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CHAPTER 24

Judicial Conduct and Professional Responsibility

RICHARD J. VITA

§24.1. Introduction. During the 1972 SURVEY year, the Supreme Judicial Court took signal action in the regulation of professional legal and judicial conduct by incorporating within its Rules of Court the substance of two ethical codes of the American Bar Association. The Code of Professional Responsibility, with some modification, has been incorporated by reference within Court Rule 3:22; the Code of Judicial Conduct has been adopted as chapter 5 of the Court Rules.

A. PROFESSIONAL RESPONSIBILITY

§24.2. The Code. The Code of Professional Responsibility was unanimously adopted by the House of Delegates of the American Bar Association on August 12, 1969.¹ It is divided into three separate but interrelated parts: the Canons, the Ethical Considerations, and the Disciplinary Rules. The Preliminary Statement to the Code describes the purpose and function of each section:

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.²

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§24.2. ¹ At this writing, codes based on the ABA Code are in force in 45 states and the District of Columbia. Three other states, California, Montana, and South Carolina have codes under consideration. Only Alabama and North Carolina have taken no official action regarding adoption of the Code.

² *Preamble and Preliminary Statement* to ABA CODE of PROFESSIONAL RESPONSIBILITY at 1.

The Supreme Judicial Court has adopted two of the three sections, the Canons and the Disciplinary Rules. The promulgation specified seven modifications of the Disciplinary Rules for application in Massachusetts. The Ethical Considerations were not incorporated within the Court Rules as such, but were designated as a body of principles upon which the Canons and the Disciplinary Rules are to be interpreted. The new Court Rule, known as the Canons of Ethics and Disciplinary Rules Regulating the Practice of Law, is effective for conduct occurring on or after October 2, 1972.³

§24.3. Canons of Ethics and related Disciplinary Rules.

Canon 1: A lawyer should assist in maintaining the integrity and competence of the legal profession.

The Disciplinary Rules under Canon One are divided into three sections. The first is directed to the lawyer's obligation to assist the Supreme Judicial Court in enforcing the requirements for admission to the bar, including his own application as well as those of others.¹ The second disciplinary rule under Canon One defines the lawyer's obligation to refrain from personal misconduct.² A lawyer is subject to disciplinary sanction for professional misconduct by violating any disciplinary rule relating to the nine Canons.³ Conduct which involves dishonesty, fraud, deceit, misrepresentation,⁴ or which is prejudicial to the administration of justice,⁵ or which adversely reflects on one's fitness to practice,⁶ is prohibited and extends to non-professional as well as professional activities.

The Court did not adopt the rule which prohibits a lawyer from engaging in illegal conduct involving moral turpitude.⁷ The term "moral turpitude" is not easily susceptible of precise definition and for that reason is a doubtful standard for professional discipline.⁸ Conduct which might be contemplated by the term, however, may well be the basis for discipline under alternate rules in this or other sections.

The third rule under Canon One states that a lawyer possessing unprivileged knowledge or evidence concerning a lawyer or a judge shall reveal such information upon request of the proper authorities.⁹ The

³ Supreme Judicial Court Rule 3:22(3).

§24.3. 1 DR 1-101. All citations to the text of the Code of Professional Responsibility are to the original ABA version unless otherwise indicated. Modifications appearing in the Massachusetts version are described with reference to the ABA text.

² DR 1-102.

³ DR 1-102(A)(1).

⁴ DR 1-102(A)(4).

⁵ DR 1-102(A)(5).

⁶ DR 1-102(A)(6).

⁷ DR 1-102(A)(3).

⁸ See Report of Special Master No. 7631 at 16, Supreme Judicial Court (April 13, 1972); Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 *Texas L. Rev.* 267, 276 (1970).

⁹ DR 1-103(B).

companion to this rule which was not adopted, required a lawyer possessing unprivileged knowledge of a violation of the rule under Canon One prohibiting misconduct to report such knowledge to proper authorities.¹⁰ This provision has been criticized as being too harsh and likely to breed distrust among members of the bar, thereby creating a profession of informants.¹¹

Canon 2: A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.

Although Canon Two is stated in positive terms, the ten Disciplinary Rules under it are proscriptive. The traditional prohibitions against publicity, advertising and solicitation are set out in detail.¹² A lawyer is prohibited from holding himself out publicly as a specialist unless specifically permitted by one of the enumerated subsections.¹³ One rule describes circumstances under which a lawyer may not accept employment.¹⁴ Another focuses on the reasons for which a lawyer may or must withdraw from the representation of a client.¹⁵ Several other rules are concerned with fees for legal services.¹⁶

In the latter area, a number of alterations of the original ABA Disciplinary Rules were effected. The rule which defines an excessive fee¹⁷ was modified by making the measure of a fee the "definite and firm conviction" of a lawyer "of ordinary prudence *experienced in the area of the law involved*" rather than that merely of a lawyer "of ordinary prudence." Furthermore, to be within the purview of the rule, a fee must be *substantially* in excess of a reasonable fee. This refined definition eliminates minor fee excesses as a disciplinary problem. The rule which prohibits charging a contingent fee for defending a client against a criminal charge¹⁸ was broadened by deletion of the criminal charge reference and substitution of a requirement of conformance to Supreme Judicial Court Rule 3:14; which sets out the limitations on contingent fees for all areas of law.

The ABA version of the Code prohibits lawyers who are not associates in a firm or office from dividing a fee unless, among other reasons, "[t]he total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client."¹⁹ The Supreme Judicial Court deleted the word "clearly," thereby strengthening the protection of the client whose attorney has associated with other counsel. However,

¹⁰ DR 1-103(A).

¹¹ See Report of Special Master, note 8 *supra*, at 17-19; Weckstein, note 8 *supra*, at 281-82; 1970 Ann. Surv. Mass. Law §29.2.

¹² DR 2-101, 2-102, 2-103, 2-104.

¹³ DR 2-105.

¹⁴ DR 2-109.

¹⁵ DR 2-110.

¹⁶ DR 2-106, 2-107.

¹⁷ DR 2-106(B).

¹⁸ DR 2-106(C).

¹⁹ DR 2-107(A)(3).

the Court did not adopt the section which required that the division of fees among lawyers be made in proportion to the services performed and responsibility assumed.²⁰ Thus, the long standing practice of fee splitting in Massachusetts is preserved.

A final modification of the Disciplinary Rules appears in a section dealing with a lawyer's participation in group legal service programs.²¹ The original rule specifies certain types of group service activities with which a lawyer may cooperate, then includes in addition "[a]ny other non-profit organization that . . . furnishes . . . legal services to its . . . beneficiaries, but only . . . to the extent that controlling constitutional interpretation *at the time of the rendition of the services* requires the allowance of such legal service activities . . ."²² (Emphasis added). The Court omitted the italicized phrase, perhaps reasoning that it would be more appropriate to determine a possible violation of this rule upon the controlling constitutional interpretation at the time of the institution of disciplinary action rather than at the time of the rendition of services.

Canon 3: A lawyer should assist in preventing the unauthorized practice of law.

This Canon delineates the lawyer's responsibility to protect the public from unqualified individuals who do not possess the training in the law deemed necessary to a practitioner and who are not subject to the requirements and regulations imposed upon members of the legal profession. The three Disciplinary Rules under Canon 3 specifically prohibit a lawyer from aiding in the unauthorized practice of law,²³ dividing legal fees with a non-lawyer,²⁴ or forming a partnership with a non-lawyer.²⁵

Canon 4: A lawyer should preserve the confidences and secrets of a client.

This traditional ethical standard encourages frank and open discussion between the client and his lawyer. The Disciplinary Rule defines the terms "confidence" and "secret" and enumerates the circumstances under which a lawyer may or may not disclose a confidence or secret.²⁶

Canon 5: A lawyer should exercise independent professional judgment on behalf of a client.

A lawyer's paramount duty is to represent his client with unswerving loyalty. Canon 5 proscribes any conduct or commitment by the lawyer that could compromise his performance of that duty, and the Disciplinary Rules under it postulate standards of professional conduct to the same end. A lawyer may not accept employment when his personal or business

²⁰ DR 2-107(A)(2).

²¹ DR 2-103(D).

²² DR 2-103(D)(5).

²³ DR 3-101.

²⁴ DR 3-102.

²⁵ DR 3-103.

²⁶ DR 4-101.

interests impair his independent judgment²⁷ or when he knows or should know that he will be a witness in the case.²⁸ A lawyer must withdraw from or refuse employment when the interests of another client are likely to be adverse.²⁹ Other Disciplinary Rules under Canon 5 specify that a lawyer should avoid acquiring a proprietary interest in litigation³⁰ and avoid the influences of third parties.³¹

Canon 6: A lawyer should represent a client competently.

This Canon is corollary to Canon 1. The rules forbid the handling of a legal matter which the lawyer is not competent to handle,³² inadequate preparation in the circumstances of a particular case,³³ and neglect by a lawyer of a legal matter entrusted to him.³⁴ They also prohibit a lawyer from limiting his liability to a client for his personal malpractice.³⁵

Canon 7: A lawyer should represent a client zealously within the bounds of the law.

Canon 7 focuses on the heart of the adversary process and expresses succinctly the professional responsibility of a lawyer in the course of representing his client. The Disciplinary Rules set forth with specificity the standard of zealous representation to which the lawyer is required to conform³⁶ and the bounds of the law within which a lawyer in the course of representation must remain.³⁷ Among limitations related to the latter category, a lawyer is prohibited generally from communicating with a party of adverse interest³⁸ or threatening to present criminal charges solely to obtain an advantage in a civil case.³⁹ Other rules under Canon 7 prescribe mandatory standards on trial conduct,⁴⁰ trial publicity,⁴¹ communications with jurors,⁴² and contact with witnesses,⁴³ judges and officials.⁴⁴

Canon 8: A lawyer should assist in improving the legal system.

The limited scope of the Disciplinary Rules together with the broad language espoused in this Canon suggests that it was intended to be an aspirational pronouncement of professional responsibility to which ethi-

²⁷ DR 5-101(A).

²⁸ DR 5-101(B).

²⁹ DR 5-105.

³⁰ DR 5-103.

³¹ DR 5-107.

³² DR 6-101(A)(1).

³³ DR 6-101(A)(2).

³⁴ DR 6-101(A)(3).

³⁵ DR 6-102.

³⁶ DR 7-101.

³⁷ DR 7-102.

³⁸ DR 7-104.

³⁹ DR 7-105.

⁴⁰ DR 7-106.

⁴¹ DR 7-107.

⁴² DR 7-108.

⁴³ DR 7-109.

⁴⁴ DR 7-110.

cally responsive lawyers should strive. The specific prohibitions cover the use of a public office by a lawyer-occupant to obtain special advantage for himself or his client,⁴⁵ and the making of statements or accusations known to be false against a judge or candidate for judicial appointment.⁴⁶

Canon 9: A lawyer should avoid even the appearance of professional impropriety.

Canon 9 is designed to promote public confidence in the integrity of the legal system and legal profession. The Disciplinary Rules prohibit a lawyer from accepting private employment in a matter upon which he has acted in a former judicial⁴⁷ or public⁴⁸ position, and require a lawyer to preserve with utmost care the identity of funds and property of a client, including the maintenance of complete records regarding such funds or property.⁴⁹

§24.4. Disciplinary enforcement. Although the Canons and the Ethical Considerations will provide enlightened guidance to those members of the bar who recognize that their professional responsibility is above mere conformance to the Disciplinary Rules, the fundamental utility of the new rule is directed at breach rather than observance. Nevertheless, neither the ABA Code nor Rule 3:22 delineates grievance procedures or penalties for violations.¹ Enforcement of violations remains the responsibility of existing grievance committees. Twelve county bar associations, the Boston Bar Association and Massachusetts Bar Association have appointed such committees to receive allegations of violations of disciplinary rules, conduct hearings and recommend to their governing boards whether the filing of information proceedings with the Supreme Judicial Court is warranted. However, as recent national² and local³ reports have shown, serious inadequacies exist in current programs of disciplinary enforcement in all parts of the country. In Massachusetts, professional discipline is marked by "a conspicuous absence of uniformity in grievance procedures. . . . [I]t can be said that the only common . . . feature [among grievance committees is] the unlimited discretion enjoyed by each grievance committee in determining what methods it will employ."⁴ It is safe to say that under present conditions, the new rule

⁴⁵ DR 8-101.

⁴⁶ DR 8-102.

⁴⁷ DR 9-101(A).

⁴⁸ DR 9-101(B).

⁴⁹ DR 9-102.

§24.4. ¹ Supreme Judicial Court Rule 3:01(6) provides that discipline by the Court may be by censure, suspension, or disbarment. However, none of these sanctions is made specifically applicable to specific disciplinary breaches.

² ABA Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970). This celebrated report is popularly known as the "Clark Report" after its Chairman, Retired Justice Tom C. Clark of the United States Supreme Court.

³ Inker & White, The "Clark Report" in Massachusetts, 56 Mass. L.Q. 141 (1971).

⁴ Id. at 142.

cannot be implemented in the manner necessary to provide effective, equitable and uniform self-regulation to the legal profession.

The solution to the problem may lie in an action being carried forward by the Supreme Judicial Court. Acting upon a petition filed by the Massachusetts Bar Association, the Court has been exploring the possibility of unification of the Massachusetts bar by judicial order. It has entered an interlocutory order setting forth seven objectives, including professional ethics and disciplinary enforcement, clients' security, and uniform procedures for investigation and disposition of grievances.⁵ A special master, Retired Justice of the Court R. Ammi Cutter, has been appointed to conduct hearings and file reports pursuant to the objectives set forth in the order. The Court has reserved its judgment on the extent to which it will effect unification of the bar in the Commonwealth. Many aspects of the plan no doubt require examination and careful deliberation. But clearly, the promulgation of comprehensive rules for a program of disciplinary enforcement in Massachusetts will go far towards alleviating the present deficiencies and realizing the proper implementation of the new Code. It is encouraging to see the Supreme Judicial Court's enthusiastic pursuit of reforms in this heretofore neglected area.

