-by-case[97] analysis when applying these flexible ethical standards. The approach of the Supreme Court of Maryland is representative of the refusal to cabin general ethical standards with precise definitions. In *In re Diener,*[98] the Maryland court acknowledged:

> Precisely what conduct prejudicial to the proper administration of justice is or may be, in any or all circumstances, we shall not undertake to say. Indeed, a comprehensive, universally applicable definition may never evolve but it is unlikely that we shall ever have much trouble recognizing and identifying such conduct whenever the constituent facts are presented.[99]

The California Supreme Court in *Geiler v. Commission on Judicial Qualifications,*[100] described "prejudicial conduct" as conduct which an objective observer would find unjudicial, prejudicial to public esteem for judicial office, or conduct that casts the judicial office into disrepute.[101] None of the three foregoing descriptions is particularly definite, yet each fairly reflects the language of Canons 1 and 2 of the Code.[102]

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94. *See* Hall, *Judicial Removal For Off-Bench Behavior: Why?,* 21 J. PUB. L. 127, 146-47 (1972); Rifkind, *supra* note 59, at 28.

95. *See* Halleck v. Berliner, 427 F. Supp. 1225, 1240 (D.D.C. 1977); Kaiser v. Bell, 332 F. Supp. 608, 614-15 (E.D. Pa. 1971); Napolitano v. Ward, 317 F. Supp. 79, 81 (N.D. Ill. 1970).

96. In Geiler v. Commission on Judicial Qualifications, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973), *cert. denied,* 417 U.S. 932 (1977), the California Supreme Court stated that "[t]he first two Canons of the Code of Judicial Conduct . . . emphasize the importance of appraising alleged judicial conduct objectively rather than subjectively." *Id.* at 281, 515 P.2d at 8, 110 Cal. Rptr. at 208. The Court of Appeals of Maryland has applied a reasonable person standard, which is somewhat objective, for determining the effect of a judge's conduct on the public. *See In re* Foster, 271 Md. 449, 469, 318 A.2d 523, 533 (1974).

97. *See In re* Karns, No. 80-CC-4, 1, 5 (Ill. Cts. Comm'n Dec. 17, 1982) (inherently vague ethical restrictions require case-by-case analysis to determine violation); *In re* Diener, 268 Md. 659, 733, 304 A.2d 587, 624-25 (1973) (Barnes, J., dissenting) (whether "conduct [is] prejudicial to the proper administration of justice" requires case-by-case factual determinations), *cert. denied,* 415 U.S. 989 (1974).

98. 268 Md. 659, 304 A.2d 587, (1973), *cert. denied,* 415 U.S. 989 (1974).

99. *Id.* at 671, 304 A.2d at 594. Justice Barnes argued that the majority had left dangling the meaning of the phrase "conduct prejudicial . . . ," and he argued for a more precise definition. *Id.* at 733, 304 A.2d at 624-25 (Barnes, J., dissenting).

100. 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973), *cert. denied,* 417 U.S. 932 (1977).

101. *Id.* at 284, 515 P.2d at 9, 110 Cal. Rptr. at 209.

102. *See supra* note 93 and accompanying text.

Courts have repeatedly rejected challenges to ethical codes of conduct on due process and vagueness grounds.[103] Likewise, courts have rejected first amendment challenges to the Code as violating a judges speech and associational rights.[104] In summary, the Code regulates conduct which shakes public confidence in the judiciary and thereby threatens judicial independence. The Code achieves this by regulating both actual and apparent impropriety. Given the flexible nature of the Code, its value as a guide to behavior lies in its application to specific instances of controversial conduct and the standards that can be fairly derived from factually specific decisions.

IV. JUDICIAL DISCIPLINE FOR INVOLVEMENT IN CONTROVERSIAL TOPICS

Little guidance can be gleaned from the cases in which a judge is disciplined for public comment. A pre-Code case from Florida, *In re Kelly*,[105] is representative of the risk of discipline a controversial judge may encounter. Judge Kelly, the presiding judge of Florida's Sixth Judicial Circuit, instituted immediate and massive reforms in circuit court procedures. The other circuit judges objected to the reforms and Judge Kelly ultimately resigned under their concerted pressure.[106] Judge Kelly then filed a petition with the Clerk of the Court which contained "suggested court reforms and criticism of court administration," and publicized his actions through press releases and other public commentary.[107] The Florida Supreme Court publicly reprimanded Judge Kelly for "conduct unbecoming a member of the judiciary."[108]

The discipline in *Kelly* could easily have fallen within the ambit of Canons 1 and 2 of the Code which are simply more comprehensively written analogs of the standard Judge Kelly violated.[109] The court characterized Judge Kelly's actions as an "effort to pamper the public" and "bolster his public image at the expense of the judiciary."[110] Chief Justice Ervin, dissenting, rejected

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103. The standards are "[no] more nebulous or less objective than the reasonable and prudent man test which has been part of our negligence law for centuries." *In re* Foster, 271 Md. 449, 476, 318 A.2d 523, 537 (1974).

104. *See* Babineaux v. Judiciary Comm'n, 341 So. 2d 396, 402 (La. 1976) (restrictions on associational rights reasonably necessary to meet state interest); *In re* Rome, 218 Kan. 198, 542 P.2d 676 (1975) (judge's right to speak freely is circumscribed by the Code). *But cf. In re* Stevens, 31 Cal. 3d 403, 645 P.2d 99, 183 Cal. Rptr. 48 (1982) (Mosk, J., dissenting) (judicial discipline should not trammel speech rights). *See also* Mosk & Fortier, *Should Judges Speak Out? Yes/No*, 24 JUDGES J. 42 (Summer 1985) (authors express their opposing views as to judicial free speech). The Code and other limitations on political speech in judicial election campaigns have engendered first amendment challenges. *See generally* Ashman, *supra* note 9; Comment, *First Amendment Rights of Judges in Judicial Election Campaigns*, 47 OHIO ST. L.J. 201 (1986).

105. 238 So. 2d 565 (Fla. 1970).

106. *Id.* at 567.

107. *Id.*

108. *Id.* at 574.

