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Courtroom Misconduct by Prosecutors and Trial Judges

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COURTROOM MISCONDUCT BY PROSECUTORS AND TRIAL JUDGES

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As courtroom disruption became a national issue in the late 1960's, public attention focused primarily on the conduct of the criminal defense attorney and his client. Professor Alschuler examines the courtroom misconduct of prosecutors and trial judges both as it relates to disruptive behavior by defendants and defense attorneys and as it poses a threat in its own right to the orderly administration of justice.

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* Professor of Law, University of Texas. A.B., Harvard, 1962; LL.B., 1965. This article is based on a report that Professor Alschuler prepared for the Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York. The Special Committee, chaired by Dean Burke Marshall and directed by Professor Norman Dorsen, has undertaken a wide-ranging study of courtroom misconduct. Its final report will be published by Pantheon Books in 1973.

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I. THE PROSECUTOR

Criminal justice is concerned with the pathology of the body politic A criminal trial, it has well been said, should have the atmosphere of an operating room.

FRANKFURTER, J., dissenting
in *Sacher v. United States*¹

A. *The Frequency and Significance of Prosecutorial Misconduct: An Introductory Overview*

In February 1971, Brent Stein was on trial in a Dallas courtroom on a charge of interfering with a police officer during a civil disturbance. Stein, the former editor of the underground newspaper *Dallas Notes*,² testified that he had neither been involved in the disturbance nor interfered with the officer. On cross-examination, he added that he had been manhandled by the police officers who arrested him.

Assistant District Attorney John Stauffer responded to Stein's charge of police brutality by saying, "Too bad they didn't kill you."

Stein's attorney immediately moved for a mistrial. The trial judge, after admonishing the prosecutor that his remark was improper, denied the defense motion.³

There the matter will probably end. If Stein's conviction were to come before an appellate court for review, the court would probably conclude that the trial judge's prompt admonition had cured any error.⁴ If it had been a defense attorney who had stood before the bench and expressed his disappointment that the prosecutor had not been murdered, he would have run a substantial risk of being cited for contempt of court. Despite the theoretical availability of this sanction in

¹ 343 U.S. 1, 37-38 (1952).

² See *Dyson v. Stein*, 401 U.S. 200 (1971). A massive seizure of materials and equipment by the Dallas Police Department, which Mr. Justice Douglas characterized as a "search and destroy mission," had effectively closed down Stein's newspaper. *Id.* at 204 (dissenting opinion).

³ "Judge Denies Stein Mistrial for Prosecutor's Remark," *Dallas Morning News*, Feb. 26, 1971, § D, at 1, col. 5.

⁴ See text accompanying notes 101-06 *infra*.

the *Stein* case, District Attorney Stauffer was in little danger of a contempt citation.⁵ Similarly, it was almost inconceivable that Stauffer would be disciplined by the bar.⁶ Stein would have no basis for a civil action against the prosecutor,⁷ and no other formal corrective measure was even remotely available.

It would be fashionable and diplomatic to suggest that this incident was an isolated one, that the vast majority of prosecutors perform their tasks with dignity and restraint, and that only a few "bad apples" pose any problem at all. Unfortunately, the statement would probably not be true. The academic commentators who have examined the problem of prosecutorial misconduct have almost universally bemoaned its frequency.⁸ Moreover, even a brief glance at the digests of appellate decisions, especially in the state courts, indicates that courtroom misconduct by prosecutors provides one of the most frequent contentions of criminal defendants on appeal. John F. Onion, the Presiding Judge of the Texas Court of Criminal Appeals, estimates that at least 60 percent of the cases that come before his court involve a claim of prosecutorial misconduct, although he adds that only occasionally is the claim well founded.⁹

The lack of a more effective remedy for this misconduct is ironic and unfortunate, for a prosecutor's abuse of a criminal defendant in the manner illustrated by the *Stein* case seems more damaging to both the substance and appearance of justice than any disrespectful wisecrack that a "movement" defense attorney has ever uttered in a courtroom. There are several reasons for this conclusion. First, the likely subjects of a defense attorney's disrespect, the prosecutor and trial judge, are not themselves on trial. A criminal defendant, whose liberty is at stake and who is involved in one of the most traumatic experiences of his life, presents a far more vulnerable target. At the same time, a loss of professional detachment usually seems less excusable in the prosecutor, who confronts crime and courtrooms every day, than it does in the defendant—or even in many defense attorneys who feel the weight of their responsibility for the defendant's liberty and who are not accustomed to playing for such high stakes.

⁵ See text accompanying notes 164-69 *infra*.

⁶ See text accompanying notes 152-63 *infra*.

⁷ See text accompanying notes 141-51 *infra*.

⁸ See, e.g., R. POUND, CRIMINAL JUSTICE IN AMERICA 187 (1930); Singer, *Forensic Misconduct by Federal Prosecutors—And How It Grew*, 20 ALA. L. REV. 227 (1968); Hobbs, *Prosecutor's Bias: An Occupational Disease*, 2 ALA. L. REV. 40 (1949); Note, *Prosecutor Forensic Misconduct—"Harmless Error"?*, 6 UTAH L. REV. 108 (1958).

⁹ Telephone interview, May 5, 1971.

The most obvious ill effect of prosecutorial misconduct is, of course, its tendency to deprive the defendant of a fair trial. The state is entitled to a fair trial as well, but nevertheless misconduct by prosecutors seems distinguishable from misconduct by defendants or their attorneys in terms of its ultimate effect. When a defense attorney resorts to what Professor Paul Freund calls "the infantile-regressive mode of expression,"¹⁰ he knows, if he has any sense, that he is likely to alienate the jury trying his client. The attorney may have decided to appeal to a larger audience (perhaps Walter Cronkite's) or just to go down with his colors flying. A prosecutor, of course, may also find that his misconduct will create resentment and hurt his chances with the jury.¹¹ Nevertheless, while a defense attorney sometimes suffers from association with his client, a prosecutor usually benefits from his association with the cause of law enforcement. The assistant district attorney is the representative of an elected, presumably popular public official, and the mere fact that he is a state employee may create a sense of trust and an expectation of fairness that a defense attorney would find difficult to match through the most strenuous exertion of his charm.

A California appellate court has observed that the statements of a defense attorney "have little weight as compared with similar statements of the district attorney. . . . A statement of the prosecutor . . . is weighted with the authority of his office. It . . . cannot fail to make an impression upon the minds of jurors."¹² Thus, another reason for viewing prosecutorial misconduct as more damaging than misconduct by defense attorneys is simply that the prosecutor, for a variety of reasons, commonly has more influence with the jury.¹³

Prosecutorial misconduct may also have serious consequences apart from its impact on the jury in the case at hand. The Wickersham Commission observed in 1931 that unlike police abuse, prosecutorial misconduct occurs "in the publicity of a court room" where it is easily

¹⁰ Freund, *Contempt of Court*, 1 HUMAN RIGHTS 4, 8 (1970). Freund adds that certain forms of militant expression in the courtroom have "all the persuasive power of that classic line of Ring Lardner, 'Shut up! he explained.'"

¹¹ See *Pacman v. United States*, 144 F.2d 562, 563 (9th Cir. 1944), cert. denied, 323 U.S. 786 (1944).

The producers of the CBS News broadcast, "Justice in America, Part I: Some Are More Equal Than Others" (Apr. 20, 1971), reassembled most of the members of a New York jury which had tried a member of the Black Panther Party for a conspiracy to rob. The jurors uniformly expressed a sense of insult and disgust at the prosecutor's effort to suggest a connection between the Black Panther Party and the government of Communist China and to inject this consideration into the case.

¹² *People v. Kirkes*, 243 P.2d 816, 831-33, aff'd, 39 Cal. 2d 719, 249 P.2d 1 (1952). See *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹³ See Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946, 947 (1954).

noted by members of the public and the press.¹⁴ Because this "lawless enforcement of the law" is perpetrated by the "officials most definitely responsible for law observance," the natural result is public resentment of the entire legal process. Moreover, this resentment is likely to become especially intense when the defendant belongs to a racial minority or other stigmatized or unpopular group. Members of this group tend to view official misconduct as evidence that they cannot expect fair treatment from the courts. Finally, rehabilitative efforts are obviously hindered when the defendant "feels deeply and justly that society in the person of its chief representatives has behaved tyrannically and brutally."¹⁵

These considerations all point to the propriety of a double standard: the prosecutor should be afforded less leeway in his courtroom conduct than the defense attorney.¹⁶ Although some courts have explicitly accepted this position,¹⁷ others have insisted that both attorneys should be judged by the same criteria.¹⁸ These abstract verbalizations are, of course, less significant than actual judicial practice, and in practice, particularly in the area of punishment for contempt, the courts *have* utilized a double standard. It has been backwards.

B. Efforts to Define Prosecutorial Misconduct

The courts have fairly well delineated the basic outlines of a few forms of prosecutorial misconduct. For the most part, these types of misconduct involve efforts to influence the jury through various sorts of inadmissible evidence. Thus a prosecutor may not comment on the

¹⁴ NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 268 (1931) [hereinafter cited as WICKERSHAM COMM'N REP.].

¹⁵ *Id.*

¹⁶ See *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958):

The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

¹⁷ *Di Carlo v. United States*, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); *Fitter v. United States*, 258 F. 567, 572 (2d Cir. 1919); *Bynum v. State*, 35 Ala. App. 297, 298, 47 So. 2d 245, 247, *cert. denied*, 245 Ala. 22, 47 So. 2d 247 (1950).

¹⁸ *United States v. Cook*, 432 F.2d 1093, 1106-07 (7th Cir. 1970), *cert. denied*, 401 U.S. 996 (1971); *State v. Brown*, 214 La. 18, 24, 36 So. 2d 624, 626 (1948); *State v. Dallao*, 187 La. 392, 434, 175 So. 4, 18, *cert. denied*, 302 U.S. 635 (1937); *State v. Graziani*, 168 La. 397, 302, 121 So. 872, 874 (1929).

failure of the defendant to testify;¹⁹ he may not assert facts which have not been presented in evidence;²⁰ he may not suggest that evidence exists which he has been unable to introduce;²¹ he may not express his personal belief in the defendant's guilt;²² he may not, at least in non-capital cases, discuss the possibility of pardon or parole;²³ nor may he argue that erroneous convictions can always be reversed on appeal.²⁴

When it comes to what are commonly the most disruptive forms of prosecutorial misbehavior, however—abuse and insult, inflammatory argument, and appeals to prejudice—specific judicial standards are usually lacking. A starting point for the courts is often the statement

¹⁹ Griffin v. California, 380 U.S. 609 (1965).

²⁰ See, e.g., Kempf v. State, 464 S.W.2d 112 (Tex. Crim. App. 1971) (reference to defendant's seduction of a fifteen-year-old girl, a fact not in evidence and not relevant to any issue in the case); Sanders v. State, 175 Ark. 61, 296 S.W. 70 (1927) (a certain letter would "stick" defendants if it had not been excluded); Wasy v. State, 236 Ind. 215, 138 N.E.2d 1 (1956) (unsubstantiated charge that someone had tried to bribe a prosecution witness); Whitfield v. State, 21 Ala. App. 490, 109 So. 524 (1926) (repeated reference to offense committed subsequent to offense at issue); Cline v. State, 57 Okla. Crim. 206, 47 P.2d 191 (1935) (improper impeachment of defendant's character). See Note, *The Permissible Scope of Summation*, 36 COLUM. L. REV. 931 (1936).

²¹ E.g., Ginsburg v. United States, 257 F.2d 950 (5th Cir. 1958) ("I could probably have fifty people here who would show that the defendant is not of good character"); People v. Talle, 111 Cal. App. 2d 650, 245 P.2d 633 (1952) (prosecutor's invitation to jurors to visit his office after trial; statement that the prosecutor could give the jurors a great deal of information that he could not divulge in the courtroom); Snipes v. United States, 230 F.2d 165 (6th Cir. 1956) (prosecutor's statement that he could have brought forty counts rather than the one before the court); Brower v. State, 26 Okla. Crim. 49, 53, 221 P. 1050, 1052 (1924) ("I have my reasons"); Commonwealth v. French, 170 Mass. 619, 259 N.E.2d 195 (1970), *petition for cert. filed sub nom.* Limone v. Massachusetts, 39 U.S.L.W. 3126 (U.S. Aug. 11, 1970) (No. 526, 1970 Term; renumbered No. 5-70, 1971 Term) ("Of course you have to use your imagination. There are many things in a court of law that can't be introduced").

²² This limitation is sometimes confusing. It is permissible for the prosecutor to argue forcefully that the defendant is guilty beyond any doubt, but he must not assert that it is his policy not to prosecute unless he is personally persuaded of the defendant's guilt. Even more clearly, the prosecutor must not assert that as an old-timer in the criminal courts, he knows a guilty man when he sees one. Two vices can be discerned in this sort of expression of personal opinion—first, the prosecutor's invitation to the jury to rely on him as a crime expert, and second, the implication that the prosecutor's judgment may be based on evidence not presented at trial. When the prosecutor is clearly arguing from the evidence, there is no error. See United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970); Lawn v. United States, 355 U.S. 339, 349 n.15 (1958); Leary v. United States, 383 F.2d 851, 865 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); Walker v. State, 105 Tex. Crim. 252, 288 S.W. 220 (1926); State v. Hively, 103 W. Va. 237, 136 S.E. 862 (1927); Note, *Expression of Opinion by Prosecuting Attorney to Jury*, 25 MICH. L. REV. 203 (1926).

²³ In colorful Texas, a prosecutor once argued that if the defendant were sent to the penitentiary, killed twenty-five guards, and were convicted of all of these crimes, he would still be pardoned by Mrs. Ferguson, the governor. This improper argument was not the sole ground for reversal, however, since in the same case the prosecutor had responded to the defendant's plea of insanity by urging the jury to convict whether or not the defendant was insane. Maynard v. State, 106 Tex. Crim. 558, 293 S.W. 1104 (1927). See generally, Note, *supra* note 13, at 957.

²⁴ E.g., Goff v. Commonwealth, 241 Ky. 428, 44 S.W.2d 306 (1931); Deutsch v. State, 46 Ohio App. 223, 188 N.E. 399 (1932); People v. Esposito, 224 N.Y. 370, 121 N.E. 344 (1918); Crow v. State, 33 Tex. Crim. 264, 26 S.W. 209 (1894); People v. Stembridge, 99 Cal. App. 2d 15, 221 P.2d 212 (1950).

of the American Bar Association's Code of Professional Responsibility, "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."²⁵ Or a court may begin with Mr. Justice Sutherland's classic opinion in *Berger v. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.²⁶

Eloquent as they are, statements at this level of generality do not solve cases. They are instead invoked ceremoniously when an appellate court decides, on more detailed grounds, to reverse a conviction for prosecutorial misconduct.²⁷ Nor do these statements seem inconsistent with the "boilerplate" on the other side. Even before its decision in *Berger*, the Supreme Court, in *Dunlop v. United States*, had provided some quotable language that could be employed whenever an appellate court decided to disregard an instance of prosecutorial misconduct:

There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. . . . If every remark made by counsel outside of the testimony were grounds for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.²⁸

²⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-13. See also the predecessor of this provision, ABA CANONS OF PROFESSIONAL ETHICS No. 5: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."

²⁶ 295 U.S. 78, 88 (1935).

²⁷ The courts have also said that a prosecutor should have "character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment of no mean order." Attorney Gen. v. Tufts, 239 Mass. 458, 489, 132 N.E. 322, 326 (1921).

²⁸ 165 U.S. 486, 498 (1897).

The tone of other judicial statements seems to depart even further from the ideal of impartiality suggested by the Code of Professional Responsibility and the *Berger* opinion. For example, the Ninth Circuit observed in 1945:

It is our opinion that if the conduct of the prosecution in argument in this case constitutes error, then, the prosecution in every case is limited to a listless, vigorless summation of fact in Chesterfieldian politeness. Gone are the days of the great advocates whose logic glowed and flowed with the heat of forensics! Gone, except for counsel for the defense.²⁹

As general as this rhetoric on both sides seems to be, it does raise the basic problem of the attitude with which a prosecutor should approach his courtroom tasks. Should he really be a man for all seasons, "both an advocate, determined to convict the defendant, and a representative of the state, safeguarding the rights of all"?³⁰ Or should he follow the line suggested by Whitney North Seymour Jr. and act as a quasi-judicial officer in deciding whether to prosecute and then, once the trial begins, as a zealous champion who leaves the judging to the judges?³¹ My own answer to these questions is admittedly extreme: The prosecutor should not think of oratory as part of his job at all. He should avoid the "glow and flow of the heat of forensics" and should, in fact, strive for more "Chesterfieldian politeness." The prosecutor should forego not only appeals to prejudice, but any deliberate appeal to emotion.³²

²⁹ *Ballard v. United States*, 152 F.2d 941, 943 (9th Cir. 1945), *rev'd on other grounds*, 329 U.S. 187 (1946). See *United States v. Wexler*, 79 F.2d 526, 530 (2d Cir. 1935) (L. Hand, J.), *cert. denied*, 297 U.S. 703 (1936). Judge Hand had written the decision that, seven months earlier, had been reversed in *Berger*. This statement can be viewed as his response. See also *Gray v. State*, 90 Miss. 235, 241, 43 So. 289, 290 (1907).

³⁰ Note, *supra* note 13.

³¹ Seymour, *Why Prosecutors Act Like Prosecutors*, 11 RECORD OF N.Y.C.B.A. 302, 312-13 (1956).

³² The appeal to emotion most often endorsed by the courts is the "plea for law enforcement." An example is provided by a Texas case:

There are a number of stands that you, as citizens of this county, may take. You can, on the one hand, say to Officer R.E. Kelnar, Officer A.T. Hermann, and Officer A.J. Crow, and all the rest of them with the Houston Police Department: "You may go and do the best you can to stop crime. We don't mind if you get shot; we don't care, and we are not going to support law enforcement in this county." Or by your verdict you may say, "Officer Kelnar and those that serve with you, we are proud of you and we appreciate what you are doing for us. We want to help in every way that we can. When Thomas Henry Rhodes takes his pistol and tries to kill you, we are going to support you and find him guilty"

Rhodes v. State, 450 S.W.2d 329, 331-32 (Tex. Crim. App.), *cert. denied*, 400 U.S. 927 (1970).

See also *State v. Carter*, 451 S.W.2d 340, 344-45 (Mo. 1970) (proper plea for law enforcement for prosecutor to urge conviction as a warning to defendant to stay out of county); *Asay v. State*, 456 S.W.2d 903, 905 (Tex. Crim. App. 1970) ("But also sympathize with the wives and children of this county and state"); *Villarreal v. State*, 440 S.W.2d 74,

This prosecutorial attitude should promote more rational verdicts in criminal cases. In my opinion, the adversary system reflects an intelligent division of labor in marshaling relevant evidence. Because objectivity is an illusion, the prejudices of a single fact-gatherer might lead him to overlook important considerations and important data. To overcome this defect, the legal system effectively preordains the prejudices of two advocates. It directs these advocates to find all the evidence they can to support their assigned positions, to present this evidence in a coherent and orderly way, and to argue its relevance to the jury. On this view, the adversary system does not rest upon the proposition that truth is most likely to emerge from unrestrained, emotional oratory on both sides of an issue.

How the adversaries' arguments to the jury should proceed necessarily turns on how we want the jury to make its decision, a fact that some observers seem to forget. If a judgment of criminal conviction should not rest upon emotionalism, we should encourage the prosecutor not to argue in emotional terms. If the basis for a criminal conviction should be a detailed sifting of the evidence, we should encourage the prosecutor to present arguments that will promote a careful sifting of the evidence.

Again, the rules need not be the same for both advocates. Long ago, a distinguished Englishman said that it was better for ten guilty men to go free than for one innocent man to be convicted, and another added that the quality of mercy is not strained. Prosecutors themselves regularly exercise an equitable discretion to dismiss cases in which the evidence clearly demonstrates the defendant's guilt. Thus if a defense attorney, through emotional appeal, is able to persuade a jury that his client's conviction would be unfair, there should be no great cause for alarm. Although even an occasional conviction not based on the evidence is a terrifying prospect, an occasional "nonevidentiary" acquittal is a tolerable and probably desirable occurrence.³³

My acceptance of this double standard does not rest on a simple pro-defendant bias. Men once satisfied their desire for certainty in judgments of criminal guilt by seeking the verdict of God; today we pursue the same goal by requiring proof beyond a reasonable doubt and the unanimous verdict of twelve jurors. This quest for certainty

75 (Tex. Crim. App. 1969) ("And now as you have an opportunity for the first time in your lives to do something about helping this county be a better county"). *But cf.* State v. Raspberry 452 S.W.2d 169 (Mo. 1970).

³³ See D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 134 (1966).

serves the public's interest as much as it does the defendant's. Although we usually maintain that we provide procedural and evidentiary safeguards solely for the protection of persons accused of crime, in reality we provide them as much for ourselves. Much of the forceful condemnation that attaches to convictions of crime would be lost if the public doubted the accuracy of the factual determinations that lay behind them. When our system of criminal procedure fails to ensure a high degree of certainty of guilt, criminal punishment loses some of its effectiveness as an instrument of social control. For this reason, arguments by prosecutors that tend to make juries less deliberate, less reflective, and less dispassionate cheapen the criminal law.

At the everyday, tactical level, prosecutors should recognize that calm, analytical argument is probably the most effective form of advocacy and, in any event, that it minimizes the danger of reversal on appeal. Beyond that, prosecutors should recognize that rationality in the criminal process only makes it stronger. One need not harbor an ideological bias in favor of criminal defendants to regard prosecutorial restraint as a virtue.

These observations do not go very far in solving cases, and neither do many of the statements of the courts. It may therefore be productive to review the factual circumstances of some of the decided cases in an effort to capture the courts' sense of what constitutes prosecutorial misconduct. This task is complicated by the various procedural obstacles confronting an advocate who seeks reversal of a conviction on the basis of a prosecutor's courtroom behavior. The question in a given case may be not whether the prosecutor's conduct was erroneous, but whether the error was so clear that an appellate court could consider it despite the absence of an objection at trial, whether the effect of the error was minimized or eliminated by the subsequent action of the court or prosecutor, or whether the error was serious enough to affect the integrity of the verdict. We therefore confront such categories as "error," "plain error," "cured error," "harmless error," and "error if any."

The sense that most clearly emerges from the decisions is that of unpredictability. Cases proceed on an ad hoc basis, and results do not follow a consistent pattern. Even if the alleged misconduct in one case seems similar to the alleged misconduct in another, the procedural context is invariably different. The force of precedent is therefore slight. The courts seem to enjoy an almost total freedom to reach any result on any given set of facts.

Overt appeals to racial, national, and religious prejudice, for example, were once a fairly common form of misconduct. The courts were quick to reverse convictions when prosecutors argued that Negroes should not be judged by the same law as white men,³⁴ that Southern gentlemen would not condemn the victim of the crime for trying to keep a Negro in his place,³⁵ and that the jury would have lynched the defendant's copper neck if they had seen the family of the victim.³⁶ It was also reversible error, in an attempted-murder prosecution before an all-white jury, to cross-examine the defendant by saying, "Then you struck him because he was a white man."³⁷ Yet an admonition and an instruction to disregard were held sufficient to cure the error when the prosecutor made the following appeal in a prosecution for the unlawful sale of liquor:

There is lots of drinking going on up around Liberty Hill. If you want to stop it, give this nigger the limit. . . . I want you gentlemen to send the word by these people from Liberty Hill out there in the court room that this nigger is stuck and there must be no more liquor drinking at their Saturday night socials or any other time up there.³⁸

Moreover, when a prosecutor argued that a verdict of guilty would "throw a chill down the spine of every Negro in Gregg County and thereby stop some of these Negro killings," an appellate court in 1941 described the statement as a "mild effort at oratory" and said, "[W]e find nothing to condemn."³⁹

In a similar vein, it was reversible error for prosecutors to argue that the testimony of one Christian was worth more than that of all Jews,⁴⁰ that because the defendant had changed his name from Rosenfelt to Ross, he was a traitor to his race,⁴¹ that the defendant had never filed an income tax return "because it was not the nature of his creed

³⁴ *State v. Brice*, 163 La. 392, 111 So. 798 (1927).

³⁵ *Blocker v. State*, 112 Tex. Crim. 275, 16 S.W.2d 253 (1929).

³⁶ *Johnson v. Commonwealth*, 217 Ky. 565, 290 S.W. 325 (1927).

³⁷ *State v. Moore*, 212 La. 943, 33 So. 2d 691 (1947).

³⁸ *Yett v. State*, 110 Tex. Crim. 23, 24, 7 S.W.2d 94, 94 (1928).

³⁹ *King v. State*, 141 Tex. Crim. 257, 148 S.W.2d 199 (1941). Compare *State v. Alexander*, 255 La. 941, 955, 233 So. 2d 891, 896 (1970), *cert. granted*, 401 U.S. 936 (1971):

It appears from the record that [the prosecutor] pronounced the word Negroes with less emphasis on the letter "o" than commonly used so that the word as she pronounced it sounded somewhat like "nigras". The judge thought the objection to the pronunciation . . . frivolous. But counsel in argument here stresses that the pronunciation of the district attorney somehow prejudices defendant before an all-white jury. We agree with the trial judge.

⁴⁰ *Skuy v. United States*, 261 F. 316 (8th Cir. 1919).