B. JUDICIAL CONDUCT

§24.5. Introduction. The Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association on August 16, 1972, replacing the old ABA Canons of Judicial Ethics. The Supreme Judicial Court, acting with admirable dispatch, announced nine days later that it was considering the Code for adoption in Massachusetts. It received the opinions and suggestions of interested parties in the matter, notably a brief filed by the Massachusetts Bar Association, and on December 4, 1972, it promulgated a slightly revised version of the Code as Chapter Five of its court rules.¹ The Code is effective in Massachusetts regarding conduct occurring after January 1, 1973.

The Code consists of seven Canons which express in general terms the standards of professional conduct that judges should observe. Accompanying each Canon is a text which sets forth specific rules derived from it. The Canons and text are mandatory in character unless otherwise indicated. They state the level of professional conduct below which a judge is subject to disciplinary action. These sections have been adopted by the Supreme Judicial Court in revised form. The Court did not adopt

⁵ Interlocutory Order on Petition to Organize the Bar of Massachusetts as a Unified Self-governing Bar by Rule of Court, Supreme Judicial Court, Supreme Judicial Court, Full Court No. 7718 (November 30, 1972).

¹ At this writing, in addition to Massachusetts, Colorado and West Virginia have adopted versions of the Code. Other states are giving it consideration. A special committee of the ABA is currently working to realize its adoption in all the states.

as part of its rule the commentaries that follow various specific rules in the ABA Code. The commentaries are explanatory statements of the objectives and rationales of certain Canons and specific rules. The commentaries remain, however, a reference source of the drafter's intent and objectives for use in the interpretation of the Canons and rules.

§24.6. The Canons and related Rules. The newly stated Canons provide a broad conceptual framework for the accompanying text of specific rules. The seven Canons as adopted by the Supreme Judicial Court are as follows:

Canon 1: A judge should uphold the integrity and independence of the judiciary.

Canon 2: A judge should avoid impropriety and the appearance of impropriety in all his activities.

Canon 3: A judge should perform the duties of his office impartially and diligently.

Canon 4: A judge may engage in activities to improve the law, the legal system, and the administration of justice.

Canon 5: A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.

Canon 6: A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.

Canon 7: A judge should refrain from political activity inappropriate to his judicial office.¹

The text accompanying Canon 1 of the ABA Code was expanded to state that the provisions of the Code do not place "any limitation upon the Supreme Judicial Court in the exercise of its power of general superintendence whether statutory or inherent, in areas not delineated in the Code." Thus, the Court preserves by specific reservation its broad supervisory power over the judicial system, including the power to discipline a member of the judiciary for misconduct in areas not specifically covered in the Code.²

Several Rules under Canon 3 have been adopted with changes from the ABA Code. The provision under Canon 3 in the ABA Code that a judge may obtain the advice of a disinterested expert on the law under certain prescribed conditions has been dropped. The rule that a judge may permit the recording and reproduction of judicial proceedings was adapted to conform to existing or future rules of Court and broadened to extend to use for educational purposes.³ The rule directing a judge to initiate disciplinary action against a judge or lawyer for unprofessional conduct was amended to require in addition that a judge who has be-

¹ §24.6. This Canon differs slightly from Canon 7 of the ABA Code: "A judge should refrain from political activity."

² See §24.9, *infra*.

³ Canon 3A(7). All citations to the text of the Code of Judicial Ethics are to the version adopted by the Supreme Judicial Court.

come aware of such conduct by another judge to report his knowledge to the Chief Justices of the Supreme Judicial Court and of the court of which the judge in question is a member.⁴ One section of Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest.⁵ The definition of "financial interest" for the purposes of this section has been narrowed to ownership of a substantial legal or equitable interest,⁶ whereas the ABA version included any degree of ownership, however small. A related subsection of the definition further differs from the ABA Code by adding that ownership of a small percentage of shares of a corporation is a financial interest only if the outcome of proceeding could substantially affect the value of the interest.⁷ Though these changes give judges more latitude in financial matters than would the ABA Code, the Massachusetts version did adopt the more stringent of alternative provisions regarding operation of a business, so that judges are prohibited from such activity completely.⁸ Finally, complementing the many provisions regulating the personal business affairs of judges, a judge must file a public report yearly in the office of the Executive Secretary of the Supreme Judicial Court setting forth the date, place and nature of any activity for which a judge received compensation; the name of the payor; and the amount of compensation received during the previous calendar year.⁹

The Massachusetts Code also deleted various provisions that have no application in the Commonwealth, such as references to judicial elections, or pro tempore judgeships.

§24.7. Code Enforcement. If the Code is to restore and elevate public confidence in the integrity and competence of the judiciary, it must be scrupulously observed. Ensuring such observance will require the establishment of clearly drawn and effective disciplinary procedures. The two *DeSaulnier* opinions¹ and their aftermath have brought into sharp focus the inadequacy of the procedures which are presently available for these purposes. A judge may only be removed from judicial office for misconduct, not by the Supreme Judicial Court, but by legislative and executive branches pursuant to express constitutional authority.² Judicial discipline short of removal from office rests with the judiciary. But because of the lack of structured procedures in this area, cases which arise must necessarily be decided on an ad hoc basis. This was painfully evident in the *DeSaulnier* cases, a series of extraordinary proceedings in which the Supreme Judicial Court effected a result tanta-

⁴ Canon 3B(3).

⁵ Canon 3C(1)(c).

⁶ Canon 3C(3)(c).

⁷ Canon 3C(3)(c)(iv).

⁸ Canon 5C(2).

⁹ Canon 6C.

§24.7. ¹ In re *DeSaulnier*, 1971 Mass. Adv. Sh. 1345, 274 N.E.2d 454; In re *DeSaulnier*, 1972 Mass. Adv. Sh. 65, 279 N.E.2d 296.

mount to removal by a very broad construction of its general superintendence power over lower courts and its power to establish and enforce rules of court for the orderly conduct of judges and officers, and judicial administration.³ The Court held that these powers derived from common and constitutional law and that they impose on the Court a duty to prevent a judge found guilty of serious judicial misconduct from exercising the power and duty of his office. The entire proceedings were, however, attended by considerable straining, much of which can be attributed to a lack of established remedial procedures. The Court's ruling that it could discipline a judge for misconduct *in his capacity as a member of the bar* suggests the extent to which it was groping for remedies.

Existing procedures for judicial discipline on lesser matters are similarly inadequate and complex. Pursuant to Rule 3:17 of the General Rules of the Supreme Judicial Court, complaints may be submitted to the Court's Committee on Complaints Concerning the Administration of Justice. They are preliminarily examined by the Executive Secretary of the Supreme Judicial Court, who is also secretary of the Committee on Complaints. Although the Executive Secretary's office can effectively handle some complaints, complex inquiries which need substantial preliminary investigative preparation are beyond the capabilities of that office. The office is presently understaffed, and while time expended pursuant to judicial discipline could be more efficiently allocated in other matters affecting the administration of justice, matters of judicial discipline themselves would be more efficiently assigned to a body specially designed to handle them.

An alternative to existing procedures has been proposed and legislation filed with the general court to establish a Judicial Qualification Commission to investigate complaints against any judge in the Commonwealth.⁴ The proposed Commission would have the power to hold hearings, subpoena witnesses and compel testimony. The plan has been modeled after one presently operative in California. The Board of Delegates of the Massachusetts Bar Association has voted to support the establishment of such a commission. The enactment of legislation that would streamline existing procedure for judicial discipline, together with the new Code of Judicial Conduct, would be a great step toward ensuring public confidence in the integrity of judges in the Commonwealth.

STUDENT COMMENT

§24.8. Constitutional processes for the discipline of judges in

² For a thorough treatment of this subject see §24.8, *infra*.

³ The problems raised by these cases and their ramifications are analyzed in §24.9, *infra*.

⁴ House Bill 1375 (1973). Other similar proposals have been filed. See §24.9 note 100, *infra*.

Massachusetts. The Massachusetts Constitution provides that all judicial officers “shall hold their offices during good behavior. . . .”¹ Apart from the “misconduct and mal-administration” standard found in the article on impeachment,² the constitution neither defines “good behavior” nor suggests the sort of conduct which would violate this standard. Nevertheless, it does provide four ways in which a judge may be removed or retired: (1) by impeachment in the legislature;³ (2) by the governor and council upon address of the legislature;⁴ (3) by the governor and council for advanced age or disability;⁵ and (4) by mandatory retirement upon reaching the age of seventy.⁶ The constitution places no responsibility for the removal of judges in any judicial court, and aside from removal and retirement by these four means, it makes no other provision for judicial discipline in cases in which a judge’s conduct, while not in violation of the “good behavior” standard, is sufficiently offensive to require some sort of disciplinary action.

This comment will examine, in their historical perspective, the nature of these constitutional processes for the removal of judges. It will analyze the adequacies of these techniques today, with special regard to those cases which might require some form of judicial discipline that is less extreme than removal. Finally, it will consider, in terms of efficiency, economy, and justice, the mechanisms and merits of alternative constitutional processes for the discipline and removal of judges.

I. BACKGROUND

Impeachment. As noted above, judges in Massachusetts hold office “during good behavior” although they must retire at age seventy. They may, however, be removed by impeachment for “misconduct and mal-administration in their offices.” John Adams, the principal draftsman of the Massachusetts Constitution, was instrumental in the use therein of the “good behavior” and “misconduct and mal-administration” standards. His insistence that a judge’s term continue “during good behavior” probably was a response to the fact that, prior to the Declaration of Independence, the commissions of the judges of Massachusetts, unlike the commissions of their English counterparts, did not contain the clause *quamdiu se bene gesserint* (for so long as they conduct themselves well).⁷

§24.8. ¹ Mass. Const. pt. 2, c. 3, art. I.

² Mass. Const. pt. 2, c. 1, §2, art. VIII.

³ Id.

⁴ Mass. Const. pt. 2, c. 3, art. I.

⁵ Id.

⁶ Id.

⁷ 3 J. ADAMS, WORKS 558, 559 (C. F. Adams ed. 1850). “‘Good behavior’ is commonly associated with the Act of Settlement [12 & 13 Will. 3, c. 2, §37 (1700)] which granted judges tenure *quamdiu se bene gesserint*, that is, for so long as they conduct themselves well, and provided for termination by the Crown upon Address (formal request) of both Houses of Parliament. The origin of ‘good behavior,’ however, long antedates the Act.” Berger, *Impeachment of Judges*

As a result, the tenure of the colonial judges was not as secure against arbitrary termination by the Crown as was the tenure of the English judges. Adams' insistence on the use of the "misconduct and mal-administration" standard for removal by impeachment probably was based on his unsuccessful attempt, in 1774, to have Chief Justice Oliver removed by impeachment for accepting his salary from George III rather than from the Massachusetts legislature. Governor Hutchinson refused to try the Chief Justice "on the ground that he knew of no 'high crimes and misdemeanors' chargeable against the Chief Justice of which the Governor and Council had jurisdiction."⁸ Although the Chief Justice was effectively removed from office in 1775 by the Declaration of Independence, Adams did not forget the problems which he had encountered in the Oliver case. His choice of "misconduct and mal-administration" rather than "high crimes and misdemeanors" as the standard for impeachment arguably was intended to broaden the definition of judicial misconduct punishable by removal from office by impeachment.⁹

What is the nature of an impeachment?¹⁰ Impeachment trials in England were criminal in nature and the House of Lords could inflict capital or any other punishment on a person who was impeached and convicted.¹¹ The terminology employed in the Massachusetts Constitution with regard to impeachment may be considered contradictory, or at least inconsistent, on this point. In one provision it refers to impeachment in apparently criminal terms: "The power of pardoning offenses, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor. . . ."¹² Yet a distinction between a criminal trial and an impeachment proceeding might be inferred from the provision of the constitution which states that the judgment of the senate in an impeachment trial

and 'Good Behavior' Tenure, 79 Yale L.J. 1475, 1478 (1970) [Hereinafter cited as *Berger*].

⁸ Causes of Impeachment and Legislative Practice, 13 Mass. L.Q. 37, 42 (#5, 1928) [hereinafter cited as *13 Mass. L.Q.*]. The traditional English categories of "high crimes and misdemeanors" which were cause for impeachment were, *inter alia*, misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruption, and advice of pernicious measures. Berger, Impeachment for 'High Crimes and Misdemeanors,' 44 S. Cal. L. Rev. 395, 411-413 (1971).

⁹ *13 Mass. L.Q.*, note 8, *supra*, at 42. It has been said that conduct of either description (misconduct or maladministration) is a ground for impeachment, but it must occur in the office of the officer to be removed. Opinion of the Justices, 308 Mass. 619, 626-27, 33 N.E.2d 275, 279 (1941) [hereinafter cited as *Opinion of the Justices*].

¹⁰ Raoul Berger has directed himself to this question, especially in the federal context, in his very comprehensive and authoritative book, *IMPEACHMENT: THE CONSTITUTIONAL ISSUES* (1973).

¹¹ Trial of Prescott, 193.

¹² Mass. Const. pt. 2, c. 2, §1, art. VIII.

shall not extend further than to removal from office and disqualification to hold or enjoy any place of honor, trust, or profit, under this commonwealth: but the party so convicted, shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.¹³

Then again, the constitution employs criminal terminology when it says that, "[t]he house of representatives shall be the *grand inquest* of this commonwealth; and all impeachments made by them, shall be heard and tried by the senate." (Emphasis added).¹⁴ Yet the provision of the constitution separating "removal from office" by impeachment from subsequent criminal prosecution seems to indicate that impeachment is not criminal in nature. Construing impeachment as a criminal proceeding might raise questions of double jeopardy.¹⁵ Also, if an impeachment were deemed criminal in nature, so as to amount to a "criminal case", it might possibly contradict the constitutional right of trial by jury in such cases.¹⁶

Massachusetts has had little experience with the impeachment of judges. Since the writing of the state's constitution in 1780, only one judge has been impeached by the house of representatives and tried and convicted by the senate. In 1821, Middlesex Probate Court Judge James Prescott was convicted for extortion in the collection of fees in excess of amounts authorized by statute and removed from office.¹⁷ His case was tried by some of the most distinguished and able lawyers in the history of Massachusetts.¹⁸

¹³ Mass. Const. pt. 2, c. 1, §2, art. VIII.