109. *See supra* note 93 and accompanying text.

110. 238 So. 2d at 566.

the majority's contention that Judge Kelly's actions were motivated by personal vanity.[111] Justice Ervin argued that Judge Kelly had the right, if not the duty, to criticize perceived deficiencies in the court system.[112] The Chief Justice concluded that the public would suffer if judges must restrict their comments to "uncritical banalities," that the decision trammeled first amendment rights, and would lead to a "timorous lot of judges lacking independence . . . ."[113] Had the Code been in effect, the conduct may have been condoned under Canon 4(a) as activities to improve the administration of justice. However, consistent with the court's opinion, Judge Kelly's "unbecoming conduct" would still violate the general standards of Canons 1 and 2, such that Canon 4 would probably have been of no avail to him.

In *In re Bonin,*[114] the Supreme Judicial Court of Massachusetts suspended and censured Chief Judge Bonin of the Massachusetts Superior Court following his attendance at a controversial public lecture.[115] Gore Vidal was the featured speaker of the lecture entitled "Sex and Politics in Massachusetts."[116] Proceeds from ticket sales were to benefit a group of criminal defendants indicted for their alleged involvement with an illicit homosexual sex ring.[117] The cases were then pending before the superior court, but not before Judge Bonin.[118] Judge Bonin was photographed after the lectures with Gore Vidal and the newspapers ran the following headline with the photograph, "Bonin at benefit for sex defendants."[119]

The Supreme Judicial Court of Massachusetts stated that Judge Bonin violated Canon 2(A) in that his conduct impugned public confidence in the integrity and impartiality of the judiciary. In addition, Judge Bonin's conduct violated Canon 5(B) since his extrajudicial activities reflected adversely on his impartiality through his exposure to "one-sided statements and argumentation on matters before his court."[120] The court noted that ordinarily, a judge would be free to attend a public lecture on such topics, but this situation was distinguishable since the cases were pending before his (the superior) court.[121]

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111. *Id.* at 575 (Ervin, J., dissenting).

112. *Id.* at 577.

113. *Id.*

114. 375 Mass. 680, 378 N.E.2d 669 (1978).

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

116. *Id.* at 685, 378 N.E.2d at 672.

117. *Id.* at 687, 378 N.E.2d at 673.

118. *Id.* at 685, 378 N.E.2d at 672.

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

120. *Id.* at 707, 378 N.E.2d at 683. Service on behalf of civic and charitable activities are permitted under Canon 5(B), but Canon 5(B)(1) admonishes, "[A] judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court." CODE, *supra* note 2, Canon 5(B). It would take a stretch of logic to find that Judge Bonin's attendance at the lecture was service on behalf of a civic or charitable organization within the prohibition of Canon 5(B)(1). *Cf. infra* note 122.

121. 375 Mass. at 708, 378 N.E.2d at 683.

In retrospect, Judge Bonin probably should have chosen a less controversial course of conduct, but his censure has been criticized as an extension of "caution beyond the point of reasonable application."[122] Judge Bonin's public association with a controversial topic—homosexuality—was apparently enough to shake public confidence in his impartiality. Judge Bonin's short tenure as Chief Judge has also been attributed to his proposed court reforms.[123] As Sidney Blumenthal observed, Judge Bonin's career was shortened because he "had stumbled into a maze of political ambitions, petty privileges, cronyism, homosexual indictments and media sensationalism."[124] His proposed reforms were relatively mild, but they threatened many political interests.[125] Regardless of the justifications offered, this case clearly demonstrates the potential of the Code as a basis for discipline of controversial conduct.

The *Bonin* and *Kelly* cases demonstrate how the Code and similar restrictions on judicial propriety can be employed to discipline controversial judges. The only discernable standard in these cases is that judges associated with controversies lessen the public's confidence in the judiciary. The concern with controversial conduct has led to the use of the Code to prevent judges from expressing views on politically charged issues. Although many off-bench activities may embroil a judge in controversy, politically oriented off-bench activities are perhaps the most problematical.[126]

A. Judicial Involvement In Political Issues

A judge may run afoul of permissible judicial activity through involvement with politically charged issues. Canon 4 allows judges to speak, write, teach,

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122. Lubet, *supra* note 25, at 1006. Lubet observes that the *Bonin* court relied on the fact that Judge Bonin's attendance at the meeting entrenched on matters pending before his court in violation of Canon 3(A)(6). Lubet further notes that abstention was unnecessary since Judge Bonin had not "commented" on pending matters, at least in the usual sense of the word. Additionally, the cases to which the meeting was directed were not scheduled to come before Judge Bonin. The attendance at the meeting may have led some members of the public to infer that he supported the criminal defendant's cause, but it may just as well have been motivated by curiosity or interest in the speaker, Gore Vidal. *Id.*

123. Blumenthal, *There Goes The Judge,* 7 STUD. LAW. 21, 51 (Nov. 1978). Bonin ordered court house workers, patronage employees, to change their long entrenched work habits. *Id.* at 23. The greatest threat posed by Bonin was the change in procedures that had allowed the District Attorney control over the assignment of judges and scheduling of cases, a power which Bonin threatened. *Id.* at 21-23.

124. *Id.* at 21. Blumenthal chronicles the incidents and political maneuverings that accompanied Judge Bonin's rapid rise and fall in public service. "Bonin's overriding offense was being an outsider in a system tightly controlled by insiders." *Id.* at 51.

125. *Id.* at 51.

