JUDICIAL DISCIPLINE AND JUDICIAL INDEPENDENCE

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I

INTRODUCTION

This essay develops three related points. First, the friction between accountability and judicial independence occurs primarily at the state level, largely in consequence of disciplinary measures taken (or potentially taken) by state judicial conduct organizations. Second, there are significant areas of discipline—many of which are truly burdensome and some which are quite controversial—that have no palpable impact on judicial independence. Finally, judicial independence is most gravely threatened when judges face sanctions for "decisional conduct," which may be defined as discipline based upon the merits of a ruling.

II

DISCIPLINE, INDEPENDENCE, AND STATE COURTS

The question of judicial accountability and independence arises primarily in the context of state courts. Federal judges, however they might be criticized or berated, are protected by the Constitution's provision for life tenure during good behavior. Hence, even the most concerted political or editorial attack on a federal judge[1] cannot truly threaten the judge's independence. While Circuit Judicial Councils are now authorized to investigate complaints of judicial misconduct,[2] their disciplinary powers are narrowly circumscribed. When it comes to accountability, it is state judges—many of whom face the additional burden of running for retention or reelection—who must be concerned about threats to their independence.

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The author participated as either a consulting or testifying expert in a number of the cases discussed in this essay, including *Heiple*, *Broadman*, *Sanders*, and the anonymously decided Alaska matter.

1. The most notorious recent example involved the attacks on Judge Harold Baer of the Southern District of New York, following his decision to suppress evidence of more than 80 pounds of cocaine seized by New York City police officers. Robert Dole, then the Republican candidate for president, called for his impeachment; President Clinton, campaigning for reelection, responded that he might call for Judge Baer to resign. *See* Steven Lubet, *The Presidential Campaign Is Off to a Dirty Start*, NAT'L L.J., Apr. 22, 1996, at A23; Steven Lubet, *Judicial Independence and Independent Judges*, 25 HOFSTRA L. REV. 745, 747 (1997).

2. *See* 28 U.S.C. §§ 331, 332, 372, 604 (1994 & Supp. II 1996).

In 1960, California became the first state to establish a permanent commission charged with the regulation of judges' conduct.[3] By 1981, all fifty states and the District of Columbia had created judicial conduct organizations empowered to investigate, prosecute, and adjudicate allegations of judicial misbehavior.[4] Though the commissions vary widely in structure, composition, and procedure,[5] they are typically authorized either to recommend or impose sanctions on a continuum that extends from private reprimand to removal from office. Moreover, nearly every state has also adopted a version of the Model Code of Judicial Conduct,[6] which sets mandatory standards for both official and off-the-bench conduct.[7]

Both phenomena—the establishment of commissions and the promulgation of the Judicial Code—were motivated by a perceived need to increase the accountability of judges.[8] In this they have succeeded. State court judges are now subject to regulation of conduct involving the management of their personal finances,[9] civic and charitable activities,[10] public speaking or writing,[11] and social activity.[12] In recent years, judges have actually faced discipline for the use of racial slurs,[13] sexual harassment,[14] improper business activity,[15] fund raising,[16] offensive conduct,[17] and substance abuse.[18]

To be sure, judicial independence does not require absolute immunity, so it is hardly threatened when judges are called to account for personal transgressions. It is not controversial to expect judges to refrain from sexual assault, racial slurs, financial coercion, and similar conduct. No one worries that the independence of the judiciary is threatened by enforceable standards of dignity, respect for others, and non-exploitation of office.[19]

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3. JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS 7 (2d ed. 1995). New York and New Jersey had each taken steps to establish comparable bodies in 1947, but neither effort was immediately successful. *See id.*

4. *See id.*

5. *See id.* at 427-88.

6. MODEL CODE OF JUDICIAL CONDUCT (1990). A prior version of the Model Code was promulgated in 1972, superseding the 1924 CANONS OF JUDICIAL ETHICS.

7. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990) ("A judge shall perform the duties of judicial office impartially and diligently."); *id.* Canon 4 ("A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.").

8. *See* SHAMAN ET AL., *supra* note 3, at 7.

9. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4D (1990).

10. *See id.* Canon 4C.

11. *See id.* Canon 4B.

12. *See id.* Canons 2A, 2B, 2C & 4B.

13. *See* SHAMAN ET AL., *supra* note 3, at 318-20, 342-44.

14. *See id.* at 351-52.

15. *See id.* at 218-20.

16. *See id.* at 288-96.

17. *See id.* at 311-12.

18. *See id.* at 312-13.

19. There have been exceptions. California Supreme Court Justice Stanley Mosk once argued in dissent that a judge should not be disciplined for using racial slurs, lest the punishment interfere with the independence of the judiciary. *See In re* Stevens, 645 P.2d 99, 101 (Cal. 1982) (Mosk, J., dissenting). That view has found few adherents among either courts or commentators. *See* STEVEN LUBET,

III

JUDICIAL INDEPENDENCE IN THEORY AND PRACTICE

The abstract principal of judicial independence ranks high on the scale of democratic values. Without an independent judiciary, many of our rights and liberties would amount to little more than hollow promises. But what are the components of judicial independence?

Though he did not use the term explicitly, we can learn much about the meaning and value of judicial independence from a little known passage by the late Justice Robert Jackson. Writing in the midst of the Cold War, and deep in the throes of the McCarthy era, Justice Jackson observed:

> Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.[20]

Justice Jackson's pointed disdain was for Soviet procedural *practices*, not necessarily for their formal law of procedure. His point, in other words, was that Soviet judges were known to be influenced by considerations other than the merits of a particular case. They decided cases as the government wanted them decided—they were not independent.