⁴¹ *Ross v. United States*, 180 F.2d 160 (6th Cir. 1950), *cert. denied*, 344 U.S. 832 (1952).

to do anything of the kind,"⁴² and that "[t]here has, of course, grown up a suspicion in this country with reference to fires whenever a Jew has anything to do with it."⁴³ The statement of the appellate court in this last case may itself have been revealing of the temper of the times: "It should make absolutely no difference in a court of justice whether the defendant is a Jew, . . . a Chinaman, a Negro, or an American" (emphasis mine). In 1930, however, the Eighth Circuit saw nothing improper when a prosecutor responded to a defendant's story by saying, "I never knew of a Jew before that would surrender a piece of a warehouse . . . for nothing."⁴⁴ The court commented that this statement was merely a reference to the "recognized business acumen of the Jewish race."⁴⁵

It is improper for a prosecutor to argue that a defense should be rejected even when it is supported by the evidence.⁴⁶ For this reason, a Kentucky court ordered a new trial in a case in which the prosecutor said, "The law of self-defense and reasonable doubt is the biggest joke of the day."⁴⁷ Yet when a prosecutor referred to self-defense as "a typical gnnman's defense," a Pennsylvania court refused to reverse and held that the prosecutor was "within his rights."⁴⁸

Similarly, convictions have been reversed when the prosecutor argued that the defendant deserved lynching,⁴⁹ but not when the prosecutor merely said, "If the circumstances are as narrated, . . . the electric chair is too good."⁵⁰

Criminal prosecutions during wartime have sometimes led prosecutors to draw invidious comparisons between defendants and America's fighting men and to urge conviction as an act of patriotism. Guilty verdicts have often been reversed because of this conduct,⁵¹ yet the

⁴² *People v. Schuster*, 339 Ill. 73, 76, 170 N.E. 726, 727 (1930).

⁴³ *People v. Simon*, 80 Cal. App. 675, 677, 252 P. 758, 759 (1927).

⁴⁴ *Rosenthal v. United States*, 45 F.2d 1000, 1003 (8th Cir. 1930).

⁴⁵ Compare *Fontanello v. United States*, 19 F.2d 921 (9th Cir. 1927) (conviction reversed when prosecutor argued Italian domination of illegal liquor trade), with *United States v. Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir.), cert. denied, 329 U.S. 742 (1946) (nonprejudicial error for prosecutor to refer to defendant's Italian descent and the fact that Americans were battling Italians at that very moment). See also *People v. Piazza*, 84 Cal. App. 58, 257 P. 592 (1927) (harmless error for prosecutor to refer to the untruthfulness of Italians and the importance of maintaining American customs).

⁴⁶ E.g., *Rogers v. State*, 111 Tex. Crim. 419, 13 S.W.2d 116 (1929).

⁴⁷ *Fleming v. Commonwealth*, 224 Ky. 160, 5 S.W.2d 899 (1928).

⁴⁸ *Commonwealth v. Del Vaccio*, 299 Pa. 547, 554-55, 149 A. 696, 699 (1930).

⁴⁹ *Johnson v. Commonwealth*, 217 Ky. 565, 290 S.W. 325 (1927); *O'Neill v. State*, 189 Wis. 259, 207 N.W. 280 (1926).

⁵⁰ *Commonwealth v. Meyers*, 290 Pa. 573, 580, 139 A. 374, 377 (1927).

⁵¹ See *Viereck v. United States*, 318 U.S. 236, 247 n.3 (1943) (dictum); *Greenberg v. United States*, 280 F.2d 472 (1st Cir. 1960) (reference to low taxes paid by defendant during World War II and the sacrifices of others); *August v. United States*, 257 F. 388 (8th Cir. 1918).

Indiana Supreme Court found only harmless error in this argument in a misdemeanor prosecution:

This hoodlum . . . by the acts which have been proved here in evidence is no better than a saboteur, *and should be made to face the firing squad*. . . . These fellows are worse than German spies sent over here from Naziland. . . . If you jurors think any thing of your soldier and sailors sons and daughters, give this fellow the limit of the law, and if you don't think of your own sons and daughters, for God's sake think of my son who is over there.⁵²

In this case, the prosecutor had conducted his cross-examination by asking male witnesses about their draft status and female witnesses about the draft status of their husbands. He had also asked defense witnesses if they knew there was a war on.

Prosecutorial abuse of the defense attorney is a frequent ground of reversal. Extreme examples are: the California case in which a prosecutor said that the defense attorney had for thirty-three years represented "[h]ighway robbers, murderers, men of the underworld and he is now defending Alpine. Do you not see back of this case, ladies and gentlemen, the operation of the underworld?";⁵³ the Texas seduction prosecution in which the prosecutor responded to a claim that the prosecutrix was unchaste by saying, "If . . . a paid lawyer can come here and besmirch the character of a young lady it is time we should resent it with our guns";⁵⁴ and the 1970 Illinois case in which a prosecutor said that the defense attorney could qualify as an S.S. trooper.⁵⁵ In another 1970 Illinois decision, by contrast, an appellate court found it harmless error for the prosecutor to assert that he knew from years of personal experience that the defense counsel was trying to free the defendant by trickery.⁵⁶

⁵² *Blue v. State*, 224 Ind. 394, 414-16, 67 N.E.2d 377, 385 (1946), *cert. denied*, 330 U.S. 840 (1947). See also *United States v. Lawson*, 337 F.2d 800 (3d Cir. 1964), *cert. denied*, 380 U.S. 919 (1965) ("[I]hose men at Gettysburg . . . fought and they died").

⁵³ *People v. Alpine*, 81 Cal. App. 456, 468, 254 P. 281, 286 (1927).

⁵⁴ *Harrell v. State*, 114 Tex. Crim. 412, 413, 24 S.W.2d 47, 48 (1930).

⁵⁵ *People v. Weller*, 123 Ill. App. 2d 421, 258 N.E.2d 806, 809 (1970). See also *People v. Garippo*, 321 Ill. 157, 151 N.E. 584 (1926).

⁵⁶ *People v. Gilyard*, 124 Ill. App. 2d 95, 108, 260 N.E.2d 364, 370 (1970). Courts have also found the error harmless when a prosecutor referred to unscrupulous, shyster lawyers who got criminals free, *People v. Cummings*, 338 Ill. 636, 170 N.E. 750 (1930); to the deplorable conduct of an attorney who would represent a murderer, *Adams v. State*, 176 Ark. 916, 5 S.W.2d 946 (1928); to the dollars jingling in the defense attorney's pocket, *Gatlin v. State*, 113 Tex. Crim. 247, 20 S.W.2d 431 (1929); and to the asserted fact that the defense attorney was a "poor, humble, simple little fellow" who talked "out of two sides of his mouth, or as the Indian might say a forked tongue," *State v. Gonzales*, 105 Ariz. 434, 436, 466 P.2d 388, 390 (1970).

Apart from efforts to bring inadmissible evidence before the jury, the most frequent form of prosecutorial misconduct is abuse of the defendant. It has been held reversible error to call the defendant "doubly vicious because he demanded his full constitutional rights,"⁵⁷ a "cheap, scaly, slimy crook,"⁵⁸ a "leech of society,"⁵⁹ a user of "Al Capone tactics of intimidation,"⁶⁰ and a "junkie, rat, and 'sculptor' with a knife."⁶¹ Courts have, however, found no error in cases in which the defendant was called "animalistic,"⁶² "lowdown, degenerate and filthy,"⁶³ "a mad dog,"⁶⁴ "a rattlesnake,"⁶⁵ "a trafficker in human misery,"⁶⁶ "a blackhearted traitor,"⁶⁷ "a hired gunfighter,"⁶⁸ "a creature of the jungle,"⁶⁹ "a type of worm,"⁷⁰ or "a brute, a beast, an animal, a mad dog who does not deserve to live."⁷¹

The uncertainty that these cases exhibit is largely the product of necessity. The varieties of prosecutorial mischief are so great that it would be impossible to anticipate them all and to define them in advance. Moreover, much does turn on the context of the alleged misconduct and the procedural posture of the case. Still, the courts generally seem to have set their "thresholds of error" too low. They have often shown more sympathy for the foibles of the prosecutor than for the defendant's right to a fair trial.

One further observation on the problem of defining prosecutorial misconduct seems in order. In many cases, the courts have justified

⁵⁷ *United States v. Hughes*, 389 F.2d 535, 536 (2d Cir. 1968).

⁵⁸ *Volkmar v. United States*, 13 F.2d 594, 595 (6th Cir. 1926). The prosecutor also said, "A skunk is always a skunk; you can decorate him any way you want to. . . . I also presume you cannot make a rose out of an onion, no matter what you do. . . . Take a weak-faced weasel, such as the defendant—." At this point, the defense counsel interjected an objection, but the prosecutor continued with the remark quoted in the text.

⁵⁹ *State v. Owen*, 73 Idaho 394, 408, 253 P.2d 203, 211 (1953).

⁶⁰ *Horner v. Florida*, 312 F. Supp. 1292, 1295 (M.D. Fla. 1967), *aff'd*, 398 F.2d 880 (5th Cir. 1968). This statement was not the only ground for reversal. The prosecutor failed to correct a material, false statement made by a prosecution witness; he characterized the defense attorney as "an expert in the rackets"; he asserted facts not in evidence; and he said, "It isn't viciousness that you see from the prosecutor here. What it is, is venom, for this reason: I represent the law."

⁶¹ *People v. Hickman*, 34 App. Div. 2d 831, 312 N.Y.S.2d 644 (1970).

⁶² *People v. Elder*, 25 Ill. 2d 612, 614, 186 N.E.2d 27, 29 (1962), *cert. denied*, 374 U.S. 814 (1963).

⁶³ *Williams v. State*, 93 Okla. Crim. 260, 275, 226 P.2d 989, 997 (1951).

⁶⁴ *Commonwealth v. Capps*, 382 Pa. 72, 79, 114 A.2d 338, 342 (1955).

⁶⁵ *Commonwealth v. Narr*, 173 Pa. Super. 148, 153, 96 A.2d 155, 156 (1953).

⁶⁶ *United States v. Markham*, 191 F.2d 936, 939 (7th Cir. 1951).

⁶⁷ *Stephan v. United States*, 133 F.2d 87, 98 (6th Cir.), *cert. denied*, 318 U.S. 781 (1943).

⁶⁸ *Johnston v. United States*, 154 F. 445, 449 (9th Cir. 1907).

⁶⁹ *State v. Goodwin*, 189 La. 443, 446, 179 So. 591, 599 (1938).

⁷⁰ *United States v. Walker*, 190 F.2d 481, 484 (2d Cir. 1951).

⁷¹ *Miller v. State*, 226 Ga. 730, 731, 177 S.E.2d 253, 254 (1970).

the epithets applied to criminal defendants by calling them reasonable deductions from the evidence.⁷² An extreme example is the rape case in which the prosecutor said, "A snake crawls on his own belly, but these human vultures crawl on the bellies of our helpless and defenseless women." An appellate court described the statement as "a reasonable deduction from facts commonly known."⁷³

Courts too often assume in this fashion that "going beyond the evidence" is not simply one form of misconduct but the only one. Some courts even go so far as to say, "In the closing argument, excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury."⁷⁴

The fact that a defendant might be black, however, would surely not justify an argument based on that circumstance, and other appeals to irrational decisionmaking should also be condemned. I cannot define prosecutorial misconduct with precision, but I can suggest a simple and obvious test that seems applicable in most circumstances and that might lead to findings of error in many situations in which the courts today excuse prosecutorial conduct. The basic issue should be whether the prosecutor's conduct was designed to induce a decision not based on a rational assessment of the evidence. If so, the conduct should be held improper.⁷⁵

Direct precedent for this sensible position is sparse but not entirely

⁷² *E.g.*, *Johnston v. United States*, 154 F. 445, 449 (9th Cir. 1907); *State v. Goodwin*, 189 La. 443, 470, 179 So. 591, 600 (1938).

⁷³ *Hill v. State*, 144 Tex. Crim. 415, 423, 157 S.W.2d 369, 373 (1941), *rev'd on other grounds*, 316 U.S. 400 (1942).

⁷⁴ *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970). *See also* *People v. Phillips*, 126 Ill. App. 2d 179, 184, 261 N.E.2d 469, 471-72 (1970) ("It is not improper for the prosecuting attorney to reflect unfavorably on the character of the accused and to denounce his alleged wickedness"); *Battle v. State*, 478 P.2d 1005, 1007 (Okla. Crim. App. 1970) ("The right of argument contemplates a liberal freedom of speech . . . It is only when argument by counsel for the State is grossly improper and unwarranted upon some point . . . that a reversal can be based on improper argument"). *But see* *Singer, supra* note 8, at 254.

⁷⁵ This test focuses on only one of the vices of prosecutorial misconduct, but it will usually be adequate to identify conduct by prosecutors that presents the other vices as well. Still, the test is obviously not designed for all situations—for example, those in which the misconduct occurs outside the presence of the jury.

Compare Note, *supra* note 13, at 949: "Prosecutor's forensic misconduct may be generally defined as any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in a manner prescribed by law." Perhaps the most comprehensive effort to define courtroom misconduct by prosecutors has been provided by the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION (tent. draft 1970). The relevant standards are §§ 5.2, 5.4(b), 5.5-5.9.

lacking. For one thing, there is the English experience. As one observer describes it,⁷⁶

For a very long time now both law and tradition require that a criminal prosecution in England should be conducted in the most objective and humane manner possible It is held as self-evident that while the prosecution should place before the jury all the relevant facts of the case in strict accordance with the rules of evidence, this should be done in the most dispassionate and unemotional way possible

In 1936, the Sixth Circuit declared, "Above and beyond all technical procedural rules . . . is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place" ⁷⁷ And as early as 1889, the Pennsylvania Supreme Court said that "heated zeal" might be "excusable on the part of counsel engaged in the defense of a man on trial for his life," but not on the part of the prosecutor. In the court's view, the state's representative should be "an impartial officer" rather than "a heated partisan."⁷⁸ We would do well to recapture that attitude.

C. Remedies for Prosecutorial Misconduct

1. *The Uses and Limitations of Appellate Reversal.*—Despite its forceful description of the prosecutor's duties in 1889, the Pennsylvania Supreme Court refused to consider the defendant's claim that his conviction should be reversed because of the prosecutor's improper summation. The court was "[u]naware of any way by which the speeches of counsel [could] legally be placed on the record," and Chief Justice Paxson commented, "I would regard any system of practice by which error could be assigned to the summing up of counsel as a very great calamity."⁷⁹ Although other courts had been reviewing allegedly improper arguments on their merits since at least the 1850's, the Pennsylvania court continued as late as 1905 to oppose any system in which "the appellate court would be asked to review the trial, not on the evidence, but on the talk."⁸⁰

Today, by contrast, courts uniformly recognize the importance

⁷⁶ Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure*, 21 A.B.A.J. 301, 305 (1935). See also Note, *supra* note 8, at 118-19.

⁷⁷ *Pierce v. United States*, 86 F.2d 949, 953 (6th Cir. 1936).

⁷⁸ *Commonwealth v. Nicely*, 130 Pa. 261, 270, 13 A. 737, 738 (1889).

⁷⁹ *Id.*

⁸⁰ *Commonwealth v. Ezell*, 212 Pa. 293, 296, 61 A. 930, 931 (1905).

of the prosecutor's closing argument to the fairness of the trial process, and allegations of prosecutorial misconduct have become a staple of the appellate reports. Indeed, the review of criminal convictions has given the courts their only significant opportunity to present formal, written views concerning the proprieties of prosecutorial behavior. It is interesting to reflect that because other mechanisms for remedying prosecutorial misconduct have been largely unavailable, prosecutors would have been left effectively without judicial guidance if the early position of the Pennsylvania Supreme Court had prevailed.

The basic function of appellate review is of course to insure a fair trial for the defendant and not to discipline the prosecutor. Accordingly, when serious misconduct occurs outside the presence of the jury,⁸¹ when it can be cured by instructions at the trial court level, or when it is considered harmless because evidence of guilt is overwhelming, another remedy must be found. Judge Learned Hand said in a 1939 decision:

That was plainly an improper remark, and if a reversal would do no more than show our disapproval, we might reverse. Unhappily, it would accomplish little towards punishing the offender, and would upset the conviction of a plainly guilty man. . . . [I]t seems to us that a reversal would be an immoderate penalty.⁸²

Academic commentators have generally despaired of appellate reversal as an effective means of controlling prosecutorial misconduct. They have referred to reversal as a "quasi-sanction"⁸³ and have said, "Appellate justices time and time again have condemned . . . poor conduct and warned prosecutors to keep within the bounds of propriety. Later opinions reflect the result—frustrating failure."⁸⁴ These academic observers have found it imperative that "two distinct problems—justice and discipline—be kept separate."⁸⁵

In deciding whether to reverse, however, courts have frequently attached significance to whether the prosecutor's misconduct was intentional.⁸⁶ Many of the commentators have been critical of this sort

⁸¹ See *Veney v. Warden*, 259 Md. 437, 271 A.2d 133, 142 (1970).

⁸² *United States v. Lotsch*, 102 F.2d 35, 37 (2d Cir.), *cert. denied*, 307 U.S. 622 (1939).

⁸³ Note, *Misconduct of Judges and Attorneys During Trial: Informal Sanctions*, 49 IOWA L. REV. 531, 543 (1964).

⁸⁴ Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L. J. 477, 487 (1959).

⁸⁵ Singer, *supra* note 8, at 237.

⁸⁶ *Namet v. United States*, 373 U.S. 179, 188 (1963); *Gladden v. Frazier*, 388 F.2d 777, 780 (9th Cir. 1968), *aff'd sub nom. Frazier v. Cupp*, 394 U.S. 731 (1969); *Nicholson v. United States*, 221 F.2d 281, 284 (8th Cir. 1955); *Baish v. United States*, 90 F.2d 988, 991

of judicial analysis, arguing that the effect of misconduct on the trial process remains the same whatever the prosecutor's intention. Because fairness for the defendant, not discipline of the prosecutor, is the function of appellate review, intention should be irrelevant.⁸⁷

I am inclined to agree with the courts rather than the commentators on this issue for two reasons. First, the effects on the defendant and on the trial process do not really remain the same regardless of the prosecutor's intention. Somewhat paradoxically, the term "intentional" may be used primarily to describe the objective character of what happened. The statement, "His conduct was so bad that I think that it constituted intentional wrong-doing," says something about how bad the conduct was. Beyond that, even when the objective manifestations of the prosecutor's conduct do remain more or less the same, a calculated and cold-blooded air may sometimes communicate itself and have an effect of its own. As Justice Holmes once said, even a dog understands the difference between being kicked and being stumbled over.

Second, appellate reversal may indeed serve to discipline prosecutors, and courts need not be blind to that fact. For that reason alone, the prosecutor's intention may properly tip the balance in the proverbial "close case." The United States Supreme Court has argued that the rule excluding illegally obtained material from evidence deters misconduct by policemen,⁸⁸ and depriving the prosecutor of the benefit of his own improper behavior might similarly have a deterrent effect. This analogy confronts a significant difficulty, however, because recent evidence suggests that the exclusionary rule has not materially altered police conduct.⁸⁹ The experience of the station house, far from showing the effectiveness of appellate review, may lead to skepticism concerning the ability of the courts to affect the behavior of prosecutors through appellate reversal.

Nevertheless, there are reasons to think that reversals, lost convictions, and retrials might influence prosecutors more than they apparently

(10th Cir. 1937); *People v. Horowitz*, 70 Cal. App. 2d 675, 699, 161 P.2d 833, 846 (1945); *People v. Wells*, 100 Cal. 459, 461, 34 P. 1078, 1079 (1893).

⁸⁷ *E.g.*, *Singer*, *supra* note 8, at 271-72; Note, *supra* note 13, at 975. Some courts have also adopted this position. *E.g.*, *United States v. Nettl*, 121 F.2d 927, 930 (3d Cir. 1941) ("We cannot understand how the accused is interested in the personal character of his accuser. . . . [I]t hurts the defendant just as much to have prejudicial blasts come from the trumpet of Gabriel"); *Griffin v. United States*, 183 F.2d 990 (D.C. Cir. 1950); *United States v. Sprengel*, 103 F.2d 876 (3d Cir. 1939).

⁸⁸ *Linkletter v. Walker*, 381 U.S. 618, 633 (1965).

⁸⁹ See *Oaks*, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 223-43 (1966).

influence police officers. First, the burden of a retrial falls on the prosecutor himself. He is in effect told to "go back and do it right." Second, although it has often been contended that policemen "count" arrests and not convictions, the same thing cannot be said of prosecutors. Third, a policeman's superiors are not members of the legal profession and do not regularly read appellate opinions. When the behavior of an assistant district attorney leads to a reversal, his superiors know about it. Fourth, as a member of the legal profession himself, a prosecutor may find a judicial rebuke especially stinging.

This analysis points to the potentiality of appellate review as a device for controlling prosecutorial misconduct, but unfortunately it does not demonstrate the effectiveness of this remedy today. Instead, a variety of procedural snares have deprived this mechanism of much of its potential force. When prosecutorial misconduct occurs at trial, the defense attorney has, of course, only two choices. He may object or he may remain silent. If he objects, he then gives the trial judge two choices—to overrule the objection or to sustain it. If the trial judge sustains the objection, the usual remedy will be an instruction to the jury to disregard the prosecutor's improper comments. As simple and basic as it seems, this procedure leaves the defense attorney effectively boxed in when it comes to an appeal, whatever the prosecutor's conduct. The purpose of many rules of appellate practice is, of course, to confine appellate review to exceptional situations. If the defense attorney has failed to object, the appellate court will ordinarily conclude that the error was "waived." If an objection was made but overruled, the misconduct will rarely be so serious that the appellate court will find more than "harmless error." Finally, if an objection was made and sustained, the appellate court will ordinarily conclude that the trial judge's instructions effectively "cured" the error.

These generalizations are subject to exceptions, and many convictions have been reversed on grounds of prosecutorial misconduct. Still, reversals occur in only a small percentage of the cases in which the appellate courts condemn the prosecutors' behavior as improper. It may therefore be desirable to reexamine the basic rules of appellate practice as they apply to cases of prosecutorial misconduct. Although appellate review should indeed have a limited function, perhaps it can be restructured to become a somewhat more effective mechanism of control in this area. At the moment, in default of other remedies, appellate review is the only significant corrective device available for prosecutorial misconduct. We should therefore do our best to make it work.

2. *The Requirement of Objection and the Remedies Available in the Trial Court.*—In *United States v. Socony-Vacuum Oil Co.*,⁹⁰ an antitrust prosecution, the prosecutor referred to the defendants as “malefactors of great wealth” and “eager grasping men . . . without any consideration for the underdog or the poor man.” The prosecutor also told the jury that high governmental officials wanted a conviction in the case, that the defense attorneys had been “working night and day with suggestions as to how the red herring [could] be drawn across the clear-cut issue in this case,” that government counsel viewed the case as a crusade because they “believe[d] to the bottom of their hearts in the justice of the cause,” and that the expert witnesses who had been presented by the defense were worse than damn liars.

The United States Supreme Court agreed that some of the prosecutor’s remarks were improper, but it refused to reverse the defendants’ convictions. Among other things, the defense attorneys had failed to object to some of the prosecutor’s most inflammatory statements, and the Court said, “Counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments . . . were improper and prejudicial.”⁹¹

The requirement of objection as set forth in the *Socony-Vacuum* decision services two closely related policies. First, there is the notion of judicial economy; the trial court should have the first chance to correct any trial errors because its remedies are ordinarily less burdensome and expensive than appellate reversal. Second, there is the moral notion that the defendant should not be allowed to “ride the verdict”; he should not be able to have a conviction set aside on the basis of secret, “hip-pocket” error while he can retain the benefit of a verdict of acquittal.

The requirement of objection is, however, subject to criticism on the ground that it visits the carelessness of the lawyer upon his client,⁹² and upon other grounds that seem to have special force when the asserted error consists of prosecutorial misconduct. For one thing, a jury is likely to resent repeated objections, and objection during an attorney’s closing argument often seems especially impolite. It is, of course, the prosecutor’s closing argument that provides the most frequent occasion for prosecutorial misconduct.

⁹⁰ 310 U.S. 150 (1940).

⁹¹ *Id.* at 238-39 (Douglas, J.).

⁹² *Cf.* *Fay v. Noia*, 372 U.S. 391 (1963).

Some prosecutors may even capitalize upon a jury's resentment of interruptions in the manner that the prosecutor did in the *Socony-Vacuum* case. When the trial judge sustained a defense objection to the prosecutor's assertion of a fact not in evidence (although the judge remarked that he had been thinking about something else and had not heard the statement in question), the prosecutor said, "Now if you will let me alone a few minutes, I will be through. If you don't, like 'Old Man River,' I will just keep rolling along. I don't want to do that."⁹³

Apart from the danger of resentment by the jury, many attorneys seem to regard the lack of objection during an opponent's closing argument as a matter of professional courtesy.⁹⁴ Their attitude seems to be that excesses on one side can always be cancelled by excesses on the other, and that there is a certain beauty in the mutual remission of sin.

A more important objection to the "objection rule" is that the defense attorney's complaint, even if sustained by the court, may have exactly the opposite effect from the one intended. It may call attention to the prosecutor's improper remarks and reemphasize them in the jurors' minds.⁹⁵ Again, this criticism, although applicable in other situations, has special weight when prosecutorial misconduct is at issue. In this area, courts are not concerned with technical errors in the admission of evidence or with difficult legal matters which jurors might recognize that they do not understand. They are concerned instead with cases in which a flamboyant prosecutor has dipped into his mental menagerie for a disparaging label for the defendant. The effect of the prosecutor's vivid imagery is not likely to be altered by the process of objection and formal ruling by the trial court.

Many courts have refused to require objection in serious cases of prosecutorial misconduct.⁹⁶ Indeed, in the federal courts, this result is required by Rule 52(b) of the Federal Rules of Criminal Procedure,

⁹³ 310 U.S. at 267 (Roberts, J., dissenting). As always, the problem is multiplied when a lawyer's misconduct is reinforced by misconduct on the part of the trial judge. In *Giglio v. Valdez*, 114 So.2d 305 (Fla. Dist. Ct. App. 1959), a civil case, the trial judge said, "That's a sharp trick, that's exactly what it is. You see a lawyer getting along pretty good on his argument and you interrupt him and disrupt his line of thought. . . . As a general rule I don't let lawyers interrupt other lawyers, and I ain't a going to start it. I'm too old to start doing that sort of thing." The appellate court held that these judicial remarks constituted reversible error.