¹⁴ Mass. Const. pt. 2, c. 1, §3, art. VI. "The term 'grand inquest' is not unknown, and has, so far as we are advised, no other meaning than 'grand jury.'" *Geiger v. United States*, 162 F. 844, 845 (1908).

¹⁵ Indeed, in response to the proposed constitution of 1780, the townspeople of Sutton, Massachusetts, objected to the impeachment article on just such grounds, since the impeached official could be subsequently tried in a court of law. O. HANDLIN AND M. HANDLIN, *THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780*, 235-36 (1966).

¹⁶ U.S. Const. art. III, §2(3) and 6th Amendment; Mass. Const. pt. 1, arts XII & XV.

¹⁷ A full report of the case of Judge Prescott was printed after the trial was over. An unofficial document compiled for, and published by, the Boston Daily Advertiser, it is hereinafter referred to as *Trial of Prescott*. As of the date of this writing, all four copies of the Trial of Prescott previously held at the State House Library were missing. Only one copy was found in existence in Boston, at the Social Law Library.

¹⁸ In the trial before the senate, the managers on the part of the house were John G. King, Levi Lincoln, William Baylies, Warren Dutton, Samuel P.P. Fay, Lemuel Shaw (later Chief Justice of the Supreme Judicial Court), Sherman Leland, Horatio G. Newcomb and Francis C. Gray, the leading part being taken by Messrs. Shaw and Dutton. The counsel for Judge Prescott were William Prescott, George Blake, Daniel Webster, Samuel Hoar, Samuel Hubbard (later a Justice of the Supreme Judicial Court), and Augustus Peabody, the leading part being taken by Messrs. Hoar, Blake and Webster. *Trial of Prescott*, 11, 15, 211.

The fifteen articles of impeachment against Judge Prescott could be conveniently arranged in three classes:

1. Demanding and receiving other and greater fees for performing the duties of his office, than are by law allowed.
2. Transacting the business of the Probate Court at his own private office, and not at any Probate Court held according to law. . . .
3. Acting as counsel, and demanding and receiving fees for advice and assistance in matters upon which he had passed, or might be called to pass, or which were pending before him as a judge.¹⁹

Such alleged acts formed the basis of the house's claims of "misconduct and mal-administration in office" by Judge Prescott. Custom and usage were the principal defenses relied on by Prescott.²⁰ Ultimately, he was acquitted on all but two of the fifteen articles. On those two articles, the third and the twelfth, he was found "guilty by a majority of the members present and voting thereon."²¹

The trial of Prescott stands unique in the constitutional and judicial history of Massachusetts. The participants in the trial were aware of its historical significance.²² Yet, it has limited value as precedent in determining the exact nature of impeachment. During the proceedings, Lemuel Shaw (for the house) and Daniel Webster (for the respondent) both argued that impeachment was essentially a criminal proceeding.²³ How-

¹⁹ *Trial of Prescott*, 27.

²⁰ *Id.* at 18, 28.

²¹ *Id.* at 207. The total amount for which Prescott was impeached was about forty-six dollars collected over a period of fifteen years. *Id.* at 128.

²² As Mr. King, the Chairman of the Managers, said in opening the prosecution: ". . . they [the managers] cannot but feel embarrassed and oppressed by the novelty and solemnity of this scene. This is the first instance of the trial of a Judge under our present constitution; the first instance, in which the people have appealed to their constitutional protectors against the ministers of justice. Every circumstance connected with this trial partakes of this solemn character and deep interest. . . ." *Id.* at 26.

²³ "I do not advocate the proposition that this Hon. Court is bound by all the rules and forms of other inferior Courts, but I do contend that the Constitution is as imperative on this Court as on any other, where it declares, that every man's offense shall be described to him plainly, substantially and formally. This Court is a criminal Court; its judgment is as deep, as penal, as the judgment of any Court. It does not take away life, but it takes away every thing that makes life worth having. You take away not only a man's property, not his office merely; you disfranchise him, you dismember him, you turn him out of his society, you disqualify him, you take away the privilege which every citizen enjoys, of holding and being elected to office if the people see fit to choose him. You are a Court of criminal jurisdiction, and are bound substantially by the universal, fundamental rules of justice, by which all Court are governed." *Id.* at 43 [Webster].

". . . [W]e have never for a moment imagined, that the proceedings on this impeachment could be influenced or affected [sic. affected] by that provision [the provision of the constitution for removal by address]. The two modes of proceeding are altogether distinct, and in my humble apprehension were designed

ever, the judgment of the senate was rendered without an opinion, and it appears to have been limited to removal from office without any explicit consideration of “disqualification” or other punishment.²⁴ The assertion of counsel for both sides that the nature of the proceeding was essentially criminal were uncontradicted, but there was no affirmative decision on that point.

The Supreme Judicial Court has been apprised of this problem at least twice, but the results have been less than definitive. On one occasion, in a discussion of the impeachment clause of the constitution, the following was argued to the court:

It was stated by Mr. Lemuel Shaw, one of the managers in the trial of Judge Prescott, that the Senate in such a case sits as ‘a court of justice, of criminal jurisdiction, possessing all the attributes and incidents of such a court.’ *Prescott’s case*, 182. Jurisdiction therefore being given to the Senate, as a court, of the offense of judicial misconduct, such jurisdiction must be exclusive, except so far as concurrent jurisdiction is given to some other tribunal. The Constitution states one express exception, namely, the right of the appropriate tribunal to proceed by indictment, but it states no other. *This clause of the Constitution makes judicial misconduct a crime*, and designates the Senate as the tribunal to try it. Being a crime, it falls within the 12th article of the Declaration of Rights, which declares that ‘No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him.’ It also gives him the right ‘to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election.’ (Emphasis added.)²⁵

to effect totally distinct objects. No Sir; had the House of Representatives expected to attain their object, by any means short of the allegation, proof and conviction of criminal misconduct, an address and not an impeachment would have been the course of proceeding adopted by them. We readily therefore agree, that there is no question of expediency, of fitness or unfitness; but one of judicial inquiry, of guilt or innocence. . . . We also cheerfully accede to the proposition that this is a court of justice, of criminal jurisdiction, possessing all the attributes and incidents of such a court.” *Id.* at 182. [Shaw].

²⁴ *Id.* at 209, 210. “The Court for the trial of impeachment having found James Prescott guilty of misconduct and maladministration in the office of Judge of Probate of wills and for granting letters of administration within and for the county of Middlesex, charged upon him in the third and twelfth article of impeachment as charged against him by the House of Representatives—It is considered by the Court, that the said James Prescott be removed from the office of Judge as aforesaid . . . and he is removed accordingly.” *Id.* at 209.

²⁵ *Commonwealth v. Harriman*, 134 Mass. 314, 318-319 (1883). The language of the Prescott trial, quoted here in the argument in the Harriman case, characterizes the senate in an impeachment trial as a “court.” It should be noted that both sides in the Prescott trial were quite careful to characterize the senate in an impeachment trial as a “judicial court” and not a legislative body, or “legislative court.” *Trial of Prescott*, 164, 182.

The Court, in its decision in that case, chose not to discuss the argument that the constitution makes judicial misconduct a crime. But the assertion that it does is open to question. When the Court later addressed itself to the meaning of "misconduct and mal-administration in office," the result was an ambiguous opinion which was confusing in its attempt to define those words and which did little to aid in a precise determination of the nature of an impeachment proceeding. The Court said that

[t]he two words 'misconduct' and 'mal-administration' convey distinct ideas to the mind though the same conduct may often fall within both words. They do not describe, however, two elements of a single wrongdoing. Conduct of either description [misconduct or maladministration] is a ground for impeachment. . . . [And] . . . 'misconduct' that does not amount to 'mal-administration' may be a ground for impeachment.²⁶

In the same opinion the Court also said that:

[t]he words 'misconduct and mal-administration in their offices,' used in art. 8, and the word 'misconduct' as used therein include acts or omissions of [an officeholder] while holding the office . . . that can be said reasonably to render him unfit to continue to hold the office.²⁷

The Court thus infers two levels of misbehavior, with "misconduct" being less offensive than "mal-administration." Such acts or omissions do not have to be crimes, and thus, without being explicit, the opinion strongly suggested that something less than criminal conduct might be ground for impeachment. Any act or omission which would render the official "unfit to hold the office" is included in, but not a limitation on, categorization of impeachable offenses. Thus, the Court did not rule out the possibility of impeachment for conduct of a tortious nature or which is so contrary to the established notions of judicial administration²⁸ as to arouse the indignation of the general public.

A determination of the exact nature of an impeachment trial has im-

²⁶ *Opinion of the Justices*, note 9, *supra* at 627, 33 N.E.2d at 279. In this case, the justices answered certain questions of the house of representatives in relation to the possible impeachment of a member of the executive council.

²⁷ *Id.* at 629, 33 N.E.2d at 280. It is submitted that the Court chose to use the words "while holding office" instead of "while in office" in order to clarify the broad category of acts for which an officer might be impeached. I.e., the acts or omissions are not limited to those which might occur while an officer is physically in his office, or while he is wearing his robes, but rather they extend to any acts or omissions occurring *during his term of office* which might render him unfit to hold office.

²⁸ Such conduct might include habitual intemperance, habitual absence from office or neglect of duties, habitually crude treatment of parties and witnesses, etc.

portant bearing on several aspects of the trial procedure, such as the rules of pleadings and evidence, the burden of proof, the vote required to convict, the right to appeal, and the applicability of statutes of limitations. The trial of Judge Prescott was, in many ways, too ambiguous to be of assistance in the determination of these issues. For example, at one point, Warren Dutton, for the prosecution, said:

As to the rules of evidence which are to govern a Court of Impeachment, I agree with the learned Counsel who opened this part of [*sic*, of] the Respondent's defence, that they are essentially the same as govern Courts of Common Law. . . .

I also agree with the same learned Gentleman, that the same legal notions of crimes and offenses, are as substantially to be regarded in this Court, as in any other.²⁹

Yet Mr. Dutton seemed to be contradicting what he had stated earlier in the trial:

The words misconduct and mal-administration in office include every thing in the nature of an offense—bribery, extortion, *as well as other offenses for which an indictment would not lie at common law*; and the Respondent may be impeached and condemned for acts for which he could not be indicted. (Emphasis added.)³⁰

In spite of the arguments that an impeachment trial is tantamount to a criminal proceeding,³¹ there is strong indication that it is not. If the framers of the constitution had contemplated that impeachment was to be a criminal proceeding, they would probably not have provided that, notwithstanding impeachment, a person could still be called before a jury upon an indictment and be required to answer.³² If the proceedings are criminal, then it would seem to follow that the proof necessary to convict must be beyond a reasonable doubt. The Massachusetts Constitution is silent on this point. In the Prescott trial, the question of the degree of proof necessary to convict was not explicitly discussed, but was raised indirectly by reference to the common law.³³ It may be questioned

²⁹ *Trial of Prescott*, 193.

³⁰ *Id.* at 79.

³¹ Although impeachment does not prevent indictment, and although the punishment is limited to removal and disqualification, impeachment proceedings are highly penal in their nature and governed by rules of law applicable to criminal causes, so that provisions of statutes and of constitutions on the subject of procedure therein are to be construed strictly. 46 *Corpus Juris* 1002-1003, citing, *inter alia*, *State v. Hasty*, 184 Ala. 121, 63 S. 559 (1913), *Nelson v. State*, 182 Ala. 449, 62 S. 189 (1913), *State v. Hastings*, 37 Nebr. 96, 55 N.W. 774 (1893). See also note 23, *supra*.

³² 2 *PEOPLE v. SULZER*, 1534 (1913). This argument was made by the prosecution in the impeachment trial of Governor Sulzer of New York in 1913. The impeachment clause of the New York constitution is virtually the same as that of Massachusetts with regard to judgment.

³³ See text at note 29, *supra*.

whether a conviction by a simple majority vote is the result of proof of guilt beyond a reasonable doubt. On one of the two articles on which Prescott was convicted, the vote against him was less than two-thirds of the votes cast.³⁴ One of the traditional assurances that the burden of proof of guilt beyond a reasonable doubt has been met in criminal jury trials has been the requirement of a unanimous vote for conviction by all twelve jurors. Anything less than an unequivocal vote would show that reasonable men do entertain doubts as to the guilt of the accused, and that the burden of proof required in a criminal proceeding has not been met.³⁵ Perhaps it would be asking too much to require and expect a unanimous vote by forty senators in an impeachment trial, yet it is submitted that a simple majority vote for conviction fails to supply adequate assurance that such burden of proof has been met. If Massachusetts had had a rule similar to that of New York, i.e., that a two-thirds vote of those present is required to convict in an impeachment trial,³⁶ Prescott would have been acquitted on at least one of those two articles on which he was ultimately convicted. Judge Prescott was represented by extremely able counsel, yet the question of the number of votes required to convict was not raised.

It should be noted also that there is no provision for appeal and review in impeachment cases:

The legislative power of impeachment is not an arbitrary power, but the authority is final, and the judgment of the senate sitting as a court of impeachment cannot be called in question in any tribunal whatsoever except for lack of jurisdiction or excess of constitutional power.³⁸

Consider then, the following hypothetical under the Massachusetts Constitution: Assume an impeachment proceeding for alleged criminal acts, in which a judge is convicted. That judgment cannot be appealed nor, apparently, may the judge be pardoned.³⁹ Then assume that the judge

³⁴ *Trial of Prescott*, 206 (third article, 16-9).