126. The debate over the legislative lobbying and other political intrigues of the late Justices Brandeis and Frankfurter exemplifies the controversial nature of judicial involvement in politics. *See* B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION (1982); Murphy, *Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter,* 69 GEO. L.J. 101 (1980) (includes discussion of political activities of Justices Fortas and Burger); Nathanson, *The Extra-judicial Activities of Supreme Court Justices: Where Should The Line Be Drawn?* (Book Review), 78 NW. U.L. REV. 494 (1983); Dalton, *Off the Bench and Into the Mire: Judging Extrajudicial Behavior* (Book Review), 91 YALE L.J. 1708 (1982).

and participate in legally related activities as long as the judge's ability to decide cases impartially is not impaired.[127] Canon 5(A) allows the same activities with respect to nonlegal topics so long as such involvement does not interfere with the dignity of the court, entrench on judicial duties, or present potential for disqualification from cases that may come before the judge.[128]

Despite these provisions which allow for judicial community involvement, Pennsylvania Common Pleas Judge Lisa Richette was advised by the Pennsylvania Judicial Inquiry and Review Board not to make her planned speech on the legal system in Nicaragua at a lawyer's forum on U.S. Central American policy.[129] The Board's director stated that although the judicial Canons did not prohibit such speech, Board guidelines discouraged judges from speaking on controversial topics.[130] Judge Richette's speech arguably fell outside of Canon 4 since it did not directly concern the American legal system. However, such an interpretation would effectively encompass any comparative and international legal issues. It could be argued that the speech was outside Canon 5 as well since speeches on controversial topics may "detract from the dignity of [her] office . . . ."[131] Finally, the speech may have fallen within the prohibition of political activities under Canon 7(A)(4).[132] However, none of these provisions fits the activity involved so as to provide a guide to other judges. Ultimately, the director's comments display a disregard for whatever free speech rights a judge may have.[133] On the other hand, the Pennsylvania Board's order characterizes the position of many judicial disciplinary commissions which may otherwise rely on vague notions of propriety and impartiality to obscure the basis of their decisions.[134]

The controversy over District of Columbia Circuit Court Judge Abner Mikva's activities on behalf of the American Bar Association's Individual Rights and Responsibilities section further demonstrates the inherent difficulty in applying the Code to quasi-political activity.[135] The Washington

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127. CODE, *supra* note 2, Canon 4(A). *See generally* Tate, *The Propriety of Off-Bench Judicial Writing or Speaking on Legal or Quasi-Legal Issues,* 3 J. LEGAL PROF. 17 (1978) (examining pros and cons of off-bench commentary and how it can be effectively employed to affect changes that could not be easily done in an official capacity due to the limitations inherent in official court opinions).

128. CODE, *supra* note 2, Canon 5(A).

129. *Her Talk Blocked, Judge Ponders Suit,* Nat'l L.J., Nov. 12, 1984, at 3, col. 3.

130. *Id.*

131. *See supra* note 88 and accompanying text.

132. *See infra* note 150.

133. The City Council of Philadelphia passed a resolution asking the Board to rescind its "order" and stated that "judges are not excluded from First Amendment rights guaranteed in our Constitution, nor should the public be deprived of hearing important information." Nat'l L.J., Nov. 12, 1984, at 3, col. 3. *See In re* Kelly, 238 So. 2d 565, 577 (Fla. 1970) (Ervin, J., dissenting) (judicial discipline should not censor free speech on matters of public concern).

134. *See infra* notes 185-201 and accompanying text.

135. Judge Mikva's off-bench activities and the charges of judicial misconduct filed against him prompted a debate over the differing treatment of "liberal" judges like Mikva, and the

Legal Foundation[136] filed a complaint which alleged that Judge Mikva's activities as chairman of the ABA section "compromise the appearance of his impartiality by identifying him with the controversial aims of the section."[137] The Council's decision noted that chairmanship of bar association committees is encouraged under Canon 4(C),[138] but advised that the judge should terminate his involvement with the section's recruitment efforts.[139]

Judge Mikva characterized his recruitment efforts as being "exactly modeled on a political campaign," and as "a battle for the soul of the American Bar Association."[140] Judge Mikva sought to recruit women, minority, and politically liberal lawyers into the bar organization.[141] Although the Council determined that Judge Mikva did not violate the Code, he voluntarily ceased his recruitment efforts, and pledged to abide by the recommendations of the Advisory Committee on Codes of Conduct.[142] Ultimately, the Committee was unable, for lack of full information, to determine whether or not Judge Mikva might appropriately continue as chairman or engage in the contested activities.[143]

Significantly, the *Mikva* case demonstrates how the Code may be employed by special interest groups to challenge a controversial judge's off-bench activities. Merely by filing a complaint, a judge may be threatened with sanctions and discipline, and perhaps be unjustly intimidated where no actual impropriety has been demonstrated. Even if Judge Mikva's activities were characterized as political, they may have been permissible under Canon 7(A)(4) which allows political activity directed toward legal reform.[144] Judge Mikva's off-bench conduct could be viewed as an honorable effort to improve

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scrutiny to which "conservative" judicial nominees to the federal bench had been subjected. *See An Apology,* Wall St. J., Aug. 12, f986, at 28, col. 1; *Asides,* Wall St. J., July 17, 1986, at 24, col. 1; *Judicial Restraint,* Wall St. J., July 11, 1986, at 20, col. 1; *A U.S. Judge's Campaign for the "Soul" of the ABA,"* Nat'l L.J., Oct. 28, 1985, at 1, col. 1 [hereinafter *Judge's Campaign*].

136. The Washington Legal Foundation (WLF) has been characterized as "ultra-conservative." *Judge Mikva and the ABA,* Wall St. J., Aug. 12, 1986, at 29, col. 1. In 1985, the WLF brought a suit against the ABA for its role in passing on judicial qualifications. The WLF alleged that this role was being abused to block the placement of "conservative" judges on the federal bench. *Id.*

137. *In re* A Charge of Judicial Misconduct or Disability, Judge Abner Mikva, No. 86-2 (Jud. Coun. D.C. Cir. June 26, 1986).

138. *Id.* at n.2."The judge must of course avoid any involvement that might place his impartiality in doubt." *Id.* (quoting E.W. THODE, *supra* note 4, at 76).

139. *In re* A Charge of Judicial Misconduct or Disability, Judge Abner Mikva, No. 86-2 (Jud. Coun. D.C. Cir. June 26, 1986). The decision does not indicate the basis of this advisement beyond the fact that the Advisory Committee on Codes of Conduct recommended it.

140. *Judge's Campaign, supra* note 135.