Parsing further, we may conclude that the details of independence are fairness, impartiality, and good faith. Thus, an independent judge gives every party a full and fair opportunity to be heard without regard to the party's identity or position in society. An independent judge presides impartially, free from extraneous influences and immune to outside pressure. An independent judge rules in good faith, determined to follow the law as she understands it, unmindful of possible personal, political, or financial repercussions.

There are, no doubt, other components or definitions of judicial independence, but Justice Jackson's conception surely provides us with a useful starting point. What is the potential impact of accountability upon a judge's capacity to be fair and impartial and to rule in good faith?

IV

INDEPENDENCE NOTWITHSTANDING ACCOUNTABILITY

Why should judges be "accountable," and for what? While a survey of the law and philosophy of judicial discipline is beyond the scope of this essay, it is probably safe to say that a broad consensus of the public expects judges to be answerable, one way or another, for broad categories of misconduct that include misuse of office,[21] undignified behavior,[22] bias or prejudgment,[23] harmful

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BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 41 (1984).

20. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

21. *See, e.g.*, *In re* Heiple, No. 97-CC-1 (Ill. Cts. Comm'n Apr. 30, 1997) (attempt to avoid traffic tickets by invoking status as state supreme court justice); *Report of the Committee* [Heiple Impeachment Report], *reported in* CHI. DAILY L. BULL., May 16, 1997, at 1 & Supp.

or offensive conduct,[24] dereliction of duty,[25] or disrespect for the law (including, of course, lawbreaking).[26]

It is striking to note how *little* threat to independence is implicit in most instances that seem to call for accountability. Looking only at the events of the past few years, there can be no serious argument that independence is compromised when a judge faces reprimand or suspension for using his office to coerce the payment of a debt to his daughter,[27] fixing traffic tickets (or attempting to),[28] or attempting to recruit litigants as Amway sales representatives to the judge's own financial benefit.[29] Nor would fairness and impartiality be threatened when a judge faces discipline for vulgar sexual harassment (or worse),[30] public intoxication,[31] or interference with law enforcement.[32]

The preceding examples are easy for two reasons: The judges' conduct was outrageous and their interest in pursuing the conduct was trivial. If accountability calls for a balancing test, harassment and intoxication place negative weight on the scale.

There are other situations, however, where judicial discipline does collide with important rights and interests. It may well be that judges are overregulated in certain areas, resulting in an unnecessary diminution of personal freedom. Nonetheless, it does not follow that all improvident restrictions impinge upon independence.

For example, there has been much litigation in recent years over the scope of judges' campaign speech. The clear trend has been toward broadening the range of permitted speech, but some restrictions still remain.[33] There are good arguments on both sides of this issue. Restrictionists want to keep judging out

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22. *See, e.g.*, *In re* McClain, 662 N.E.2d 935, 937 (Ind. 1996) (vulgar and offensive telephone calls and mailings).

23. *See, e.g.*, SHAMAN ET AL., *supra* note 3, at 345 (discussing Inquiry Concerning a Judge No. 52, Unreported Determination (Tex. Comm'n 1989) ("I don't much care for queers.")).

24. *See, e.g.*, United States v. Lanier, 117 S.Ct. 1219, 1222 (1997) (sexual assaults in chambers).

25. *See, e.g.*, Doan v. Commission on Jud. Perf., 902 P.2d 272, 275 (Cal. 1995) (habitual tardiness).

26. *See, e.g.*, *In re* Fournier, 480 S.E.2d 738, 739 (S.C. 1997) (indecent exposure); Dodds v. Commission on Jud. Perf., 906 P.2d 1260, 1265-66 (Cal. 1995) (obstruction of law enforcement).

27. *See In re* McKinney, 478 S.E.2d 51, 52-53 (S.C. 1996).

28. *See In re* Snow's Case, 674 A.2d 573, 574 (N.H. 1996).

29. *See In re* Phalen, 475 S.E.2d 327, 329 (W. Va. 1996).

30. *See In re* Gordon, 917 P.2d 627, 627 (Cal. 1996) (judge made sexually suggestive remarks to female staff members); *In re* McClain, 662 N.E.2d 935, 937 (Ind. 1996) (judge mailed a used condom to female court employee); *In re* Gravely, 467 S.E.2d 924, 925 (S.C. 1996) (judge induced a female litigant to have sex with him by telling her he could help her stay in her home); *see also* United States v. Lanier, 117 S. Ct. 1219, 1222 (1997) (state court judge charged with sexually assaulting women in his chambers).

31. *In re* Timbers, 674 A.2d 1221, 1221 (Pa. Ct. Jud. Disc. 1996).

32. *See* Dodds v. Commission on Jud. Perf., 906 P.2d 1260, 1265-66 (Cal. 1995) (judge impeded police investigation of criminal acts by another judge); *In re* Heiple, No. 97-CC-1 (Ill. Cts. Comm'n Apr. 30, 1997) (judge struggled with police officers and resisted arrest following traffic stop) (author's note: Professor Lubet consulted with the Illinois Judicial Inquiry Board regarding this matter); *Report of the Committee* [Heiple Impeachment Report], *supra* note 21.

33. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990); *see also* Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 1993) (holding broader restrictions unconstitutional).

of politics; campaigning judges want to inform the electorate. For the time being, it appears that the balance will tip in favor of speech, although it is possible that a series of excesses might swing the pendulum back toward constraint.