³⁵ It is conceded, however, that the strength of such an argument is diminished somewhat by the holding in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which ruled that the sixth amendment, made applicable to the states by the fourteenth, does not require jury unanimity. Also, in the companion case of *Johnson v. Louisiana*, 406 U.S. 356, (1972) the Court upheld a 9-3 criminal conviction (three-quarters vote of the jury) observing that ". . . a substantial majority of the jury . . . were convinced by the evidence. . . [D]isagreement of [one-quarter of the] jurors does not alone establish a reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt." 406 U.S. 356, 362.

³⁶ N.Y. Const. art. 6, §24.

³⁷ See note 63, *infra*.

³⁸ 46 Corpus Juris 1003, citing *In re Opinion of Court*, 14 Fla. 289 (1872); *State v. O'Driscoll*, 5 S.C.L. 526, 7 S.C.L. 713 (1815); *Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924). Mass Const. pt. 2, c. 2, §1, art. VIII states that a conviction by impeachment may not be pardoned.

³⁹ See note 12, *supra*.

is indicted and convicted in a judicial criminal court for the same offenses. It would appear then that his case in the second proceeding may be appealed and reviewed, and that he may even be pardoned, or his conviction may be reversed. The anomaly becomes obvious. If his conviction in the second proceeding may be overturned, or if he may be pardoned for the offense, then a double standard is applied: one wrongful act is punishable in two different criminal courts with materially different results. One conviction is not reviewable and not pardonable, and the other is fully reviewable and pardonable. If a pardon or a reversal is granted on the second conviction, the first conviction still stands. Is the judge still a criminal? Consider also the confusion if the judge were acquitted in the second proceeding.

Finally, if impeachment were truly a criminal proceeding as was argued in the Prescott trial, statutes of limitations might possibly be raised as a bar to impeachment. In the Prescott case, some of the offenses alleged occurred sixteen years before the trial.⁴⁰ The general statute of limitation for the crimes which Prescott allegedly committed is and always has been six years.⁴¹ Yet, this issue was not raised on Prescott's behalf.

Perhaps, in the end, we can only reach the ambiguous determination of the nature of impeachment that was argued in the trial of Governor Sulzer of New York in 1913: "It is a proceeding, a trial if you will, that stands in a class by itself. It is neither exclusively criminal upon the one side nor exclusively civil upon the other."⁴² Perhaps it is because of this ambiguity in its nature that impeachment has been used only once in Massachusetts to remove a judge. Its rareness might also be the result of the existence of the much easier method of removal by address.

Address. In addition to impeachment, the Massachusetts Constitution provides that "[t]he governor, with the consent of the council, may remove . . . [judicial officers] upon the address of both houses of the legislature."⁴³ The address procedure stems from the English Act of Settlement (1700)⁴⁴ which provided for judicial tenure during good behavior (formerly the judges' commissions had been held during the king's pleasure), and which, in an effort to reduce the king's prerogative, provided that, notwithstanding the commission during good behavior, judges could lawfully be removed by the Crown *only* upon an address of both Houses of Parliament. Removal by address "is, in fact, a qualification of, or exception from, the words creating a tenure during good behavior, and not an incident or legal consequence thereof"; the power 'may be

⁴⁰ *Trial of Prescott*, 8.

⁴¹ G.L., c. 277, §63.

⁴² 2 *PEOPLE v. SULZER*, 1533-1534. In *Nebraska*, impeachment proceedings are considered criminal in nature. *State v. Leese*, 37 *Nebr.* 92, 94, 55 *N.W.* 798, 799 (1893).

⁴³ *Mass. Const.* pt. 2, c. 3, art. I.

⁴⁴ *Berger*, note 7, *supra* at 1500 n.127.

invoked upon occasions when the misbehavior complained of would not constitute a legal breach of the conditions on which the office is held.'"⁴⁵

Perhaps because most of the United States may have recognized the availability of the address procedure as a means for arbitrary invasion of the independence of the judiciary, only four states—Maryland, Massachusetts, New Hampshire, and South Carolina—in drafting their constitutions provided for the removal of judges by address without regard to misbehavior.⁴⁶ The result in Massachusetts has been that a judge may be removed without any reason being demonstrated, and without a hearing, if a simple majority of the members of both houses of the legislature and the governor's council can gain the concurrence of the governor.⁴⁷

The power of removal of judges by address has been exercised in Massachusetts on a number of occasions, as compared to the single instance of removal by impeachment discussed above. Two judges of the court of common pleas were removed by address in 1803 for extortion,⁴⁸ two justices of the peace were removed by address in 1876,⁴⁹ and on at least three occasions the procedure was used in cases relating to judges of the higher courts:

In 1803 Mr. Justice Bradbury of the Supreme Judicial Court was

⁴⁵ 1 A. TODD, *PARLIAMENTARY GOVERNMENT* (Walpole ed. 1892), quoted in *Berger*, note 7, *supra* at 1500 n.127. Merger notes that the Act of Settlement "was designed to curb *royal* interference with judges, not to restrict Parliament" and also that it did not provide Parliament with a means of forcing the Crown to follow its request for the removal of a judge. *Berger*, note 7, *supra* at 1500-01. The Act of Settlement made removal by address the only means by which the Crown could remove judges. It did not impinge upon the right to Parliament to impeach and try judges.

⁴⁶ Section 30 of the Maryland Constitution (1766), provided: "Judges shall be removed for misbehavior on conviction in a court of law, and may be removed by the Governor, upon the address of the General Assembly. . . ." 1 B. POORE, *FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS* (1877) 819. The Massachusetts Constitution of 1780, c. 3, art. 1, read as it does today, "All judicial officers . . . shall hold their offices during good behavior . . . provided, nevertheless, the governor . . . may remove them upon the address of both houses of the legislature." *Id.* at 968. The New Hampshire constitution (1784) read the same as that of Massachusetts on removal by address. 2 *Id.* at 1290. Section XX of the South Carolina Constitution (1776) read that judges were to be commissioned "during good behavior, but shall be removed on the address of the general assembly and legislative council." 2 *Id.* at 1619.

⁴⁷ See generally, Frothingham, *The Removal of Judges by Legislative Address in Massachusetts*, 8 *Am. Pol. Sci. Rev.* 216 (1914) [hereinafter cited as *Frothingham*]. See also, Grinnell, *The Removal of Judge Bradbury in 1803 and the History of the Removal by Address in Massachusetts*, 2 *Mass. L.Q.* 508 (1917) [hereinafter cited as *Grinnell*].

⁴⁸ *Frothingham*, note 47, *supra* at 218-19.

⁴⁹ *Id.* at 219. The procedure for the removal of justices of the peace was changed in 1907 by *Mass. Const. Amend. art. XXXVII*, which provides that "[t]he governor, with the consent of the council, may remove justices of the peace and notaries public.

removed because of incurable illness, his reason for not resigning being that he had no means of support. He died so soon after his removal that the problem of support did not continue. During the period of anti-slavery excitement, Judge Charles [*sic.*, Edward] G. Loring, who was both Judge of Probate in Suffolk County and United States Commissioner, was removed by Governor Banks [March 19, 1858] upon address of the legislature from his office of Judge of Probate because, in his capacity as United States Commissioner, he enforced the fugitive slave law, which was at that time unpopular in this neighborhood. This was an obvious abuse of the process as his act as commissioner was a simple performance of his duty under the law. The legislature had voted an address in the previous year and Governor Gardiner had refused to make the removal. The next case was that of the removal of Judge Day of the Barnstable Probate Court . . . in 1882.⁵⁰

Judge Joseph M. Day's removal brings into focus the contrasting uses of address and impeachment in Massachusetts history. By 1882, address, in spite of its arbitrary and unlimited nature, seems to have replaced impeachment as the means for removing judges, even for blatant offenses which would normally be impeachable. The acts of misconduct which were attributed to Judge Day, and for which he was never tried, were at least as criminal as the acts for which Judge Prescott was impeached in 1821.⁵¹ Yet no reasons for his removal were stated in the address to the governor, and none were assigned by the governor in his removal.⁵²

Judge Day protested his removal by address, especially since it denied him the right to cross-examine witnesses against him, and, in a *quo warranto* proceeding against the judge appointed in his place, he sought a judicial determination of the propriety of the procedure. The resulting case of *Commonwealth v. Harriman*⁵³ required a thorough judicial determination of the nature and purpose of removal by address. Accord-

⁵⁰ Grinnell, Removal by Address in Massachusetts and the Action of the Legislature on the Petition for the Removal of Mr. Justice Pierce, 7 Mass. L.Q. 17, 19 (#4, 1922).

⁵¹ Charges of misbehavior against Judge Day included, *inter alia*, allegations "that he improperly and illegally acted as counsel for executors, administrators, and guardians appointed by his own court . . ." that he allowed "the register of probate to take illegal fees. . .," that he was often in a state of "drunkenness" and was guilty of "rudeness," and that he was guilty of extortion (the alleged acts of which had taken place twenty-one years earlier). Hearing of Joseph M. Day, Senate 150, Report of the Joint Special Committee, xxv-xxviii (1882).

⁵² The address reads simply: "To his Excellency John D. Long, Governor of the Commonwealth of Massachusetts. The two branches of the Legislature, in General Court assembled, respectfully request that your Excellency would be pleased, with the consent of the Council, to remove Joseph M. Day from the office of judge of probate and insolvency for the county of Barnstable." *Id.* at xxii.

⁵³ 134 Mass. 314 (1883).

ing to Chief Justice Morton, who wrote the opinion of the Court, the common law does not control in the removal of judges by address. In such cases, no reason need be alleged. Judges may be removed notwithstanding good behavior. "The Constitution authorizes the removal [by the address procedure] without any reason being assigned for it; and therefore it is wholly immaterial what evidence or causes induced the Legislature to vote the address, or led the Governor and Council to act upon it. . . ." ⁵⁴ On the question of the removal of judicial officers, the executive and the legislative department are the sole judges. ⁵⁵ The power of removal by address is unrestricted and without limitation. ⁵⁶

The framers of the federal constitution rejected the procedure of removal of judges by address as "fundamentally wrong" and "arbitrary" since it provided for removal "without a trial." ⁵⁷ Address was also opposed "as weakening too much the independence of the Judges." ⁵⁸ In their efforts to assure that independence, the framers of the federal constitution restricted legislative interference with the judiciary "to trial by impeachment, under a standard ('high crimes and misdemeanors') of narrow, technical meaning, and even then a two-thirds vote was required for conviction." ⁵⁹

There can be little question that the distrust of the arbitrary nature of the address procedure which was expressed by the framers of the federal constitution had a rational basis. The address procedure, as unlimited and unrestricted as it is, carries with it always the threat of arbitrary interference in the judicial branch of government by the legislative and executive branches. This danger of arbitrary interference is not unreal, as is well illustrated by the removal of Judge Loring:

In the case of Judge Edward G. Loring, who was one of the distinguished lawyers of his day, it should be remembered that he was United States commissioner before he was appointed Judge of Probate, that there was no provision at that time against the holding of these two offices, and that the real cause of his removal was the fact that he did his duty as United States commissioner in enforcing the fugitive slave law as it then existed, but, as the law was unpopular, this created the excitement which resulted in his removal from the probate bench. In this instance, at least, it seems to be clear that the procedure was resorted to as a result of popular excitement not in any way connected with his conduct of the office from which he was removed, and that the community lost an

⁵⁴ Id. at 329.

⁵⁵ Id. at 326.

⁵⁶ Id. at 328.

⁵⁷ 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 428 (revised ed. 1937).

⁵⁸ Id. at 429.

⁵⁹ *Berger*, note 7, *supra* at 1502.

efficient judge by the removal, which was merely for the purpose of punishing an unpopular act.⁶⁰

Retention of the address procedure has been rationalized on the theory that it “has undoubtedly had an influence in avoiding any serious agitation for the recall of judges in Massachusetts.”⁶¹ While there is no historic basis for this theory, it is true that Massachusetts has resisted the temptation to make judges subject to recall,⁶² thus protecting the independence of the judiciary. It is submitted, however, that to justify the retention of the address procedure, with its potential for arbitrary interference with the judiciary, simply on the basis that it might offset any demand for another potentially arbitrary removal procedure, is to give removal by address undeserved support. No provision of Massachusetts law dealing with the judiciary carries with it as much potential for interference with the independence of the judicial branch of the government as does the law relating to the removal of judges by address. That potential exists even though the address must be acted upon by four distinct entities—the house, the senate, the council, and the governor.

The Massachusetts Constitutional Convention of 1820 twice considered the procedure for the removal of judges by address. The question first arose in a proposal to amend the constitution so as to require a two-thirds vote of both houses of the legislature to remove judicial officers instead of a bare majority vote. The proposition was defeated at the convention by a vote of 210 to 105.⁶³ It then arose a second time in a proposal that judicial officers should not be removed on address until the causes of removal were stated and such officers were given a chance to be heard in their own defense.⁶⁴ This amendment was adopted by the convention,⁶⁵ but it was rejected by the people at the polls.⁶⁶ Although

⁶⁰ *Grinnell*, note 47, *supra* at 517.

⁶¹ *Id.*

⁶² Recall is a procedure for removal which exists in a small number of states. It originates with the electorate. If a specified percentage of voters sign a petition for recall, the judge must face a special election. In some states, the judge runs unopposed and must win a majority of the votes to stay in office. In other states, opposition candidates may run and the individual who receives the highest total of votes serves the remainder of the term. AMERICAN JUDICATURE SOCIETY, *SELECTED READINGS ON THE ADMINISTRATION OF JUSTICES AND ITS IMPROVEMENT* 91 (1969). See also Note, Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges, 41 N.Y.U. L. Rev. 149, 164-65 (1966).

⁶³ See BOSTON DAILY ADVERTISER, *JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES* 472-86 (1853). Among the proponents of this measure were Lemuel Shaw and Daniel Webster, who were to meet one year later on opposite sides in the impeachment trial of Judge Prescott. Perhaps this is why Webster never raised the question of whether a two-thirds vote should be required to convict in an impeachment trial. See text at note 37, *supra*.

⁶⁴ BOSTON DAILY ADVERTISER, *JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES* 489 (1821).