141. *Id.*

142. *In re* A Charge of Judicial Misconduct or Disability, Judge Abner Mikva, No. 86-2 (Jud. Coun. D.C. Cir. June 26, 1986).

143. *Id.*

144. *See infra* notes 162-72 and accompanying text.

the legal system.[145] On the other hand, as former Supreme Court Chief Justice Stone once warned, "[G]ossip about political activities within the Court . . . is injurious to the Court . . . ."[146] Canon 7 is the Code's attempt to limit judicial involvement in political issues and reflects a bias toward Justice Stone's philosophy.[147]

B. Recent Off-Bench Involvement In Political Issues—Two Opposing Views

Most of Canon 7's provisions[148] and the Reporter's Notes[149] are directed toward partisan political activities. Canon 7 apparently bans all political activity outside of that necessary to gain election to judicial office.[150] However, Canon 7(A)(4) provides an exception, analogous to Canon 4,[151] which encourages limited "political" activity.[152] Two recent cases have taken widely divergent approaches to nonpartisan political activity under Canon 7. In *In re Norma Randolph,*[153] the New Jersey Supreme Court held that not only partisan activity, but any issue-oriented activity was impermissible under Canon 7.[154] However, in *In re Staples,*[155] the Washington Supreme Court interpreted Canon 7(A)(4) such that only partisan political activities were prohibited.[156] These two courts' interpretations obviously are at odds with

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145. As Justice Holmes once stated: "[L]aw is the business to which my life is devoted, and I should show less than devotion if I did not do what lies in me to improve it." O.W. HOLMES, COLLECTED LEGAL PAPERS 167, 194 (1920).

146. Mason, *Extrajudicial Work for Judges: The Views of Chief Justice Stone,* 67 HARV. L. REV. 193, 195 (1953) (quoting Letter to William Allen White, Dec. 1939). Justice Stone continued: "[W]hen that occurs, everything the victim does or writes becomes suspect, and the institution . . . is damaged in its reputation and influence." *Id.*

147. *See* E.W. THODE, *supra* note 4, at 97.

148. CODE, *supra* note 2, Canon 7.

149. *See* E.W. THODE, supra note 4, at 95-100; *supra* note 44. *See also In re* Hayden, 41 N.J. 443, 197 A.2d 353 (1964) (any partisan political activity raises suspicions about judge's impartiality).

150. CODE, *supra* note 2. Canon 7(A)(4) reads as follows:

> A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

Canon 5(B) warns judges to refrain from civic and charitable activities where the organization is conducted for the political advantage of its members. The commentary to Canon 5(B) warns that a judge should not affiliate with organizations which make policy decisions that may have political significance. CODE, *supra* note 2, Canon 5.

151. *See* Canon 4, *supra* note 32.

152. Canon 7(A)(3) of the Code of Judicial Conduct for United States Judges is the federal counterpart to the Model Code's Canon 7(A)(4). It explicitly states that a judge should refrain from political activity, "provided, however, this should not prevent a judge from engaging in the activities described in Canon 4." *Id.*

153. 101 N.J. 425, 502 A.2d 533, *cert. denied,* Randolph v. Supreme Court of New Jersey, 106 S. Ct. 2289 (1986).

154. *Id.* at 437, 502 A.2d at 539.

155. 105 Wash. 2d 905, 719 P.2d 558 (1986).

156. *Id.* at 910, 719 P.2d at 561.

one another and present judges with a dilemma in states where the extent of permissible political activity is still open to interpretation.

The New Jersey Supreme Court adheres to the position that Canon 7 should be vigorously enforced and every precaution must be taken to assure the separation of judges from either direct or indirect political activity.[157] In *Randolph,*[158] the New Jersey Supreme Court upheld a ban on membership in both governmental and private organizations which advocate or support social, political, or legislative issues. Although the case involved the activities of a court attendant, the court stated that the appearance of neutrality it sought to maintain applied to judges as well as all court personnel.[159] Ms. Randolph was a member of a county health board, a youth guidance council, a citizens group,[160] a homeowners association, and the NAACP.[161] The court held that all of the activities violated the ban on political activity since they posed: "A realistic likelihood of (1) involving judicial activities in important and recurring public issues that are frequently the subject of political controversy; (2) giving the impression of judicial involvement in those issues; and (3) creating the appearance of . . . impartiality . . . ."[162]

In justifying its decision, the *Randolph* court relied on restrictions on governmental employee speech,[163] the separation of powers doctrine,[164] and

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157. *See, e.g., In re* Gaulkin, 69 N.J. 185, 351 A.2d 740 (1976) (relaxing previous total ban on political activities of judges' spouses).

158. 101 N.J. 425, 502 A.2d 533.

159. *Id.* at 437, 502 A.2d at 539. New Jersey Supreme Court Rule 1:17-1 bans judges and most court personnel from other elective office or political activity. *Id.* at 434-35, 502 A.2d at 538.

160. The *Randolph* court noted that these organizations were created by statutory authority and that although none actually endorsed political candidates or engaged in partisan politics, all were "deeply involved in the political activity of the community." *Id.* at 442-43, 502 A.2d at 542.

161. *Id.* at 445, 502 A.2d at 544. The *Randolph* court noted that service with community groups posed a likelihood for political conflict between competing community groups for scarce public funds, and the NAACP's concern with civil rights and related matters placed her in the midst of significant political and legislative controversies. *Id.* at 445-50, 502 A.2d at 544-46.

162. *Id.* at 427-28, 502 A.2d at 534.

163. The *Randolph* court reviewed U.S. Supreme Court decisions allowing restrictions on government employee speech, and observed that they would balance the employee's free speech rights against the substantial interest of the judiciary in operating without disruption. *Id.* at 430-33, 502 A.2d at 535-37.

164. The *Randolph* court noted:

> That 'the complete independence of the courts is peculiarly essential in a limited Constitution.' THE FEDERALIST No.. 78, at 484 (A. Hamilton) (H. Lodge ed. 1888); that any 'lessening [of] the independence of the judiciary [attacks] . . . the democratic republic itself.' A. de Tocqueville, DEMOCRACY IN AMERICA 289 (Vintage Books 1945) . . . . The judiciary seeks to advance these governmental interests by its rule proscribing political activities by judicial employees.