For present purposes, however, it is sufficient to note that even the more rigid limits on campaign speech do not threaten judicial independence. A recent controversy in Georgia illustrates this point. In a 1998 election for a position on the Georgia Supreme Court, candidate George Weaver made a series of abrasive attacks on the incumbent, Justice Leah Sears. A special panel of the state's Judicial Qualifications Commission ("GJQC") determined that Mr. Weaver's campaign materials were misleading, as defined by the Georgia Code of Judicial Conduct, and issued a "cease and desist request."[34] When Mr. Weaver continued to run his television spots, the GJQC issued a formal rebuke, branding Mr. Weaver's materials "false, deceptive, and misleading."[35] The GJQC faxed its finding to twelve major news carriers, adding that "all appropriate media outlets are requested and urged to prominently publicize this Notice at the earliest practical date."[36] Mr. Weaver responded by filing a federal court lawsuit,[37] which is unresolved as of this writing.

Mr. Weaver's campaign rhetoric was rough by any standard. He claimed that Justice Sears believed traditional moral standards to be "pathetic and disgraceful," that she favored licensing same-sex marriage, and that she had called the electric chair "silly."[38] The GJQC panel, however, believed that Mr. Weaver had taken all of his references far out of context—hence the reprimand.[39] Of course, the constitutional issues are clearly framed: Is there a compelling public interest in confining the terms of debate in judicial campaigns? Does a public reprimand amount to a prior restraint?[40]

But it is equally clear that whatever the outcome of Mr. Weaver's litigation, whether or not the GJQC continues to vet campaign ads for deception, there will be no discernible impact on judicial independence. Returning to our touchstones of fairness, impartiality, and good faith, we can conclude rather safely that the extent of Mr. Weaver's ability to criticize his opponent would not cause him to be more or less fair and impartial upon taking the bench. The reprimand of Mr. Weaver—that is, the GJQC's assertion of accountability—had little capacity to affect the manner in which he would have judged had he

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34. Jonathan Ringel & Emily Heller, *Rapped for "False, Deceptive" Ads, Weaver Sues over Campaign Rules*, FULTON COUNTY DAILY REP., July 17, 1998, *available in* LEXIS, News Library, Fulton County Daily Report File.

35. *Id.*

36. *Id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *Compare* Irwin W. Stolz, Jr., *Time May Be Right to Consider Merit Selection*, FULTON COUNTY DAILY REP., Aug. 11, 1998, *available in* LEXIS, News Library, Fulton County Daily Report File (defending the GJQC's findings), *with* Steven Lubet, *Weaver's Campaign, Though Abrasive, Did Not Violate State's Judicial Code*, FULTON COUNTY DAILY REP., Aug. 11, 1998, *available in* LEXIS, News Library, Fulton County Daily Report File (criticizing "ethics police").

won the election. Mr. Weaver campaigned as a conservative. Can there be any doubt that he would have judged as a conservative, with or without the GJQC's cease and desist request? Indeed, both candidates' views predated the election, as did their qualifications, and the only real question posed by the GJQC's reprimand was how much information would be shared with the public.

The same can be said of noncampaign related speech. While the issues are important and in need of serious attention, judicial independence is not compromised by restrictions—even by unacceptable restrictions—on judges' First Amendment rights.

In *In re Sanders*,[41] a specially constituted *pro tempore* panel of the Washington Supreme Court[42] considered disciplinary charges against Justice Richard Sanders, an elected member of that court. The Washington Commission on Judicial Conduct ("WCJC") had earlier reprimanded Justice Sanders for addressing a "March for Life" held on the steps of the state capitol. In a prepared statement, delivered shortly following his induction to his court, Justice Sanders told the assembled marchers:

> I want to give all of you my best wishes in this celebration of human life. Nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life. By coincidence, or perhaps by providence, my formal induction to the Washington State Supreme Court occurred about an hour ago. I owe my election to many of the people who are here today and I'm here to say thank you very much and good luck. Our mutual pursuit of justice requires a lifetime of dedication and courage. Keep up the good work.[43]

The WCJC concluded that these remarks, in the context of a rally that also included the endorsement of political candidates, violated several sections of the Washington Code of Judicial Conduct, primarily because the political nature of the event (in their view) "diminish[ed] public confidence in the judiciary."[44]

The Washington Supreme Court disagreed, holding that Justice Sanders's short speech did not "rise to a level permitting sanction."[45] The court analyzed the issue as a conflict between "the government's interest in a fair and impartial judiciary [and] a judge's interest in the right to express his or her views."[46] On balance, the court decided that Justice Sanders's "words and actions" had not "call[ed] into question the integrity and impartiality of the judge."[47] Consequently, the reprimand was reversed.[48]

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41. 955 P.2d 369 (Wash. 1998) (author's note: Professor Lubet consulted on this matter with the Washington Commission on Judicial Conduct).

42. The panel was composed of appellate court justices chosen pursuant to WASH. CONST. art. IV, §2(a) (amend. 38) and Discipline Rules of Judges 13. *See* 955 P.2d at 369 n.*.

43. *Id.* at 371.

44. *Id.* at 371-72.

45. *Id.* at 370.

46. *Id.* at 374.

47. *Id.* at 377.

48. *See id.*

Many, obviously including the Washington Commission on Judicial Conduct, believe this to have been a close case. The court itself, while reversing the sanction, limited its ruling to the facts of the case, observing that "the principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process."[49] Thus, the question is sure to arise again in other states and in other contexts.