⁶⁵ *Id.* at 489.

⁶⁶ *Grinnell*, note 47, *supra* at 515.

each of these proposals, if adopted, would have diminished the arbitrary nature of removal by address they would not have eliminated it. Technically, it would still be possible for a judge to be removed for no legally justifiable reason. The proposals might have improved the address procedure, but they still would not have provided absolute guarantees against its arbitrary use. In fact, despite the popular rejection of the recommendation of the Constitutional Convention of 1820, the practice in address cases has been to give such notice and opportunity for hearing as a matter of general custom.⁶⁷ But notice and hearing do not amount to trial on the merits, and that was the basis of Judge Day's objection to his removal, as expressed in *Commonwealth v. Harriman*. Today, the procedure for the removal of judges by address is potentially as unlimited and unrestricted as it was in 1780.

Removal for Age and Disability. The Massachusetts Constitution of 1780 provided for the removal of judges in only two ways: impeachment for "misconduct and mal-administration" in office, and removal by address. Otherwise, the judicial commission was to be held "during good behavior", which amounted to life tenure. The sad case of Judge Bradbury, who was incapacitated to the point where he would never be able to work again, but who refused to resign because there was no provision for pensions at that time and because he had no other means of support, pointed up the need for a more benevolent method of involuntary retirement for advanced age or disability. Bradbury was removed by address in 1803.⁶⁸ Over a hundred years later, following the Constitutional

⁶⁷ "In both these cases [Judge Loring and Judge Day] hearings were given, but only because this was a general custom. The course of procedure followed the usual method governing legislation. A petition was introduced for the removal of the judges. The petition was referred to a committee—in the Loring case to the committee on federal relations, and in the Day case to a special committee. These committees then sat and heard the evidence for and against removal, together with the arguments of counsel; after which in due time they reported to the legislature. This report, of course, had to be acted upon by both the house and the senate. If the committees favored removal they said so at the end of their reports; then they further recommended that a joint committee, consisting of two members from the senate and five from the house, be appointed to present the address to the governor. Full reasons for the removal were given in the report of the committee, and dissenters were allowed to file a report of their own. When the house and the senate adopted the report, the address was taken by this special committee to the governor. . . . When the address went to the governor . . . it consisted merely of a request for the removal of the judge, and did not state any reasons as did the report of the legislative committee. The governor, after the receipt of the address, presents the question of removal to the council, and if the council and the governor favor it the latter issues a writ of removal, sending a message to the legislature to inform them of the fact that removal has taken place." *Frothingham*, note 47, *supra* at 219.

⁶⁸ See text at note 50, *supra*. A full text of the address of the legislature to the governor, and a letter of Bradbury to the governor are contained in *Grinnell*, note 47, *supra*. Bradbury died shortly after his removal so that the problem of his support did not last long. *Id.* See *Grinnell*, Retirement of Judges, 40 *Mass. L.Q.* 40 (#2, 1955).

Convention of 1917-1918, the people of Massachusetts ratified the 58th Amendment which provided that "the governor, with the consent of the council, may after due notice and hearing retire . . . [all judicial officers] because of advanced age or mental or physical disability."⁶⁹ This newer removal procedure, unlike the unrestricted and potentially harsh process of address, provides for a hearing and exempts the legislature from the removal process. It also includes a *retirement* provision which entitles the judges affected by it to three-fourths retirement pay.⁷⁰

The fourth and final method of removal was just recently added to the constitution when the voters ratified the 98th Amendment which requires all judges to retire upon reaching seventy years of age. Nearly half the states now have mandatory retirement ages for judges.⁷¹

II. SUFFICIENCY OF THE CONSTITUTIONAL PROCESSES

Except for cases of old age or disability, the formal, constitutional mechanisms for the removal of judges in Massachusetts remain in the form of either impeachment or address. In the extreme situation which calls for nothing short of removal of the judge, these processes are available, and they have been used, even if rarely.⁷² Unfortunately, address and impeachment carry with them at least five basic, inherent problems: First, impeachment requires legislators to deal, in a non-legislative manner, with judicial misconduct. In effect, the law makers are required to assume the role of judge in an area—that of judicial misconduct—with which they normally have little contact.⁷³ It may also be questioned whether legislative processes are adequate for the fact-finding, trial court procedure which impeachment, if not address, demands.⁷⁴ Second, the legislature might well be unable to find the time or the money to conduct address or impeachment proceedings.⁷⁵ Third,

⁶⁹ Mass. Const. pt. 2, c. 3, art I. An earlier Constitutional Convention in 1853 has passed a resolution which abolished "good behavior" (life) tenure for judges and proposed a constitution which set the tenure of the justices of the Supreme Judicial Court at ten years and the tenure of the judges of the lower courts at seven years. The new constitution was rejected by the voters. See Drinan, *Judicial Appointments for Life by the Executive Branch of Government: Reflections on the Massachusetts Experience*, 44 *Texas L. Rev.* 1103, 1108 (1966).

⁷⁰ See G.L., c. 32, §65A.

⁷¹ Winters and Allard, *Judicial Selection and Tenure in the United States*, in *AMERICAN ASSEMBLY, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* 146, 166-67 (Jones ed. 1965) [Hereinafter cited as *Winters and Allard*].

⁷² In a report published in 1970, it was noted that "only five states . . . have used impeachment against judges within the last fifteen years, and no instance of the use of address, concurrent resolution, or recall (which exists in only seven states) [occurred] within the last three decades." Braithwaite, *Judicial Misconduct and How Four States Deal with It*, 35 *Law and Contemporary Problems* 151, 154 (1970) [hereinafter cited as *Braithwaite*].

⁷³ Shartel, *Federal Judges—Appointment, Supervision and Removal—Some Possibilities Under the Constitution*, 28 *Mich. L. Rev.* 485, 871 (1930).

⁷⁴ *Id.* at 871-73.

⁷⁵ Two states, Florida and Oklahoma, resorted to impeachment trials in the

if it did find the time and money, there is still no guarantee that the legislature would not be susceptible to partisan political influences. "Since the forum of decision is the legislature and legislators are partisan advocates by civic obligation and practical necessity, the . . . criticism seems justified."⁷⁶ Fourth, address and impeachment are processes which have all-or-nothing results: removal or retention. They are systems of elimination rather than of judicial discipline, and any disciplinary effects that they may have on members of the judiciary must result from the threat of the ultimate sanction—removal. It is a threat that cannot carry much weight with the judge whose conduct, even if obnoxious, would not warrant removal by impeachment for misconduct and mal-administration. Nor should such a judge be especially bothered by the threat of removal by address. Unless his conduct has aroused and outraged the general public, the political difficulties in mobilizing the executive and the legislature in an address proceeding would seem to rule against such a removal. The threat is further neutralized by the virtual disuse into which these procedures for removal have fallen. The Trial of Prescott remains the only impeachment of a judge in Massachusetts history, and no judge has been removed by address in this century. In reality, impeachment and address are effective disciplinary mechanisms only in those cases where a judge's misconduct has been so blatant that nothing short of removal would satisfy the general public. Cases not amounting to public scandal are not likely to result in any definitive action.

1950's and 1960's. Each trial took about fifteen days of the legislature's time. The two trials of judges in Florida were estimated to have cost around \$250,000. Both resulted in acquittal. In 1966, two years after the last impeachment trial, Florida changed its constitutional procedure for the removal of judges to that of the commission plan, discussed *infra*. See Dunn, *Impeachment System Goes on Trial*, in AMERICAN JUDICATURE SOCIETY, SELECTED READINGS ON THE ADMINISTRATION OF JUSTICE AND ITS IMPROVEMENT 86-87 & n.1 (1969). Legislative time, exclusive of costs of investigation, in the trial of two Oklahoma Supreme Court Justices, was estimated at \$50,000. After that trial, in 1966, the legislators of Oklahoma voted almost unanimously to change the constitutional procedure for the removal of judges to a system involving a Court on the Judiciary, discussed *infra*. See Hays, *The Discipline and Removal of Judges, An Oklahoma View*, 50 *Judicature* 64 (1966) [hereinafter cited as *Hays*].

⁷⁶ *Braithwaite*, note 72, *supra* at 154. "What is wrong with impeachment? 1. It is cumbersome. The legislature must either be in session or be called into session. Much time of all legislators is required which takes them from other duties. 2. It is expensive. In the Oklahoma case, legislative time alone amounted to more than \$50,000 in expenses in addition to the cost of investigation. Florida impeachment trials a short while ago were estimated to cost \$250,000. 3. It is essentially political rather than judicial in nature. Widespread publicity and editorial comment put many senators under pressure to vote the sentiment of their constituents rather than their own. 4. If thiser is a miscarriage of justice, there is no appeal. 5. The excessive publicity is damaging to the entire judicial system. *Hays*, note 75, *supra*."

III. DEVELOPMENT OF JUDICIAL SELF DISCIPLINE

One of the results of the disuse of constitutional processes for judicial discipline and removal has been the partial assumption by the courts themselves of various disciplinary techniques utilizing statutory grants of administrative superintendence. The Supreme Judicial Court itself is given "general superintendence of the administration of all courts of inferior jurisdiction," including the power to issue such "orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration."⁷⁷ Extrapolating from two recent opinions dealing with alleged misconduct on the part of two superior court judges,⁷⁸ one commentator—now an Associate Justice of the Superior Court—outlined the bases of power, authority and jurisdiction of the Supreme Judicial Court to discipline judges: The Supreme Judicial Court has (1) inherent common law and constitutional power to protect and preserve the judicial system; (2) general supervisory powers conferred by statute (G.L., c. 211, §3, quoted in part above); (3) the power to maintain and impose discipline with respect to the conduct of all members of the bar (i.e., the power to disbar a judge);⁷⁹ (4) the power, as a matter of judicial administration, to prevent a judge of an inferior court from exercising the powers and duties of his office; and (5) absolutely *no power*, regardless of the transgression, to remove any judge permanently from his judicial office.⁸⁰

A more limited disciplinary power is conferred on the Chief Justice of the District Courts. He is empowered by statute with the "general superintendence of all the district courts, other than the municipal court of

⁷⁷ G.L., c. 211, §3.

⁷⁸ *In re DeSaulnier*, 1971 Mass. Adv. Sh. 1345, 274 N.E.2d 454; 1972 Mass. Adv. Sh. 65, 279 N.E.2d 296.

⁷⁹ It is not necessary, however, for a judge in Massachusetts to be a lawyer. There are at least two reported cases in Massachusetts of the disbarment of lawyers who were also judges. Each case involved essentially criminal conduct. *Matter of Ruby*, 328 Mass. 542, 105 N.E.2d 234 (1952) [requesting a bribe]; and *Centracchio, petitioner*, 345 Mass. 342, 187 N.E.2d 383 (1961) [federal tax evasions, as well as breach of professional duty to clients]. Both actions involved district court judges, but they both also dealt with criminal acts which would have warranted disbarment proceedings against lawyers who were not judges.

⁸⁰ *Lynch*, *The President's Page*, 16 Boston Bar J. 3, 9 (# 6, 1972) [hereinafter cited as *Lynch*]. In the *DeSaulnier* case, the Supreme Judicial Court did not and could not remove the judge permanently; prior to hearing he had not been assigned to Superior Court sessions with his own consent; after its findings, following a full public hearing before the full court, the Supreme Judicial Court as a matter of judicial administration ordered him not to exercise the powers and duties of a judge, as the only interim remedy available pending action by the Legislature. The judge then resigned as a judge. *Id.* The *DeSaulnier* case was the first of its type in the history of the Superior Court. *In re DeSaulnier*, 1972 Mass. Adv. Sh. 65, 85, 279 N.E.2d 296, 308.

the city of Boston, and their clerks and other officers."⁸¹ If any judicial officer within his jurisdiction fails to comply with an order of the Chief Justice of the District Courts in the performance of his powers and duties, then the matter may be referred to the Supreme Judicial Court. If, after a hearing, the Supreme Judicial Court finds such non-compliance, it "shall forthwith make an appropriate order as to the matter involved."⁸²

The *DeSaulnier* case represents a nonstatutory assumption of disciplinary powers by the judiciary. Superior Court Chief Justice McLaughlin, whose statutory powers of supervision are strictly limited, initiated an ad hoc investigation of the incident. The investigatory proceedings, while not illegal, had no statutory basis, and thus represented an outright assumption of disciplinary authority by the Chief Justice.

What appears to have developed in Massachusetts is a complicated and ill-defined coalescence of judicial discipline (by the courts) and removal (by the executive and legislative branches) based on a disjointed set of statutory and constitutional provisions. The definitions of acts which may trigger the mechanisms for discipline and removal are often abstruse, and the basic inertia of the machinery appears to be such that only the most blatant cases of judicial misbehavior will be forceful enough to set its ponderous wheels in motion. "In situations involving anything less than the most flagrant violations of judicial ethics or indisputable incompetency, legislators and citizens hesitate to take the trouble to initiate removal procedures."⁸³ But even when citizens do attempt to make their grievances with a particular judge the basis for a disciplinary or removal action, the system has proven so ponderous and inefficient that it has frustrated not only those who bear the grievances but also those who deign to hear them out and determine the appropriate action to be taken. Indeed, there is no statutory obligation on any public body or individual to hear such grievances unless they amount to complaints of criminal conduct. In one recent case involving a district court judge, there has been such a seemingly unjustified prolongation of the controversy as to result in embarrassment to the judiciary. The report of Chief Justice Flaschner's Grievance Committee on its investigation into administration of justice in the Dorchester District Court was released on April 20, 1972, and yet in 1973 the controversy still rages.⁸⁴ The report is a testament to the inefficiency of the current procedures for the discipline and removal of judges in Massachusetts at least insofar as they pertain to the district courts:

⁸¹ G.L., c. 218, §43A. Under his authority, Chief Justice Flashner has established a Grievance Committee.

⁸² *Id.* But no explicit disciplinary or suspension power is provided by the statute.

⁸³ *Winters and Allard*, note 71, *supra* at 167.