⁹⁴ Cf. R. KEETON, *TRIAL TACTICS AND METHODS* 197-98 (1954).

⁹⁵ See, e.g., Note, *Statements by Prosecuting Attorneys to Juries Which Demand Improper Considerations for Verdict or Punishment*, 39 VA. L. REV. 85, 97 (1953).

⁹⁶ E.g., *Lawn v. United States*, 355 U.S. 339, 359-60 n.15 (1958); *Viereck v. United States*, 318 U.S. 236, 248 (1943); *State v. Hawley*, 229 N.C. 167, 48 S.E.2d 35 (1948); *Jenkins v. State*, 49 Tex. Crim. 457, 95 S.W. 726 (1906); *State v. O'Donnell*, 191 Wash. 511, 71 P.2d 571 (1937).

which provides, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Even in the federal courts, however, judges usually do not advert to this rule but instead seem to consider the problem afresh with each case. Judge Simon Sobeloff wrote in 1965:

[T]here may be instances where the failure to object to a grave violation manifestly stems from the attorney's fear that an objection will only focus attention on an aspect of the case unfairly prejudicial to his client. . . . [I]t is the judge's duty, on his own initiative, to interrupt, admonish the offender and instruct the jury to disregard the improper argument.⁹⁷

Although Judge Sobeloff's refusal to attach conclusive weight to the lack of objection is sound, the solution that he proposes is not ideal. If a defense attorney has deliberately chosen to let an improper remark pass in the hope that the jury will forget it, he is not likely to regard it as a favor when the judge himself, in an effort to correct the remark, reemphasizes it. When the circumstances permit, the trial judge should instead call both lawyers to the bench, chastise the prosecutor appropriately, and ask the defense attorney whether he wishes an instruction on the impropriety of the prosecutor's behavior.

In assessing the requirement of objection, it is important to consider the range of remedies available in the trial court. Courts have sometimes said that no objection is required when action by the trial court could not correct the error.⁹⁸ As a California appellate court explained the rule,

Where an examination of the entire record fairly shows that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, then the absence of [objection] will not preclude the defendant from raising the point in this court.⁹⁹

This analysis seems to overlook the fact that a trial court can always order virtually the same remedy that an appellate court would provide. The court can declare a mistrial. A mistrial has at least one advantage over reversal by an appellate court. The defendant cannot "speculate on the verdict." When misconduct occurs early in a trial, moreover, a

⁹⁷ *United States v. Sawyer*, 347 F.2d 372, 374 (4th Cir. 1965).

⁹⁸ *Pierce v. United States*, 86 F.2d 949, 954 (6th Cir. 1936); *Volkmer v. United States*, 13 F.2d 594, 595 (6th Cir. 1926); *Simmons v. State*, 139 Fla. 645, 648, 190 So. 756, 757 (1939), *overruled as to substantive holding*, *State v. Hines*, 195 So. 2d 550 (Fla. 1967).

⁹⁹ *People v. Podwys*, 6 Cal. App. 2d 71, 74, 44 P.2d 377, 379 (1935).

mistrial also serves the goal of judicial economy. When, for example, the prosecutor makes a seriously prejudicial remark during his opening statement, it may not be especially burdensome to empanel a new jury and start over. Moreover, even when the jury-selection process does become a major, time-consuming activity, a mistrial is obviously more efficient than appellate reversal or the grant of a new trial after the verdict.

When, however, misconduct occurs late in a trial—during the prosecutor's closing argument for example—judicial economy may argue against a mistrial. The jury may of course acquit even after serious misconduct has occurred. It may therefore be more efficient to allow the trial to reach its conclusion than to go back to the beginning and to repeat the entire trial process. A few hours of jury deliberation may make the problem academic, while a mistrial would probably lead to a new trial lasting as long as the first. If the jury does not acquit, the prosecutor's serious misconduct would still entitle the defendant to a new trial. In that sense, the defendant would be able to "have it both ways." In these circumstances, however, the goals of judicial economy and of avoiding "speculation on the verdict" pull in opposite directions, and allowing the defendant to "speculate" seems the lesser evil.

When serious misconduct occurs late in a trial, there are just three realistic alternatives. The trial can continue, and its result can be binding on both parties. This alternative is unfair to the defendant in that it may subject him to a verdict influenced by the prosecutor's misconduct. Or the court may declare a mistrial. This solution is also unfair to the defendant; it will subject him to the trauma and expense of a second judicial proceeding. Finally, the court may permit the trial to continue but consider the result binding only if the jury acquits. The situation is one in which the defendant, the victim of the prosecutor's wrong, cannot be placed in the position that he would have occupied had the wrong not occurred. It seems better to place him in an unusually favorable position—one in which he can "have it both ways"—than one in which he will inevitably pay a heavy price for the wrong of his opponent. Indeed, if this alternative were adopted, the defendant might still pay a significant price for the prosecutor's misconduct. It might still take two trials to place the defendant in the position that he should have occupied after one.¹⁰⁰

¹⁰⁰I do not propose that "incurable" misconduct should lead to an automatic

This analysis brings us back to the judicial argument that objection should not be required when curative instructions would be inadequate to remedy the prosecutor's wrong. When "incurable" misconduct occurs early in a trial, it seems to me that there remains a substantial interest in requiring immediate objection so that the trial court will consider the desirability of declaring a mistrial. This interest diminishes, however, as the trial proceeds. Even at the end of the trial, a prompt objection would enable the court to decide at the critical moment whether the situation was so extreme that the defendant should be allowed to "ride the verdict." Nevertheless, when the situation in fact calls for this remedy, the lack of an objection should not be fatal. The case will occupy the same posture after the verdict that it would have occupied if the objection had been made and sustained. From the standpoint of judicial economy, it would still be desirable to avoid the burden and cost of an appellate proceeding, but that goal could be accomplished by requiring a motion for a new trial after the verdict without any requirement of objection.

Mistrials are wasteful, and busy trial judges are probably more influenced by that consideration than they should be. Partly for this reason, the usual remedy for prosecutorial misconduct is an instruction to the jury to disregard the improper behavior. Courts "presume" that juries obey these curative instructions, but of course they know better. Juries are quite incapable of forgetting on command. The difficulty of correcting trial error through catechism is accentuated when prosecutorial misconduct is at issue. Professor Richard Singer asks, "[H]ow can a fair instruction be drawn that admonishes the jury to forget that the prosecutor called the defendant a human vulture?"¹⁰¹

It would be unfair to assert that curative instructions have no ameliorative effect whatever. An instruction, even when it does not "cure" the error, may detract from it. A jury cannot forget, but a jury may be less influenced by the prosecutor's improper conduct when it knows that the trial judge strongly disapproves. When error is followed by instruction, the usual result may be a sort of psychological vector between the two events—not a return to the status quo ante, but still something less than the appeal to improper decisionmaking that the prosecutor apparently had in mind.

Thinking in terms of "psychological vectors" suggests a possible

acquittal, but even that position does not seem wholly untenable if one believes that the defendant should not suffer any detriment because of the prosecutor's wrong.

¹⁰¹ Singer, *supra* note 8, at 261.

alternative to the usual "instruction to disregard." I advance this alternative, not entirely seriously, but primarily as a starting point for analysis. Rather than attempt to "blot out" the prosecutor's misconduct by incantation, the trial judge might really try to cure it, by "aiming" his remarks to the jury at a point which would lead to a "final vector" of zero. Suppose, for example, that at the end of a long trial, the prosecutor improperly referred to the defendant's numerous prior convictions. Instructing the jury to disregard this revelation would probably be an exercise in futility, but the judge might go further: "Ladies and gentlemen of the jury, you must disregard the prosecutor's last statement. I happen to know that this defendant had never even been arrested until his trouble in this case. The prosecutor is attempting to influence you by material not in evidence, and in this instance, he has his facts wrong. The prosecutor should know better, and his misconduct should indicate to you why the law insists that you base your verdict solely on the evidence admitted during this trial." This strong statement, virtually calling the prosecutor a liar, might really succeed in "blotting out" his serious error.

It would of course be unseemly for the trial judge to engage in this sort of bickering with the prosecutor, and especially so when the prosecutor's improper remarks were factually accurate and the judge's "curative statement" untrue. There is, however, no entirely satisfactory alternative. The judge could intone a colorless instruction to the jury to disregard the statement—in which event the defendant would run a significant risk of being convicted in part because of his prior record. Or the judge could declare a mistrial, which would impose a significant burden and expense upon both the defendant and the state. When a brief judicial statement would in fact provide a clear, speedy, and effective remedy, "unseemliness" may be a small price to pay. The notion that the courts might begin to sacrifice their dignity to a functioning concept of "situation ethics" is at least a fascinating one.

Under this regime, trial judges would emerge as more than "ruling machines." They might even have fun. When a prosecutor referred to the defendant's unimpressive and somewhat shady lawyer as a "two-bit shyster," the judge might indignantly declare that he had always regarded this fair-minded leader of the bar as a personal hero. When the prosecutor spoke of the defendant as a human vulture, the judge might remark that at least the defendant seemed to him a better man than the prosecutor. A very few rebukes of this sort might lead to a significant decline in the incidence of prosecutorial misconduct. Moreover,

because the trial judge probably has a greater influence with the jury than the prosecutor, his serious efforts to counter the prosecutor's misconduct could work. Repeated factual misstatements would, I recognize, lead to a loss of judicial credibility, but strong counter-epithets and expressions of opinion do not seem to pose that danger.

I admit that I am being more devilish than earnest in making this suggestion. It is so inconsistent with current concepts of the judicial function that most observers probably would not consider it seriously.¹⁰² Nevertheless, putting these extreme cases does serve a purpose. The cases indicate how much more trial judges could do to correct instances of prosecutorial misconduct than simply to utter the words, "Objection sustained—jury may disregard."

Even if one is appalled by the notion of judicial "counter-error" as a corrective, he may recognize the need for a heightened sense of judicial activism in remedying prosecutorial misconduct. When the prosecutor's behavior has in fact created a misimpression, the judge should not hesitate to correct it. He should not automatically leave that task to the defense attorney. Similarly, the judge should usually explain to the jury why the prosecutor's conduct was improper, and he should forcefully remind the jurors of their duty to render a careful and thoughtful verdict based solely on the evidence. Finally, the judge should not be reluctant to accompany his instructions to the jury with a strong admonition of the prosecutor. A dispassionate ruling sustaining an objection may be far less effective than the statement, "Mr. Prosecutor, that remark was thoroughly unprofessional. Any further effort to appeal to passion and prejudice, or to inject other improper considerations into this case, will be met with strong sanctions. Ladies and gentlemen of the jury, I apologize for the prosecutor's behavior, and I instruct you to disregard his last statement. As rational, intelligent men and women, I am sure that you would not have been influenced by it in any event."

Courts have universally recognized the propriety of a judicial admonition when a prosecutor has engaged in courtroom misconduct,¹⁰³

¹⁰² Compare ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE JUDGE'S ROLE IN DEALING WITH TRIAL DISRUPTIONS, standard B.1 (tent. draft 1971) [hereinafter cited as ABA, JUDGE'S ROLE]:

When it becomes necessary during the trial for [the trial judge] to comment upon the conduct of . . . counsel . . . he should do so in a firm, dignified and restrained manner, avoiding repartee, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

¹⁰³ *United States v. Bugros*, 304 F.2d 177 (2d Cir. 1962); *United States v. Pepe*, 247

but in cases involving defense counsel, some courts have suggested that it is improper for a trial judge to admonish any attorney in the presence of the jury.¹⁰⁴ These courts rely on the danger that an unsophisticated jury may read the admonition as an expression of the judge's opinion concerning the merits of the litigation. This danger, however, if present at all, seems greater when the defense attorney is the object of the trial judge's comments than when it is the prosecutor who is censured. The defense attorney may be closely identified with his client in the jurors' minds, and the jury may infer that the judge's low opinion of the defense attorney's conduct extends to the defense attorney personally and to the defendant as well. If the trial judge expresses his distaste for the prosecutor's conduct, however, the jury is not likely to read the statement as a manifestation of judicial dislike for the state government. The jury is much more likely to regard the admonition for what it is—the rebuke of a single individual for a single instance of misconduct. The courts' rulings concerning the impropriety of any judicial admonition in the presence of a jury should therefore be read in the context of the cases in which they were made.

Appellate courts have often said that primary responsibility for correcting misconduct by prosecutors lies with the trial courts.¹⁰⁵ This responsibility cannot be discharged by perfunctory yes-or-no rulings on objections. Insofar as they can, trial courts should insure that every judgment of criminal guilt reflects a careful and responsible decision by the jury. When judicial activism leads a court to impose its own views upon the jury, of course it should be condemned; but judicial restraint that effectively allows biased, emotional, and self-righteous prosecutors to impose their views on the jury seems to me an even greater fault.

Appellate courts properly look to trial judges as the primary line of defense against prosecutorial misconduct, but these courts should not minimize the extent of their own responsibility for the quality of deliberation at the trial level. The written opinions of appellate courts have an impact that extends far beyond the case at hand. In deciding what significance to attach to the lack of objection, the courts should consider the effectiveness of the remedy that the trial

F.2d 838, 844-45 (2d Cir. 1957); *Baker v. United States*, 115 F.2d 533, 542-43 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941).

¹⁰⁴ *Whittenburg v. State*, 46 Okla. Crim. 380, 386, 287 P. 1049, 1051 (1930); *Bell v. State*, 130 Tex. Crim. 90, 92-93, 92 S.W. 2d 259, 260 (1936).

¹⁰⁵ Note, *supra* note 83, at 536.

court would probably have provided, the tactical obstacles that may have stood in the way of an objection (either the fear of provoking jury resentment or the danger of reemphasizing the prosecutor's improper remarks), the extent to which it is necessary that the defendant suffer for his attorney's carelessness, and the public interest in securing dignified and accurate adjudication even when the parties may not seem to care. When these factors enter the balance, there can be no justification for an unyielding requirement of contemporaneous objection.¹⁰⁶

3. *Provocation by the Defense Attorney.*—When an appellate court concludes that prosecutorial misconduct was induced by misconduct on the part of the defense attorney, it may refuse to reverse on that ground alone.¹⁰⁷ Indeed, when the trial record has been incomplete, some courts have gone so far as to “presume” that the prosecutor's improper remarks must have been provoked by unrevealed defense misconduct.¹⁰⁸ The provocation rule has, however, had its critics. As early as 1914, a Georgia appellate court declared:

The fact that the prisoner's counsel had violated the rule would not authorize the State's counsel to do likewise. . . . We could as well hold that if the prisoner's counsel introduces illegal evidence, the State's counsel can reply by introducing other illegal evidence.¹⁰⁹

¹⁰⁶ It might be helpful to permit the defense attorney to raise his objection at the close of the prosecutor's argument or at any time prior to the judge's charge to the jury. He could thereby avoid the apparent rudeness of interrupting his opponent, yet he would still give the trial judge specific notice of his complaint and foreclose speculation on the verdict.

If a speedier objection would have permitted the court to remedy the prosecutor's misconduct by a less drastic method than the one finally suggested, the delay might reasonably count against the defense attorney. Nevertheless, if an instruction would still be useful, a refusal to give it should be error.

Some courts have permitted defense attorneys to raise objections at the close of argument. *E.g.*, *Dusky v. United States*, 271 F.2d 385, 401 (8th Cir. 1959) (dictum), *rev'd on other grounds*, 362 U.S. 402 (1960). Others have held the lack of promptness fatal. *Carpenter v. State*, 129 Tex. Crim. 397, 406, 87 S.W.2d 731, 735 (1935); *State v. Coolidge*, 106 Vt. 183, 190, 171 A. 244, 247 (1934); *Buck v. Territory*, 1 Okla. Crim. 517, 519, 98 P. 1017, 1018 (1909).

¹⁰⁷ *Brennan v. United States*, 240 F.2d 253, 263-64 (8th Cir.), *cert. denied*, 353 U.S. 931 (1957); *Baker v. United States*, 115 F.2d 533, 544 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941); *People v. Piazza*, 84 Cal. App. 58, 82, 257 P. 592, 602 (1927); *State v. Pinkston*, 336 Mo. 614, 617, 79 S.W.2d 1046, 1048 (1935) (dictum); *State v. Johnson*, 195 Wash. 545, 547-48, 81 P.2d 529, 530 (1938).

¹⁰⁸ *Pietch v. United States*, 110 F.2d 817, 823 (10th Cir.), *cert. denied*, 310 U.S. 648 (1940); *State v. Berlovich*, 220 Iowa 1288, 1291, 263 N.W. 853, 855 (1935). Courts have also relied on provocation as a justification for the prosecutor's behavior when the state made no suggestion, even on appeal, that the defense attorney acted improperly. *United States v. Sober*, 281 F.2d 244, 246 (3d Cir.), *cert. denied*, 364 U.S. 879 (1960).

¹⁰⁹ *Nixon v. State*, 14 Ga. App. 261, 265, 80 S.E. 513, 515 (1914). *See also Dugan Drug Stores, Inc. v. United States*, 326 F.2d 835, 837 (5th Cir. 1964):

We are not impressed with the argument that the conduct of the prosecutor was

The argument that two wrongs cannot make a right has obvious force, but I believe that misconduct by a defense attorney can sometimes justify prosecutorial behavior that would otherwise be improper. The test should not be whether the prosecutor was "provoked," but whether the prosecutor's action was reasonably designed to remedy the wrong perpetrated by the defense.

Ordinarily, for example, it would be improper for a prosecutor to express his personal belief in the defendant's guilt or to suggest that the defense attorney had been biased by his fee. Suppose, however, that a defense attorney had improperly told the jury that he knew in his heart that the defendant was innocent, and that he would blame his own inadequacies and never again enjoy a good night's sleep if the defendant were convicted. It would be unfair to confine the remedy for this misconduct to an instruction to the jury, and to inform the prosecutor that he could not mention the incident at all in his own remarks. The prosecutor should be able to go beyond the court's formal instruction in explaining why the defense attorney's misconduct should be disregarded. Indeed, in the course of his argument, I think that the prosecutor should be permitted to mention his own belief in the defendant's guilt and to suggest that the defense attorney had, after all, been paid to think as favorably of the defendant as he could. It should be incumbent on the prosecutor, if he chose this course, to make it clear to the jurors that he was not urging conviction on the basis of his personal opinions, but merely illustrating why full responsibility for the ultimate decision belonged to the jurors alone.

The courts should thus recognize a "right of reply" as a permissible and appropriate remedy for courtroom misconduct. At the same time, they should be alert to the danger of excessive retaliation.¹¹⁰ The fact that an attorney had urged one sort of error should not justify his opponent in urging the opposite sort. The line is obviously a fine one, but I believe that it can be drawn.

This analysis would justify only a small minority of the results that the courts have reached under the "provocation rule." The provocation rule has usually not been justified on the ground that a limited and specific response may constitute a reasonable corrective for defense misconduct. Instead, the courts have commonly proceeded on a theory of estoppel (the defense with its unclean hands and big,

caused by the conduct of defense counsel. A prosecutor should be immune to improper tactics. If he feels that his opponent has overstepped, the remedy is an appeal to the trial court—not in the adoption of unfair procedures.

¹¹⁰ See *Howard v. State*, 147 Tex. Crim. 88, 92, 178 S.W.2d 691, 693 (1944).

dirty mouth lacks standing to complain) or invited error (the defense should not be able to secure a new trial by tempting the prosecutor to match its improper conduct).¹¹¹ Indeed, the courts have not usually regarded provocation by the defense attorney as just one factor in the case; they have regarded it as a license. One serious slip by the defense attorney, and the prosecutor confronts an open field. The effect of this judicial approach is to abandon any controlled search for truth in favor of a free-for-all.¹¹² The "provocation rule" may thereby actively encourage misconduct. For example, although I doubt that it often happens in quite so deliberate a fashion, one law review note reviews the provocation cases and then offers this practice tip:

The prosecutor may deduce from this that he would do well to watch carefully for certain mistakes that the defense counsel may make, and, instead of objecting if that course is open to him, attempt to take advantage of that mistake¹¹³

Prior misconduct by the defense attorney may be one circumstance that a court should consider in assessing a prosecutor's behavior. A prosecutor's conduct must always be evaluated in the context of the case, and there is no reason why the defense attorney's behavior should be automatically disregarded. By allowing this consideration virtually to harden into a rule, however, the courts have apparently lost sight of the main objective. The issue is not whether the prosecutor's conduct represented an understandable human response in light of the behavior of the defense. It is whether the defendant was tried in an atmosphere that gives us confidence in the accuracy and fairness of his conviction. A narrow and specific response to a defense attorney's misconduct may ultimately lead to a more dispassionate verdict, and courts should therefore recognize the propriety of this sort of prosecutorial comment. Misconduct by the defense attorney should not, however, become a license for unrestrained argument by the prosecutor. The central question should remain whether the prosecutor's behavior was likely to induce a decision not based on a rational assessment of the evidence.

4. *The Harmless Error Doctrine.*—Judge Joe R. Greenhill of the Texas Supreme Court sometimes gives an after-dinner speech in which

¹¹¹ See *State v. Cascio*, 219 La. 819, 829-30, 54 So. 2d 95, 99 (1951); *Buck v. Territory*, 1 Okla. Crim. 517, 519, 98 P. 1017, 1018 (1909); *Wilson v. State*, 143 Tex. Crim. 442, 446, 158 S.W.2d 799, 801 (1942).

¹¹² See *Singer*, *supra* note 8, at 247.

¹¹³ Comment, *Limitations Upon the Prosecutor's Summation to the Jury*, 42 J. CRIM. L.C. & P.S. 73, 81 (1951).

he describes how to translate appellate opinions into English. When an appellate court says, "The error, if any, was harmless," Judge Greenhill reports that the statement should be read, "The judge sure goofed up the trial, but we think that the defendant is guilty anyway, so what the hell." It is the harmless error doctrine that, more than any other procedural rule, accounts for the relative ineffectiveness of appellate review in controlling prosecutorial misconduct today.

Under this doctrine, courts have affirmed convictions at the same time that they said, "This outrageous conduct on the part of the Government attorney was unethical, highly reprehensible, and merits unqualified condemnation."¹¹⁴ Too often, moreover, the courts' application of the harmless error doctrine has been mechanical, resting on makeweight arguments or on no arguments at all rather than on a careful evaluation of the circumstances of the trial. Courts have, for example, cited long deliberations by the jury as showing that the verdict must have been based on the evidence and not on the prosecutor's improper remarks.¹¹⁵ Exactly the same circumstance has, however, seemed to demonstrate the opposite point when the courts wished to reverse; then the length of the deliberations has indicated that the case was a close one, so that the prosecutor's statements might have tipped the balance.¹¹⁶

The courts have also found errors harmless partly because the trial was a long one,¹¹⁷ because the prosecutor said that the jury should disregard any remark of his that was not supported by the evidence,¹¹⁸ because the jury acquitted the defendant on some of the charges,¹¹⁹ because the jury acquitted some of the co-defendants,¹²⁰ and because the jury imposed less than the maximum sentence.¹²¹ The

¹¹⁴ *Baker v. United States*, 115 F.2d 533, 543 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941).

¹¹⁵ *Goddard v. State*, 143 Fla. 28, 38, 196 So. 596, 601 (1940); *Commonwealth v. Nelson*, 172 Pa. Super. 125, 148, 92 A.2d 431, 444 (1952), *rev'd on other grounds*, 377 Pa. 58, 104 A.2d 133 (1954), *aff'd*, 350 U.S. 497 (1956).

¹¹⁶ *People v. Podwys*, 6 Cal. App. 2d 71, 44 P.2d 377, 379 (1935); *People v. Esposito*, 224 N.Y. 370, 372, 121 N.E. 344, 345 (1918).

¹¹⁷ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-40 (1940); *Isaacs v. United States*, 301 F.2d 706, 738 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962); *United States v. Kravitz*, 281 F.2d 581, 586 (3d Cir. 1960), *cert. denied*, 364 U.S. 941 (1961); *United States v. Ramos*, 268 F.2d 878, 880 (2d Cir. 1959); *Henderson v. United States*, 218 F.2d 14, 19 (6th Cir.), *cert. denied*, 349 U.S. 920 (1955); *United States v. Hiss*, 185 F.2d 822, 832 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951).

¹¹⁸ *Haskette v. State*, 65 Okla. Crim. 299, 306, 85 P.2d 761, 764 (1938).

¹¹⁹ *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 637-38 (2d Cir.), *cert. denied*, 329 U.S. 742 (1946); *Commonwealth v. Wilcox*, 316 Pa. 129, 146, 173 A. 653, 660 (1934).

¹²⁰ *Stunz v. United States*, 27 F.2d 575, 577 (8th Cir. 1928).

¹²¹ *People v. Milewski*, 316 Ill. 288, 291, 147 N.E. 246, 247 (1925).

multiplication of these non sequiturs strongly suggests that the courts do not care very much about prosecutorial misconduct. Professor Singer says that the harmless error doctrine, which was "intended to be a meaningful and rational approach to technical deviations, has grown, like Topsy, into a trite phrase, repeated by rote, dealing with and concealing truly important substantive errors."¹²² In a notable dissenting opinion, Judge Jerome Frank described the psychological effect of the courts' routine reliance on the harmless error doctrine in the area of prosecutorial misconduct:

This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. . . . If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. . . . Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude toward the judiciary.¹²³

There are, I think, occasions on which an appellate court may properly disapprove the prosecutor's conduct while affirming the defendant's conviction. There is surely no contradiction in advising prosecutors and trial judges that the defendant's objection should have been sustained while ruling that the deviation from propriety was so minor that a new trial is not required. Application of the harmless error doctrine is not, however, confined to situations in which the prosecutor's misconduct was minor. Indeed, one of the difficulties of this doctrine lies in its use to resolve a wide variety of problems with little recognition of their distinctive qualities. Consider, for example, a few variations on the facts of a 1927 Missouri case in which the prosecutor's misconduct would certainly be classed as serious. In *State v. Sheeler*¹²⁴ the prosecutor told the jury that the issue was "whether this government shall be run by the Italian bootleggers . . . or by the men . . . who are constituted to run our government, by Americans, for Americans."¹²⁵ In each of the following hypothetical cases, the prose-

¹²² Singer, *supra* note 8, at 269.