It is important to note that the Washington Supreme Court consistently characterized Justice Sanders's interest as "the right to express [his] views" and the need for "free expression" and "the interest of a judge in exercising his or her rights under the First Amendment."[50] In other words, freedom of speech is a personal right; it is precious and not easily abridged, but it is not an essential element of independent judging. The Washington court did not conclude, nor does it appear that Justice Sanders argued, that restrictions on speech would impinge upon judicial independence.

Thus, we may conclude, in turn, that the WCJC reprimand (read: order of accountability), had it been upheld, would have been bad for Justice Sanders and his colleagues, but that it would not have compromised the fairness, impartiality, and good faith of the Washington judiciary.

I do not mean to trivialize restrictions on judges' speech.[51] Rather, my point is that the impact of such limitations is personal and not institutional. We could have a perfectly independent judiciary even if they had to function under severe—even unjustified and unnecessary—constraints on individual expression. Other incidents of accountability do, however, threaten judicial independence.

V

ACCOUNTABILITY AS A THREAT TO INDEPENDENCE

Accountability and independence are not mutually exclusive; most often, we can have both. But there are situations in which the possibility of discipline most definitely does endanger the independence of the judiciary. The most serious threat arises when sanctions are imposed based upon the content of a judge's decision. Consider a series of fairly recent cases in California, Alaska, and Illinois.

A. An Easy Case

Perhaps the most troubling and controversial matter is the pending case against Justice J. Anthony Kline of the California Appellate Court. In 1997,

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49. *Id.* at 375 (quoting Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 1993)).

50. *Id.* at 374-75.

51. It happens that I tend to favor somewhat greater limits on judges' speech than do many of my colleagues, but I do not mean to rehearse those arguments in these pages. *See generally* Steven Lubet, *Judicial Conduct: Speech and Consequences*, 4 THE LONG TERM VIEW 71 (1997). On the other hand, it seems fair to point out that even the strongest advocates of judges' speech do not make their points in terms of protecting independence. *See, e.g.*, Erwin Chemerinsky, *In Defense of Speech: Judges and the First Amendment*, 4 THE LONG TERM VIEW 78 (1997).

Justice Kline issued a dissenting opinion in *Morrow v. Hood Communications, Inc.*[52] in which he stated that he declined, "as a matter of conscience" to follow a state supreme court precedent that allows parties to use so-called "stipulated reversals" as a settlement device.[53] Several months later, the California Commission on Judicial Performance ("CCJP") filed a formal charge against Justice Kline, accusing him of "willful misconduct" in office, based on his dissent in *Morrow*.[54] This may well be the very first time that a state judicial conduct organization has pursued disciplinary charges solely on the basis of the substance of a judge's written ruling.

The threat to judicial independence is made all the more palpable by the moderate and reasoned nature of Justice Kline's position. First, it must be noted that Justice Kline wrote in dissent. The majority of his court actually entered the requested reversal, though noting that they agreed with Justice Kline's objections to the procedure.[55] Consequently, the most that can be said of Justice Kline's action is that he expressed his opinion about a matter of California law. Although he refused to sign an order, that refusal had no consequence to any party or any court. Moreover, Justice Kline detailed his reasons, making it clear that he acted in good faith. According to Justice Kline, the "stipulated reversal" process can damage the adjudicative function of trial courts by turning their decisions into "commodities that may be bought and sold."[56] Stating that he would "of course comply with an order of the California Supreme Court to grant a particular request for a stipulated reversal,"[57] he went on to implore that court to reexamine its precedent and explained that his dissent could provide them with an opportunity to do so, which might not arise in the ordinary course of litigation:

> It is an unwise and even dangerous decision that warrants reconsideration by our Supreme Court. However, because motions for stipulated reversal are by nature collaborative and almost never opposed, and because the Courts of Appeal have little discretion to deny them, petitions for review to the Supreme Court are unlikely. That court will therefore have few opportunities to reconsider [the precedent] unless it exercises its power to review on its own motion. This case provides an excellent opportunity for the exercise of that power.[58]

Thus, Justice Kline faces punishment—in theory, the penalty could include removal from the bench—because he stated his views while attempting to follow the law in good faith. Indeed, his dissent served a purposeful legal function, in that it created a path for the supreme court to reconsider a ruling that might otherwise evade review.

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52. 69 Cal. Rptr. 2d 489 (1st Dist. 1997).

53. *Id.* at 491 (Kline, P.J., dissenting) (arguing that it is inconsistent with the role of courts to permit stipulations that enable the parties to act, for purposes of settlement, as though a previous ruling of the trial court had been reversed or vacated).

54. Greg Mitchell, *CJP Charges Justice Kline*, RECORDER (San Francisco), July 7, 1998, at 1.

55. *See* 69 Cal. Rptr. 2d at 490.

56. *Id.* at 492 (Kline, P.J., dissenting).

57. *Id.* at 493 (Kline, P.J., dissenting).

58. *Id.* at 493-94 (Kline, P.J., dissenting) (citations omitted).

An independent judge "rules in good faith, determined to follow the law as [he] understands it, unmindful of possible personal . . . repercussions."[59] The CCJP action threatens precisely that concept of independence. In a regime where judges are punished for speaking their minds, the judiciary will necessarily become timid and unimaginative. In the worst case, the disciplinary authorities may use such power to enforce a judicial orthodoxy, limiting the way in which the law may be interpreted or understood. Judges who must rule in the shadow of personal jeopardy are the very antithesis of independent, as fear and doubt may cause them to steer a safe course rather than a true one.