⁸⁴ TROY CASE BROADENED. The SJC has allowed the Boston Bar to broaden its inquiry into the actions of Judge Jerome P. Troy and has given it the power to summon witnesses. Retired Judge John V. Spaulding was named special commissioner in the case. 1 Mass. Lawyers Weekly 79 (Feb. 5, 1973).

The office of the Chief Justice and his Grievance Committee can absorb and effectively handle some complaints, but when a matter, such as the instant case, develops with attendant complexity, controversy or publicity, it is entirely inappropriate for the office of the Chief Justice to be so engaged. Not only are there deficiencies in staff and time, but the disciplinary function in such an extraordinary instance as this is misplaced and counter-productive in an office which should be devoted primarily to working out with Judges and other personnel in the District Courts policies and procedures for improvement in the administration of justice.⁸⁵

Conviction of a judge for a serious crime, especially one involving moral turpitude, probably would not pose any great problems for the existing system of judicial discipline and removal in Massachusetts. Quick removal on address would be the likely result. For somewhat lesser crimes, a judge might be disciplined by disbarment as were the judges in *Matter of Ruby* and *Centracchio*.⁸⁶ However, problems may arise when a judge is charged with conduct which is not criminal or corrupt. For example, what actions could be taken against a judge whose behavior and demeanor on the bench "is illustrated by a lack of judicial poise or a disregard of established court practices—the type of behavior which does not necessarily render a judge unfit for the bench but which does make him less perfect and less worthy of his honored position?"⁸⁷ What action could be taken against a judge whose alleged misconduct is not so dramatic as to set in motion the constitutional processes for removal but which nevertheless has an eroding effect upon the efficient administration of justice? Examples of such behavior may be habitual tardiness or intoxication, short hours, long vacations, undignified courtroom behavior, arbitrary use of court powers, and extreme rudeness to lawyers, litigants, and witnesses.⁸⁸ According to Chief Justice Tauro,

⁸⁵ Report on the Investigation into the Administration of Justice in the Municipal Court of the Dorchester District 9 (April 20, 1972) quoted in *Lynch*, note 80, *supra* at 13.

⁸⁶ See note 79, *supra*.

⁸⁷ Tauro, *The Few and the Many*, 51 *Judicature* 215, 216 (1968) (hereinafter cited as *Tauro*).

⁸⁸ *Braithwaite*, note 72, *supra* at 152. See also Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 *U.S.F.L. Rev.* 244, 245-250 (1969). "[T]he Report of Chief Justice Flaschner's Grievance Committee [see *supra* note 80] concerns findings of non-criminal conduct in the judicial processing of criminal cases, i.e., lack of patience, concern, compassion and sensitivity toward defendants; non-compliance with law and required procedures; bail abuses; and mismanagement in the operation of the Dorchester Municipal Court . . ." *Lynch*, note 82, *supra* at 12. Judicial bad manners is a critical problem which renders a disciplinary technique vital. Although circumstances will not normally permit or justify removal, the public needs a tool to assert the standards of decency." Frankel, *Judicial Conduct, Discipline and Removal and Involuntary Retirement*, in *THE IMPROVEMENT OF THE ADMINISTRATION*

It is my belief and experience that most higher courts throughout the country possess a small segment of members whose professional and personal attitude and conduct are detrimental to them and to their fellow justices. . . . The overriding characteristic of these judges is a careless disregard for established practices of the court necessary for coordination of effort and effectiveness of action and direction. "I'll do as I please" marks his general attitude.⁸⁹

To those who are aggrieved by such judges, no definitive, formal and strict disciplinary remedy is available in Massachusetts short of an appeal to those branches of the government having the constitutional power of removal. Instead, they must take their grievances to such loosely defined and basically powerless committees as the Chief Justice's Grievance Committee, which has already admitted a certain lack of legal and administrative competence in this area.⁹⁰

IV. THE NEED FOR NEW ALTERNATIVES

Since all efficient court systems require that judges be given appropriate administrative authority, and while problems of judicial misconduct are admittedly and correctly within that authority, it is becoming increasingly evident that efficient and expeditious judicial discipline is not possible under the statutory administrative authority which presently exists. In a number of states, awareness of this fact has shown the necessity for, and resulted in the adoption of, workable apparatus for judicial discipline which exist outside the local court systems and which are available when needed. It has been said that the quality of justice is in large measure determined by the quality of the judiciary.⁹¹ The need for high standards of high judicial conduct is unquestioned. There is some objection, however, to the idea of subjecting judges to external, extrajudicial disciplinary procedures. The tradition of an independent judiciary carries with it the notion of conscientious self-discipline. Opponents of formal disciplinary procedures feel that apart from cases involving criminal conduct, the maintenance of judicial ethical standards should rest completely in the conscience of the judge, and that purely judicial misconduct should not be the subject of sanctions if the independence of the judiciary is to be inviolate. Many independence advocates would argue that a formal, easily accessible disciplinary mechanism would provide a means for unwarranted attacks on judges and that existing methods of judicial discipline are adequate.

OF JUSTICE (A.B.A. Handbook) 55, 59 (5th ed. 1971) [Hereinafter cited as *Frankel*].

⁸⁹ *Tauro*, note 87, *supra* at 216-17.

⁹⁰ See text at note 85, *supra*.

⁹¹ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 146 (1967) [Hereinafter cited as *The Challenge of Crime in a Free Society*].

However, according to Jack E. Frankel, the Executive Secretary of the California Commission on Judicial Qualifications:

[A] modern court system needs effective discipline and removal procedures. To maintain that a judge should be restrained only by his conscience is to restate the divine right of kings in a different guise. The concept of an independent judiciary does not necessarily entail the immunity of judges from the rule of law. The American temperament rebels at the thought that public officials are above the law and beyond reasonable sanction. Abuse of the procedures should not be feared, since notions of fair play can be as applicable when the judge is being judged as when he is judging. Traditional methods of discipline have proven unsatisfactory. Public opinion, elections, and bar association action are ineffective against a recalcitrant judge, and the convening of the United States Senate or a busy state senate for a judge's impeachment proceeding is almost fanciful today. * * *

In state after state, study after study, conference after conference, the need for fair but effective disciplinary measures for maintaining judicial fitness has been proved.⁹²

Some of the advantages of such a formal judicial disciplinary procedure are that it would protect judges from harrassment as much as it would see to the maintenance of their ethical standards; by relieving the legislature from such non-legislative matters it would provide the best opportunity for the questions of misconduct or disability to be decided on their merits; and it would eliminate, to a great extent, the political pressures and influence to which legislators, the executive, and even bar associations are subject.⁹³

A growing number of states are adopting formal procedures for the discipline and removal of judges through judicial action. Such procedures usually involve one of two methods. One system, examples of which may be found in New York and Oklahoma,⁹⁴ uses a completely separate

⁹² Frankel, *Judicial Discipline and Removal*, 44 *Texas L. Rev.* 1117, 1118-19 (1966).

⁹³ *Id.* at 1120.

⁹⁴ The New York system of an independent tribunal, called the Court on the Judiciary, was created by constitutional amendment in 1947. N.Y. Const. art. VI, §22. It was created as an addition to, and not a replacement for, pre-existing methods of removal which included impeachment, N.Y. Const. art. VI, §24; removal by concurrent resolution of both houses of the legislature, N.Y. Const. art. VI §23a; and removal of lower court judges by the Appellate Division, N.Y. Const. art. VI, §22i. The court itself is composed of six members: the chief judge and senior associate judge of the Court of Appeals (the state's highest court), and one judge from each of the four departments of the Appellate Division of the Supreme Court, selected by a majority of the judges in each department whenever the Court on the Judiciary is convened. N.Y. Const. art. VI, §22b. It has statewide jurisdiction and is empowered to remove judges for cause and to retire judges for mental or physical disability upon the concurrence of four or

tribunal, not subordinate to any other court, to hear cases on judicial misconduct. The other system, examples of which may be found in California and Florida,⁹⁵ uses a procedure of investigation and hearing, with recommendations made to the Supreme Court or highest appellate court of the state, which court orders the discipline or removal. The procedure is entirely confidential until the report is filed with the high court. Variations on the two systems exist in other states.⁹⁶

In at least two of those other states, Florida and Oklahoma, the impetus to adopt a new formal system of judicial discipline through judicial action can be traced directly to bad experiences with the more

more of its members. N.Y. Const. art. VI, §22c. The powers of the court—to appoint attorneys, summon witnesses and documents, etc., and the rights of the respondents notice, opportunity to be heard, etc., are the usual ones. N.Y. Const. art. VI, §22f. Any case under its consideration, except for a disability case, may be pre-empted by the initiation of a disciplinary proceeding in the legislature. N.Y. Const. art. V, §22e. The court has no permanent staff or continuous existence as a body, and it may be called into existence only by the Chief Judge of the Court of Appeals, the governor, the executive committee of the state bar association, or any of the presiding judges of the Appellate Division departments. N.Y. Const. art. VI, §22d. The court has been convened three times since it was established, resulting in two removals and two “rebukes and reprimands.” An account of its three cases may be found in *Braithwaite*, note 72, *supra*, at 160-62.

⁹⁵ The California Commission on Judicial Qualifications was established by constitutional amendment in 1960. It is basically a hearing agency, authorized to receive and investigate complaints on five specified grounds: 1. wilful misconduct in office; 2. wilful and persistent failure to perform duties; 3. habitual intemperance; 4. disability which is likely to become permanent; and 5. conduct prejudicial to the administration of justice which brings the judicial office into disrepute. Cal. Const. art. VI, §18c. If, after investigations and a hearing which are confidential by law, the commission deems that censure, removal, or forced retirement is warranted, it may recommend such action to the state Supreme Court which is empowered, after publicly reviewing the facts, to remove the judge's rights to office and pension, to compel his retirement, or to censure him. Cal. Const. art. VI, §18d. The commission, which meets regularly and may receive complaints from anyone, is composed of five members of the judiciary, two members of the bar and two laymen, all of whom are unsalaried and serve for four year terms. Cal. Const. art. VI, §8. In the first ten years of its existence, the commission began investigations on hundreds of complaints. In some instances the instigation of these confidential proceedings would be followed by the voluntary retirement of the judge in question. *Frankel*, note 92, *supra* at 1128. Only two cases had full proceedings though to the state Supreme Court in that time. In one, the court refused to follow the commission's recommendations for removal, and in the other it gave the recommended censure. *Braithwaite*, note 72, *supra* at 164.

⁹⁶ Courts on the Judiciary are provided for in Alabama, Hawaii, Illinois, Indiana, Iowa, Louisiana, New Jersey, New York, North Carolina, Oklahoma, Texas and Virginia. Commissions exist in Alaska, California, Florida, Idaho, Louisiana, Maryland, Michigan, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, Texas and Utah. As of 1968, proposals for commissions were in various stages of consideration in Georgia, Indiana, Iowa, Missouri, Montana, Nevada, North Dakota and West Virginia. AMERICAN JUDICATURE SOCIETY, JUDICIAL DISCIPLINE AND REMOVAL (Report No. 5 April 1968).

traditional legislative method of impeachment.⁹⁷ Probably as a result of their judicial characteristics, the plans have met with negligible opposition by members of the judiciary, and they have been almost unanimously lauded by the commentators.⁹⁸ The California commission system in particular, with its easy accessibility for any aggrieved party and its confidential investigations, has been most favorably received.⁹⁹

As of this writing, three bills are pending in the Massachusetts legislature, each of which would amend the constitution to provide for judicial grievance committees similar to the California Commission on Judicial Qualifications.¹⁰⁰ Such an amendment, while not to be adopted lightly or without serious consideration, should be encouraged. Massachusetts has virtually no system for judicial discipline as such. From the judge's point of view, those processes which do exist for judicial discipline may seem extremely unjust and arbitrary when applied. The prerogatives of the legislature and the executive are not in jeopardy. Existing processes for removal can be maintained, as has been the case in New York and California. If the experiences of other states are accepted, the independence of the judiciary would not be jeopardized by such changes. What is and always should be our concern is the quality of our judiciary, for that is the key to the quality of our justice.

No procedural or administrative reforms will help the courts, and no reorganizational plan will avail unless judges have the highest

⁹⁷ See AMERICAN JUDICATURE SOCIETY, *SELECTED READINGS ON THE ADMINISTRATION OF JUSTICE AND ITS IMPROVEMENT* 86-89, 93-94 (1967).

⁹⁸ See Burke [Justice of the Supreme Court of California], *Judicial Discipline and Removal: The California Story*, 48 *J. Am. Jud. Soc'y* 167 (1965); Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 *U.S.F. L. Rev.* 244 (1969); and Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 *N.Y.U. L. Rev.* 149 (1966).

⁹⁹ Cumbersome procedures [for involuntary retirement and removal of judges] e.g., impeachment, should be supplemented by effective machinery for the investigation of complaints against judges and for the removal of those found unfit or guilty of misconduct in office. The commission plan of judicial removal adopted by constitutional amendment in California in 1960 seems admirably designed for these purposes and is worthy of adoption in other states. Recommendation No. 7 of the 27th American Assembly on the Courts Public and the Law Explosion, April 29-May 2, 1965. The President's Commission on Law Enforcement and the Administration of Justice recommends: States should establish commissions on judicial conduct taking the approach used in California and Texas. *The Challenge of Crime in a Free Society*, note 91, *supra* at 147. In a similar vein in Recommendation No. 5 of the Consensus of the National Conference on Judicial Selection and Court Administration, 1959, sponsored by the A.B.A., the American Judicature Society and the Institute of Judicial Administration, Inc.

¹⁰⁰ Mass. Senate Bill 572, Mass. House Bill 1375, Mass. House Bill 4532. Senate 572 is the most thorough of the bills, and is the most similar to a California plan. It is proposed to make it even more thorough by means of an amendment proffered by the Coalition for Better Judges, 48 Inman Street, Cambridge, Massachusetts 02139.

qualifications, are fully trained and competent, and have high standards of performance.¹⁰¹

TRAVER C. SMITH, JR.