Id. at 435-36, 502 A.2d at 538. *See* Rifkind, *The Public Concern in a Judge's Private Life,* 19 U. CHI. L. SCH. CONF. SER. 25, 26 (1964) (special relationship between public and judge is a source of stability in a democratic society).

the overriding concern for an independent judiciary.[165] The *Randolph* court reasoned that there is more to politics than partisan political activity. The court noted that advocate organizations play a vital role in the exercise of political power, and political activity includes activity supporting opposing sides of social, political, or legislative issues. Consequently, issue activity so defined is political activity.[166]

The court further stated that it was not imposing a blanket ban on civic and charitable activities.[167] It observed that the holding did apply to the same type of activities permitted by Canon 5(B).[168] The position adopted by the New Jersey Supreme Court leaves little doubt as to the scope of Canon 7(A)(4)—a ban on all off-bench activities on behalf of organizations which support an identifiable viewpoint on matters of public concern.

In *In re Staples,*[169] the Washington Supreme Court took an expansive view of the political activities allowed by Canon 7(A)(4).[170] The court held that Canon 7(A)(4) applied only to partisan political activity, and not to non-partisan, civic-minded political activity.[171] In *Staples,* a judge circulated

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165. "This concern for an independent judiciary is at the heart of the American legal system." 101 N.J. 425, 433, 502 A.2d 533, 537. *See* Canon 1, *supra* note 4.

166. 101 N.J. at 436, 502 A.2d at 539.

167. *Id.* at 455, 502 A.2d at 549. Justice Garibaldi argued that the majority's broad classification of political activity was an effectual ban on any civic involvement. *Id.* at 465, 502 A.2d at 554 (Garibaldi, J., dissenting).

The New Hampshire Supreme Court issued an advisory opinion whose reasoning parallels the *Randolph* court's position regarding civic and charitable activities. A part-time New Hampshire judge was advised that membership on the Steering Committee of Common Cause of New Hampshire should not be accepted. The court noted that the activity in question may not reflect adversely on the judge's impartiality or interfere with his judicial duties. But, the court also noted that the activities of the organization were "arguably political," and the organization did engage in court proceedings which would therefore violate Canon 5(B). *New Hampshire Advisory Opinion,* Dec. 12, 1985, 12 N.H.L.W., Jan. 1, 1986, at 375, col. 3. The most significant portion of the opinion stated that Canons 1 and 2 would be violated by "[p]articipation in a policy-making role in a quasi-political organization [since it] could reduce public confidence in a judge." *Id.*

168. 101 N.J. 425, 436-37, 502 A.2d 533, 539. The court extended Canon 5(B)'s ban on extrajudicial activities which are "conducted for the . . . political advantage of its members," to organizations advocating issues that may come before a court. *Id.* at 437, 502 A.2d at 539.

169. 105 Wash. 2d 905, 719 P.2d 558 (1986). The *Staples* court noted that, to its knowledge, no other jurisdiction had yet defined the scope of permissible political activity directed toward the law, the legal system, or the administration of justice. *Id.* at 909, 719 P.2d at 561. In *In re* Davis, 249 Ga. 248, 291 S.E.2d 547 (1982), a justice of the peace claimed that his participation in a recall movement and mayoral election were excused under Canon 7(A)(4) since he was acting in the city's best interests. The Georgia Supreme Court rejected this claim.

170. The *Staples* court rejected the Judicial Qualifications Commission's narrow reading of "administration of justice" as including only measures directly related to court procedures and rules. 105 Wash. 2d at 909-10, 719 P.2d at 561. The Commission also relied on its conclusion that Judge Staples's claim, that the county seat had to be moved to avoid a constitutional conflict, was invalid. The Washington Supreme Court did not decide the validity of this claim, but instead relied on the public benefit from a better functioning court system that Judge Staples's efforts could have yielded. *Id.*

171. *Id.*

petitions, made campaign speeches, organized a committee, and ran newspaper advertisements in a highly visible and controversial effort to move the county seat.[172] The *Staples* court held that the concededly political activity fell within the 7(A)(4) exception to the general prohibition of political activity.[173]

The *Staples* court based its decision in part on the lack of conflict with the three purposes behind Canon 7's general ban on political activity.[174] The court noted that Judge Staples' activities had not otherwise impaired his performance of judicial duties.[175] The court then summarily dismissed the possibility that actual bias or apparent bias might result, or that the court's esteem was threatened. The court stated that such dangers simply do not exist where civic-minded nonpartisan activities are involved.[176] The court also acknowledged that a judge does not lose his rights as a citizen by assuming the bench,[177] concluding that a narrow interpretation of Canon 7(A)(4) would chill the efforts of individuals who are best suited to improve the judicial system.[178]

The *Staples* decision may later prove to be limited to its particular facts, but it stands as a well reasoned decision that establishes criteria by which to judge judicial political activity. The decision does not address controversial judicial conduct generally, nor can it fairly be extended to all issue-oriented activity by judges. However, the court's decision is a departure from many other cases in that it credits the public's ability to discern proper from improper behavior.

It is difficult to reconcile the *Staples* decision with the *Randolph* court's holding. The two cases represent disparate approaches to off-bench conduct. The Washington Supreme Court trusts that the public's perception of an impartial judiciary is threatened only where a judge is involved in partisan

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172. *Id.* at 906-07, 719 P.2d at 559-60. The circumstances which led to the effort to move the county seat were the existence of two duplicative court facilities, an old building at the county seat, and a new facility in another town. The court predominantly used the new facility, although the older facility was the "proper" courthouse. *Id.*

173. *Id.* at 910-11, 719 P.2d at 561.

174. Those purposes the court recognized are:

> (1) participation in outside activities so extensive that the time and energy available for the primary obligation are measurably impaired; (2) participation in . . . activities that may lead to actual bias or the appearance of prejudgment of issues likely to come before the court; and (3) actions that impair the dignity and esteem [of] the court . . . .

Id. (citations omitted).