The Kline inquiry turns out to be an easy case for almost everyone except the California Commission on Judicial Performance. Judges, lawyers, academics, and even legislators have rallied behind Justice Kline.[60] It is safe to say that there is very little support for punishing judges under such circumstances (though as of this writing the CCJP continues to pursue Justice Kline). Other cases, however, are harder. The judge may not be so articulate or sympathetic; the ruling may be less principled, it may be wrong, it may even be intolerable. The true test of our commitment to judicial independence comes in more difficult circumstances.

B. Some Harder Cases

While everyone believes in judicial independence, it turns out to be much harder to appreciate independent judges—especially when their rulings are objectionable or ill-conceived. But independence is intended to protect a judge's freedom of conscience, not to guarantee popular, or even uniformly appropriate, outcomes.

In an unreported Alaska case, a trial court judge was charged by that state's judicial commission with having violated the due process rights of a criminal defendant.[61] The judge, on his own motion, had ordered an *ex parte* "security hearing" in which he considered various precautions to be taken in the courtroom against the possibility that the defendant might attempt to escape. The prosecutor was asked to propose security measures to the court, but the defendant and his counsel were excluded from the hearing.

It was later determined, at least to the satisfaction of the disciplinary panel, that the judge had indeed violated the defendant's right to be present.[62] In

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59. *Supra* text following note 20.

60. *See* Mitchell, *supra* note 54, at 1 (quoting lawyers, professors, and judges critical of CCJP complaint); Catherine Bridge, *Wilson Vetoes 2 Bills on Judicial Discipline*, RECORDER (San Francisco), Oct. 2, 1998, at 3 (describing passage of judicial discipline reform bills by state legislature vetoed by governor).

61. There is no official report of this case and the identity of the judge is protected by Alaska's confidentiality rules. A squib description, lacking the judge's name, may be found in SHAMAN ET AL., *supra* note 3, § 5.01, at 150 n.11 (author's note: Professor Lubet consulted with the respondent-judge in this matter).

62. Though I was called as an expert witness on behalf of the respondent-judge, I agreed that the security hearing appeared improper—in my own judgment, it should not have been held without the

other words, the ruling was wrong. Moreover, it had few of the saving graces of Justice Kline's dissent. The Alaska judge acted alone; his order was not merely advisory, but actually imposed severe conditions on a defendant who had no input at the hearing. The judge did not write an opinion aimed at obtaining review from a higher court, but rather pushed ahead over the defendant's objection. It was not alleged that the judge acted other than in good faith, but his alleged disregard for the defendant's rights resulted in a disciplinary charge.

In a far more notorious and widely-reported case, Judge Howard Broadman of California's trial court created a national controversy when he ordered a female defendant to submit to an implanted birth control device as a condition of probation.[63] Women's groups and civil liberties organizations protested that the judge had trampled on the defendant's right to bodily integrity. Judge Broadman refused to relent, stating his position that his "Norplant condition" enabled him to sentence her to probation rather than the penitentiary.[64] He did, however, stay his order pending appeal. The order thereafter became moot when the defendant violated her probation and was sentenced to prison by another judge.[65]

In a similar case, Judge Broadman placed a woman on probation for five years subject to the condition that she "not get pregnant" during that time.[66] Convicted on drug charges, the woman had previously lost custody of all five of her children.[67] Said Judge Broadman, "I'm afraid that if you get pregnant we're going to get a cocaine or heroin addicted baby."[68] The "no pregnancy" condition was later reversed on appeal because it impinged upon the exercise of the fundamental right to privacy.[69]

The California Commission on Judicial Performance served a formal complaint on Judge Broadman, charging him with willful misconduct in office on the ground that he had abused the rights of defendants and acted in excess of his judicial authority. Without fully rehearsing the facts, which have been thoroughly reported in the legal and mainstream press, suffice it to say that this aspect of the *Broadman* case[70] placed the issue of judicial independence in sharp contrast. On one hand, the CCJP, supported by many civil liberties and women's groups, charged that Judge Broadman had flouted clear legal mandates, in the process violating the most intimate rights of several defendants.

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defendant's counsel, if not the defendant himself. For a further description of the hearing, *see* Lubet, *Judicial Independence and Independent Judges*, *supra* note 1, at 746.

63. *See* Broadman v. Commission on Jud. Perf., 959 P.2d 715, 725 (Cal. 1998).

64. The defendant had been convicted on three counts of felony child abuse and was pregnant at the time of sentencing. The Norplant order was to go into effect only following the delivery of her next child. *See id.*

65. *See id.*

66. People v. Zaring, 10 Cal. Rptr. 2d 263, 265 (5th Dist. 1992).

67. *See id.* at 270.

68. *Id.*

69. *See id.* at 268.

70. Judge Broadman was also charged with other incidents of misconduct, not relevant to our present discussion. For a further description of several of the charges against Judge Broadman, *see* Broadman v. Commission on Jud. Perf., 959 P.2d 715 (Cal. 1998).

On the other hand, Judge Broadman, supported by an *amicus* brief from the California Judges Association, argued that the disciplinary charge itself impinged upon his own exercise of judicial independence. He pointed out that his efforts at creative sentencing (even if misguided) had allowed him to place two women on probation who otherwise would have been sentenced to the penitentiary and that future defendants would be ill-served if judges were to become wary of creative sentencing alternatives, lest they subject themselves to charges of misconduct.