¹²³ *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946).

¹²⁴ 300 S.W. 318 (Mo. App. 1927).

¹²⁵ *Id.* at 320.

cutor's statement will remain the same as it was in the *Sheeler* case itself.

First, suppose that despite the prosecutor's heated remarks about Italian bootleggers, the defendant was plainly not of Italian ancestry. (That was, in fact, the situation in *Sheeler*.) Second, suppose that although the defendant was Italian-American, so were most of the members of the jury. The prosecutor, carried away with his own prejudices, had simply forgotten his audience and the likely effects of his remark. Third, suppose that the defendant was Italian-American and the jurors were not. The defendant was not, however, on trial for a liquor offense. He was a teetotaler charged with taking indecent liberties with his granddaughter. Again, the prosecutor's remark would seem wholly inappropriate, and its most probable effect might be to persuade the jurors that the prosecutor was insane. Fourth, suppose that the defendant was an Italian-American on trial for a liquor violation, and all the jurors were of Puritan ancestry. Still, the evidence of the defendant's guilt was overwhelming.

In each of these situations, there would be reason to suspect that the prosecutor's remark had not altered the verdict, and there would be room to argue that the remark was harmless error. The last situation, however, seems very different from the first three, and all of them seem different from situations in which the prosecutor's misconduct could fairly be classed as minor. In the last situation (in which the evidence of guilt was apparently overwhelming), application of the harmless error doctrine would not turn upon the perceived impact of the prosecutor's remark. The remark might concededly have had a seriously prejudicial effect; the state would nevertheless claim that the resulting prejudice was irrelevant because the defendant was plainly guilty. It is this last situation that truly "places the appellate court in the jury box"¹²⁶ and requires it to make a determination of the defendant's guilt or innocence on the basis of the entire record. Use of the harmless error doctrine in these circumstances seems "tantamount to saying that if one is obviously guilty as charged, he has no fundamental right to be tried fairly."¹²⁷ That proposition, in my view, is outrageous. Indeed, although the Supreme Court has apparently ruled to the contrary,¹²⁸ I consider it a violation of the defendant's right

¹²⁶ Singer, *supra* note 8, at 232.

¹²⁷ Note, *supra* note 84, at 486.

¹²⁸ See *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

to trial by jury for a court to disregard serious error because of its own belief in the defendant's guilt.

There is universal agreement that the right to jury trial would be violated if a judge were to direct a verdict against the defendant in a criminal case. A defendant has a constitutional right to a chance for acquittal whatever the evidence against him. It is, in my view, unfair for a defendant to be deprived of this right by virtue of trial error that may have persuaded the jury not even to consider the possibility of acquittal. When a defendant has been denied a reasonable "shot" at an irrational jury acquittal, I think that a verdict has been effectively directed against him. As the Indiana Supreme Court put it, "No court has the right to assume the guilt of any person accused until that person has been given a fair and impartial trial . . ." ¹²⁹ The courts, in applying the harmless error doctrine, should therefore ask only whether the error itself was harmless. They should not take it upon themselves to rule that although the error may have had a prejudicial impact, it should nevertheless be disregarded because of the defendant's manifest guilt. It should not be the job of an appellate court to comb through the record and, in effect, convict the defendant itself.

Application of the harmless error doctrine to the other hypothetical variations of the *Sheeler* case would not require an appellate court to review the entire trial record or to make a judgment of guilt or innocence. The court would be concerned only with the probable psychological effect of the prosecutor's remark upon the jury. It would ask whether the prosecutor's statement was so irrelevant to the case at hand or so contrary to the apparent attitude of the jurors themselves that it could fairly be presumed to have had little or no effect upon their deliberations.

Still, all of these variations on *Sheeler* seem different from situations in which the prosecutor's misconduct was truly minor. If, as I have contended, appellate reversal does serve a disciplinary function, the interest in discipline obviously becomes more intense as the misconduct becomes more serious. Moreover, even when a court is fairly and honestly persuaded that an instance of misconduct did not influence the jury, its affirmance might be misread as evidence of the court's willingness to tolerate the prosecutor's behavior. Especially when many courts have a manifest history of routine affirmance in cases of prosecutorial misconduct, the natural assumption may be that the judges are again winking at lawlessness. The danger of promoting

¹²⁹ *Wasy v. State*, 236 Ind. 215, 220, 138 N.E.2d 1, 3 (1956).

a cynical disrespect for the judiciary seems greatest when affirmance follows truly outrageous misconduct.

It is probably a concern of this sort for the appearance of justice that accounts for the various rules of "automatic reversal" that the Supreme Court has articulated. When an involuntary confession has been introduced in evidence,¹³⁰ when the defendant has been denied counsel,¹³¹ when a community has been saturated with prejudicial pre-trial publicity,¹³² or when the trial judge has had a direct financial interest in the defendant's conviction,¹³³ the Supreme Court has not bothered to inquire whether the error was harmful.¹³⁴ For example, an involuntary confession might have done no more than duplicate the statements of other admissible confessions; still, the defendant has been granted a new trial.¹³⁵

I do not think highly of rules of automatic reversal. When a retrial would undoubtedly be an idle gesture, it seems foolish to provide one. Although it is common to declare that justice must not only be done but must be seen to be done, that statement often carries overtones of patronizing hypocrisy. It would be quite enough if the courts would only do justice all the time. A concern for the appearance of justice may be appropriate, but this concern should carry no further than to influence the courts to be certain that justice has in fact been done.

The "automatic reversal" cases do seem to suggest the propriety of a sliding scale of review. The more serious the error, the more certain a court should be before it labels the error harmless. Although I would not apply a rule of automatic reversal, I would reverse almost automatically in cases of serious constitutional error. An appellate court should be virtually certain that a serious constitutional error has not influenced the verdict before it proceeds to affirm the defendant's conviction. Moreover, the court should require the same degree of certainty in serious cases of prosecutorial misconduct. When the misconduct was no more than a minor slip, however, the mere possibility that it might have influenced the jury should not result in a time-consuming new trial. Misconduct may be harmless either because it

¹³⁰ Jackson v. Denno, 378 U.S. 368, 376-77 (1964); Lynumn v. Illinois, 372 U.S. 528, 537 (1963); Spano v. New York, 360 U.S. 315, 324 (1959); Payne v. Arkansas, 356 U.S. 560, 568 (1958); Malinski v. New York, 324 U.S. 401, 404 (1945).

¹³¹ White v. Maryland, 373 U.S. 59, 60 (1963); Hamilton v. Alabama, 368 U.S. 52, 55 (1961); Glasser v. United States, 315 U.S. 60, 75-76 (1942).

¹³² Sheppard v. Maxwell, 384 U.S. 333, 351-52 (1966).

¹³³ Tumey v. Ohio, 273 U.S. 510, 535 (1927).

¹³⁴ See generally Chapman v. California, 386 U.S. 18, 42-45 (1967) (Stewart, J., concurring).

¹³⁵ See Haynes v. Washington, 373 U.S. 503, 518-19 (1963).

did not influence the jury or because it was trivial. I think that those issues should be considered separately before a court renders a final judgment based on an aggregate of both factors.

In a haphazard way that has been determined more by the division of jurisdiction between the state and federal courts than by conscious considerations of policy, the courts have adopted a sliding scale of review. At one end of the spectrum are the "automatic reversal" cases involving very serious constitutional error. The "automatic reversal" doctrine has not been applied to instances of prosecutorial misconduct, however, although some of this misconduct is every bit as outrageous as the constitutional violations presented in the "automatic reversal" cases themselves. Next on the scale come other cases involving federal constitutional violations. In *Chapman v. California*,¹³⁶ the Supreme Court held that whether a federal constitutional error was harmless was itself a federal question. The standard to be applied was whether it was clear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."¹³⁷ Finally, there are cases of nonconstitutional error, which are governed by a bewildering variety of state standards. Courts sometimes consider all error harmless when the trial court's verdict was "not clearly wrong." At other times they ask whether the result below was "correct." On still other occasions, they ask whether it was "reasonably probable" that the error did not influence the verdict. Courts may, moreover, substitute the phrase "highly probable" or the phrase "more probable than not" for the phrase "reasonably probable" in this last formulation.¹³⁸ Each of these standards is usually suggested as a universal solvent, applicable to all state-law errors.

Application of this scheme to cases of prosecutorial misconduct may produce considerable confusion. Some prosecutorial misconduct undoubtedly constitutes a violation of the due process clause of the fourteenth amendment. Other misconduct is presumably only trial error under state law. The issue usually turns on whether the misconduct deprived the defendant of a fair trial. Whether the misconduct deprived the defendant of a fair trial may, in turn, depend upon whether the misconduct was harmless error.

Thus when a court seeks to apply the *Chapman* standard, it is sometimes confronted with a problem of *renvoi*. Which harmless error

¹³⁶ 386 U.S. 18 (1967).

¹³⁷ *Id.* at 24.

¹³⁸ See R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 15-36 (1970).

standard to apply may hinge on whether the error was harmless. Courts might cut through this difficulty by asking whether it was clear beyond a reasonable doubt that the defendant had received a fair trial. It would seem odd, however, to apply a reasonable-doubt standard to this ultimate issue of law rather than to the factual issue of whether the prosecutor's behavior influenced the jury. Even if this problem of circularity could be surmounted, *Chapman* would apparently call upon appellate courts to apply one fine distinction (whether the error arose under state law or had a constitutional dimension) so that the courts could apply another fine distinction (for example, whether the error was "probably harmless" or was "harmless beyond a reasonable doubt"). I doubt that the courts could slice the salami that thin even if they wanted to.

So long as the *Chapman* decision remains the law, it would be simpler for the courts to apply *Chapman's* "harmless beyond a reasonable doubt" standard to all cases of prosecutorial misconduct. At least the courts should do so when the misconduct was more than trivial and when it has been seriously suggested that it deprived the defendant of a fair trial. Nice calculations as to the source of the right that the prosecutor violated would serve very little purpose.

A more durable solution might, however, lie in a restructuring of the harmless error doctrine by both state and federal courts. Contrary to the apparent assumption of the *Chapman* decision, constitutional rights are not fungible.¹³⁹ Neither are rights under state law. The source of a right is an inadequate measure of its importance to the defendant. When serious trial error has occurred, a court should find the error harmless beyond a reasonable doubt before it affirms the defendant's conviction. When the error was minor, however, a conclusion that the error probably did not affect the verdict should be enough to justify affirmance. In neither event should it matter whether the error arose under state or federal law.

It is of course difficult to formulate rules for measuring the "seriousness" of an error, and a "sliding scale" could be bent to disingenuous analysis of the sort that has characterized the courts' application of the harmless error doctrine in the past. Whatever its deficiencies, the *Chapman* decision did represent a significant effort by the Supreme Court to foreclose unreflective invocation of the harmless error doctrine. Prior to *Chapman*, courts had far too regularly concluded that constitutional rights were not worth the bother and

¹³⁹ 386 U.S. at 44 (Stewart, J., concurring).

expense required to vindicate them, and in *Chapman*, the Supreme Court called a halt. Under the proposed "sliding scale," however, the courts would be expected to make clear in each case which "harmless error" standard they were applying. In doing so, they would automatically reveal their views concerning the seriousness of each error. The federal courts would retain the power to review each state-court determination to ensure that its effect was not to deprive the defendant of a federal right. Above all, the courts would be precluded from applying the harmless error doctrine solely on the ground that the defendant seemed guilty. With a modicum of good faith on the part of state and federal appellate judges, this proposal should vindicate significant rights while discouraging reversals for minor or technical violations that probably did not affect the verdict. The proposal is thus designed to further the original goal of the harmless error doctrine.

Before turning from appellate review to other correctives for prosecutorial misconduct, it may be helpful to examine one final case. This 1969 decision of the Texas Court of Criminal Appeals illustrates how much misconduct it may take to persuade a reluctant court to grant the defendant a new trial. It also offers a review of some of the procedural devices that the courts frequently employ in misconduct cases to defeat the substantively valid claims of criminal defendants. The case is *Joyner v. State*,¹⁴⁰ a prosecution for robbery by assault.

The prosecutor began his argument in *Joyner* by implying the existence of incriminating evidence outside the record:

There are many things that you must want to know about this case that the law deprives you from knowing, properly I suppose, but I am just frustrated and burned with the idea that I would like to tell you things that I can't.

The court refused to reverse on the basis of this misconduct, observing that "the record fails to reflect that any objection was interposed to such argument at the time it was made. It is axiomatic that an objection is requisite for appellate review."

The prosecutor next took the gun that the defendant had allegedly used in the robbery and said, "Let me tell you a little bit about this pistol: they will kill you It will kill any of you, and me (Pointing pistol towards defendant) [I]t will kill any four time loser, just like that (pulling trigger)." The defendant's prior convictions were not in evidence, and on this occasion the defense attorney

¹⁴⁰ 436 S.W.2d 141 (Tex. Crim. App. 1969).

did object. The court, however, held that the error was cured because, following the objection, the prosecutor explained that he had "no reference to any specific individual" and the trial judge instructed the jury that "what lawyers say is argument."

The prosecutor then suggested without support in the record that if the victim of the crime had resisted, the defendant would be on trial for murder. The higher court noted cryptically, "This is not reversible error." The court also held that it was not error for the prosecutor to refer to the defendant as a hijacker, because this statement was supported by the evidence.

The defense argued that the prosecutor had commented on the defendant's failure to testify when he said, "Of course, the fact that he was there, by his own admission—let's see what he said that night: he didn't say anything that night" The court of appeals rejected this defense contention without explaining its reasons.

The prosecutor also criticized Supreme Court decisions and actions of the Texas Legislature. He said that as a result of these actions, "we are on the verge of anarchy in this country." The Court of Criminal Appeals held that the prosecutor's statements concerning the Supreme Court were not a ground for reversal because a prompt objection had not been made, but it regarded the criticism of the state legislature as "the only serious question in the case." As the court observed, the prosecutor was now abusing "another branch of the government." Still, the court held that the prosecutor's statement was harmless error: "[I]t is not every demonstration of poor taste on the part of a prosecutor which necessarily calls for reversal of a conviction."

Perhaps the most striking instance of misconduct occurred prior to the prosecutor's final argument. The prosecutor asked a defense witness whether he was a member of the Black Muslim organization and secured a negative answer. The prosecutor then asked the witness whether the defendant belonged to the Black Muslim organization. The defense attorney objected, and the objection was sustained. Although the effect of this incident was probably the same as if the witness had given an affirmative answer, the appellate court held, "No reversible error appears."

For the Court of Criminal Appeals, this case was apparently a cliffhanger, but one with a happy ending. After the court had filed an initial opinion affirming the defendant's conviction, the defense attorney submitted a petition for rehearing. The petition noted that an objection had been presented on one of the occasions when the court

said that none had been made, and it also emphasized that the trial had occurred less than two weeks after the major ghetto disturbance in Detroit during July 1967. This circumstance added further racial overtones to the prosecutor's statements about "Muslims" and "anarchy," and it was enough to tip the balance. The conviction was reversed.

Courts have often shown a significant reluctance to entertain claims of prosecutorial misconduct. One might expect that in all but the most extreme cases, defense attorneys would grow tired of presenting these claims and decide to forgo the bother and frustration. Many appellate courts seem to be awaiting that development impatiently. My own impression, however, is that the courts' "understanding attitude" toward prosecutorial misconduct has added to the bulk of appellate litigation. If the courts would begin to exhibit a working commitment to the ideals of prosecutorial dignity and impartiality, the present volume of misconduct cases could be reduced—simply because prosecutors do care about retrials and lost convictions. Prosecutors today apparently assume that it is appropriate to give unrestrained vent to their personal zeal, and the courts have done little to create a glimmer of prosecutorial reflection and self-doubt. Some re-education through reversal seems necessary in order to produce a fair and dignified system of trial procedure.

At best, of course, the disciplinary function of appellate review will remain incidental. There will always be cases of misconduct in which it would be wasteful and functionless to grant new trials. Accordingly, a corrective mechanism that focuses directly on the propriety of the prosecutor's behavior, disregarding the effect of this behavior on the verdict, seems necessary. A few mechanisms of this sort are currently available, but as the following sections of this article will indicate, they have not been put into operation.

5. *Civil Actions for Damages.*—Some prosecutorial misconduct is defamatory; some probably constitutes intentional infliction of emotional suffering; and some violates the defendant's constitutional right to a fair trial, so that it might give rise to a cause of action under the Federal Civil Rights Act of 1871.¹⁴¹ Regardless of how a prosecutor's conduct is characterized, however, a litigant confronts a major obstacle when he relies upon this conduct as a basis for the recovery of damages: Prosecutors enjoy an "absolute immunity" from civil liability for actions undertaken in the performance of their official duties.¹⁴²

¹⁴¹ 42 U.S.C. § 1983 (1970).

¹⁴² *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965).

The prosecutor's immunity cannot be defeated by a showing of "actual malice."¹⁴³ When a prosecutor's behavior has been characterized by a "complete absence of jurisdiction," however, the courts have ordinarily held him liable.¹⁴⁴ The scope of this limitation upon the doctrine of "absolute immunity" is unclear. Prosecutors apparently have "jurisdiction" to slander,¹⁴⁵ to deny the defendant a speedy trial,¹⁴⁶ to engage in malicious prosecution,¹⁴⁷ and even to present fraudulent evidence.¹⁴⁸

If a prosecutor has engaged in "police activity" outside the courtroom, he may be subject to a civil action.¹⁴⁹ If he has acted at all like a prosecutor, however (even a vicious, lawless, and dishonest prosecutor), he apparently remains immune. Whatever the boundaries of prosecutorial immunity, no court has held a prosecutor liable for statements made during the course of a trial. The prosecutor's courtroom remarks, like those of any other lawyer, are absolutely privileged in this context.¹⁵⁰ Thus the prosecutor's courtroom conduct seems to be doubly protected, both by a general prosecutorial immunity and by a privilege applicable to other lawyers and litigants as well.

The justifications usually asserted for immunity are first, that the threat of liability would make prosecutors less independent and courageous in executing their duties, and second, that the burden of defending lawsuits would itself interfere with the prosecutors' performance of their public tasks. Although these rationales are plausible, they do not seem entirely persuasive. In my view, no privilege should be so "absolute" that it cannot be overcome by a showing of "actual malice" (which, in this context, might be defined as any conscious sense of serious wrongdoing).

Plainly there are kinds of courage and independence that should *not* be encouraged. Moreover, it is difficult to believe that the burden of defending civil litigation would require any district attorney's office to add more than one or two lawyers to its staff. Prosecutors have long defended actions brought to enjoin threatened illegal prosecutions, and the burden of defending injunctive actions has not brought the business

¹⁴³ *Wise v. City of Chicago*, 308 F.2d 364, 366 (7th Cir. 1962), *cert. denied*, 372 U.S. 944 (1963).

¹⁴⁴ *Lewis v. Brautigam*, 227 F.2d 124, 128-29 (5th Cir. 1955).

¹⁴⁵ *Sauber v. Gliedman*, 233 F.2d 941 (7th Cir. 1960), *cert. denied*, 366 U.S. 906 (1961).

¹⁴⁶ *Phillips v. Nash*, 311 F.2d 513 (7th Cir. 1962), *cert. denied*, 374 U.S. 809 (1963).

¹⁴⁷ *Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

¹⁴⁸ *Hurlburt v. Graham*, 323 F.2d 723 (6th Cir. 1963); *Lusk v. Hanrahan*, 244 F. Supp. 539 (E.D. Ill. 1965).

¹⁴⁹ *Robichaud v. Ronan*, 351 F.2d 533, 537 (9th Cir. 1965).

¹⁵⁰ See W. PROSSER, *THE LAW OF TORTS* § 114(1) (4th ed. 1971); Note, *supra* note 13, at 979.

of prosecution to a halt. I doubt that judicial recognition of a duty to defend damage actions would have a significantly more devastating effect. If the burden of defense did pose a problem, perhaps each plaintiff could be required to make a preliminary showing of malice in an *ex parte* proceeding—a proceeding that would not bind the prosecutor but that might establish the desirability of hearing both sides in a full trial.

Although the current immunity of prosecutors should be restricted, the restriction probably would not convert damage actions into a major corrective for prosecutorial misconduct. Both malice and financial damage would usually be difficult to prove. Moreover, accused and convicted criminals commonly evoke little sympathy from juries, while prosecutors may evoke a great deal. Civil actions have been notoriously ineffective as a remedy for police misconduct,¹⁵¹ and many of the difficulties encountered in cases involving police officers would undoubtedly be duplicated in actions against prosecutors. The limitation of prosecutorial immunity would at least serve a symbolic function, however; it would show that prosecutors are not entirely above the law that holds other mortals financially accountable for their intentional misdeeds.

6. *Discipline by the Legal Profession.*—The procedure for disciplining an attorney who departs from professional standards usually begins with the grievance committee of his state bar association. The judgment of this committee is invariably subject to some form of judicial review before discipline is imposed. Usually the grievance committee commences a legal action; the trial court must make an independent finding of misconduct; and the trial court's finding is subject to review on appeal. The available sanctions are censure, temporary suspension from the bar, and permanent disbarment.

These disciplinary procedures are rarely invoked as a corrective for courtroom misconduct, and they are virtually never invoked as a corrective for courtroom misconduct by prosecutors.¹⁵² A 1954 study reported only a handful of cases in which bar associations had begun disciplinary proceedings against defense attorneys for their courtroom behavior,¹⁵³ and the authors uncovered only a single case in which

¹⁵¹ See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

¹⁵² This observation is also applicable to the various state statutes authorizing the removal of prosecutors from office for gross misconduct. See Note, *supra* note 13, at 980.

¹⁵³ *Id.* Almost all of these cases involved counsel for leaders of the Communist Party in the early 1950's. See *Sacher v. Association of the Bar*, 347 U.S. 388 (1954); *In re Isserman*, 9 N.J. 269, 87 A.2d 903 (1952), *cert. denied*, 345 U.S. 927 (1953).

a prosecutor had been disciplined for forensic misconduct.¹⁵⁴ I have been unable to discover a more recent instance of professional discipline for courtroom misconduct by a prosecutor. Although appellate opinions in criminal cases have documented repeated instances of serious prosecutorial misbehavior, bar associations have not acted upon the readily available information.

A striking illustration of the reluctance of bar associations to discipline prosecutors was provided by the Grievance Committee of the Illinois State Bar Association in 1968. In *Miller v. Pate*,¹⁵⁵ the United States Supreme Court granted habeas corpus relief to a state prisoner under a death sentence on the ground that the prosecutor had "deliberately misrepresented the truth" in securing his conviction. The prosecutor had introduced into evidence a pair of men's undershorts covered with large reddish-brown stains. He had referred to these shorts, allegedly discarded by the defendant one mile from the scene of the crime, as "a garment heavily stained with blood." The prosecutor had permitted other witnesses, including the defendant, to refer to the shorts in similar terms. Indeed, a prosecution witness, a chemist for the State Bureau of Crime Identification, had testified that the shorts were stained with blood and that the blood matched that of the victim of the crime. No defense witness testified to the contrary; the prosecutor had successfully resisted a defense motion to permit scientific inspection of the shorts.

Later evidence revealed that throughout the proceedings the prosecutor was aware of a startling fact: The shorts were stained with paint. The prosecutor had even secured a memorandum from the local police department explaining, in the prosecutor's words, "how this exhibit contains all the paint on it."

The Supreme Court's reliance upon the prosecutor's deception induced the Grievance Committee of the Illinois State Bar Association to begin its own investigation. The Committee quickly concluded that "the United States Supreme Court had misapprehended the facts of the case."¹⁵⁶ The Committee reported that in addition to the reddish-brown paint, the shorts did contain blood. Its opinion said, "The question before the Grievance Committee, then, was not whether the prosecution misrepresented the fact that there was *blood* on the shorts,

¹⁵⁴ *In re Maestretti*, 30 Nev. 187, 191, 93 P. 1004, 1005 (1908).

¹⁵⁵ 386 U.S. 1 (1967).

¹⁵⁶ Statement of the Grievance Committee of the Illinois State Bar Association in the Matter of the Prosecution of the Case of People of the State of Illinois v. Lloyd Eldon Miller, Jr. at 1, May 14, 1968 (unpublished).

because clearly its statement to this effect was not a misrepresentation. *Instead the question was, assuming the defense did not know of the paint, whether the prosecution was guilty of unethical conduct in failing to disclose its presence to the defense.*"¹⁵⁷ The Committee answered this question in the negative on the ground that "the presence or absence of paint on the shorts was not a material question in the case." It refused to recommend any disciplinary action.

The Supreme Court's opinion in *Miller* can fairly be criticized for failing to make it clear that there might have been blood on the shorts in addition to the paint. Still, the Court probably did not "misapprehend the facts." The Court quoted the testimony of the state chemist at trial, and this testimony later became the primary basis for the Grievance Committee's conclusion that blood was present. Moreover, both the state's brief and the defendant's had fairly presented the situation. It was conceded that there might have been blood on the shorts.¹⁵⁸ The presence of this blood did not alter the validity of the Supreme Court's conclusion that the prosecutor had "deliberately misrepresented the truth." The Grievance Committee's apparent attempt to convert the issue from one of affirmative misrepresentation to one of nondisclosure seems disingenuous. Plainly the prosecutor had deliberately created the impression that the massive stained areas on the shorts were blood, and he did so although he knew better. As the Supreme Court observed, the "gruesomely emotional impact upon the jury was incalculable."¹⁵⁹

It is ironic that the Grievance Committee saw misleading implications in the Supreme Court's failure to state that there was blood on the shorts in addition to the paint, but none in the prosecutor's failure to state that there was paint on the shorts in addition to the blood. In view of the fact that the presence of the paint was apparently wholly unsuspected, the approach of the Grievance Committee seems backwards. When bar associations fail to see the ethical problems involved in using dishonest tactics to place a man in the electric chair, it is not

¹⁵⁷ *Id.* at 2 (emphasis in original).