175. *Id.*

176. *Id.*

177. *Id.* The court also noted that judges were specifically granted authority under the Code to engage in limited political activity, and if they could not, the benefits to legal reform would be lost. *Id.*

178. *Id.* at 912, 719 P.2d at 562. In conclusion, the *Staples* court alluded to the full history of judicial involvement in what, for lack of a better term, could broadly be defined as the administration of justice. *Id.*

politics. Consequently, a judge enjoys appreciable latitude of discretion in off-bench speech and associational activities. On the other hand, the New Jersey Supreme Court appears wary of any activity that may be even remotely connected with politics or controversial political issues. As a result of this posture, the *Randolph* court granted little credit to the public's ability to evaluate the propriety of judicial off-bench activities and imposed severe restrictions on judicial conduct. However, the *Randolph* decision reflects the general assumption that controversial conduct must adversely affect public confidence in the judiciary.

V. The Effect Of Judicial Discipline Based Upon Ill-Defined Standards

Courts which have disciplined judges for controversial or issue-oriented activities may have gone too far in the direction of a presumption of partiality.[179] This assumption of partiality has led to interpretations of the Code which severely restrict a judge's off-bench life. The goals of maintaining the appearance of impartiality and public confidence in the judiciary seem to have taken precedence over other considerations. Scant attention is paid to whether or not off-bench activities actually interfere with official duties or exploit the judicial office.[180] It is also noteworthy that none of the Code provisions explicitly prohibit a judge from making public statements on current issues.[181] Despite this fact, judges are, or apparently may be, disciplined for the appearance of partiality that their public conduct may convey.

Judicial discipline which relies solely on appearances may effectively isolate judges from society.[182] Judge Fuchsberg is not alone when he states that

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179. *See* Markey, *supra* note 1 and accompanying text. Markey argues that the Code and statutes should be revised so as to yield a salutary presumption of impartiality. *Id.* at 383.

180. The *Staples* court did consider whether Judge Staples had carried out his duties, but did not examine whether he had exploited his office. In Shilling v. State Comm'n on Judicial Conduct, 51 N.Y.2d 397, 401-03, 415 N.E.2d 900, 901-02, 434 N.Y.S.2d 909, 910-11 (1980), the court thought it was improper for a judge to announce that he was a judge when he sought, in his private capacity, to help a local animal shelter. The dissent thought the court relied too heavily on this factor, and that the majority's view would require judges to unnecessarily move about in a cloak of anonymity. *Id.* at 408, 415 N.E.2d at 905, 434 N.Y.S.2d at 914 (Fuchsberg, J., dissenting).

181. Volcansek, *supra* note 37, at 503. Volcansek evaluated a survey of Texas judges' attitudes toward off-bench activities taken both before and a few years after the Code was adopted in that state. She notes that the survey revealed the percentage of judges who thought speaking on public issues was prohibited nearly doubled in the two-year interim between the surveys. *Id.* Donald Hall, in a critical commentary on judicial discipline, asserts that public statements by judges advocating controversial viewpoints are inherently political. Hall, *supra* note 94, at 133.

182. *See* Markey, *supra* note 1, at 383. Judge Markey observes that the public is demanding greater judicial involvement in managing society, and less judicial involvement in society off-the-bench. *Id.* at 377. Jeffrey Shaman notes that too many restrictions on a judge's life will be like placing them in a monastery and will diminish their judicial ability. Shaman, *supra* note 63, at 24. *See also* Grossman, *A Political View of Judicial Ethics,* 9 San Diego L. Rev. 803, 809 (1972) (strict limits on off-bench activity reduces judicial vision and independence of judicial thought).

"[j]urists do not sit in isolated, cloistered, legal splendor, completely detached from responsibilities to the community . . . ."[183] Restrictions on off-bench involvement with topical, controversial issues raise a question as to whether or not judges enjoy any free speech or associational rights.

For example, Judge Bonin's discipline for attempting to inform himself about "contentious issues of social importance"[184] by merely attending a lecture offers little hope that judges may enjoy first amendment rights of association and speech.[185] Judge Bonin was censured in part because the court concluded that his conduct conveyed an appearance of impropriety, yet there was arguably no other violation of the Code.[186] Justice Baucher noted in his dissent in *Bonin,* that he would be reluctant to censure a judge solely because of an appearance of impropriety.[187] As Justice Baucher noted:

> The injunction of Canon 2 . . . must not be read to require that a judge cater to public misunderstanding or prejudice in his extrajudicial conduct. His duty to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism.[188]

Likewise, the order advising Judge Richette[189] not to speak on a controversial topic can only be justified if the public confidence is shaken through the expression of unpopular views by judges.[190] Finally, as the Judicial Council of the Sixth Circuit recently asserted, judicial independence is obliterated if discipline is based upon public disagreement or unhappiness with a judge's opinion, and discipline will not change the judge's opinions.[191]

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183. Shilling v. State Comm'n on Judicial Conduct, 51 N.Y.2d 397, 406, 415 N.E.2d 900, 904, 434 N.Y.S.2d 909, 913 (1980) (Fuchsberg, J., dissenting).

184. *In re* Bonin, 375 Mass. 680, 707, 378 N.E.2d 669, 683 (1978).

185. Lubet, *supra* note 25, at 1005-06.

186. *See supra* notes 114-25 and accompanying text.

187. 375 Mass. 680, 729, 378 N.E.2d 669, 693 (1978) (Braucher, J., concurring).

188. *Id.* at 730, 378 N.E.2d at 694.

189. *See supra* notes 129-34 and accompanying text.

190. Judge Richette's speech should have been permissible under Canon 4 since it was directly related to legal issues facing the legal system in Nicaragua. Under Canon 5(A), her speech would have been unlikely to foster doubts about her impartiality in cases likely to come before her court, since it is unlikely she would ever face the issue. Finally, a speech given on her own time could hardly have entrenched on her official duties. Obviously, no Code or similar provisions were in danger of being violated. The only prohibitions the speech could have violated are those restrictions on political activity. Of course, one must accept controversial or topical issues as inherently political to prohibit her speech on this basis.