As matters developed, the "improper sentencing" charges against Judge Broadman were both dismissed,[71] as was the "security hearing" charge against the Alaska judge,[72] though not until after lengthy hearings. In each case, the respondent-judge was required to retain counsel at personal expense and was subjected to an extended public review. While neither was ultimately punished for the content of his rulings, the potential for intimidation nonetheless seems clear.

C. A Troubling Case

Few judicial decisions in recent Illinois history have created as much outcry as the case of "Baby Richard," whose birth father, Otakar Kirchner, spent three years attempting to undo an adoption to which he had never consented.[73] During the extended litigation, "Richard" continued to live with his would-be adoptive parents, developing the close emotional ties attendant to every nurturing and loving relationship.

The Illinois Supreme Court, in an opinion written by Justice James Heiple, eventually ruled in favor of Mr. Kirchner, holding that "the father's parental interest was improperly terminated" and ordering that the child be returned to his birth-father notwithstanding the ties he had formed with his adoptive parents.[74]

To many observers of the case, Mr. Kirchner's efforts were cruel and heartless, an attempt to sever Richard's loving connection to the only family he had ever known. Critics castigated the Illinois Supreme Court and Justice Heiple in particular.[75] One highly respected legal commentator observed:

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71. Judge Broadman was eventually censured, however, for two unrelated acts of misconduct. *See id.* at 718.

72. The judge was reprimanded, however, for engaging in an *ex parte* communication on an unrelated subject in the same prosecution. Though the disciplinary proceeding is unreported, it is described in SHAMAN ET AL., *supra* note 3, at 163-64.

73. The facts of the case are complex and a detailed review is not necessary for present purposes. *See generally*, Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63 (1995).

74. *In re* Doe, 638 N.E.2d 181, 182 (Ill. 1994) (author's note: an *amicus curiae* brief supporting the position of Mr. Kirchner was filed in this matter by attorneys for the Children and Family Justice Center of the Northwestern University Legal Clinic; the author is not affiliated with the Children and Family Justice Center and had no involvement in the brief.)

75. *See, e.g.*, Bob Greene, *The Words That So Upset Them*, CHI. TRIB., Mar. 7, 1995, Tempo Section, at 1.

> No state should be allowed to deny a child the love and support and affection of his parents without even considering the child's interests. That is what the Illinois Supreme Court did. It held that a father had a right to be with his child but ignored the rights of a child to be with his [adoptive] parents.[76]

Illinois Governor Jim Edgar took the same position, stating it even more bluntly:

> [The case] is about a young boy whom the court has decreed should be brutally, tragically torn away from the only parents he has ever known—parents who by all accounts loved and nurtured him from the second he joined their family.
>
> . . . .
>
> This young child should have found a champion—a protector—in the highest court of the state. Instead, he found justices who betrayed their obligations to him and to the people who placed them in their lofty positions.[77]

Most noticeably, *Chicago Tribune* columnist Bob Greene declared virtual war on Justice Heiple, devoting column after column to personal attacks on the judge.[78] Walter Jacobson, a television newscaster, went so far as to announce Justice Heiple's home telephone number, urging his viewers to call the judge and voice their complaints.[79] Justice Heiple no doubt made matters worse when he responded to the attacks in the body of a judicial opinion, referring to them as "journalistic terrorism."[80]

Criticism in the press is a fact of life for judges. In extreme situations, it is possible that such criticism may actually threaten judicial independence, but there is no solution to that problem—the press must be free. The same cannot be said of politicians, however, who may seize upon press reports to launch their own attacks on unpopular judges. This is precisely what happened in the case of Justice Heiple, who seems to have done all he could to make himself as unpopular as possible.

Justice Heiple, it turns out, was a confirmed highway speeder, in consequence of which he often found himself stopped by the Illinois State Police. On at least three occasions, he used (or attempted to use) his position as a supreme court justice as a means of avoiding a citation. Once, when that method failed, he resorted to physical resistance, resulting in his arrest.[81] The arrest led to a

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76. Susan Estrich, *What About Child's Interests?*, USA TODAY, July 21, 1994, at 9A.

77. *What 2 Justices Wrote and How Edgar Responded*, CHI. TRIB., July 13, 1994, at 17.

78. A database search conducted on October 8, 1998, shows 73 such columns between June 19, 1994 and July 29, 1998. Sample headlines include *The Sloppiness of Justice Heiple* (June 26, 1994), *What Heiple Did to Another Boy* (Jan. 22, 1995), and *An Innocent Life that Heiple Didn't Destroy* (Dec. 18, 1996). *See also* Theresa Grimaldi Olsen, *Bob Greene's Richard File (Adoption Case)*, COLUM. JOURNALISM REV., Sept. 19, 1995, at 11 (referring to 66 such columns since 1993).

79. In Mr. Jacobson's words, "I wanted people to call him up and bother him until he did the right thing." Olsen, *supra* note 78; *see also*, Mike Royko, *Anchorman Crosses Line from Expressing Opinion to Punishing Newsmaker*, SUN-SENTINEL (Fort Lauderdale), Feb. 15, 1995, at 15A (criticizing newscaster to similar effect).

80. *In re* Doe, 638 N.E.2d 181, 189 (Ill. 1994) (Heiple, J., supplemental opinion denying rehearing).

81. *See* Ken Armstrong, *Standing on Principle; Heiple Pulls No Punches; Criticism for "Baby Richard" Case and Arrest in Traffic Stop Haven't Softened Justice's Stance*, CHI. TRIB., May 12, 1996, News Section, at 1.

disciplinary charge, which led, in turn, to a formal censure.[82] None of this, of course, remotely threatens judicial independence—but the next installment in the saga does.