¹⁵⁸ See especially Brief for Petitioner at 25 n.7, *Miller v. Pate*, 386 U.S. 1 (1967): "It is *questionable* whether there is or was any blood on the shorts" (emphasis added). Although the defendant adopted this agnostic position, the state argued vigorously that blood was present. Perhaps the Supreme Court sought to avoid the controversy by failing to advert to the issue. It would, I think, have represented more thorough opinion-writing for the Court to refer to the dispute and to state explicitly that it was irrelevant to the Court's decision. Nevertheless, the Grievance Committee's criticism of the Supreme Court seems unwarranted. The Court did not suggest that the testimony of the state chemist was perjured, nor did anyone argue that the defendant's conviction should be invalidated on that ground.

¹⁵⁹ 386 U.S. at 5.

surprising that they have been unconcerned about the verbal abuse of criminal defendants.

Prosecutors have, of course, been disciplined for accepting bribes, for perjury, for embezzling county funds, and for other serious criminal conduct.¹⁶⁰ Even in these situations, courts have sometimes exhibited a strange hesitancy to subject prosecutors to the rules that are applicable to other lawyers. On at least one occasion, for example, a court announced that although the prosecutor's conduct might merit disbarment, that sanction was inappropriate because it would work forfeiture of office as county attorney and deprive the people of the services of one whom they had selected.¹⁶¹ The court therefore confined the remedy for the prosecutor's misconduct to a reprimand. On other occasions, courts have suspended prosecutors from the practice of law but ruled that the suspension was inapplicable to the performance of their prosecutorial duties.¹⁶²

In theory, suspension and disbarment are intended less as penalties than as devices for the protection of the public, and as the *Columbia Law Review* has observed, "[I]t seems anomalous that [an attorney] may be declared a danger to the bar and yet allowed to represent the state."¹⁶³ The legal profession has long contended that its lofty ideals are effectuated through a process of rigorous self-policing, but at least in the area of prosecutorial misconduct, its pretensions have been totally unfounded. Although the courts and the bar associations have frequently described prosecutors as quasi-judicial officers who must meet higher standards than other lawyers, both groups have usually seemed to act on the opposite theory.

7. *Punishment for Contempt of Court.*—The ideal corrective for courtroom misconduct by prosecutors may be punishment for contempt of court. This sanction can be easily and quickly administered, and it permits substantial flexibility in adjusting penalties to reflect the severity of the prosecutor's misconduct. The authorized penalties range from suspended sentences and token fines to larger fines, jail terms, and indefinite suspension from the practice of law.¹⁶⁴

There is no reason why contempt citations could not be used to control prosecutorial conduct in the same way that they have been

¹⁶⁰ *E.g.*, *Jones v. Eighth Judicial Dist. Ct.*, 67 Nev. 404, 219 P.2d 1055 (1950); *In re Simpson*, 79 Okla. 305, 192 P. 1097 (1920).

¹⁶¹ *Commonwealth ex rel. Buckingham v. Ward*, 267 Ky. 627, 103 S.W.2d 117 (1937).

¹⁶² *E.g.*, *Melville v. Wettengel*, 98 Colo. 529, 57 P.2d 699 (1936); *In re Maestretti*, 30 Nev. 187, 93 P. 1004 (1908); *Snyder's Case*, 301 Pa. 276, 152 A. 33 (1930).

¹⁶³ Note, *supra* note 13, at 981.

¹⁶⁴ *Id.*

used to control the conduct of defense attorneys and lawyers in civil cases. Indeed, when appellate courts have affirmed criminal convictions despite the occurrence of prosecutorial misconduct, they have sometimes suggested that the trial court should have held the prosecutor in contempt.¹⁶⁵ Nevertheless, contempt citations do not seem to have been used at all for this purpose.

In preparing this article, I surveyed the reported decisions for the past twenty-five years. Although I uncovered a large number of cases in which defense attorneys had been punished for contemptuous courtroom behavior, I did not find a single case in which a prosecutor had been so disciplined. Professor Singer's review of the decisions, although limited to federal cases, went back further than mine. He was similarly unsuccessful in his efforts to find any contempt citation for forensic misconduct by a prosecutor.¹⁶⁶ I did discover one case in which a trial court had held a prosecutor in contempt for a courtroom statement, but the trial court's action was reversed on appeal.¹⁶⁷ The prosecutor in this case had disparaged the trial judge in informal remarks to a court bailiff—at a time when the judge and jury were absent from the courtroom.

As this lonely attempt to discipline a prosecutor for asserted courtroom misconduct indicates, contempt proceedings, which are summary in character and which rest upon ill-defined standards, pose serious dangers of abuse. Nevertheless, some of the dangers present when defendants and defense attorneys are disciplined seem minimized when prosecutorial misconduct is at issue. The usual objects of a prosecutor's abusive remarks are, of course, the defendant and defense attorney rather than the trial judge. The court therefore seems less likely to lose its objectivity through personal embroilment in the controversy.¹⁶⁸ Moreover, as a previous section of this article has indicated,¹⁶⁹ the discipline of a defendant or of a defense attorney may prejudice the jury trying his case, but the discipline of a prosecutor seems unlikely to do so.

Despite these distinctions, reforms in contempt procedures should certainly be extended to cases of prosecutorial misconduct as well as to cases of contemptuous behavior by the defense. Like a defendant or

¹⁶⁵ *Castle v. Commonwealth*, 269 Ky. 168, 170, 106 S.W.2d 626, 627 (1937). Cf. *Rogers v. State*, 8 Okla. Crim. 226, 243, 127 P. 365, 372 (1912).

¹⁶⁶ Singer, *supra* note 8, at 276.

¹⁶⁷ *Brutkiewicz v. State*, 280 Ala. 218, 191 So. 2d 222 (1966).

¹⁶⁸ Cf. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

¹⁶⁹ See text accompanying notes 103-04 *supra*.

defense attorney, a prosecutor should, for example, be afforded a full hearing and an ample opportunity to prepare and present a defense. Moreover, except in cases of truly outrageous behavior, the prosecutor should be warned that his conduct might result in punishment before punishment is actually imposed. Contempt citations should ordinarily be confined to cases of repeated misconduct in which judicial reprimands have failed to do the job.

“You can lead a horse to water, but you cannot make him drink.” With contempt proceedings (as with professional disciplinary procedures), the machinery is available. The problem lies in persuading the courts to use it. The task is not easy, and as frustration mounts, one’s thoughts may turn to the creation of a new and independent authority—perhaps an ombudsman or an administrative agency—that could assume primary responsibility for the discipline of prosecutors. To be sure, this reform probably would not offer procedures superior to those currently available, but one can always hope that a different set of personnel would somehow exhibit a greater understanding of the problem.

It would certainly be inappropriate, however, to entrust the discipline of prosecutors to non-lawyers, if only because a rather specialized sense of courtroom propriety seems necessary for effective performance of the task. It would plainly be worse to make defense attorneys responsible for the discipline of their opponents. If the judiciary seems too sympathetic to prosecutors to do an effective job, it is improbable that the prosecutors themselves would do better. Representatives of the entire legal profession have, of course, had innumerable chances. There is apparently no one left. Moreover, there is something seriously unsettling about employing ombudsmen and similar devices to promote the impartial resolution of disputes that the courts themselves were created to provide. If the courts were doing their jobs, they would be our ombudsmen.

The key to the problem lies with the appellate courts. In this area as in others, they are the most likely agents of reform. If appellate judges would consistently demand careful and dignified trial procedures as a prerequisite to criminal conviction, their concern would be effectively communicated to the trial courts. Trial judges might well begin to use the various correctives at their command, including punishment for contempt of court, in an effort to ensure the integrity of their judgments. It is perhaps unfortunate that the legal profession has come to look to the appellate courts as the principal or almost

exclusive source of innovation in criminal procedure. Nevertheless, these tribunals do seem to accumulate primary responsibility for setting the "tone" of justice. In practice, when the tribunals at the pinnacle of the judicial system do not care, no one else is likely to care either.

8. *Long-Range Structural Reform.*—In 1931, the Wickersham Commission said, "The system of prosecutors elected for short terms, with assistants chosen on the basis of political patronage, with no assured tenure yet charged with wide undefined powers, is ideally adapted to misgovernment."¹⁷⁰ Prosecutors' offices are usually characterized by low salaries, rapid job turnover, lack of in-service training programs, overwhelming caseloads, and a deep involvement in local politics. All of these considerations seem to push prosecutors toward an impatient, crusading, "gangbuster" self-image (that of the prosecutor of the mass media) rather than toward a careful, impartial, quasi-judicial self-image (that espoused by the Code of Professional Responsibility). Institutions shape attitudes, and attitudes shape conduct. I believe that the structural reform of prosecutors' offices might ultimately lead to a reduction of prosecutorial misconduct in the courtroom.

In England, it is common for a barrister to represent the Crown at one trial and the defendant at the next. This system seems well designed to promote professional detachment and perspective. Efforts to implement the English system in the United States would undoubtedly encounter overwhelming political obstacles. Still, lesser steps might be feasible. If, for example, through salary increases and other measures, a body of career prosecutors and public defenders could be developed, some rotation of assignments between the two offices might be possible. A decline in mutual self-righteousness might be the result.

Another productive step would be the elimination of local prosecutors' offices and the reorganization of prosecutorial functions at a state rather than a county level. As the Wickersham Commission observed, "Under the conditions of transportation to-day and with the . . . coming of highly organized crime, the State is as natural a unit as the county or town was a century ago."¹⁷¹ This reform might, among other things, reduce the temptation of prosecutors to engage in flamboyant conduct calculated to appeal to the local press.

The realities of political power probably preclude the total

¹⁷⁰ WICKERSHAM COMM'N REP., *supra* note 14, at 15.

¹⁷¹ *Id.* at 13.

abolition of local prosecutors' offices. Again, however, lesser measures may be practicable. In 1952, the National Conference of Commissioners on Uniform State Laws and the American Bar Association Commission on Organized Crime proposed a Model Department of Justice Act. This Act would authorize the State Attorney General to "maintain a general supervision over the prosecuting attorneys of the State with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State."¹⁷² The Attorney General would be empowered to survey the administration of criminal justice, to organize conferences of prosecutors, and even to supersede local prosecutors when that course became necessary.

Still another politically difficult but potentially productive reform would be to replace the current system of electing district attorneys with an appointive system. Even without this reform, the length of the district attorney's term might be increased, and it might also be possible to permit incumbent prosecutors to run unopposed for reelection in the same way that judges do in many of the states that have adopted proposals for judicial reform.

Although local political interests seem to stand in the way of many desirable innovations, political forces are not in these days of intense concern about crime a major obstacle to necessary increases in salaries, manpower, and training programs. Finally, many jurisdictions have already removed the appointment of assistant district attorneys from the patronage system. Certainly none of these reforms could be justified exclusively or primarily on the ground that they would reduce courtroom misconduct by prosecutors. They might well have an effect in this area, however, and they should therefore be considered in a full evaluation of the problem.

II. THE TRIAL JUDGE

The quality of our judges is the quality of our justice.

Leflar, *The Quality of Judges*, 35 IND. L.J. 289, 305 (1960).

A. Introduction: *The Trial Judge as Traffic Cop*

An effective traffic policeman must sometimes be an aggressive, "take-charge kind of guy." When a motorist attempts an illegal left-hand turn in heavy traffic and then disobeys an order to drive straight ahead, the situation does not call for a sensitive understanding of the

¹⁷² MODEL DEPARTMENT OF JUSTICE ACT § 7(2) (1952).

motorist's social circumstances. Instead, it usually requires an immediate, forceful, and intimidating response—perhaps by an officer whose lip is even stronger than the motorist's. A certain amount of authoritarianism seems to come with the policeman's uniform and badge.

The nature of a trial judge's job is, of course, essentially different. In theory at least, a trial judge should rarely be called upon to act in a crisis situation. He should act after the fact to resolve carefully focused disputes that have not yielded to private settlement. Because both parties to each case are usually convinced of the soundness of their positions, the trial judge's task is frequently difficult. It requires ample time, an atmosphere of careful deliberation, and the maintenance of what Mr. Justice Sutherland called "the calm spirit of regulated justice."¹⁷³

Nevertheless, over the course of the last half-century, this nation seems to have done its best to divert its trial judges from their naturally reflective role and to convert them into traffic policemen. At least we have placed most of our judges at very busy intersections.¹⁷⁴ In 1964, the three judges of Atlanta's Municipal Court resolved over 70,000 cases.¹⁷⁵ The following year, a single judge sitting in Detroit's Early Sessions Division disposed of more than 20,000 cases.¹⁷⁶ In 1968, New York City's criminal courts took on 480,000 new cases, and they ended the year with 520,000 cases still unresolved.¹⁷⁷ In many urban jurisdictions, criminal caseloads have doubled within a single decade.¹⁷⁸

The causes of today's administrative crisis in the criminal courts are many: population growth; rising crime rates; the proliferation of criminal statutes by legislatures that rarely consider enforcement costs; and most recently, the Supreme Court's "due process revolution," which has required trial courts to devote a greater portion of their resources to the resolution of pre-trial motions and post-conviction proceedings

¹⁷³ Powell v. Alabama, 287 U.S. 45, 59 (1932).

¹⁷⁴ For a general description of the rush-hour atmosphere of one misdemeanor court, see Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951).

¹⁷⁵ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 31 (1967) [hereinafter cited as 1967 TASK FORCE REP.].

¹⁷⁶ *Id.* at 133.

¹⁷⁷ TIME, Nov. 9, 1970, at 60.

¹⁷⁸ In Cleveland, for example, the number of felony indictments increased from 4,514 in 1952 to 9,470 in 1963. Unpublished statistics supplied by John L. Lavelle, Court Administrator for the Court of Common Pleas of Cuyahoga County. In Houston, the number of indictments rose from 2,582 in 1956 to 5,811 in 1967. Unpublished statistics supplied by R. J. Roman, Clerk's Office, Harris County District Courts. In Los Angeles, the length of an average felony jury trial increased from 3.5 days in 1964 to 7.2 days in 1968. SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON THE CRIMINAL COURTS OF SAN FRANCISCO, PART I: THE SUPERIOR COURT BACKLOG—CONSEQUENCES AND REMEDIES I (1970).

and which has also increased the length of the average criminal trial.¹⁷⁹ Justice Bernard Botein recently described the situation in Manhattan by saying, "We are holding the process together with Scotch tape and wire because of lack of manpower."¹⁸⁰

Many trial judges seem to have become as preoccupied with "moving" cases as traffic policemen are with moving vehicles. Moreover, the techniques that they have come to employ are not entirely dissimilar. Justice Mitchell D. Schweitzer of the New York Supreme Court apparently expressed the philosophy of many trial judges when he said:

In this job, one can do as much work as he wants to do. He can sit back and listen patiently to every matter that is brought before him. If he does that, he has done the job that a judge is paid to do. But if every judge took that attitude, the courts would be backed-up for twenty years. Some of us therefore take a more active part.¹⁸¹

The general change in judicial attitudes can be seen, not only in the trial courts themselves, but in appellate opinions concerning courtroom conduct by trial judges. During the late nineteenth and early twentieth centuries, appellate courts generally attempted to promote a truly antiseptic atmosphere in America's trial courts. In 1899, for example, a New York court reversed a criminal conviction because the trial judge had instructed an evasive defendant to "answer the question and stop quibbling."¹⁸² Similarly, in North Carolina in 1917, a judge told a criminal defendant to answer a question without "dodging." The defense attorney objected, and the trial judge both apologized and instructed the jury to disregard his remark. The North Carolina Supreme Court nevertheless found the use of the word "dodging" so offensive that it reversed the defendant's conviction.¹⁸³ In 1967, by contrast, a Michigan court found no error when a trial judge, without significant provocation, told a defendant under cross-examination to "shut up."¹⁸⁴

In 1891, the California Supreme Court ordered a new trial because a trial judge had remarked, apparently accurately, that the defen-

¹⁷⁹ In the District of Columbia, the length of the average felony trial increased from 1.9 days in 1950 to 2.8 days in 1965. REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 263 (1966).

¹⁸⁰ "City Courts Facing a Growing Crisis," N.Y. Times, Feb. 12, 1968, at 41.

¹⁸¹ Personal interview, Jan. 11, 1968.

¹⁸² *People v. Hill*, 37 App. Div. 327, 328, 56 N.Y.S. 282, 283 (1899).

¹⁸³ *State v. Rogers*, 173 N.C. 755, 756, 91 S.E. 854, 855 (1917).

¹⁸⁴ *People v. Esse*, 8 Mich. App. 362, 154 N.W.2d 545 (1967).

dant "had contradicted herself several times in the record."¹⁸⁵ In 1953, the Fifth Circuit held that there was no "real claim" of reversible error when a trial judge accused the defendant of making a misstatement and then refused to specify what it was.¹⁸⁶

In 1919, the Colorado Supreme Court overturned a conviction because a judge had responded to a defendant's story by asking, "Do you mean to tell these jurors your wife and your stepdaughter are trying to frame up a case on you?"¹⁸⁷ Forty years later, the Ninth Circuit found no reversible error when a trial judge asked a defense attorney, "Do you mean to say that this defendant here is an innocent individual that has been duped by this young girl?"¹⁸⁸

In 1935, a California court reversed a conviction because a trial judge had told an apparently malingering defendant that his "theatricalism" must stop.¹⁸⁹ In 1954, the Missouri Supreme Court found no error in telling an emotional defendant to "leave out all the histrionics. You are not in any show here."¹⁹⁰

Although the relative formalism of the early cases would probably have disappeared in any event, today's overwhelming caseloads have undoubtedly played a significant part in altering the trial judge's role. Unlike a traffic policeman whose tasks are eased by the fact that motorists invariably share his interest in promoting the smooth flow of traffic, a trial judge must confront some lawyers and litigants who would not be at all distressed to see the flow of cases come to a halt. Perhaps even more than traffic policemen, judges must be alert for illegal turns.

When criminal proceedings are delayed, tempers cool, memories fade, witnesses are worn down by repeated court appearances, and other witnesses disappear. Accordingly, criminal defendants—at least those who are able to secure their release on bond—usually attempt to postpone their trials for as long as they can. Delay is also useful to defense attorneys who have encountered difficulty in collecting their fees, and the techniques, both honest and dishonest, for postponing the day of trial are many.¹⁹¹

In an effort to improve their position in guilty-plea negotiations,

¹⁸⁵ *People v. Willard*, 92 Cal. 482, 489-90, 28 P. 585, 588 (1891).

¹⁸⁶ *Shelton v. United States*, 205 F.2d 806, 811 (5th Cir.), *petition for cert. dismissed*, 346 U.S. 892 (1953).

¹⁸⁷ *Laycock v. People*, 66 Colo. 441, 182 P. 880 (1919).

¹⁸⁸ *Bush v. United States*, 267 F.2d 483, 488 (9th Cir. 1959).

¹⁸⁹ *People v. McNeer*, 8 Cal. App. 2d 676, 47 P.2d 813 (1935).

¹⁹⁰ *State v. Brotherton*, 266 S.W.2d 712, 716 (Mo. 1954).

¹⁹¹ See generally Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259 (1968).

defense attorneys commonly employ tactics whose primary function is simply to threaten the trial court's time. An attorney may, for example, file a series of frivolous pre-trial motions hoping that a prosecutor will offer sentencing concessions to avoid the burden of a hearing.¹⁹² Other defense maneuvers are used, not for their stated purposes, but to bring cases before judges who are considered favorable to the defense. Finally, although this threat probably materializes more often on television than in reality, some defendants may obstruct the trial process as a form of political protest.

Many judges therefore believe that lawyers and litigants—particularly those on the defense side of criminal cases—will take advantage of our inundated court systems if the judges do not exercise a firm control. These judges may conclude, with some justification, that only an authoritarian attitude can bring a measure of order out of the chaos of America's criminal courts.

Our society has, of course, learned that authoritarian police attitudes cannot easily be confined to the situations in which they are appropriate. Similarly, when a trial judge adopts a forceful, "take-charge" attitude toward defense maneuvers in criminal cases, he may be unlikely to abandon that attitude when it becomes manifestly inappropriate. In that way, the administrative crisis confronting our courts has undoubtedly intensified the likelihood of courtroom misconduct by trial judges.

The pressures of the caseload not only encourage litigants to abuse the system and judges to react to this threat; in addition, the rapid flow of cases tends to dehumanize the criminal process. Cases come to represent numbers rather than people, and authoritarian judicial behavior becomes more likely. Judge Tim C. Murphy explains, "You sit there day after day and you hear the same problems and the same excuses. You find yourself becoming impatient or losing interest."¹⁹³ In his 1956 Holmes Lecture at the Harvard Law School, Justice Walter V. Schaefer wrote, "Someone once wisely said that the basic trouble with judges is not that they are incompetent or venal beyond other men; it is just that they get used to it."¹⁹⁴

Of course judicial misconduct cannot be attributed entirely to the chaotic atmosphere that prevails today in urban courts. In relatively

¹⁹² See Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 56-57 (1968).

¹⁹³ *Some Call It Justice—A Special Report on Washington Area Judges*, THE WASHINGTONIAN, Sept., 1970, at 45, 77.

¹⁹⁴ Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956).

unpressured rural courts, there are many judges who, in Professor Herman Schwartz's phrase, "daily prove the truth of Acton's dictum."¹⁹⁵ Professor Schwartz's portrait of a common species of American trial judge may be a bit overdrawn, but no trial lawyer will fail to recognize the figure that it portrays: "Glaring down from their elevated perches, insulting, abrupt, rude, sarcastic, patronizing, intimidating, vindictive, insisting on not merely respect but also abject servility—such judges are frequently encountered in American trial courts, particularly the lowest criminal and juvenile courts which account for most of our criminal business."¹⁹⁶

A local magazine for the District of Columbia, *The Washingtonian*, recently investigated the performance of trial judges in and around that city. Its report provided frequent and striking illustrations of judicial misconduct.¹⁹⁷ In suburban Virginia, for example, a reporter visited the courtroom of Judge L. Jackson Embrey and heard the following exchange:

THE COURT: How old was this boy you were with?

DEFENDANT: I don't know, maybe 18 or 19.

THE COURT: You say this boy is a friend of yours?

DEFENDANT: Yes, sir. He's a friend.

THE COURT: And you don't know how old he is?

DEFENDANT: Not exactly. No, sir.

THE COURT: Have you ever had your head examined?

DEFENDANT: No, sir.

THE COURT: I think that it would be a good idea, don't you?¹⁹⁸

In suburban Maryland, the reporter investigated the courtroom behavior of Judge William B. Bowie, whose approach to life and to judging was illustrated by a remark that he made in court about certain black defendants: "If they want to live like animals, let them stay in a pen somewhere."¹⁹⁹

In the District of Columbia, *The Washingtonian* focused largely on the Court of General Sessions.²⁰⁰ In the courtroom of Judge Edward A. Beard, two defendants were awaiting trial on a narcotics charge

¹⁹⁵ Schwartz, *Judges as Tyrants*, 7 CRIM. L. BULL. 129, 130 (1971).

¹⁹⁶ *Id.* at 129-30.

¹⁹⁷ THE WASHINGTONIAN, Sept., 1970, at 45.

¹⁹⁸ *Id.* at 74. The same judge once suggested that a mother beat her 18 year-old daughter in court and ordered the sheriff to provide a strap.

¹⁹⁹ *Id.* at 48.

²⁰⁰ This court, which has since gone out of existence in a general court reorganization, was one of the better misdemeanor courts in the nation. Its judges were appointed by the President, and they were compensated at the rate of \$34,000 per year.

when one of them fell asleep. Judge Beard promptly sentenced both defendants to thirty days' imprisonment for contempt of court.

"But I'm all right," the non-offending defendant said. "Why me?"

"You are guilty by association," the judge replied. "Get them out of here."²⁰¹

In a similar vein, Judge W. Byron Sorrell once noticed a long-haired observer in the courtroom and shouted, "Get out of my courtroom and never come back."²⁰²

After General Sessions Judge Milton S. Kronheim, Jr. had placed a convicted defendant on probation, the defense attorney gave notice that he planned to appeal. Judge Kronheim then announced that the defendant would not begin his term of probation until after the Court of Appeals had made its ruling. Instead, because the defendant could not post a \$2,000 appeal bond, he would be returned to jail.

The defense attorney responded, "Your Honor, I would not want to see this defendant locked up any longer, so I will not appeal the case." The judge refused the defense attorney's offer—then withdrew his award of probation and sentenced the defendant to 360 days' imprisonment.²⁰³

These examples are extreme. Nevertheless, similar incidents have occurred throughout the nation. Judges have, for example, asked defense attorneys whether they were not taught better in their first year of law school,²⁰⁴ referred to their behavior as "shyster stuff,"²⁰⁵ called their cross-examination of prosecution witnesses "just ridiculous,"²⁰⁶ and characterized them as "troublesome, like a school boy."²⁰⁷ Judges have similarly referred to defendants as drifters,²⁰⁸ as bamboozlers,²⁰⁹ as black cats in a white Buick,²¹⁰ and as Sing Sing graduates.²¹¹ As recently as 1960 and 1963, moreover, judges told juries that they might consider racial factors in reaching their verdicts.²¹²

²⁰¹ *Id.* at 45-46.

²⁰² *Id.* at 47.

²⁰³ *Id.* at 48.

²⁰⁴ *Eager v. State*, 205 Tenn. 156, 166, 325 S.W.2d 815, 820 (1959).

²⁰⁵ *Moore v. State*, 147 Neb. 390, 397, 23 N.W.2d 552, 556 (1946).