STUDENT COMMENT

§24.9. **Non-constitutional processes: Judicial self-discipline in Massachusetts: In Re DeSaulnier.**¹ In the summer of 1971, Michael Raymond, a reputed underworld figure, appeared before a Congressional subcommittee investigating organized crime. His testimony raised serious questions concerning the conduct of two Massachusetts Superior Court Justices, Edward DeSaulnier and Vincent Brogna, and prompted a confidential investigation into their activities by Superior Court Chief Justice Walter McLaughlin, Sr. Following submission of Chief Justice McLaughlin's report, the Supreme Judicial Court of Massachusetts, sitting en banc, conducted a formal hearing to investigate the conduct of Judges DeSaulnier and Brogna.

In *In Re DeSaulnier*, the Court essentially confirmed Raymond's allegations. It found that in 1962, Raymond paid Charles Baker, a bailbondsmen, \$60,000 in consideration for Judge DeSaulnier's attempt to obtain a favorable disposition of a larceny case² pending before Judge Brogna in which Raymond was a defendant.³ Judge DeSaulnier communicated with Judge Brogna, without objection, in an attempt to influence the case.⁴ Following a restitution agreement between Raymond and his victims⁵ and a series of continuances,⁶ Judge Brogna gave Raymond a suspended sentence and placed him on probation (following the recommendation of the District Attorney's Office).⁷ At a meeting with Raymond and Baker following disposition of the case, Judge DeSaulnier made reference to a telephone conversation with Judge Brogna and expressed his pleasure in doing business with Raymond.⁸

In addition to the Raymond incident, the Court found that: (1) Judge DeSaulnier, while a member of the Committee on Bail, "frequented places of entertainment outside the Commonwealth" with Nathan Baker, a bailbondsmen, and Baker did on occasion lend money to Judge De-

¹⁰¹ *The Challenge of Crime in a Free Society*, note 91, *supra* at 146.

§24.9. ¹ 1972 Mass. Adv. Sh. 65, 279 N.E.2d 296.

² *Id.* at 70, 74, 279 N.E.2d at 300, 302.

³ Raymond was charged with larceny of approximately \$17,000 from Sylvia Barrows and larceny of approximately \$18,000 from Evelyn Lewis. The indictment alleged his "fraudulent exchange of worthless oil and gas leases for cash and marketable securities owned by Miss Lewis." *Id.* at 68, 279 N.E.2d at 299.

⁴ *Id.* at 76, 279 N.E.2d at 303.

⁵ *Id.* Raymond agreed to pay Miss Lewis \$8,000 in discharge of her claim and Mrs. Barrows \$7,000 in discharge of her claim.

⁶ *Id.* at 72-74, 279 N.E.2d at 301-302.

⁷ *Id.* at 78, 279 N.E.2d at 304. Raymond was placed on probation for three years subject to his fulfilling his restitution agreement.

⁸ *Id.* at 79, 279 N.E.2d at 305.

Saulnier; (2) Judge DeSaulnier placed long distance telephone calls, not involving official court business, which were charged to Berkshire County; and (3) Judge DeSaulnier was issued a real estate broker's license while on the bench.⁹

In *DeSaulnier*, the Supreme Judicial Court was confronted by four major issues: (1) whether it had jurisdiction to hear the case; (2) what rules of procedure and evidence should govern the proceeding, which was without precedent in this Commonwealth; (3) what kind of behavior constitutes judicial misconduct warranting punitive sanctions; and (4) what range of sanctions the Supreme Judicial Court is empowered to employ.

The Supreme Judicial Court held that it had the authority and the duty to investigate judicial misconduct occurring either inside or outside the courtroom.¹⁰ The Court, in formulating rules for the conduct of such a proceeding, held that the usual rules of court would govern, but that where the public interest required, strict adherence to the formal rules would not be demanded.¹¹ On the question of standards of conduct for judges, the Court placed primary emphasis on the need for judicial behavior to conform to the public's expectation of appropriate judicial conduct. The Court concluded that all judicial conduct should reinforce the belief in an impartial and honest judiciary.¹² Where deviation from this norm is sufficient to warrant a finding of "serious judicial misconduct,"¹³ the Court held that it is empowered to order punitive sanctions.¹⁴ Finding that Judge DeSaulnier's conduct had rendered him unfit to serve as a judge or as a member of the bar, the Court disbarred him and ordered him to discontinue the exercise of his judicial duties.¹⁵ Judge Brogna was censured for failing to report the attempt to influence his disposition of the Raymond case.¹⁶

I. JURISDICTION

Counsel for DeSaulnier and Brogna contended that the Supreme Judicial Court lacked jurisdiction to entertain the case, claiming that impeachment and address were the exclusive means by which judges may be disciplined in Massachusetts. The Massachusetts Constitution provides: "[t]he senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and maladminis-

⁹ *Id.* at 82, 279 N.E.2d at 306-07.

¹⁰ *Id.* at 83-84, 279 N.E.2d 307-08.

¹¹ *In re DeSaulnier*, 1971 Mass. Adv. Sh. 1345, 1348, 274 N.E.2d 454, 457. See *Matter of Welansky*, 319 Mass. 205, 207, 65 N.E.2d 202, 203 (1946).

¹² 1972 Mass. Adv. Sh. at 85, 279 N.E.2d at 308.

¹³ *Id.* at 84, 279 N.E.2d at 308.

¹⁴ 1971 Mass. Adv. Sh. at 1347, 274 N.E.2d at 456.

¹⁵ 1972 Mass. Adv. Sh. at 89, 279 N.E.2d at 310.

¹⁶ *Id.* at 89, 279 N.E.2d at 311.

tration in their offices.”¹⁷ An official who is convicted by the Senate is removed from office and may be disqualified from holding office in state government.¹⁸ The Massachusetts Constitution also expressly provides for the removal of judges by address: “All judicial officers . . . shall hold their offices during good behavior . . . nevertheless, the governor, with consent of the council may remove them upon the address of both houses of the legislature.”¹⁹

Although conceding that these provisions give the other branches of government “primary responsibility for removal of judges,”²⁰ the Court concluded that the judiciary also possesses a disciplinary authority which derives from (1) its “inherent common law power . . . to supervise the administration of justice,”²¹ (2) its power “to establish and enforce rules of court,”²² (3) its authority to discipline and disbar attorneys,²³ and (4) its general statutory power to superintend the administration of all courts.²⁴ The Court placed particular emphasis upon its disbarment authority as illustrated by the case of *In Re Ruby*²⁵ and the general superintendence statute.

In *In Re Ruby*, the Supreme Judicial Court upheld the decision of a single Justice disbaring Ruby, a judge in the district court of Williamstown, for requesting money from an individual who had an eviction action pending in the judge’s court.²⁶ It was clear on the record that a solicitation had occurred, the only question being whether Ruby had asked for a gift or for a loan. The Court, feeling that distinction not to be crucial,²⁷ affirmed the disbarment, treating the case as a simple

¹⁷ Mass. Const., pt. 2, c. 1, §2, art. 8.

¹⁸ *Id.*

¹⁹ Mass. Const., pt. 2, c. 3, art. 1.

²⁰ 1972 Mass. Adv. Sh. 65, 84-85, 279 N.E.2d 296, 308.

²¹ *Id.* at 84, 279 N.E.2d at 307.

²² *Id.*

²³ *Id.*

²⁴ *Id.* The statute reads: “Superintendence of inferior courts; power to issue writs and process. The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue writs of error, certiorari, mandamus, prohibition, quo warranto and all other writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

“In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in three c; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration. . . .”

²⁵ 328 Mass. 542, 105 N.E.2d 234 (1952).

²⁶ *Id.* at 544, 105 N.E.2d at 235.

²⁷ *Id.* at 547, 105 N.E.2d at 237.

disbarment of a lawyer who also happened to be a judge. This penalty was solely operative against Ruby qua lawyer, without regard to possible punishment against him as a judge. Nor was there any discussion in *Ruby* of any authority under which the Court might impose any sanction other than disbarment. Thus, after the *Ruby* case, it was clear that the Court had authority to investigate judicial misconduct brought to its attention by a Bar Association complaint and to disbar a judge who was also an attorney. The decision did not reach the questions of the Court's authority to initiate an independent inquiry into judicial wrongdoing or its powers to move against a judge in his judicial capacity.

The history of the general superintendence statute²⁸ indicates that it was probably not intended it to authorize judicial inquiries into alleged misconduct. The statute is entitled "Superintendence of inferior courts; power to issue writs and process." As originally enacted the statute, under a general superintendence clause, authorized the Supreme Judicial Court to issue writs to correct errors in matters pending in the lower courts.²⁹ A second paragraph was added in 1956 to confer broader authority on the Supreme Judicial Court to superintend the *administration* of all lower courts by issuing "such orders, directions and rules as may be necessary."³⁰

The amendment's history dates back to 1954, when the governor appointed a judicial survey commission to study the administration of justice in the courts of Massachusetts.³¹ The committee's recommendations³² ranged from the appointment of an administrator of the courts to creation of pensions for judges. All of its recommendations were specific proposals, and none involved judicial discipline by the judiciary. These recommendations were sent by the governor to the House of Representatives for legislative consideration. However, the legislature adopted only three of the commission's recommendations,³³ and in

²⁸ G.L., c. 211, §3.

²⁹ This has been retained as the first paragraph of the present statute. See note 31, *infra*.

³⁰ See note 24, *supra*.

³¹ 1956 Mass. H.R. Journ. 604-605.

³² 1956 Mass. H.R. Journ. 605. The recommendations by the Judicial Survey Commission were as follows: (1) appointing an Administrator of the Courts, (2) granting of full-rule-making power to the Supreme Judicial Court, (3) giving the superior court the power to prescribe forms of pleading in law cases, (4) establishing of a fifteen dollar jury fee, (5) providing for limited oral depositions before trial in the superior court, (6) continuing the present temporary act permitting district court justices to sit in the superior court on misdemeanor and motor vehicle tort cases with certain amendments, (7) extending full-time judicial services in the district courts, (8) giving the Administrative Committee of the probate courts the power to prescribe and enforce uniform practices and procedures, (9) providing pensions for judges appointed after July 31, 1956 only if they resign within thirty days after having completed ten years service and having reached the age of seventy.

³³ 1956 Mass. H.R. Journ. 1978. The legislature had adopted legislation giving the superior court the power to prescribe forms of pleading, continuing

August of 1956 the governor sent a letter to the House proposing their re-evaluation of the other proposals.³⁴ The governor strongly recommended legislation establishing an Executive Secretary to the Justices of the Supreme Judicial Court.³⁵ Such a proposal had recently been rejected by the House, apparently for fear that it might authorize the secretary to investigate complaints involving the nonjudicial duties of court officers.³⁶ The governor in his message to the House suggested that a Senate proposal had eliminated that possibility.³⁷ The Senate's proposal charged the executive secretary with certain administrative responsibilities, but it strictly limited his duties to matters pertaining to the judicial system.³⁸ This proposal was adopted by the House in "An Act Providing for the Administration of the Courts and an Executive Secretary to the Justices of the Supreme Judicial Court."³⁹ As finally enacted, it amended G.L., c. 211, §3 by expanding the scope of superintendence to include *court administration*, and it established the office of executive secretary, whose duties corresponded closely to that expanded definition of superintendence.⁴⁰ At the time of its passage the notion that this statute might authorize the Court to investigate and discipline judges for judicial misconduct was apparently far beyond the contemplation of the legislature.

To justify its broad interpretation of the statute, the *DeSaulnier* Court relied upon the admittedly expansive language of the law and a Michigan Supreme Court decision construing a similar provision in the Michigan Constitution. *In Re Graham*⁴¹ involved a Michigan probate judge who requested a \$20,000 loan from the guardian of a ward's estate.⁴² The Michigan Supreme Court initially refrained from taking any disciplinary action until the legislature had acted on the court's recommendation that the judge be removed.⁴³ When the legislature failed to remove Graham, the court enjoined Graham "from exercising the powers and duties of . . . [his] office."⁴⁴ The court based its authority on the provi-

the law of allowing district court justices to sit in the superior court on misdemeanors and motor vehicle tort cases, and providing for limited oral depositions before trial in the superior court.

³⁴ 1956 Mass. H.R. Journ. 1979.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ 1956 Mass. S. Journ. 450, 797, 1256, 1281, 1292. Among the duties of the executive secretary were the examination of administrative records, examination of the dockets of the courts, investigation and collection of statistical data about the expenditure of public money in the operation of the courts, and investigation of complaints concerning the operation of the courts.

³⁹ Acts of 1956, c. 707.

⁴⁰ *Id.*

⁴¹ 366 Mich. 268, 114 N.W.2d 333 (1962).

⁴² *Id.* at 272-273, 114 N.W.2d at 334.

⁴³ *Id.* at 279-280, 114 N.W.2d at 338.

⁴⁴ *Id.* at 280-281, 114 N.W.2d at 338 [Reporter's Note].

sion in the 1908 Michigan Constitution giving the Supreme Court "general superintending control over all inferior courts."⁴⁵ Ironically, one year later when the Michigan Constitution of 1963 became effective, it specifically stated that "the Supreme Court shall not have the power to remove a judge."⁴⁶ The Michigan Supreme Court, in a subsequent case concerning Graham, stated in dictum that the court's injunction against Graham did not constitute removal since Graham was still able to collect his pay.⁴⁷

While the *DeSaulnier* court correctly focused upon the linguistic similarities of the Michigan and Massachusetts provisions, it glossed over the significant difference between statutory construction and constitutional interpretation. Constitutional language is meant to be dynamic. A court may be justified in giving a more expansive construction to constitutional language than the plain meaning of the words might dictate or than the drafters of the Constitution might have foreseen. On the other hand, statutory language is usually narrower in scope and is to be read carefully in light of its legislative history. G.L., c. 4, §6⁴⁸ sets out the rules for construction of statutes. The section states that rules of construction are only to be employed where they would not result in a "construction inconsistent with the manifest intent of the lawmaking body." Extracting this "manifest intent" test from the canons of statutory construction and applying it to the instant case, there is at least a reasonable possibility that the Supreme Judicial Court's construction of c. 211, §3, in *DeSaulnier* was manifestly inconsistent with the legislative purpose.