By the time his speeding exploits became public knowledge, many state legislators had had quite enough of Justice Heiple. Fueled beyond question by disgust with his "Baby Richard" ruling, the Illinois House of Representatives began an investigation of possible impeachment. The impeachment inquiry was officially limited to the traffic incidents and several administrative matters, but many believed that this was simply a convenient hook on which to hang an extraordinarily unpopular judge. Other Illinois judges had done worse, in some cases much worse, without facing impeachment. Indeed, there was little doubt at the time that a significant part of the motive for impeachment inquiry could be found in the outcome of the "Baby Richard" case.[83]

In the end, the investigation was terminated and impeachment was not pursued. The legislature's special investigative committee closed its file, announcing that "[t]o impeach for anything less than the most serious offenses would send a chilling message to once and future judges."[84] But even in the absence of an actual impeachment, it cannot have escaped the notice of every judge in Illinois that Justice Heiple had made himself a large and easy target by applying the law as he understood it in the case of "Baby Richard."

D. Resolution

The point of the preceding discussion was to make evident the potentially corrosive effect of imposing, or even threatening, discipline on the basis of a judge's good faith decision. In each of the cases reviewed, the judge attempted to apply the law to a difficult situation, perhaps correctly and perhaps in error, but always in apparent sincerity. In each case, however, the controversial or unpopular nature of the decision resulted in severe personal consequences for the judge: threatened loss of office, damage to reputation, extreme personal inconvenience and expense. While most judges are responsible and some are even courageous, it is safe to assume that few would choose to venture repeatedly into such a hazardous situation. The result, therefore, can only be timidity, with no guarantee against its steady spread throughout an entire state judiciary.

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82. *See In re* Heiple, No. 97-CC-1 (Ill. Cts. Comm'n Apr. 30, 1997) (attempt to avoid traffic tickets by invoking status as state supreme court justice) (author's note: Professor Lubet consulted with the Illinois Judicial Inquiry Board regarding this matter).

83. *See* Darryl Van Duch, *Is the Drive to Impeach Heiple Unstoppable?*, NAT'L L.J., May 19, 1997, at A6.

84. *Report of the Committee* [Heiple Impeachment Report], *supra* note 21, at Supp. at 3. For a further discussion, see SHAMAN ET AL., *supra* note 3, 1997 Supp. at 4-6.

VI

BALANCING ACCOUNTABILITY AND INDEPENDENCE: SOME STANDARDS

One could press the case for independence too far. There is some conduct, even "decisional" conduct, that must merit punishment, if for no other reason than to preserve the honor and integrity of the judiciary. Judges have been known to use ethnic slurs in the course of their judgments[85] and even to announce cruel stereotypes as the basis for a ruling.[86] Some judges have demonstrated utter ignorance of the law, or sheer disregard for it,[87] some going so far as to decide cases on the basis of "coin flips."[88] Absolute immunity for all decisionmaking behavior would surely go too far. Still, some method must be found that will draw the correct line between actual misconduct and mere error or unpopularity.

To my knowledge, neither any commentator nor any court has yet devised a bright-line test that will solve this problem in all circumstances. Even a pure "good faith" standard—protective as it would be of independence—is insufficient, because it would preclude the removal of a sincere-but-incompetent judge who repeatedly misapplies the law and damages the rights of litigants. While it may never be possible to fashion a comprehensive rule, the following factors describe situations in which the content of a judicial ruling may warrant discipline. And, in the absence of some unforseen but compelling circumstance, it seems fair to say that no discipline should ordinarily lie in the absence of at least one of these considerations.[89]

First, as noted above, a pattern of repeated and uncorrected legal error is obviously more serious than an isolated instance. Judges who fail to learn and apply the law fall into a distinctly different category from those who simply hold minority—or innovative—opinions. The commission of multiple errors, or unacceptable judging that continues over a period of years, may indicate that the judge has not maintained professional competence in the law.[90]

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85. *See* SHAMAN ET AL., *supra* note 3, at 318-20 and cases cited therein.

86. In *Inquiry Concerning a Judge No. 52 (Hampton)*, Unreported Determination (Tex. Comm'n 1989), a trial judge was censured for making the following comments about a murder case over which he presided:

> These two gays that got killed wouldn't have been killed if they hadn't been cruising the streets picking up teenage boys. . . . I don't much care for queers cruising the streets picking up teenage boys. I've got a teenage boy. . . . I put prostitutes and gays at about the same level. If these boys had picked up two prostitutes and taken them to the woods and killed them, I'd consider that a similar case. . . . And I'd be hard put to give somebody life for killing a prostitute.

See SHAMAN ET AL., *supra* note 3, at 345.

87. *See* SHAMAN ET AL., *supra* note 3, at 37-57, 60-89.

88. *See* McCartney v. Commission on Jud. Qual., 526 P.2d 268 (Cal. 1974); *In re* Daniels, 340 So. 2d 301, 307 (La. 1976).

89. The following discussion is derived from SHAMAN ET AL., *supra* note 3, at 32-37.

90. *See, e.g.*, Kloepfer v. Commission on Jud. Conduct, 782 P.2d 239, 253 (Cal. 1989) (judge contended that failure to respect procedural rights of a defendant had been an atypical, isolated incident and would not recur; California Supreme Court held that record revealed a "pattern" of discourtesy, intimidation, and punitive rulings which justified removal from bench).