²⁰⁶ *United States v. Chikata*, 427 F.2d 385, 388 (9th Cir. 1970). The Court of Appeals said in this case, "We find nothing objectionable in the court's comments."

²⁰⁷ *Adler v. United States*, 182 F. 464, 472 (5th Cir. 1910), *cert. denied*, 223 U.S. 733 (1912).

²⁰⁸ *People v. Brown*, 2 App. Div. 2d 202, 204, 153 N.Y.S.2d 744, 746 (1956).

²⁰⁹ *People v. Ohanian*, 245 N.Y. 227, 231, 157 N.E. 94, 96 (1927).

²¹⁰ *State v. Belk*, 268 N.C. 320, 324, 150 S.E.2d 481, 484 (1966). In making this remark, the judge purported to be quoting from trial testimony, but no such testimony appeared in the record.

²¹¹ *People v. Herman*, 255 App. Div. 314, 315, 7 N.Y.S.2d 560, 562 (1938).

²¹² *Berry v. United States*, 283 F.2d 465 (8th Cir. 1960), *cert. denied*, 364 U.S. 934 (1961); *People v. Burris*, 19 App. Div. 2d 557, 241 N.Y.S.2d 75 (1963). Of course the

Witnesses, too, have been the subject of harsh judicial comments. In one case, a judge said of a defense witness, "His testimony is a tissue of lies. The defendant will be convicted on his testimony alone, if nothing else."²¹³ In another case, when an attorney called a witness named "Mr. True," the trial judge remarked, "I can see now that Mr. True is not going to be very good. He is going to belie his name. But he'll be like the old gray mare that I so frequently refer to, except that he's not all hell to get, but he isn't going to be worth a damn when you get him."²¹⁴

There are, of course, still other illustrations:

—the judge who, at a pre-trial conference in a torts case, told a lawyer who had refused to stipulate the amount of damages, "I'm going to screw you every way I can short of reversible error."²¹⁵

—the judge who, at the conclusion of a court appearance by two defendants, shouted, "Take those Puerto Rican animals out of here."²¹⁶

—the judge who left the bench during testimony and wandered about the courtroom whittling on a pine board.²¹⁷

—the judge who threw coffee in a lawyer's face in a courthouse corridor.²¹⁸

Courtroom misconduct by prosecutors may merit special condemnation because of the influence that prosecutors commonly have with juries, but juries are undoubtedly even more attentive to the views and prejudices of trial judges. As the Iowa Supreme Court recently remarked, a trial judge's behavior "may influence the jury more

most striking illustrations of judicial bigotry come from another era. See, for example, *Green v. State*, 97 Miss. 834, 835, 53 So. 415, 416 (1910), in which the trial judge told a deputy to summon only young men as jurors, because "we want to break this nigger's neck." The remark, although made before trial, came to the attention of a man who later served on the defendant's jury, and as a result, the defendant's conviction was reversed.

²¹³ *People v. Frasco*, 187 App. Div. 299, 303-04, 175 N.Y.S. 511, 515 (1919). The judge added, "I hope that you will never see the light of day again except behind bars in Sing Sing prison."

²¹⁴ *Myers v. George*, 271 F.2d 168, 173 (8th Cir. 1959).

²¹⁵ Braithwaite, *Judicial Misconduct and How Four States Deal With It*, 35 LAW & CONTEMP. PROB. 151, 152 (1970).

²¹⁶ Letter from William Teitelbaum, University of Texas law student and a summer intern with the Philadelphia, Pa., District Attorney's Office, May 29, 1971, on file with the Criminal Justice Project, Univ. of Texas School of Law.

²¹⁷ Conner, *The Trial Judge, His Facial Expressions, Gestures and General Demeanor—Their Effect on the Administration of Justice*, 6 AM. CRIM. L.Q. 175, 181 (1968).

²¹⁸ Telephone interview with Jack E. Frankel, Executive Secretary, California Commission on Judicial Qualifications, June 30, 1971. For a view of judicial arbitrariness from "the consumer perspective," see N. MAILER, *THE ARMIES OF THE NIGHT* 227-37 (Signet ed. 1968).

than the evidence."²¹⁹ Moreover, if prosecutorial misconduct hinders rehabilitative efforts and encourages defendants to believe that the courts are stacked against them, if it promotes disrespect for the law by the public in general and by minority groups in particular, judicial misconduct surely has an even more harmful effect on the attitudes of various constituencies toward our system of justice. Trial judges are, however, even less subject to effective corrective measures than prosecutors.

One can imagine a vignette in which a trial judge and a defense attorney exchange obscenities with one another during a trial. Because provocation by the trial judge ordinarily is not a defense to a charge of contempt of court,²²⁰ the defense attorney might well be imprisoned as a result of this incident. The trial judge, however (who is commonly called "a symbol of experience, wisdom and impartiality"²²¹), could in many jurisdictions not be disciplined at all.²²² For some observers, the "Chicago Eight" trial has already dramatized this paradox. Professor Herman Schwartz notes, "Abbie Hoffman may go to jail for five years, but Julius Hoffman went to Florida with a stop at the White House for breakfast . . ."²²³ The remainder of this paper will examine what can and should be done to redress the balance and to give effect to Thomas Jefferson's words, "Everyone in public life should be answerable to someone."²²⁴

B. Remedies for Judicial Misconduct

1. *Appellate Review.*—Allegations of courtroom misconduct by trial judges are remarkably frequent in appellate litigation, but most

²¹⁹ *State v. Kimball*, — Iowa —, 176 N.W.2d 864, 867 (1970). Appellate courts have repeatedly made similar observations, and indeed, some may have overestimated the extent of the trial judge's influence with the jury. For example, in *Pickerell v. Griffith*, 238 Iowa 1151, 1166, 29 N.W.2d 588, 596 (1947), the court said, "[I]t is a matter of common knowledge that jurors hang tenaciously upon remarks made by the court during the progress of the trial, and if, perchance, they are enabled to discover the views of the court regarding the effect of a witness' testimony, or the merits of the case, they almost invariably follow them." In 1957, the Second Circuit said, "[The trial judge] must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings." *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1957). See also *Veal v. State*, 196 Tenn. 443, 446, 268 S.W.2d 345, 346 (1954).

²²⁰ See text accompanying notes 363-98 *infra*.

²²¹ *State v. Guido*, 40 N.J. 191, 208, 191 A.2d 45, 54 (1963) (Weintraub, C.J.).

²²² In the federal system, for example, it has commonly been maintained that impeachment is the exclusive remedy for judicial misconduct and that impeachment is permissible only in cases of "high crimes and misdemeanors." It is not clear that obscenities from the bench could meet this standard, and it is virtually certain that the House and Senate would lack the time and inclination to remedy such an incident even if they had the power to do so. See text accompanying notes 269-84 *infra*.

²²³ Schwartz, *supra* note 195, at 133.

²²⁴ Quoted in Traynor, *Who Can Best Judge the Judges*, 53 VA. L. REV. 1266, 1279 (1967).

of the allegations do not concern seriously disruptive behavior. Probably the most common contentions are that the trial judge questioned witnesses too extensively during the trial and that he commented too forcefully on the evidence. Most jurisdictions wholly forbid judicial comment, so that this last contention may merely take the form of an argument that the judge directly or indirectly revealed his view of the merits of the case.²²⁵ In jurisdictions that permit comment, the usual argument is that the trial judge went too far. In the federal system, for example, a judge may comment on the evidence, but he "may not become an advocate for one side."²²⁶ Similarly, in most jurisdictions, a trial judge may question witnesses but "must not give an impression of partisanship" in doing so.²²⁷

Standards so general invite litigation even when the trial judge's behavior has been perfectly proper. Although clearly abusive behavior does arise under the headings "questioning witnesses" and "commenting on the evidence,"²²⁸ most litigation concerns situations in which the trial judge has, at worst, made a plausible mistake of law or failed to consider the aggregate effect of his behavior on the jury. A judge may, for example, have questioned defense witnesses more extensively than prosecution witnesses simply because the defense testimony was less clear than the prosecution testimony. Despite the judge's good faith and personal objectivity, his conduct might have indicated a general suspicion of the defense position to the jury.

Other appellate cases concern judicial comment on the defendant's failure to testify²²⁹ and on the possibility that reversal, pardon, parole, or probation may follow a conviction.²³⁰ Finally, there are cases of rudeness, bias, sarcasm, provocation, and generally undignified courtroom behavior—the cases with which this article is primarily concerned.

²²⁵ See, e.g., *State v. Bryant*, 189 N.C. 112, 126 S.E. 107 (1925).

²²⁶ See *Starr v. United States*, 153 U.S. 614, 626 (1894). The leading case today is probably *Quercia v. United States*, 289 U.S. 466 (1933), in which the trial judge informed the jury that the defendant's testimony was a lie "except when he agreed with the Government's testimony." The judge explained the reason for this conclusion: the defendant had wiped his hands while testifying. Although the judge emphasized that this view was merely a personal opinion and that the jury was free to disregard it, the Supreme Court held the judge's conduct improper and reversed the defendant's conviction.

²²⁷ See *Annot.*, 84 A.L.R. 1172 (1933).

²²⁸ For example, in *Cunningham v. United States*, 311 F.2d 772 (D.C. Cir. 1962), the defendant admitted that he had been in the vicinity of the crime at 3:00 A.M. Judge Alexander Holtzoff promptly commented, "[H]onest people are in bed at 3:00 in the morning."

²²⁹ See *Griffin v. California*, 380 U.S. 609 (1965).

²³⁰ E.g., *United States v. Workman*, No. 26,500 (9th Cir. Jan. 24, 1972); *Bethel v. State*, 162 Ark. 76, 257 S.W. 740 (1924); *People v. Spitzer*, 294 N.Y. 5, 60 N.E.2d 18 (1944).

Appellate courts generally approach these cases in a different spirit from that which typifies their opinions in cases of prosecutorial misconduct. The attitude is no longer that boys will be boys; instead, appellate courts seem to take the business of judging very seriously. There are, of course, cases that seem to challenge this generalization. As in the area of prosecutorial misconduct, each case does turn on its facts, and the prediction of results is hazardous. My own view, however, is that when appellate courts abandoned the rigid concepts of courtroom propriety that had characterized their early decisions they did not swing to the opposite extreme. Instead, they generally maintained a sensible, sensitive, and fair-minded attitude toward allegations of judicial misconduct. There are a few appellate decisions that seem to tolerate abusive judicial behavior,²³¹ but not many.

There is, nevertheless, some evidence of a fraternal, protective spirit among judges. Somewhat paradoxically, it lies primarily in the opinions which reverse convictions on grounds of judicial misconduct. The performance of trial courts is important public business, but when an appellate court concludes that a trial judge's behavior was improper, it frequently fails to reveal why. Perhaps this failure is attributable to the appellate court's sympathy for the trial judge, or perhaps to a misguided desire to preserve public respect for a judiciary that sometimes does deserve it. In any event, it is common for an appellate court to say no more than that a review of the entire record has persuaded it that the trial judge did not act with the requisite impartiality. Similarly, courts sometimes cite instances of misconduct in appendices which they do not publish, and they sometimes refer to particular pages of unpublished trial records to support their findings of impropriety. Even when an appellate court severely reprimands a trial judge, it usually omits his name from the official report.

The more sensitive outlook that differentiates cases of judicial misconduct from cases of prosecutorial misconduct is apparent, not only in substantive rulings, but in decisions on issues of appellate procedure. For example, although courts have sometimes refused to consider claims of judicial misconduct because of counsel's failure to object,²³² they have usually been ready to dispense with the requirement of objection when judicial misconduct is at issue.²³³ An objection to a trial judge

²³¹ *E.g.*, *People v. Esse*, 8 Mich. App. 362, 154 N.W.2d 545 (1967); *United States v. Chikata*, 427 F.2d 385 (9th Cir. 1970).

²³² See Note, *supra* note 83, at 545.

²³³ *E.g.*, *Harding v. United States*, 335 F.2d 515 (9th Cir. 1964); *United States v. Salazar*, 293 F.2d 442, 444 (2d Cir. 1961). See Note, *Off the Deep End: Bias From the Bench*, 11 SYRACUSE L. REV. 244, 252 (1960).

concerning his own conduct is of course very likely to be fruitless; in addition, challenging the behavior of a dictatorial judge may merely antagonize him further.

Some experienced trial lawyers have considered how best to surmount the difficulties involved in raising objections to judicial misconduct.²³⁴ The task, however, remains difficult for most lawyers. As the Second Circuit observed in a judicial misconduct case in 1957, "A less experienced advocate might well have trimmed his sails to such a judicial wind as prevailed in the courtroom during this trial"²³⁵ Appellate courts seem sympathetic to the delicacy of the lawyer's position, and when this difficulty is added to the others inevitably raised by a requirement of objection,²³⁶ they have generally been charitable.

Some appellate courts have excused what would otherwise be improper behavior by a trial judge on the ground that it was provoked by the misconduct of an attorney. In a 1967 Illinois case, for example, a police officer reported that he had been assigned to a particular station, and the defense attorney asked, "Is that the famous, or should I say infamous, Fillmore district?"

²³⁴ New York defense attorney Henry B. Rothblatt recently described in some detail his strategy in confronting a trial judge whose conduct seemed prejudicial:

The question is how to take him on. Very early in the trial, when he begins to show his prejudice, let him know in a dignified way that you are not afraid of him. What I do is immediately call a bench conference. A case I was trying about two months ago was presided over by a judge who did not really mean to act in an apparently prejudiced manner. I think it was just one of those unfortunate slips. He made some remark . . . that I thought was a little facetious and sarcastic, causing members of the jury to snicker. I immediately said to myself, "Let me put him in his place." Aloud, I said, "Your Honor, we want a bench conference." We went up to the bench and, almost in a monotone, I said, "The defendant now moves for a mistrial." (When you tell off a judge, you, the attorney, never make any motions; it is the defendant who is making the motions. . . .) I said, "Your Honor's remarks, though I'm sure they weren't deliberate, hurt just as badly when you said _____," and I quoted his exact words. I said, "There was snickering in that jury. Your Honor gave that jury the impression that the . . . defense here is completely without merit. That type of remark made in the presence of the jury prevents the accused from getting effective assistance of counsel under the sixth amendment of the United States Constitution, and due process of law under the fourteenth amendment."

Every time you chew out a judge . . . raise constitutional questions. What you are doing is telling the judge in very nice language that you are a constitutional lawyer, that you are telling him off in constitutional terms, that this case is going not only all the way to the highest state court, but that you are going to petition for certiorari to the United States Supreme Court, and that the petition for certiorari is going to say what a lousy mean judge he is.

Trial Tactics in Criminal Cases, 37 TENN. L. REV. 705, 714 (1970) (proceedings of a symposium at the Southeastern Trial Lawyers Institute).

²³⁵ *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1957).

²³⁶ See text accompanying notes 90-106 *supra*.

The trial judge interjected, "It may be an infamous district but it is only because of the fact of the people who live there I suppose."

Although the Illinois Appellate Court conceded that the trial judge's remark was unfair, it decided that the defense attorney had "deliberately baited" the judge by "quipping" with the officer. On that ground, the court refused to reverse the defendant's conviction.²³⁷

There are other rulings of this sort, but they are far less common in cases involving trial judges than in cases involving prosecutors. The apparent attitude of most courts was expressed by the Second Circuit when it said in 1962, "Although the court was at times provoked by defense counsel that is no justification for allowing the trial to become a running battle between the court and counsel before the jury."²³⁸ In 1960, the Eighth Circuit noted that both the defendant and his counsel had done much to try the court's patience; nevertheless, it reversed the defendant's conviction because of the trial judge's conduct. The court observed that the defendant was entitled to a fair trial "no matter how objectionable a character he may have been."²³⁹

Perhaps the most striking procedural difference between cases of judicial misconduct and cases of prosecutorial misconduct lies in the courts' application of the harmless error doctrine. Courts have of course applied the harmless error doctrine in cases of judicial misconduct, and on occasion, the results have been as extreme as they often are in cases of prosecutorial misconduct. In one case, a defense attorney objected to the admission of a certain piece of evidence, and the judge responded, "[Y]ou don't want the truth to come out." The Tenth Circuit held the error harmless because there was "clear evidence of guilt."²⁴⁰ In another case, a trial judge asked a defendant why he was "telling all those lies," whether it was his custom to lie, and whether he ever told the truth. The judge also announced that he had tried to "get the defendant to speak like a man, but it did not seem to do any good." Once again, an appellate court held the error harmless.²⁴¹

²³⁷ *People v. Thomas*, 85 Ill. App. 2d 234, 238, 229 N.E.2d 301, 304 (1967). In a similar vein, a California court remarked that under the stress of a difficult trial, a judge could not be expected to choose his diction "with the nicety of a Field or Marshall." *People v. Knocke*, 94 Cal. App. 55, 60, 270 P. 468, 471 (1928).

²³⁸ *United States v. Persico*, 305 F.2d 534, 540 (2d Cir. 1962).

²³⁹ *Berry v. United States*, 283 F.2d 465, 467 (8th Cir. 1960), *cert. denied*, 364 U.S. 934 (1961). *See also* *People v. Di Carlo*, 242 App. Div. 328, 275 N.Y.S. 40 (1934); *Skelton v. Beall*, 133 So. 2d 477, 481 (Fla. Ct. App. 1961); Note, *supra* note 233, at 252.

²⁴⁰ *Addis v. United States*, 62 F.2d 329, 331 (10th Cir. 1932), *cert. denied*, 289 U.S. 744 (1933). *But see* *Cook v. State*, 36 Ala. App. 449, 57 So. 2d 832 (1952).

²⁴¹ *People v. Earl*, 10 Cal. App. 2d 163, 51 P.2d 147 (1935). *See also* *United States v. Allen*, 431 F.2d 712 (9th Cir. 1970).

Commonly, however, courts have demonstrated their extreme reluctance to hold courtroom misconduct by trial judges nonprejudicial.²⁴² The courts, moreover, have been particularly reluctant to apply the harmless error doctrine simply because evidence of guilt seemed overwhelming.²⁴³ The Fifth Circuit said in 1932, "It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty, he may be, should be convicted."²⁴⁴ In 1970, a New Jersey appellate court wrote,

[W]e are not to reach a conclusion of harmless error because we may believe that the defendant in fact was guilty as charged. . . . [C]ourts of justice act upon the belief that if guilty, a party will be so found after a fair trial. . . . [N]o matter how . . . evident the guilt, an accused has an absolute right to a fair trial before an impartial judge and an unprejudiced jury.²⁴⁵

In short, appellate courts have done a thorough and conscientious job in most of the cases of judicial misconduct that have come before them. Appellate judges seem to care more about preserving the integrity of the judicial system than about salving the feelings of their brethren on the trial bench. Appellate review inevitably has a narrow focus, however, and there are other important reasons why this remedy cannot by itself control courtroom misconduct by trial judges. First, judicial misconduct is most frequent and most extreme in the lower criminal courts whose judgments are rarely reviewed on appeal.²⁴⁶ Indeed, the more abusive behavior of lower-court judges may be attributed as much to the absence of any real threat of appellate review as to their more pressing caseloads or to the lower caliber of personnel who sometimes serve on the misdemeanor bench.²⁴⁷

A promising partial solution to this problem may be the installation of sound-recording systems in misdemeanor courtrooms. Since January

²⁴² See, e.g., *State v. Kimball*, 176 N.W.2d 864 (Iowa 1970).

²⁴³ See, e.g., *Meeks v. United States*, 163 F.2d 598, 602 (9th Cir. 1947).

²⁴⁴ *Hunter v. United States*, 62 F.2d 217, 220 (5th Cir. 1932).

²⁴⁵ *State v. Zwillman*, 112 N.J. Super. 6, 20, 270 A.2d 284, 291 (App. Div. 1970).

²⁴⁶ See 1967 TASK FORCE REP., *supra* note 175. The Commission noted that in many lower courts, "defendants are treated with contempt, berated, laughed at, embarrassed . . ." *Id.* at 31.

²⁴⁷ The President's Commission observed that although some lower-court judges are as capable in every respect as their counterparts in more prestigious courts, the lower courts do not attract such judges with regularity. *Id.* at 32. The Commission has proposed a thoroughgoing reform of the lower criminal courts, a reform that might substantially reduce the incidence of judicial misconduct. The program includes the abolition of justice-of-the-peace systems whenever feasible, the modernization of physical facilities, major increases in judicial manpower and supporting personnel, and the unification of felony and misdemeanor courts. *Id.* at 29-36.

1, 1970, the New Jersey court system has placed recorders in 200 Municipal Courts, including all Municipal Courts in cities whose population exceeds 10,000. Lewis Bambrick, the Assistant Administrative Director of the New Jersey Courts, reports that the recorders have apparently caused lower-court judges to conduct themselves with greater dignity. Even without appellate review, the availability of an authoritative record seems to have had a deterrent effect.²⁴⁸ At the same time, New Jersey's sound-recording systems plainly protect lower-court judges against unfounded charges of misconduct.

A second reason why appellate review cannot entirely control courtroom misconduct, even in major trial courts, is that much of what judges do is essentially unreviewable.²⁴⁹ A great deal of power lies in a judge's gestures, grimaces, and tone of voice. On occasion, of course, attorneys do seek to include evidence of non-verbal misconduct in the trial record. In a New York case, a defense attorney said, "And I want to state for the record that I wish your Honor would cease making these remarks, that he would cease smiling and frowning and doing things which might lead the jury to believe that he has an opinion as to the facts in this case, and I ask the Court to please instruct the jury to disregard any such smiles or frowns or what-not as the jury may see the Court make."²⁵⁰ There are, perhaps, less antagonizing ways of making the objection. Judge Oris D. Hyder suggests that an attorney approach the bench and say, "Judge, your indigestion this morning is showing at times, and it just so happens that the pain is apparent at critical times in my defense. I wondered if Your Honor would take a couple of Milanta tablets, which I always carry, and control the making of these faces."²⁵¹

When a lawyer attempts to place evidence of a judge's misconduct in the record, he may find that the judge will simply refuse to let him do so. Court reporters, who must work closely with trial judges, have been known to omit even verbal misconduct from official transcripts. For this reason, in school integration cases, Justice Department lawyers sometimes insisted on having their own stenographers present in Southern courtrooms.²⁵² Defense attorney Stanley E. Preiser recalls an occasion on which a federal district judge refused to let him describe the judge's behavior for the record:

²⁴⁸ Telephone interview, June 30, 1971.

²⁴⁹ See Schwartz, *supra* note 195, at 130; Conner, *supra* note 217.

²⁵⁰ *People v. Stiglin*, 238 App. Div. 407, 420, 264 N.Y.S. 832, 847 (1933).

²⁵¹ Symposium, *supra* note 234, at 711.

²⁵² Schwartz, *supra* note 195, at 130 n.6.

I was scared to death. . . . The judge said, "I'm not going to let you put it in the record, and sit down or you're going to jail." I sat down. At the first recess, I gathered all the people that I could in the courtroom and took affidavits, which we were prepared to submit later as part of the record.²⁵³

Efforts to bring non-verbal misconduct before appellate courts are sometimes successful, however. In a 1954 case, the Tennessee Supreme Court, without explaining how the facts had come before it, reversed a conviction because a trial judge had nodded in apparent disagreement throughout a defense attorney's closing arguments. The court commented, "The jury was left to speculate whether his Honor's collar was too tight" ²⁵⁴ In such a situation, the use of sound and video recorders might again be helpful.²⁵⁵

There is one final reason why appellate review cannot be entirely effective as a remedy for judicial misconduct. Some judges seem impervious to any corrective measure short of removal from office. Anyone who has spent much time among trial judges has heard some of them remark that they are quite indifferent to the prospect of appellate reversal. These judges commonly say that they "call 'em as they see 'em," and if appellate judges disagree, "that's their problem." When one has spent much time among trial judges, however, he also knows that these statements are usually false. Most judges seem to take any reversal, even one on an abstract point of law, as a personal reproach.

Still, the arrogance of some judges yields to no man and no law. These are the judges who seem to be most frequently involved in extreme cases of courtroom misconduct. Once, when a California appellate court reversed a conviction on grounds of judicial misconduct, it noted that on four previous occasions it had called the trial judge's attention to the impropriety of his behavior. "Anything we may say will have no effect on his future course of action," the court concluded.²⁵⁶ The court's prediction quickly proved accurate; within six months, the court was again required to reverse a conviction because of the judge's courtroom behavior.²⁵⁷

²⁵³ Symposium, *supra* note 234, at 712.

²⁵⁴ *Veal v. State*, 196 Tenn. 443, 446, 268 S.W.2d 345, 346 (1954). *But see Hill v. State*, 153 Tex. Crim. 105, 109, 217 S.W.2d 1009, 1011-12 ("[W]e are at a loss to see how we can rule on the expression on the face of a judge or what was meant by means of a scowl or a frown or a movement of the head.") *See also Billeci v. United States*, 184 F.2d 394, 401-02 (D.C. Cir. 1950).

²⁵⁵ *See State v. Barnholtz*, 287 S.W.2d 808, 812 (Mo. 1956).

²⁵⁶ *Etzel v. Rosenbloom*, 83 Cal. App. 2d 758, 764-65, 189 P.2d 848, 852 (1948).

²⁵⁷ *Podlansky v. Price*, 87 Cal. App. 2d 151, 196 P.2d 608 (1948). The incident is described in Note, *supra* note 83, at 548.

The point of this analysis is not that appellate review has been ineffective. In light of the pressures and temptations to which trial judges are subject (and in light of the incredible personalities that some of them possess), it is probable that judicial misconduct would have become a substantially greater problem had not the appellate courts taken it so seriously. Nevertheless, appellate review cannot do the job alone; there is a need for something more.

2. *The Statutory Challenge*.—Although appellate review, like most remedies, operates after the fact, there is one mechanism that may operate even before trial to reduce the impact of abusive judicial behavior. In every state, of course, a litigant may move to disqualify a judge on grounds of bias, but some states have gone further. They have authorized any litigant to disqualify a single judge without setting forth a reason.²⁵⁸ The result is a “peremptory challenge” comparable to that which litigants may exercise against a limited number of veniremen during the jury-selection process.