Most interestingly, the Supreme Judicial Court's resolution of the jurisdictional issue leaves open two major policy questions: (1) whether judicially imposed discipline is the best way to promote public confidence in the judiciary, and (2) whether the Court should ordinarily request legislative action before it proceeds to impose judicial sanctions. What would have been the result, for example, had the legislature voted against impeachment of Judge DeSaulnier after the order issued by the Supreme Judicial Court? To avoid needless friction between the branches of government, these questions should be clarified prior to the next judicial self-discipline proceeding.⁴⁹

II. RULES GOVERNING THE HEARING

The *DeSaulnier* case presented unique procedural problems because the Supreme Judicial Court sat, in a sense, as a trial court and heard

⁴⁵ Mich. Const., Art. VII, §4 (1908).

⁴⁶ Mich. Const., Art. VI, §4 (1963).

⁴⁷ *Ransford v. Graham*, 374 Mich. 104, 108, 131 N.W.2d 201, 203 (1964).

⁴⁸ G.L., c. 4, §6 reads: "Rules for construction of statutes. In construing statutes . . . rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute."

⁴⁹ As of this writing, such a proceeding is about to commence in the case of Dorchester District Court Judge Jerome Troy.

testimony from witnesses. Definitionally, the hearing was a trial in that it was "a judicial examination in accordance with law . . . of the issue."⁵⁰ As such, the accused were entitled to basic due process guarantees. The Supreme Judicial Court sought to assure this in several ways. The judges were represented by their own counsel throughout the proceeding. Evidence against the judges was presented by specially appointed counsel, Edward B. Hanify and John M. Harrington.⁵¹ Their appointment was designed to insure the separation of prosecutorial and judicial functions, a problem with clear constitutional implications⁵² which might have arisen had the Supreme Judicial Court conducted the proceeding on a non-adversary basis.

On the other hand, the Court never clearly characterized the proceeding as civil or criminal and hence the exact quantum of due process required was not set forth. This confusion as to the nature of the proceeding was illustrated by the standard which the Court established for the burden of proof which must be met before "serious misconduct" could be found. The Court rejected both the simple "preponderance of the evidence" test which is commonly employed in civil actions and the "beyond a reasonable doubt" standard which applies in criminal prosecutions. Instead, it chose a middle course, utilizing a "fair preponderance of the evidence" test.⁵³

This choice was probably influenced by practical as well as legal considerations. Since the statute of limitations had expired with regard to the illegal activity alleged in *DeSaulnier*, there was little likelihood of a subsequent criminal prosecution. Thus, the protection of the accused did not require application of the criminal law standard. Secondly, the charges excited public opinion and bore directly on a major public interest, the integrity of the judicial system. Employing a standard which would require finding "beyond a reasonable doubt" might have led to a situation where considerable evidence could have been gathered to support the charges, yet a reasonable doubt existed. A finding of innocence under such circumstances might have caused widespread public dissatisfaction with the entire disciplinary procedure and public confidence in the judiciary system. Finally, the time lag between the hearing and the alleged improprieties was so great as to make improbable any findings "beyond a reasonable doubt."

On the other hand, the Court was not about to employ a standard which would result in a finding of guilt based on a small quantum of evidence. It recognized the severity of the charges and the repercussions of a guilty finding not only upon the future of the accused, but, on the entire judicial system. Lawyers and judges throughout the state would

⁵⁰ BLACK'S LAW DICTIONARY 1675 (4th ed. 1968).

⁵¹ 1972 Mass. Adv. Sh. at 65, 279 N.E.2d at 298.

⁵² Id. It is basic to due process that there be an impartial trier of fact; this cannot be achieved when prosecutorial and fact-finding functions are merged.

⁵³ 1972 Mass. Adv. Sh. at 67, 279 N.E.2d at 299.

be affected by the public's reaction to the proceeding. These factors militated against the Court's adoption of a "preponderance of the evidence" standard. In conclusion, the Court selected a standard which it felt would further the twin aims of the proceeding—to protect the rights of the accused and to simultaneously police the fairness and impartiality of the judiciary.

In view of this delicate balancing of interests, one is tempted to characterize the proceeding as quasi-criminal, in some sense akin to a forfeiture proceeding. Such a characterization would impose a higher obligation to provide due process safeguards, particularly with regard to the admissibility of evidence. In *The 1958 Plymouth Sedan v. Pennsylvania*,⁵⁴ the United States Supreme Court held that liquor seized in violation of the Fourth Amendment prohibition against illegal searches and seizures was not admissible in a forfeiture proceeding. In applying the exclusionary rule, the Court recognized that forfeiture proceedings, though only quasi-criminal in nature, were subject to the mandate of the Due Process Clause of the Fourteenth Amendment.⁵⁵

If one accepts the forfeiture analogy, the rather casual manner in which the *DeSaulnier* court determined the admissibility of certain evidence is cause for concern. While the Court stated that the usual rules of court would apply,⁵⁶ it cited to *Matter of Welansky*.⁵⁷ In *Welansky*, the Supreme Judicial Court held that an attorney's conviction for involuntary manslaughter constituted sufficient grounds for disbarment. The Court noted that a disbarment proceeding was "neither an action at law in the strict sense nor a suit in equity," and that "the strict rules of evidence may not invariably apply"⁵⁸ where the advancement of *public justice* is at stake. Application of this public interest standard may well have created confusion as to what evidence generally excludable would be admissible "in the public interest." This is especially troublesome with regard to the admission of hearsay evidence. In view of the Sixth Amendment right to confront adverse witnesses, the use of hearsay would be grounds for constitutional objection if the quasi-criminal classification is valid. To eliminate any taint of unconstitutionality and to assure procedural fairness, the Massachusetts Supreme Judicial Court should have promulgated exact rules governing judicial inquiries into alleged judicial misconduct prior to the hearing. It should certainly do so in the future.

III. STANDARDS FOR JUDICIAL MISCONDUCT

The Supreme Judicial Court held that it had authority to discipline a judge of an inferior court for "serious judicial misconduct."⁵⁹ How-

⁵⁴ 380 U.S. 693 (1965).

⁵⁵ *Id.* at 702.

⁵⁶ See note 16, *supra*.

⁵⁷ 319 Mass. 205, 65 N.E.2d 202 (1946).

⁵⁸ *Id.* at 207, 65 N.E.2d at 203.

⁵⁹ 1972 Mass. Adv. Sh. at 84, 279 N.E.2d at 308.

ever, the ethical standards for determining judicial wrongdoing had not been previously defined in Massachusetts. For guidance, the Court drew heavily upon the American Bar Association's Canons of Judicial Ethics and adopted the ABA policy that not only should judges be honest and fair, but also their conduct inside and outside the courtroom should promote that belief in the eyes of the public.⁶⁰ To effectuate that policy, the Court construed G.L., c. 212, §27⁶¹ as henceforth prohibiting all Massachusetts judges from engaging in any business-related activities from which they might derive profit.⁶² It further concluded that public gambling by a judge was "incompatible" with confidence in the courts as was a judge's intimate relationship with an individual whose conduct he must regulate.⁶³ In view of those standards, Judge DeSaulnier's communication with Judge Brogna and Judge Brogna's failure to disclose it were held to be grossly improper. The opinion leaves little doubt that such conduct will not be tolerated and that it does indeed constitute serious misconduct. However, the Court failed to state which of these acts, standing alone, would satisfy the "serious misconduct" test which the opinion set forth.

The central difficulty with the "serious misconduct" test is vagueness. In a case such as *DeSaulnier* the serious misconduct test can be satisfactorily applied because of the cumulative effect of multiple instances of judicial impropriety. Looking at the pattern of activity set out in *DeSaulnier*, it can reasonably be said that such conduct, taken as a whole, so fails to conform to public expectations of judicial behavior that it calls for punitive measures. The point at which one reaches this judgment, however, is not clear. This is best exemplified by differing treatment of DeSaulnier and Brogna. Brogna's failure to disclose DeSaulnier's intervention in the Raymond case obviously constituted some form of misconduct as evidenced by the Court's censure. Yet, it was not such serious or gross misconduct as to warrant disbarment or an order prohibiting exercise of judicial duties.

Perhaps the rule to be distilled from the Court's analysis is that any deviation from the norms described in the American Bar Association canons is serious misconduct per se and that the degree of seriousness will dictate the nature of the disciplinary measure. Such a rule would still leave open the question of suspect judicial conduct which does not fall within the proscriptions of the canons,⁶⁴ but it would give judges a

⁶⁰ Id. at 86, 279 N.E.2d at 309.

⁶¹ G.L., c. 212, §27. "Salaries, etc. of justices; practice of law prohibited. . . . Such justices shall devote their entire time during business hours to their respective duties and shall not, directly or indirectly, engage in the practice of law."

⁶² 1972 Mass. Adv. Sh. at 88, 279 N.E.2d at 310.

⁶³ Id.

⁶⁴ While fiscal and ethical improprieties fall within the American Bar Association Canons of Judicial Ethics, it is not clear whether the professional code extends to judicial misconduct in the performance of judicial duties. Does it, for example, cover allegations of a pattern of judicial discrimination against a class

clearer idea of what is and is not permissible conduct. Whether the Court intended to enunciate such a broad rule is likely to be determined in the *Troy* case,⁶⁵ now pending before the Court.

IV. RELIEF

“As a matter of judicial administration,”⁶⁶ the Supreme Judicial Court disbarred Judge DeSaulnier and ordered him to refrain from further exercising his judicial duties. The Court also censured Judge Brogna for his conduct. Subsequently, the Court sent the transcript of the proceeding to the Governor and the General Court for “appropriate” action.⁶⁷

While disbarment and censure are traditional sanctions employed by courts to discipline members of the bar including judges,⁶⁸ the order restraining Judge DeSaulnier from performing his judicial functions was not. As a somewhat novel remedy, it merits particular attention.

First of all, the Supreme Judicial Court stopped short of ordering the removal of Judge DeSaulnier. It was apparently unprepared to arrogate to itself the power to remove a judge as a means of judicial discipline in light of the constitutional methods of removal provided by impeachment and address. Ostensibly, the purpose of sending the transcript to

of litigants regularly appearing before the court? The prohibition of Canon One against conduct “prejudicial to the administration of justice” may well be sufficiently broad to encompass this second major type of judicial misconduct.

The issue of whether the Supreme Judicial Court may discipline judges for bias while exercising their judicial powers is now squarely before the Court in the case of Dorchester District Court Judge Jerome Troy. The Troy inquiry is the product of an earlier federal court case, *Haley v. Troy*, 338 F. Supp. 794 (D. Mass. 1972), and continuous citizens’ complaints leveled by The People First, a community organization in Dorchester. The essence of these grievances is that Judge Troy discriminates against poor people, particularly Black and Spanish-speaking individuals. Examples of these allegedly discriminatory practices include conditioning welfare payments upon the recipient’s signing of criminal non-support complaints against her spouse and discriminatory bail setting practices. See *Haley v. Troy*, *supra*. The Troy case is now pending before the Supreme Judicial Court following a closed hearing conducted by Judge Franklin Flaschner, Chief Justice of the District Courts, and an investigation by a select committee of the Boston Bar Association.

Standards for cases of judicial misconduct will be much clearer in the future with the promulgation of Chapter 5, Supreme Judicial Court Rules, the Code of Judicial Conduct. See §§24.5-24.7, *supra*. The new code will only apply to conduct occurring after Jan. 1, 1973. It is not clear to what extent it would affect a case of conduct occurring before that date. It is interesting to note that one addition to the original ABA version of the Code provides that the provisions of the Code do not place “any limitation upon the Supreme Judicial Court in the exercise of its power of general superintendence whether statutory or inherent, in areas not delineated in the Code.”

⁶⁵ See note 64, *supra*.

⁶⁶ 1972 Mass. Adv. Sh. at 89, 279 N.E.2d at 310.

⁶⁷ *Id.* at 90, 279 N.E.2d at 311.

⁶⁸ See, e.g., *Matter of Ruby*, 328 Mass. 542, 105 N.E.2d 234 (1952).

the governor was to provide a basis for beginning address or impeachment proceedings. In this respect, the Supreme Judicial Court followed the lead of the Michigan Court in *Graham*⁶⁹ in distinguishing between removal and an injunction which precludes the exercise of judicial powers but does not affect tenure or the right to receive pay. Although the substantive basis for this distinction is questionable, it does offer a means by which the Court can achieve the equivalent of removal yet avoid a constitutional clash with the other branches of government over its power to do so.

Interestingly, the Supreme Judicial Court also avoided the use of the term "injunction" to describe its order regarding DeSaulnier. The use of the word "order" was probably intended to bring its action within the scope of G.L., c. 211, §3 which empowers the Court to issue "orders, directions and rules" necessary for achieving proper and efficient administration of the courts. It may also have wished to avoid a detailed discussion of the equity considerations involved in issuing an injunction under these circumstances.⁷⁰ However, the Court's order achieved the result which would have flowed from a formal injunction.

The expeditious relief fashioned by the Court illustrated its view of the entire proceedings. It treated the initial investigation, the hearing before the full court, and the relief as incident to the general house-keeping of the courts. Yet, the Court's admission that "primary responsibility for removal of judges" rests with the governor and the legislature⁷¹ is some indication of the Court's uneasiness with its newly carved out powers. A legislative response to the *DeSaulnier* decision might be most helpful in averting a possible clash between the branches in this area of judicial discipline.

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⁶⁹ See note 41, *supra*.

⁷⁰ While a detailed discussion of the equity problems is beyond the scope of this paper, it is suggested that a careful scrutiny of the adequacy of the available alternative constitutional remedies might have caused some uneasiness with the issuance of a clear injunction.

⁷¹ 1972 Mass. Adv. Sh. at 85, 279 N.E.2d at 308.