191. *In re* Complaints of Judicial Misconduct, Nos. 84-6-372-08, 84-6-372-10 (6th Cir. Jud. Coun. Mar. 11, 1985). *See generally* Lubet, *supra* note 25, at 999-1002 (analysis of the case and Judge Feikens' statements in light of treatment afforded cases involving racial epithets). Since the controversy over Judge Feikens' statements to the press which prompted the complaints to the Sixth Circuit Judicial Council, his impartiality has been unsuccessfully challenged on at least two occasions. *See In re* City of Detroit, Detroit Water and Sewerage Dep't, 828 F.2d 1160 (6th Cir. 1987) (upholding Judge Feikens' refusal to disqualify himself in pending cases which involved same litigants who were the subject of his off-bench statements in the earlier

Steven Lubet, professor of law at Northwestern University and a critic of judicial discipline, has argued that the regulation of conduct to maintain appearances must be balanced against a judge's legitimate right to expression and freedom of association.[192] This involves balancing the risk of a narrow and unresponsive judiciary against any possible erosion of public confidence.[193] It has been noted that the correlation between a judge's private behavior and the public's confidence have only a facial relationship because no scientific or statistical data support any direct correlation between the two.[194] Similarly, evaluation of public reaction to judicial conduct is a highly subjective exercise which should be carefully undertaken.[195]

In spite of the difficulty in assessing the effect of particular conduct on the public confidence in the judiciary, courts continue to assume a detrimental effect where none has been shown. In *In re La Motte,*[196] the Florida Supreme Court disciplined a judge for conduct which *should* have eroded public confidence, regardless of any actual loss of public confidence.[197] In a similar vein, the Maryland Supreme Court has espoused a "we will know it when we see it approach" to judicial misconduct.[198] In *In re Stevens,*[199] the California Supreme Court censured a judge for his repeated use of racial slurs and offensive language off-the-bench.[200] The majority in *Stevens* noted that a public perception of bias, whether or not it affected the court's judgments, prejudiced the administration of justice.[201] In his dissent, Justice

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complaints to the Judicial Council); Duke v. Pfizer, Inc., United Div. of Pfizer Hospital Prods. Group, 668 F. Supp. 1031 (1987) (denying motion for new trial where members of firm representing defendant had testified on behalf of Judge Feikens at disciplinary hearing). These recent challenges to Judge Feikens' impartiality demonstrate the risk of a loss of judicial independence attendant upon even an unsuccessful complaint of misconduct.

192. Lubet, *supra* note 25, at 1007. Jeffrey Shaman, professor of law at DePaul University College of Law and Director of the Center for Judicial Conduct Organizations of the American Judicature Society, warns that:

> [R]estrictions upon a judge's freedom of speech should not be pushed too far. There is little value in prohibiting judges from speaking when they cannot-and should not-be prohibited from thinking. And there is much to be lost if judges are precluded from participating in matters of public concern.

Shaman, *supra* note 63, at 25. *See also* Mosk, *Judges Have First Amendment Rights,* 2 CAL. LAW. 30 (Oct. 1982) (judges must be free to speak no matter how distasteful that speech may be).

193. Lubet, *supra* note 25, at 1007.

194. *See* Martineau, *supra* note 26, at 245; Hall, *supra* note 94, at 149.

195. Federal District Judge Frank Battisti charges that what passes for legitimate standards are merely arbitrary, personal, or vague notions. Battisti, *supra* note 48, at 360.

196. 341 So. 2d 513 (Fla. 1977).

197. *Id.* at 518 (emphasis added).

198. *In re* Diener, 268 Md. 659, 671, 304 A.2d 587, 594 (1973), *cert. denied,* 415 U.S. 989 (1974). *See also* text accompanying note 99.

199. 31 Cal. 3d 403, 645 P.2d 99, 183 Cal. Rptr. 48 (1982).

200. *Id.* at 403-04, 645 P.2d at 99-100, 183 Cal. Rptr. at 48-49.

201. *Id.* at 405, 645 P.2d at 100, 183 Cal. Rptr. at 49 (Kaus, J., concurring). The court's standard is essentially the same as that established in Canon 2 of the Code. *See* Lubet, *supra* note 25, at 1001-02.

Mosk agreed that the language was offensive, but argued that the censure was based upon the disciplinary commission's "self-determined standard of appropriate taste and style in language."[202]

The majority's position in *Stevens* may be irrefutable where racial slurs are involved, but can the court's public perception rationale be extended to encompass statements of opinion on controversial issues? Surely, *some* minority could take offense with a judge's public stance on abortion, court reform, or foreign policy. If for the sake of appearances courts prohibit off-bench activities involving these topics, can the public then be assured that a judge is impartial?[203] Finally, prohibiting off-bench expression on topical, controversial, or political issues deprives the public of a means of assessing the quality and viewpoints of the judges that are entrusted to guard individual rights.[204] Judge Battisti has argued that what passes for legitimate standards—appearances—are actually arbitrary, vague, or personal notions.[205] He concludes that judges can only be fairly judged on their work.[206]

The Code tends to support the perpetuation of a nonpolitical image of judges.[207] In light of this image, Professor Dalton argues that the free reign given to law related activities, as opposed to issue-oriented extrajudicial activities, is unjustified. Dalton views both types of activity as political and entailing the same risks.[208] Dalton's observation that law related activities permissible under Canon 4 (and Canon 7(A)(4)) can be issue-oriented and politically controversial is borne out by the *Mikva,*[209] *Richette,*[210] and *Staples*[211] cases, and would probably be consistent with the *Randolph* case.[212]

For instance, a judge's law review article evaluating the uneven imposition of the death penalty and concluding that it should be consistently imposed

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202. 31 Cal. 3d at 407, 645 P.2d at 101, 183 Cal. Rptr. at 50 (Mosk, J., dissenting).

203. *See In re* Complaints of Judicial Misconduct, Nos. 84-6-372-08, 84-6-372-10 at 2 (6th Cir. Jud. Coun. Mar. 11, 1985).