Such a mechanism might prove particularly useful in highly publicized trials with political overtones, for these trials seem to bring out, not only the worst in judges, but the worst judges. From Joseph Gary in the Haymarket trial, to Webster Thayer in the Sacco-Vanzetti case, to Julius Hoffman in the trial of the Chicago Eight, the luck of the draw has not seemed entirely satisfactory. If the defendants in each of these cases had been empowered to disqualify a single judge when the initial assignment was unacceptable to them, history might have been different.

Nevertheless, the implementation of this remedy would involve substantial costs, and there is room to doubt its effectiveness. One California defense attorney says of the statutory challenge, “Only a dumb civil lawyer goes that route. When you challenge a judge, he always sends you to another just as King-Sized as he is. Most of us therefore go about dodging judges in the same way that we always have.”²⁵⁹

Although the challenge might still be invoked in a significant number of criminal cases, I doubt that it would be used primarily to avoid bad or abusive judges. Instead, its most probable use would be to duck any judge whose sentencing philosophy was less acceptable to the defendant than that of the judge likely to appear on the second roll

²⁵⁸ CAL. CIV. PROC. CODE § 170.6(3) (West Supp. 1971); ILL. ANN. STAT. ch. 38, § 114-5 (Smith-Hurd 1970); see WIS. STAT. ANN. § 261.08 (Supp. 1972).

²⁵⁹ Personal interview with Luke McKissack, Los Angeles attorney, Feb. 17, 1968.

of the dice. Indeed, the challenge has even been used to maneuver cases into air-conditioned courtrooms and to disqualify able judges in the hope of increasing the chance of reversible trial error.²⁶⁰ Moreover, the challenge plainly becomes another weapon in the defense attorney's arsenal of delay.

I believe that the challenge might also tend to disadvantage indigent defendants and to relegate them to "bastard courtrooms." Unless a public defender's office decided to challenge a particular judge whenever a defender's client came before him, the fear of reprisal might make the defender's office reluctant to challenge the judge at all. This fear of reprisal is obviously less intense for a private lawyer, who is likely to have only one or two cases before a given judge during the judge's tour in the criminal courts. In jurisdictions without public defender systems, it is common to appoint lawyers without significant experience in criminal cases to represent indigent defendants, and these lawyers often do not know which judges to duck. They would be the lawyers most likely to occupy the courtrooms that the more knowledgeable attorneys had abandoned. Indirectly, therefore, the challenge might become another mechanism for victimizing the poor in criminal cases.

The statutory challenge has at least the virtue of honesty. The experience of most urban jurisdictions suggests that judge-shopping is endemic, and an open procedure would certainly be preferable to the disingenuous devices used today for that purpose. It would be far better, however, if judge-shopping could be controlled and if each litigant were simply required to take his chances. On a busy morning in an urban courthouse, every judge will presumably hear someone's case. The result of all the pre-trial shuffling will be simply to determine which hapless litigants come before the tyrants.²⁶¹

3. *Civil Lawsuits.*—Like a prosecutor, a trial judge enjoys absolute immunity from civil liability for acts undertaken in the performance of his official duties.²⁶² A trial judge is, of course, the natural object of a losing litigant's bitterness, and judicial independence may merit careful nurturing more than prosecutorial independence. Moreover, whoever provides legal representation for a trial judge—whether a private attorney or a governmental agency—is likely to appear before

²⁶⁰ Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149, 172 (1966).

²⁶¹ Of course some judges become tyrannical only in certain sorts of cases. The statutory challenge might be an effective means of directing these judges toward cases that they seem able to handle with equanimity.

²⁶² See Note, *supra* note 260, at 151.

him in other cases. For these reasons, judicial immunity seems more defensible than prosecutorial immunity. Although the better course might, nevertheless, be to abolish this immunity in cases of actual malice, the institution seems impregnable.

4. *Professional Discipline.*—At least two states, Missouri and Wisconsin, have given their local bar associations explicit authority to institute disciplinary proceedings against trial judges.²⁶³ The *New York University Law Review* reports that in Missouri, the power has been exercised sporadically and ineffectively. Members of the relevant bar association committee have generally expressed distaste for the dirty work that they are required to do.²⁶⁴ In Wisconsin, the bar association's power to discipline judges has never been invoked at all.²⁶⁵ As one Wisconsin lawyer explained, "It's like asking a committee of mice to put a bell on the cat."²⁶⁶ A disciplinary proceeding may stop short of removing an abusive trial judge from office, and lawyers who may again find themselves before the judge understandably fear the consequences of that development.

Professor Herman Schwartz has suggested a means by which the natural timidity of bar association committees might be overcome; the power to discipline judges might be given to "bar groups whose membership remains secret."²⁶⁷ A regime based on faceless accusers and faceless decision-makers, however, seems inconsistent with traditional notions of fair play.²⁶⁸ I am confident that a more appropriate tribunal can be created.

5. *Impeachment and Other Traditional Mechanisms for Removing a Judge from Office.*—In many jurisdictions, the discipline of judges is an all-or-nothing affair; these jurisdictions rely on traditional disciplinary procedures such as impeachment, which do not authorize any sanction short of removal from office. Because most cases of courtroom misconduct plainly do not merit so severe a penalty, these juris-

²⁶³ Mo. CONST. art. V, § 27; Wis. ST. BAR R. 10, § 5. Bar associations in other states could presumably subject trial judges to the disciplinary procedures that are applicable to all other members of the legal profession. See *Gordon v. Clinkscales*, 215 Ga. 843, 114 S.E.2d 15 (1960); *In re Copland v. Newcomb*, 66 Ohio App. 304, 33 N.E.2d 857 (1940).

²⁶⁴ Note, *supra* note 260, at 165-66.

²⁶⁵ *Id.* at 166.

²⁶⁶ *Id.* at 167.

²⁶⁷ Schwartz, *supra* note 195, at 137.

²⁶⁸ One might wonder how such a group would go about learning the trial judge's side of the story. Perhaps committee members could sit behind a partition in the hearing room and attempt to disguise their voices, or perhaps they could wear white sheets. If the committee's ruling were adverse to the trial judge, appropriate notification might consist of a page of the Bible marked with a black spot.

dictions have rarely dealt in any way with the problem of abusive judicial behavior.

In 1804, a Justice of the United States Supreme Court was brought to trial before the Senate in an impeachment proceeding. The charges against the Justice, Samuel Chase, related primarily to his courtroom conduct while riding the circuit as a trial judge. Mr. Justice Chase was beyond any question an arrogant and impatient fellow. Not only was his courtroom manner overbearing and sarcastic, but he also felt free to lecture juries on political issues. Nevertheless, the movement to impeach Mr. Justice Chase reflected not so much a concern for courtroom decorum as a desire to replace as many Federalist judges as possible with Republicans. The Justice's acquittal by the Senate has traditionally been viewed as a landmark of judicial independence,²⁶⁹ and no Supreme Court Justice has since been impeached by the House of Representatives.

Despite the lessons usually drawn from the Chase impeachment, courtroom misconduct by a trial judge may occasionally be so outrageous, or so frequent an occurrence, that removal from office seems appropriate. Nevertheless, there is room to doubt that a federal judge's courtroom behavior, however tyrannical, could ever constitute adequate grounds for impeachment under the United States Constitution. Article III, section 1 of the Constitution provides that federal judges "shall hold their Offices during good Behaviour." Article II, section 4 declares that "civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The obvious gap between the terms of these two provisions has produced a long-standing controversy, recently rekindled by the efforts of some House conservatives to commence impeachment proceedings against Mr. Justice Douglas. The basic issue is whether the impeachment of a federal judge requires a showing that he has committed a high crime or misdemeanor, or whether it is enough that his behavior has not been "good."

From my perspective, this issue is really not very difficult. It would surely do no violence to the English language to say that a judge should hold office during good behavior—that is, so long as he refrained from treason, bribery, or other high crimes and misdemeanors. It would, however, be linguistic nonsense to approach the problem from the other direction and to say that a judge might be

²⁶⁹ See Blackmar, *On the Removal of Judges: The Impeachment Trial of Samuel Chase*, 43 J. AM. JUD. SOC'Y 183 (1965).

impeached for high crimes and misdemeanors—that is, anything that a majority of the House and two-thirds of the Senate considered less than good behavior.²⁷⁰ Moreover, this Nation's claim to an independent judiciary would seem rather strained if a judge were subject to removal whenever the legislature, acting with virtually no standards, decided that his behavior had not been "good."

The Senate has on two occasions, however, convicted federal judges on articles of impeachment that did not charge indictable crimes,²⁷¹ and elaborate historical arguments have been presented to show that the Constitution was designed to preserve judicial independence only from the executive branch of government, not from the legislature.²⁷² Some authorities have even contended that because the Constitution is ambiguous, Congress may rely on the necessary and proper clause to set its own standards.²⁷³

Although I believe that the Constitution requires the commission of a high crime or misdemeanor as a prerequisite to impeachment, the question remains whether courtroom misconduct by a trial judge might satisfy this standard. Disruptive courtroom behavior by litigants and attorneys is commonly viewed as contempt of court, a criminal act, and there is no reason why a trial judge's misconduct should be considered any differently. Although it is conventional to refer to the trial judge as "the court," the man and the institution are plainly not the same.²⁷⁴ Indeed, one federal statute defines contempt of court, in part, as the "misbehavior of any of [the court's] officers in their official transactions."²⁷⁵ Another form of contempt under this statute is the "misbehavior of any person in [the court's] presence or so near thereto as to obstruct the administration of justice."²⁷⁶ Abusive judicial behavior could easily fit within these definitions, and in my view, contemptuous behavior by a trial judge might reasonably be classified as a high crime or misdemeanor.²⁷⁷

²⁷⁰ *But see* Ford, *Impeachment—A Mace for the Federal Judiciary*, 46 NOTRE DAME LAW. 669 (1971).

²⁷¹ Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CALIF. L. REV. 659, 663 (1969).

²⁷² The constitutional phrase "during good Behavior" was derived from the English Act of Settlement. This Act authorized Parliament to remove any judge from office upon a majority vote of both Houses. *Id.* at 662.

²⁷³ *Id.*

²⁷⁴ *But cf.* *Sacher v. United States*, 343 U.S. 1, 12 (1952): "At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions . . . and contempt of the one is contempt of the other."

²⁷⁵ 18 U.S.C. § 401(2) (1970).

²⁷⁶ *Id.* § 401(1).

²⁷⁷ See text accompanying notes 340-42 *infra*.

Although courtroom misconduct by a trial judge might provide a constitutional basis for impeachment even in the federal system, and although there are cases of misconduct that may merit this extreme remedy, impeachment is an extraordinarily cumbersome way of removing a trial judge from office. Thomas Jefferson referred to impeachment as "an impractical thing" and "a mere scarecrow"²⁷⁸ and the experience of a century and a half has only confirmed this judgment.

There are several reasons why impeachment has proved unsatisfactory as a remedy for courtroom misconduct. First, impeachment proceedings obviously consume time that Congress or a state legislature might otherwise devote to legislative business. Federal impeachment trials have commonly lasted from six to eight weeks,²⁷⁹ and that fact may partly explain why only eight such trials involving federal judges have occurred during the course of American history.²⁸⁰ The last of these trials was concluded in 1936, and today it is virtually inconceivable that Congress or a state legislature would abandon its regular business to remedy courtroom misconduct by a trial judge, however serious. Second, an impeachment trial is expensive. The aggregate cost of two recent impeachment proceedings in Florida, in both of which the defendant judges were acquitted, was \$250,000.²⁸¹ Third, impeachment is sometimes an extraordinarily slow remedy, especially in states whose legislatures meet only once each biennium. Fourth, the procedures employed in impeachment trials are ill-defined and seriously unfair to the accused judge. Congressman Hatton W. Sumners, the Chairman of the House Judiciary Committee, described the latest impeachment of a federal judge (that of District Judge Halsted L. Ritter in 1936) by saying, "[F]or ten days we presented evidence to what was practically an empty chamber."²⁸² On one occasion, only three Senators were present, one of whom was busily writing letters.²⁸³ At the conclusion of an impeachment trial, most Senators vote to convict or acquit without expressing any view on the law or the facts. It remains entirely unclear whether guilt must be shown beyond a reasonable doubt, by a preponderance of the evidence, or by some other standard of proof.²⁸⁴ Fifth, the outcome of an impeachment

²⁷⁸ Quoted in Note, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448, 455 n.41 (1967). See also Frankel, *Removal of Judges—Federal and State*, 48 J. AM. JUD. SOC'Y 177 (1965) (quoting Mr. Justice Samuel F. Miller).

²⁷⁹ 1967 TASK FORCE REP., *supra* note 175, at 70.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Quoted in Frankel, *supra* note 278, at 180.

²⁸³ Note, *supra* note 278, at 456.

²⁸⁴ Stolz, *supra* note 271, at 667.

proceeding may be determined as much by partisan politics as by the evidence. Congressman Sumners noted that in the Ritter trial, "there were 56 votes for conviction and of those 56 votes only five were of the same political party as the Judge being tried."²⁸⁵

Similar observations apply to two other traditional mechanisms for removing a judge from office: address, a procedure by which a state legislature may formally request the governor to terminate a judge's tenure; and concurrent resolution, a procedure which differs from address only in that the governor is legally obligated to follow the legislative recommendation.²⁸⁶ In nine states, the electorate may remove a judge from office through the process of recall; if a sufficient number of voters sign a recall petition, the judge must face a special election.²⁸⁷ This procedure is used as infrequently as the others, and when someone does undertake the burden and expense of collecting the necessary signatures, the outcome is far from certain. As in an election at the conclusion of a trial judge's term of office, most voters undoubtedly remain ignorant of the judge's courtroom behavior and most other aspects of his record.

To say that the traditional mechanisms for disciplining judges are ineffective is not, however, to establish the need for their replacement. These slow, formal, and hard-to-invoke procedures were deliberately chosen. Alexander Hamilton wrote in number 65 of *The Federalist Papers*:

The awful discretion which a court of impeachments must necessarily have, to doom to honor or infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.²⁸⁸

²⁸⁵ Quoted in Frankel, *supra* note 278, at 180. See generally ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185 (1939).

²⁸⁶ See generally AM. JUD. SOC'Y, JUDICIAL DISCIPLINE AND REMOVAL (Rep. No. 5, Aug. 1969).

²⁸⁷ ARIZ. CONST. art. VIII pt. 1, §§ 1-6; CAL. CONST. art. 23, § 1; COLO. CONST. art. XXI; KAN. CONST. art. 4, §§ 3-5; NEV. CONST. art. 2, § 9; N.D. CONST. art. 33; ORE. CONST. art. II, § 18; WIS. CONST. art. 13, § 212; OHIO REV. CODE § 705.92 (Page 1954) (municipal judges only). Most states having constitutional provisions also have statutes in furtherance of administration. See, e.g., ARIZ. REV. STAT. ANN. § 19-201 to -217 (1956); - 218 (Supp. 1971); NEV. REV. STAT. ch. 306.010 (1967).

²⁸⁸ THE FEDERALIST No. 65, at 428 (B.F. Wright ed. 1961) (Hamilton). In number 79 Hamilton added:

The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practised upon or would be more liable to abuse than calculated to answer any good purpose.

Id. No. 79, at 498.

Effectiveness therefore is not the only issue. The other side of the problem is the need to preserve an independent judiciary. One writer on the problem of judicial misconduct says, "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 American temperament rebels at the thought that public officials are above the law and beyond reasonable sanction."²⁸⁹ Another emphasizes "the right of the individual judge to exercise his office within his view of the law, without fear of repercussions. . . ."²⁹⁰ From my perspective, it does little good to intone either of these sentiments to the exclusion of the other. The problem lies in striking a reasonable balance, and that task must await an examination of the newer, more effective mechanisms that a number of states have provided for disciplining judges.

In the federal system there is a substantial argument that this question of policy is not open, that the Constitution has struck its own balance, and that impeachment must remain the exclusive method of disciplining judges.²⁹¹ It is clear, at least, that if Congress were to authorize a different disciplinary procedure, one result would be litigation of an uncertain outcome. With these considerations in mind, Professor Preble Stolz has proposed a modernization of basic impeachment procedures to overcome some of the difficulties usually associated with them and to capture some of the advantages claimed for the newer disciplinary procedures.²⁹²

The first step in Professor Stolz's reform would be the creation of a bipartisan House Committee on Judicial Fitness. This committee would have a permanent professional staff, which would receive and investigate complaints concerning judicial behavior on a confidential basis. The committee's rules might require it to afford a confidential hearing to the judge under investigation. In this hearing, the judge would be entitled to representation by an attorney and to other procedural safeguards. If the judge's conduct did not seem to warrant removal from office, the committee might nevertheless issue a letter of censure.²⁹³ On the Senate side, Professor Stolz would authorize the ap-

²⁸⁹ Frankel, *Judicial Discipline and Removal*, 44 TEXAS L. REV. 1117, 1118 (1966).

²⁹⁰ Note, *supra* note 260, at 150.

²⁹¹ See text accompanying notes 344-62 *infra*.

²⁹² Stolz, *supra* note 271.

²⁹³ If impeachment must remain the exclusive remedy for judicial misconduct under the federal Constitution, it might be wondered whether formal censure by a House committee would be a permissible form of discipline. Nevertheless, in executing the impeachment power, it is certainly "necessary and proper" to establish a committee to investigate prospective cases of impeachment, and it also seems "necessary and proper" for this committee to explain its actions, whether it recommends in favor of impeachment

pointment of a master—perhaps a senator or a retired judge—to conduct evidentiary hearings and to prepare proposed findings of fact and conclusions of law. Proceedings before the entire Senate would be limited to a review of the master's decision in much the same way that certain administrative agencies limit their proceedings to a review of the judgments of their hearing examiners.

Professor Stolz's proposals should, I think, be adopted if impeachment is to play any part at all in the discipline of judges, even a part supplemented by other disciplinary procedures. The Stolz reforms would relieve the burden that an impeachment trial imposes on Congress and at the same time offer a fairer, more orderly procedure for resolving the issues presented in each case.

6. *Modern Disciplinary Procedures.*—Between 1960 and 1970, more than twenty-five states adopted new mechanisms for disciplining judges.²⁹⁴ All of these mechanisms place the final authority for judicial discipline in a court—either the state supreme court or a special court on the judiciary.

Although the newly enacted disciplinary mechanisms differ widely in investigative and screening procedures,²⁹⁵ the two leading prototypes are the New York Court on the Judiciary and the California Commission on Judicial Qualifications. The relatively simple New York system has been copied in five states, and the more elaborate California system in twelve.²⁹⁶

The New York Court on the Judiciary was created by an amendment to the state constitution in 1947. The court has six members: the Chief Judge and the Senior Associate Judge of the New York Court of Appeals and four judges of the Appellate Division of the New York Supreme Court, one from each of the Appellate Division's four departments.²⁹⁷ The court's disciplinary jurisdiction extends only to appellate judges and to judges of the major New York trial courts (about 400 judges in all). The various departments of the Appellate Division retain

or not. The committee might, for example, report that although a judge's behavior was seriously improper, it did not justify his removal from office. Such a report would, in effect, be a letter of censure.

²⁹⁴ Braithwaite, *supra* note 215, at 155.

²⁹⁵ See, e.g., *id.*; 1967 TASK FORCE REP., *supra* note 175, at 70-71; Bray, *Judging Judges—The California Commission on Judicial Qualifications*, 33 NEV. ST. B.J., Jan. 1968, at 28; Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U. SAN FRANCISCO L. REV. 244 (1969); Burke, *Judicial Discipline and Removal: The California Story*, 48 J. AM. JUD. SOC'Y 167 (1965); Healy, *Judicial (Dis)qualifications*, 4 TRIAL JUDGE'S J., July 1965, at 3; Note, *A Study of the Colorado Commission on Judicial Qualifications*, 47 DENVER L.J. 491 (1970); Note, *supra* note 260.

²⁹⁶ Braithwaite, *supra* note 215, at 155.

²⁹⁷ N.Y. CONST. art. VI, § 22(b).

a long-standing authority to discipline city, village, and town judges (about 300 judges).²⁹⁸

The constitutional provision that created the Court on the Judiciary authorized it to impose only one form of discipline: upon the vote of four of its six members, the court may remove a judge from office.²⁹⁹ The court has, however, assumed an informal power to reprimand judges whose conduct does not seem to warrant the severe sanction of removal.³⁰⁰ Before disciplinary action is taken, the court must afford a hearing, with the customary procedural safeguards, to the judge under investigation.

The New York Court on the Judiciary has no permanent staff, no investigative arm, no screening mechanism, and indeed, no continuous existence. It must be specially convened to try each complaint. The authorities who may call the court into session are the Chief Judge of the Court of Appeals, any of the four Presiding Judges of the Appellate Division, the Governor, and, by majority vote, the Executive Committee of the State Bar Association. The Chief Judge of the Court of Appeals serves as the Presiding Judge of the Court on the Judiciary, and before any hearing is held, he must notify the Governor, the President of the State Senate, and the Speaker of the State Assembly of the identity of the judge under investigation, the charges against him, and the proposed hearing date. Any member of the state legislature may file identical charges against the judge within thirty days of receipt of this notice. If a legislator does file these charges, and if a majority of the State Assembly vote to entertain them, "proceedings before the court on the judiciary shall be stayed pending the determination of the legislature which shall be exclusive and final."³⁰¹

The immediate involvement of the political branches of government in each case plainly precludes the Court on the Judiciary from operating on a private, confidential basis. One New York judge has remarked, "[W]hen proceedings are to be initiated at the top of any of the three branches of government, there is inevitably a reluctance to take action."³⁰² The New York Court on the Judiciary has, in fact, been convened only three times since its creation.³⁰³

²⁹⁸ See Frankel, *supra* note 289, at 1125.

²⁹⁹ N.Y. CONST. art. VI, § 22(c).

³⁰⁰ *In re Sobel*, 8 N.Y.2d at (a) (Ct. on the Judiciary 1960).

³⁰¹ N.Y. CONST. art. VI, § 22(e).

³⁰² Frankel, *supra* note 289, at 1126.

³⁰³ Despite the lack of activity, the *New York University Law Review* has argued that the state's disciplinary system should be retained—primarily because it has customarily been manned by outstanding personnel. Note, *supra* note 260, at 190-91.

The California disciplinary system operates at three distinct levels. Final disciplinary authority rests with the state supreme court, but the court may act only upon matters referred to it by the California Commission on Judicial Qualifications. This body is composed of five judges appointed by the state supreme court, two lawyers appointed by the state bar association, and two laymen appointed by the Governor with the approval of the State Senate. The Commission is assisted by a permanent staff—an Executive Secretary and his secretary—and by occasional outside investigators. The staff acts on its own initiative to investigate and screen complaints, thereby serving, in effect, as a third tier in California's disciplinary structure.

California was the first state to implement a "commission system" of this sort; in 1961, the state put into operation a constitutional amendment that the voters had approved the previous year.³⁰⁴ During the first nine years of its operation, the Commission on Judicial Qualifications has received an average of about 100 complaints per year.³⁰⁵ Most complaints (although not most valid complaints) come from disgruntled litigants.

Approximately two-thirds of all complaints are, in the Commission's terminology, "closed by staff" because they seem plainly unfounded or outside the Commission's jurisdiction. In these cases, the Executive Secretary acknowledges each complaint in a letter explaining why the Commission cannot act. The Commission does, however, review all of the Executive Secretary's actions, even his actions in these apparently insubstantial cases.³⁰⁶ If a complaint seems valid on its face, the Executive Secretary conducts an informal investigation, which may include communication with the judge whose behavior has been questioned. The Executive Secretary reports regularly to the Commission, which meets every two months or so. If further action seems warranted, the first formal step is a registered letter to the judge describing the charges against him and requesting a reply.

If the judge's reply is satisfactory, of course, the case is closed. Even if the reply is not satisfactory, the Commission may decide to close the case on the theory that its investigation and communication with the judge were themselves a sufficient corrective. As Jack E. Frankel, the Commission's Executive Secretary, explains, "Sometimes there may be reason to accept the plea, 'I didn't do it but I'll see it doesn't happen

³⁰⁴ CAL. CONST. art. VI, § 18.

³⁰⁵ Braithwaite, *supra* note 215, at 162.

³⁰⁶ *Id.* at 163.

again.'"³⁰⁷ The Commission may expressly condition its closing of the case on the judge's agreement to desist from certain conduct. It may also admonish the judge in a confidential communication prior to closing the case. Throughout the proceedings, there is an emphasis on securing an informal settlement. Even in cases of serious misconduct, a judge may bring the process to a halt by resigning from office.

After a judge has replied to the charges against him, the field investigation of his behavior may continue. Commission members as well as the Executive Secretary may interview pertinent witnesses. Ultimately, the Commission may set the matter for a hearing, at which the rules of evidence will apply, the judge may appear through counsel, both sides may subpoena witnesses, and the judge may cross-examine the witnesses against him.³⁰⁸ At the conclusion of this hearing, the Commission may file a recommendation that the California Supreme Court formally censure the judge or remove him from office.

All proceedings prior to the filing of this recommendation are required by law to remain confidential,³⁰⁹ and this requirement seems to have been carefully observed. Upon the filing of the recommendation, however, the matter becomes public. If the Commission has recommended removal from office, the judge is automatically disqualified from acting in his official capacity pending the supreme court's disposition. If the supreme court does terminate the judge's tenure, he becomes permanently ineligible for judicial office and is automatically suspended from the practice of law until further order of the court.³¹⁰

The Commission's efforts to resolve disciplinary matters quietly and informally have been remarkably successful. So far, only three cases have been referred to the supreme court, and even an evidentiary hearing before the Commission has been a relatively rare event. During the first nine years of the Commission's operation, however, fifty judges resigned from office while under Commission investigation.³¹¹ A liberal system of retirement benefits undoubtedly facilitated this nonadversary resolution of serious cases, and it has been doubted that a disciplinary

³⁰⁷ Frankel, *The Case for Judicial Disciplinary Measures*, 49 J. AM. JUD. Soc'y 218, 221 (1966).