A second distinguishing criterion might be called something like the "egregiousness quotient" of the error. Serious misrulings are obviously more likely to amount to misconduct, though such a standard is admittedly inexact. There seems to be some agreement, however, that legal error becomes serious enough to warrant discipline when judges deny individuals their basic or fundamental procedural rights, as when a judge proceeds to adjudication without advising a defendant of the right to counsel, declines to hold a full hearing, or coerces a guilty plea.[91] The same may occur when judges act beyond their lawful jurisdiction, as by sentencing defendants to jail when only a fine is authorized by law or sentencing defendants to incarceration for a period longer than the maximum allowed by statute.[92] One formulation holds that discipline is appropriate only where "a reasonably prudent and competent judge would consider [the ruling] obviously and seriously wrong in all the circumstances."[93]

Of course, the motive of the judge must always be considered—is he or she acting in good faith? A willful refusal to follow the law, as distinct from an honest and acknowledged difference of opinion or interpretation, may manifest unfitness for judicial office. In the same vein, a judge may be sanctioned for intemperate or abusive rulings; such discipline being imposed because of the *manner* in which the judge ruled, rather than the substance of the decision.[94] In *In re King*,[95] for example, it was evident that the judge had ruled on the basis of racial animus when he set an unusually high bail for four African-American defendants.[96] Shortly after imposing the high bail, the judge said to a court clerk, "That's what blacks get for voting against my brother."[97] (Apparently, the judge's brother had done poorly in minority precincts in a recent gubernatorial election.[98]) Although setting bail is a judicial act, it did not threaten independence when Judge King was subsequently censured by the Supreme Judicial Court of Massachusetts—the punishment was invoked for his bad faith and ill motive in reaching a decision, not for the content of the decision itself.[99]

A third factor is the availability of appeal. A number of cases have held that discipline is unnecessary in situations where legal errors can be corrected on appeal, especially when the error is not flagrant or part of a prolonged pat-

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91. *See, e.g.*, McCullough v. Commission on Jud. Perf., 776 P.2d 259, 262 (Cal. 1989) (judge directed a verdict of guilty in a criminal trial).

92. *See, e.g.*, *Kloepfer*, 782 P.2d at 255 (trial judge wrongly asserted jurisdiction over case pending before appellate court).

93. *In re* Benoit, 487 A.2d 1158, 1163 (Me. 1985).

94. *See, e.g.*, *Kloepfer*, 782 P.2d at 246, 249-50 (hostile, angry, and demeaning conduct); Wenger v. Commission on Jud. Perf., 630 P.2d 954 (Cal. 1981) (attempted trickery); Broadman v. Commission on Jud. Perf., 959 P.2d 715, 722 (Cal. 1998) (misleading defendant in waiving procedural rights).

95. 568 N.E.2d 588 (Mass. 1991).

96. *See id.* at 590.

97. *Id.* at 594.

98. *See id.* at 590, 594.

99. *See also In re* McKinney, 478 S.E.2d 51, 52 (S.C. 1996) (judge disciplined for issuing arrest warrants solely on the affiance of his own daughter).

tern.[100] This principle could not be used as a *per se* rule, since the appellate process and the disciplinary process serve markedly different functions. Appealability, if only as an indicator of the judge's good faith and the "ordinary" nature of the perceived error, is nonetheless an appropriate considertion. It is widely understood that disciplinary complaints should not be misused as an alternative to appeals by disgruntled litigants; this value is well served by considering the availability of appeal as a factor when determining whether to discipline a judge.

Finally, there is the astonishing problem of the "coin-flip" cases—that is, instances where a judge made a decision by flipping a coin in open court or by asking bystanders for their opinions.[101] Though such behavior is "decisional" in the crudest sense, it obviously constitutes a complete abdication of the judicial function, which is, after all, the duty to make reasoned decisions according to law. However broadly one interprets judicial independence, it cannot possibly extend to throwing darts.

VII

CONCLUSION

It may well turn out that judicial independence is easier to protect than to define. Perhaps it is best to think of independence as applying solely to the content or substance of a judicial opinion or act. Thus, independent judges are at liberty to *judge*—to interpret and apply the law—as free as possible from external constraints, influences, and pressures. There are many other attributes that make for good judging—attentiveness, engagement, empathy, broadmindedness, to name a few—that are not directly related to independence.

Thus, there are circumstances in which the possibility of discipline may actually damage the quality of judging without threatening independence. For example, restrictions on civic and charitable involvement may have the effect of isolating judges from their communities, thereby making them less attuned to life on the street and ultimately less able to judge wisely. Such limitations may be ill-advised, perhaps even self-defeating, but they do not impinge on independence.

Ultimately, the most important issue is the protection of "decisional" integrity. When does accountability threaten judicial discipline? What is the distinction between misconduct and error? In this regard, the availability of appeal, the nature of the judge's conduct, the extent of the court's jurisdiction, the motive of the judge, and the egregiousness and frequency of legal error are important factors that mediate the sensitive line between judicial misconduct and simple mistake.

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100. *See In re* Charge of Judicial Misconduct, 595 F.2d 517, 517 (9th Cir. 1979); *In re* Thomson, 494 A.2d 1022, 1027 (N.J. 1985).

101. *See* McCartney v. Commission on Jud. Qual., 526 P.2d 268, 280 (Cal. 1974); *In re* Daniels, 340 So. 2d 301, 307 (La. 1976); *In re* DeRose, Unreported Determination (N.Y. Comm'n Nov. 13, 1979), *cited in* SHAMAN ET AL., *supra* note 3, at 34 n.32.