204. Judge Alarcon of the Ninth Circuit Court of Appeals, finds the limitations on judicial expression particularly threatening in states where judges are still elected. A voter may decide incorrectly where the only information available to him is that presented by the media and decisions of great public interest. Alarcon, *Political Appointments and Judicial Independence - An Unreasonable Expectation,* 16 LOY. L.A.L. REV. 9, 13 (1983). Judges may also be the persons best suited to settle public issues that are hopelessly distorted and fractional. Dalton, *supra* note 79, at 1716.

205. Battisti, *supra* note 48, at 360.

206. *Id.*

207. Grossman, *supra* note 182, at 809. Judge Edwards of the D.C. Circuit Court argues that contrary to popular belief, judges do apply the law and not their own politics. He reasons that the confusion stems from the fact that judges are pulled into politics independent of their own will when they are called upon to decide controversial cases. Edwards, *supra* note 89, at 626-27.

208. Dalton, *supra* note 79, at 1721-22.

209. *See supra* notes 135-42 and accompanying text.

210. *See supra* notes 128-34 and accompanying text.

211. *See supra* notes 169-78 and accompanying text.

212. *See supra* notes 158-68 and accompanying text.

is no less controversial or political than a politician's campaign to repeal the same law. Although the judge who wrote the article should perhaps recuse himself from all later cases where it might be imposed, it is unlikely he would be required to do so.[213]

Why then should a judge be prohibited from participation in off-bench activities on other controversial issues, particularly in the unlikely event that he would need to later recuse himself? After all, judges are presumed to be able to apply the law. Judicial history is replete with instances where courts have applied the law although they did not agree with the result. Abstention from off-bench activities should only be required where a judge's impartiality could seriously be questioned, where he was neglecting his duties, or where he was attempting to further the interests of actual or potential litigants. The Code currently includes each of these as a basis for limiting off-bench conduct, but the application of an "appearances" standard to these considerations serves to extend the prohibitions well beyond the interest they attempt to protect.

VI. PROPOSED REFORMS

The following is a proposal to amend the Code so as to assure judicial independence and participation in societal affairs while retaining the requisite counterparts of accountability and public confidence.

> I. An independent judiciary should remain informed and responsive to community and legal goals so that a judge does not become isolated from the public he serves. (Insert as the last sentence of Canon 1).
> II. A judge is not required to sacrifice all speech and associational rights. However, a judge should evaluate any conduct addressed by other provisions of this Code and refrain from activities that may impinge upon his ability to fulfill his duties impartially. (Insert as last sentence of first paragraph of Commentary of Canon 2).
> III. Commentary: Although activities under Canons 4 and 5 may be issue-oriented, nothing in this Canon should be read to prohibit the activities condoned under those provisions. A judge should refrain from activities permitted under Canon 7(A)(4) that involve a judge in the practical administration of a political campaign. (Insert this Commentary after Canon 7(A)(4)).

The goal of Amendment I is to establish explicit recognition of the interest judges should have in societal affairs and the right of the public to keep abreast of the goals and attitudes of those entrusted with judicial office. The language is calculated to inform judges and judicial disciplinary agencies that off-bench activities need not necessarily threaten the independence of the judiciary. Finally, the amendment is an explicit recognition that an informed, involved judiciary can maintain its integrity.

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213. *See In re* Gridley, 417 So. 2d 950 (Fla. 1982) (judges required to follow law; expressing opinion contrary to law, inadvisable, but not impermissible); Judicial Inquiry Comm'n of West Virginia v. McGraw, 299 S.E.2d 872, 874 (W.Va. 1983) (noting the considerable body of law holding that judges are not disqualified because of off-bench expression of opinion on the law).

Amendment II adds to the first by recognizing that not all rights are sacrificed by judges. Ideally, the second sentence will lead to a more careful analysis of the actual effect of judicial activities on the public's trust and confidence. Another goal of the amendment is to direct attention to substantive violations of Canons 3 through 7, and properly limit Canon 2 so that judges are not punished or restricted merely to maintain appearances.

Amendment III serves to recognize the controversial and political nature of many activities permitted by the Code. It is impossible to completely separate all community or legal involvement from the political sphere. The final sentence of the amendment would effectively ban activities similar to those that Judge Staples engaged in[214]—organizing and conducting a political campaign, whether on behalf of the legal system or not. The purpose is to avoid the difficulty of keeping judges out of what the public would perceive as traditional partisan politics. However, a judge would still be free to advocate reforms, through other channels, that benefit the legal system.

Although it is difficult to refine ethical codes and avoid challenges and conflicts, the appearance of impropriety standard should be further defined. However, the definition of impropriety lies largely with the courts and judicial disciplinary commissions. The lack of adequate direction with regard to the propriety of judicial membership in organizations that practice discrimination led the ABA to amend the Model Code in August of 1985.[215] The Commentary to Canon 2 now states that it is inappropriate to belong to organizations that invidiously discriminate, but in a classic case of fence-straddling, it leaves membership in such organizations to individual discretion.[216]

Any amendments to the Code should avoid such "fencestradling" so as to be an effective and concrete guide to judges. Perhaps an addition to the Commentary could grant an exception for nonpartisan or civic-minded off-bench activities. Additionally, a recognition of the political role judges play, even outside of partisan politics, could be added. A reasonable person or community standard basis for evaluating judicial conduct could be adopted. Ultimately, any of these proposals must serve to remind judicial disciplinary boards of the balance of rights the Code should accomplish. None of these proposed changes will protect judges from discipline for merely being controversial, but it may go a long way toward influencing decisions.

CONCLUSION

The goal of the Code is to assure the integrity and independence of the courts. Maintaining the appearance of impartiality should bear some relation to actual impartiality. The adoption of the Code was a step in the right direction, but it needs to be amended so that society does not lose the benefit

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214. *See supra* notes 169-78 and accompanying text.

215. MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT 135 (amended Aug. 7, 1984).

216. Shaman, *supra* note 63, at 26.

of off-bench judicial participation in societal affairs. Further, the Code should reflect the idea that judges will not be susceptible to intimidation for exercising their first amendment rights.

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