³⁰⁸ CAL. R. Cr. 909-10 (West 1971).

³⁰⁹ *Id.* § 902.

³¹⁰ CAL. CONST. art. VI, § 18(a), (d).

³¹¹ Braithwaite, *supra* note 215, at 162. See also Note, *supra* note 295, at 496 (Commission investigation responsible for resignation or retirement of five judges although only one case involved a hearing and none went to state supreme court).

commission could produce similar results in a state where retirement benefits were less generous.³¹²

Of course no mechanism of judicial discipline is designed solely to remedy improper courtroom behavior. A body like the California Commission on Judicial Qualifications must consider cases of bribery, criminal conduct not directly related to the performance of a judge's official duties, financial conflict of interest, absenteeism, alcoholism, physical disability, senility, psychosis, and other problems that resist easy classification. A basic question concerning modern disciplinary mechanisms is whether they are too concerned with other issues to be effective in controlling abusive courtroom behavior by trial judges.³¹³

Analysis can begin with the oldest of the modern disciplinary mechanisms, the New York Court on the Judiciary. Only one of the three cases that have come before this court since 1947 involved an issue of courtroom conduct. That was a case in which two trial judges had used their courtrooms and the press to express low opinions of one another's official behavior. The case ended in a decision that reprimanded both judges but did not remove them from office.³¹⁴ Because proceedings must be commenced at the highest level, because no action can be taken without a public declaration, and because there is virtually no room for informal investigation and adjustment, the New York Court on the Judiciary seems likely to act only in cases (like this one) in which relatively serious misconduct has already received substantial publicity. That pattern has, at least, been followed in the past, and abusive judicial behavior usually does not make headlines.

A disciplinary system that incorporates a permanent staff to receive and investigate complaints seems more likely to be effective in remedying courtroom misconduct by trial judges. The performance of systems of this sort has, however, been varied. In both Illinois and New Jersey, the administrative office of the state courts has, in addition to its other duties, undertaken a disciplinary screening function comparable to that of the staff of the California Commission on Judicial Qualifications. Lewis Bambrick, the Assistant Administrative Director

³¹² Note, *supra* note 260, at 182.

³¹³ Any treatment of courtroom misconduct inevitably touches upon much broader issues. A disciplinary system can, for example, be an overall success although it has proven relatively ineffective in the area of courtroom misconduct; conversely, the system that best controls courtroom misconduct may not be the system that a state should adopt.

³¹⁴ *In re Sobel*, 8 N.Y.2d at (a) (Ct. on the Judiciary 1960).

of the New Jersey Courts, reports that in his state complaints of courtroom misconduct by trial judges are extremely infrequent. Carl H. Rolewick, the Assistant Director of the Administrative Office of the Illinois Courts, reports that his office has never received such a complaint.³¹⁵ As Rolewick explains the difficulty, "Lawyers will not complain and will not testify. We need specifics, and lawyers are afraid to provide them. The result is that we spend almost all of our time on cases of official misconduct that make the newspapers."³¹⁶

Jack E. Frankel, the Executive Secretary of the California Commission, agrees that lawyers are usually reluctant to complain about judicial behavior—not only because they fear reprisal but because "it doesn't seem worth the hassle."³¹⁷ The Commission has, however, attempted to overcome this reluctance and to encourage complaints. Frankel asks lawyers to report instances of misconduct even when they wish to remain anonymous. He informs the lawyers that "it is a two-step process" and that "the decision about testifying will be made later." In that way, Frankel says, the Commission can at least "become aware of developing situations." Moreover, the Commission may undertake an investigation on its own initiative, and it may inform the judge of the general nature of the complaint in an effort to induce some self-correction.

The California Commission on Judicial Qualifications is probably better known than its counterparts in other states, and it enjoys a growing reputation for effectiveness. Those circumstances, coupled with the Commission's active encouragement of complaints, may explain why its performance in the area of courtroom misconduct seems significantly different from the performance of the New Jersey and Illinois systems. Not only do complaints of courtroom misconduct seem more frequent in California, but according to Frankel, "If all forms of rude, abusive, screaming, arrogant, impatient, and tyrannical behavior are lumped together, courtroom misconduct probably constitutes the second most common complaint that we receive."³¹⁸ (The most frequent complaint, Frankel says, is that a judge has refused to decide a matter for an extended period of time.)

Only three of the cases that have come before the California Commission on Judicial Qualifications are matters of public record—the three cases in which the Commission recommended final disciplinary

³¹⁵ Telephone interviews, June 30, 1971.

³¹⁶ *Id.*

³¹⁷ Telephone interview, June 30, 1971.

³¹⁸ *Id.*

action by the California Supreme Court. All of these cases involved, at least tangentially, charges of courtroom misconduct. In 1964, the Commission recommended that Judge Charles F. Stevens be removed from office. In addition to charges of conflict of interest and of dishonesty before the Commission, it was alleged that Judge Stevens had ridiculed and belittled police officers and prosecutors who had appeared in his courtroom. When the Stevens matter came before the California Supreme Court, it lacked the express power that it now possesses to censure judges for improper behavior. Perhaps because the supreme court considered removal too severe a sanction, it rejected the Commission's recommendation in a brief *per curiam* opinion.³¹⁹

In 1970, the supreme court accepted a Commission recommendation that Judge Gerald S. Chargin be censured. While presiding over a juvenile hearing involving a fifteen-year-old Mexican-American, Judge Chargin had referred to the youth's family and to Mexican-Americans generally as "miserable, lousy, rotten people." He had also announced that "maybe Hitler was right" in seeking to destroy "the animals" in society.³²⁰ In 1971, the California Supreme Court again accepted a Commission recommendation to censure a judge for courtroom misconduct. Judge Barnard B. Glickfeld had, at a chambers conference at which an alleged assault victim was present, referred to the young woman as "a horse's ass." Later, in the courtroom, Judge Glickfeld declared that he did not want any police officer to sit near the "alleged victim . . . and I am using the term figuratively." When the prosecutor objected that some of the judge's remarks had been unfair, he replied, "That is the way it is going to be. And I don't want to hear about what a fair remark is. There are lots of things that are not fair."³²¹

The California experience has demonstrated that a commission system can be effective in disciplining judges for abusive courtroom behavior. Nevertheless, one may have an uneasy feeling about a regime that emphasizes confidentiality, that accomplishes its results primarily

³¹⁹ Stevens v. Commission on Judicial Qualifications, 61 Cal. 2d 886, 393 P.2d 709, 39 Cal. Rptr. 397 (1964).

³²⁰ See *In re* Chargin, 2 Cal. 3d 617, 471 P.2d 29, 87 Cal. Rptr. 709 (1970). The Supreme Court's brief opinion did not report the facts in significant detail, nor did the report of the Commission on Judicial Qualifications. See *Inquiry Concerning a Judge*, No. 9, April 3, 1970 (Calif. Comm'n on Judicial Qualifications) (unpublished). The details of Judge Chargin's behavior were, however, widely reported in the press. See, e.g., *Judge Gerald S. Chargin Speaks*, 2 EL GRITO 4 (1969).

³²¹ See *In re* Glickfeld, 3 Cal. 3d 891, 479 P.2d 638, 92 Cal. Rptr. 278 (1971). Again the Supreme Court's statement of the case was cryptic and conclusory, but on this occasion the Commission's report remedied the defect. See *Inquiry Concerning a Judge*, No. 10, Nov. 13, 1970 (Calif. Comm'n on Judicial Qualifications) (unpublished).

through backroom settlements, and that is dominated by members of the elite professional group that it is designed to control. In a sense, this system resembles the disciplinary committee of a country club. Although I would not characterize the system as either too strong or too weak, it seems likely to reach too far in certain sorts of cases and not far enough in others.

For many members of a country club, a "suggestion" from the disciplinary committee is likely to carry more weight than a suggestion should. A person who values his club membership will ordinarily strive to avoid giving offense; he may quickly abandon a challenged practice regardless of his own view of its merits. Moreover, if a disciplinary committee values tradition, conformity, and restraint, its suggestions are likely to intimidate practices that are merely innovative, different, and forceful. The safest course for a club member is always to maintain a "low visibility" and to smile a lot at cocktail parties.

Some writers have maintained that because the newer mechanisms of judicial discipline are located within the judiciary itself, they pose no threat to judicial independence.³²² This argument seems to me obtuse. As Mr. Justice Black once observed, "[J]udges of the past—good, patriotic judges . . . occasionally lost not only their offices but . . . also sometimes lost their freedom and their heads because of the actions and decrees of other judges."³²³ Moreover, a system dominated by the judiciary may sometimes concern itself more with matters of tradition and form than with matters of substance. In one New Jersey disciplinary proceeding, for example, the State Supreme Court found a "shocking violation" of the rules of court and the canons of judicial ethics partly because a magistrate had refused to wear a judicial robe and had permitted smoking in his courtroom. (There were a number of more serious charges against the magistrate, but Chief Justice Vanderbilt's opinion did not differentiate among the various allegations.)³²⁴

Although informal suggestions by a country club disciplinary committee may have an immediate deterrent effect upon many club members, some members of the club will inevitably resist these sug-

³²² See, e.g., Frankel, *supra* note 278, at 180-81.

³²³ *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 143 (1970) (Black, J., dissenting).

³²⁴ *In re Stevens*, 20 N.J. 177, 119 A.2d 9 (1955). Cf. Bray, *supra* note 295, at 28, 35: "If a judge has a poor idea of public relations there should be a means of instructing him in order that the judicial image keeps the respect of the people." Los Angeles Public Defender Richard S. Buckley has observed, "Suggestions from such a prestigious and impartial tribunal as the California Commission are often gratefully heeded without further ado." Buckley, *supra* note 295, at 257.

gestions and oppose the committee in every way they can. These members may include a large portion of the "club curmudgeons" who are most in need of discipline. In these circumstances, the principal danger is not that the committee will prove too intimidating, but on the contrary that its members may lack the courage of their convictions. The committee may conclude that a public dispute would tend to bring discredit upon the entire club. Although a "friendly suggestion" to a fellow club member ordinarily seems harmless enough, an overt attack on one who has been anointed may be viewed as a threat to the anointers and a challenge to the very concept of anointment. When the power to discipline judges is given to other judges, informal suggestions and pressures may be too frequent; at the same time, formal disciplinary action may be taken only in the most serious and clear-cut cases.

Because of the confidential nature of commission proceedings, it is impossible to evaluate the extent to which these defects have materialized in practice. One may, if he likes, accept the unsubstantiated assurances of "insiders" that all is well; but the safest assumption, in my view, is that abuses are not only possible but likely. For all this skepticism, however, I consider the dangers of the commission system far less substantial than the dangers of doing nothing. I am more willing to tolerate the threat to judicial independence presented by this system than I am to permit judges to perpetrate flagrant and oft-repeated abuses with impunity. Moreover, Chief Justice Roger Traynor has argued that "once judges are held responsible to an impartial commission, there is no longer the vestige of a case for subjecting them to the popular or powerful will of the day."³²⁵ If a commission system does in fact reduce the impetus for requiring the periodic reelection of incumbent judges, it may ultimately give many judges greater security and independence than they currently enjoy.

In a recent article on the problem of judicial misconduct, William T. Braithwaite observed, "Broadly speaking, there are only two places to put the power to deal with judicial misconduct, either in the judiciary itself or outside it . . ."³²⁶ Braithwaite then quoted Justice Walter V. Schaefer on the difficulties associated with both solutions. On the one hand, "there is a latent distrust of the ability or willingness of the group of men who at any moment constitute one branch of government so to order the affairs of that branch as to satisfy legitimate public

³²⁵ Traynor, *supra* note 224, at 1280. See also Burke, *supra* note 295.

³²⁶ Braithwaite, *supra* note 215, at 153.

concern."³²⁷ On the other hand, placing the power of judicial discipline outside the courts presents "the perennial problem of the independence of the judiciary from legislative or executive domination."³²⁸ Although judicial self-policing does pose a threat to the independence of the individual judge, the threat posed by an equally effective non-judicial agency would probably be more severe. On the whole, a conservative and cautious administration of judicial discipline seems desirable, and for that reason it is not necessarily a fatal objection that judges may sometimes yield to a defensive professional instinct to close ranks when one of the group is threatened. Excessive activism, the opposite vice, might be worse, and perfection will probably be unattainable. Perhaps the best observation concerning the commission system of judicial discipline was offered by a California trial judge: "Both on paper and in practice, the program has balance."³²⁹

A number of prestigious professional groups have reached similar conclusions and have endorsed one or another of the modern disciplinary mechanisms.³³⁰ Indeed, until very recently, the pattern of endorsement was virtually unanimous. In the summer of 1971, however, the House of Delegates of the American Bar Association unanimously approved a set of *Standards Relating to the Judge's Role in Dealing With Trial Disruptions*. These standards condemned various forms of judicial courtroom misconduct, but they did not suggest any enforcement mechanisms. (The same standards did, incidentally, set forth detailed remedies for courtroom misconduct by defendants and by attorneys.) The commentary to the standards declared:

Under present practices, virtually the only sanctions available when a judge occasionally fails in his responsibility are: correction of his decisions and, perhaps, censure by an appellate court, public criticism through the news media and possibly censure by the organized bar, and, if he serves a definite term, eventual termination of his service by the electing or appointing authority. While none or all of these may appear wholly satisfactory, adoption of alternative measures must be approached with considerable caution. Mechanisms which diminish the independence of the entire judiciary could have

³²⁷ *Cusack v. Howlett*, 44 Ill. 2d 233, 240, 254 N.E.2d 506, 509 (1969) (Schaefer, J.).

³²⁸ *Id.* at 237, 254 N.E.2d at 508.

³²⁹ Healy, *supra* note 295, at 318.

³³⁰ See, e.g., *Final Report of the Twenty-Seventh American Assembly: The Courts, the Public and the Law Explosion*, 49 J. AM. JUD. Soc'y 16, 18 (1965); *The National Conference on Judicial Selection and Court Administration*, 43 J. AM. JUD. Soc'y 114, 122 (1959); Editorial, *New Ways to Deal With Judicial Misconduct*, 48 J. AM. JUD. Soc'y 163 (1965).

more harmful consequences than the occasional transgressions of a few judges. On the other hand, ineffective mechanisms merely raise false hopes.³³¹

Although it does not mention them directly, this statement seems to intimate disapproval of all of the modern disciplinary mechanisms. I am reminded of the caveat that Chief Justice Traynor appended to an optimistic prediction a few years ago: "I would be confident that qualification commissions will gain wide acceptance, were they not so plainly sensible."³³²

With somewhat less certainty than Chief Justice Traynor, I view the commission system of judicial discipline as the soundest practical mechanism for controlling courtroom misconduct by trial judges. It may, however, be helpful to explore in more detail the ways in which a commission system should operate.

(a) *The Composition of Disciplinary Tribunals.*—This article has already suggested the basic reasons for placing the power to discipline judges within the judiciary itself. Still, a leavening of non-judicial influences seems desirable, and I regard the California system—with two practicing lawyers and two laymen on a nine-member screening commission—as an appropriate model. Somewhat less attractive is the commission system that Illinois implemented under a new state constitution on July 1, 1971. As in every state that has revised its disciplinary procedures in recent years, the final authority for judicial discipline in Illinois has been given to a judicial body. The power to present cases to this tribunal, however, rests with a Judicial Inquiry Board composed of two trial judges, three lawyers, and four nonlawyers. All members of this board except the two trial judges are appointed by the Governor, and the Governor's domination of the appointment process, coupled with the relatively short, non-staggered terms of the board members, seems likely to affect the rigorously nonpartisan character that a sound disciplinary system must maintain.³³³

(b) *The Commission Staff.*—An effective system of judicial discipline must include a permanent staff to receive and investigate complaints and to advise the disciplinary tribunal. Ideally, the staff should have no other duties, but in smaller states, the volume of complaints

³³¹ ABA, JUDGE'S ROLE, *supra* note 102, at 7.

³³² Traynor, *supra* note 224, at 1280.

³³³ See ILL. CONST. art. VI, § 15(b). The constitution seeks to insure impartiality by requiring that no more than four of the governor's seven appointments be members of the same political party. This safeguard seems illusory, for even President Nixon's Secretary of the Treasury lists himself as a Democrat.

may not be large enough to warrant the employment of even a single individual with a full-time responsibility in the area of judicial discipline. In these states, the staff function can be profitably assigned to the administrative office of the state courts. There may, however, be some danger that regular contact between the administrative office and members of the judiciary on other matters will influence the office's performance of its investigative and consultative duties.³³⁴

Staff responsibilities should be clearly defined, and disciplinary tribunals should leave investigative work to the staff. The informal procedures of the California Commission on Judicial Qualifications, under which Commission members sometimes interview witnesses and participate in other ways in the investigative process, seem likely to compromise the Commission's impartiality when a formal evidentiary hearing becomes necessary. The need to preserve the impartiality of the tribunal also suggests that it have a limited role in securing negotiated settlements. The disciplinary tribunal should always act collectively; it should not make "suggestions" concerning matters upon which it would plainly be unwilling to act in other ways; and although the tribunal should consider any proposal that an affected judge might wish to put before it, it should not, except in very unusual situations, initiate proposals for the informal resolution of disputes.³³⁵

(c) *The Problem of Confidentiality.*—A disciplinary tribunal composed primarily of members of the judiciary may prefer confidential proceedings for the wrong reasons. Most judges probably tend to believe that problems of misconduct on the bench should be resolved "within the family." They may seek confidentiality so that public respect for the judiciary will be preserved. These sentiments seem misguided. The public's respect for the judiciary should be earned; it should not be preserved through myth, manipulation, and cover-up. The public has a proper interest in learning about the successes and failures of all branches of government, even its robed and revered judiciary.

Nevertheless, the public's interest in information about its government should, in this instance, be subordinated to the practical needs

³³⁴ For example, a presiding judge may believe that he should be able to correct problems of misconduct in his court in his own way, and the contact between a state's presiding judges and the administrative office of the state courts is likely to be very close. In some states, of course, there is no administrative office of the state courts, and it may be necessary to assign the staff function to another body such as the clerk's office of the state supreme court.

³³⁵ Cf. Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082 (1967).

of an effective disciplinary system, and the proceedings of a disciplinary commission should remain confidential. For one thing, confidentiality probably encourages complaints. Although a judge should be entitled to confront his accusers before discipline is imposed, I doubt the wisdom of requiring every accuser to embroil himself in public controversy as well. Indeed, a judge's resentment of complaints is likely to be intensified if they commonly lead to public as well as private embarrassment, and a complainant may therefore have even greater reason to fear retaliation from the bench. More importantly, confidentiality encourages judges to respond to complaints on their own initiative. With confidentiality, self-correction does not become a public admission of guilt. Even a judge who resigns while "under commission investigation" may of course assert reasons of age, health, finances, boredom, time pressure, or administrative burden for his decision; he will then take his place among other distinguished jurists emeriti who have resigned for similar reasons. A public accusation, by contrast, encourages a judge to fight to preserve his reputation.³³⁶ Confidentiality, in short, allows ample room for face-saving, something that greatly increases the effectiveness of a disciplinary commission.

Finally, although I find the standard arguments for secrecy unpersuasive, one of these arguments may be somewhat stronger in cases involving judges than in cases involving other public officials. Relatively fragile myths seem to surround the judiciary, and the public may truly believe that judges should be "beyond reproach." Even a saint may be reproached unjustly, however, and a false public accusation seems likely to injure a judge even more than a private individual or another governmental officer.

In 1969, two Justices of the Illinois Supreme Court resigned from office after a special commission found that they had engaged in business transactions with a criminal defendant while his case was pending before their court. The incident, quite naturally, diminished public confidence in the judiciary. Carl H. Rolewick of the Administrative Office of the Illinois Courts reports that since that time, a public accusation of misconduct—whether justified or unjustified—has effectively "washed-up" any judge about whom it was made.³³⁷

³³⁶ It is at least conceivable, for example, that recent efforts to impeach Mr. Justice Douglas have assured us of that jurist's services for a longer period than we might otherwise have had them—a fortunate result in this case (if one disregards the Justice's own possible interest in retirement) but an unfortunate result when a judge's conduct truly warrants removal from office.

³³⁷ Telephone interview, June 30, 1971.

Exaggerated concepts of judicial propriety that count smoke as the equivalent of fire lie at the heart of this problem, and one possible solution might be simply to encourage a more sophisticated public reaction. Democratic theory suggests that more information, rather than less, is the appropriate response to unfair public condemnation of this sort. In practice, however, a false accusation will almost inevitably have its painful effects, and when the anticipated public reaction seems particularly unsophisticated, the temptation is strong to commit the controversy to a secret tribunal away from public view. Although I believe that this solution may aggravate the problem in the long run, the impulse toward confidentiality reflects an understandable human response to the suffering that early publicity would otherwise inflict upon innocent individuals.

The proceedings of a disciplinary tribunal may properly remain confidential, but the existence of the tribunal should be widely known if it is to have any significant effect. Nevertheless, the public and the bar have generally seemed unaware of the modern disciplinary mechanisms even in states in which they have operated for years. The California Commission on Judicial Qualifications is, for example, the oldest, the most active, and undoubtedly the best known of the commission systems, but the *New York University Law Review* interviewed a number of California lawyers in 1966 and reported that "the vast majority . . . either had never heard of the Commission . . . or were acquainted only with the name, believing that the Commission was concerned with approving the Governor's judicial appointments."³³⁸ The *Law Review* added that Commission members were aware of this widespread public ignorance, but hesitated to act for fear that publicity "might undermine public confidence in the judiciary . . . [and] might alienate many judges whose cooperation is essential to the Commission's success."³³⁹ This attitude carries confidentiality much too far. When the victims of judicial misconduct are unaware that a corrective mechanism exists, the failure of that mechanism is ensured.

(d) *Sanctions*.—Because most courtroom misconduct does not warrant removal from office, a disciplinary tribunal should be authorized to impose lesser sanctions. Formal public censure is an obvious alternative, and most modern disciplinary systems seem to have incorporated that remedy. Usually, however, state legislatures have failed to authorize any intermediate sanction, so that disciplinary tribunals

³³⁸ Note, *supra* note 260, at 178.

³³⁹ *Id.*

have been confined to these two extreme alternatives. Ordinarily, for example, tribunals have not been empowered to cite an offending judge for contempt of court, to suspend him from office temporarily, or to require him to pay a monetary fine. A possible argument against the use of these intermediate sanctions is that they would so discredit a judge that he might as well be removed from office. His rulings would no longer command respect, and his effectiveness would be at an end.

I am not entirely persuaded by this line of argument, and I believe that a disciplinary tribunal should be able to consider the use of these sanctions in individual cases. Much judicial courtroom misconduct does, for example, fit the standard statutory definitions of contempt of court.³⁴⁰ There would be a certain equity in subjecting trial judges to the same rules that apply to others who may disrupt the trial process, and indeed, a few disciplinary systems have incorporated the power to punish offending judges for contempt.³⁴¹ Moreover, fines seem as consistent with judicial dignity as any other effective sanction, and audiences that might view public censure as a purely symbolic remedy could conceivably regard a monetary penalty as a more concrete expression of disapproval. For example, both the Chargin and the Glickfeld cases³⁴² presented situations in which fines might have been appropriate.

(e) *Implementation.*—State constitutions commonly set forth at least one mechanism of judicial discipline, and when a statute or court rule creates a different one, it may be argued that the newer mechanism unconstitutionally short-circuits procedures that were deliberately made slow, formal, and restrained. To foreclose this argument, new disciplinary procedures should ordinarily be established by constitutional amendment. The amendment process in most states, although burdensome, is not nearly so burdensome as it is in the federal system. An amendment creating a new mechanism of judicial discipline should be self-executing; despite the apparent will of the voters, state legislatures sometimes fail to enact implementing legislation. In New Jersey, for example, although the voters approved a constitutional provision on judicial discipline in 1947, the legislature did not put it into effect until 1970.³⁴³

³⁴⁰ See text accompanying notes 274-77 *supra*.

³⁴¹ The states in which disciplinary tribunals may hold trial judges in contempt for courtroom misconduct include New Jersey and Illinois. See Braithwaite, *supra* note 215, at 157-58, 167 n.3.

³⁴² See text accompanying notes 320-21 *supra*.

³⁴³ Braithwaite, *supra* note 215, at 151, 157-58.

7. *A Modern Disciplinary System for Federal Judges: The Constitutional Problem.*—Various bills have been introduced in Congress to establish a commission system for disciplining federal judges.³⁴⁴ It can reasonably be argued, however, that the Constitution permits only one remedy for misconduct by Article III judges—impeachment—and that no modern disciplinary system could be implemented without a Constitutional amendment. This issue has been debated extensively in a number of law review articles, but no scholarly consensus has emerged.³⁴⁵ Recently the United States Supreme Court touched upon the problem in *Chandler v. Judicial Council of the Tenth Circuit*.³⁴⁶

How Judge Stephen S. Chandler incurred the displeasure of his fellow judges is something of a mystery, but in December 1965, the Judicial Council of the Tenth Circuit found that Judge Chandler, the Chief Judge of the United States District Court for the Western District of Oklahoma, was “presently unable, or unwilling, to discharge efficiently the duties of his office.”³⁴⁷ Acting under its statutory authority to “make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit,”³⁴⁸ the Judicial Council ordered Judge Chandler to “take no action whatsoever in any case or proceeding now or hereafter pending . . .” After Judge Chandler unsuccessfully sought review of this order in the United States Supreme Court,³⁴⁹ the Judicial Council modified its position and permitted him to dispose of the cases previously assigned to him, but forbade him to undertake any new judicial business. When the Judicial Council issued this second order, it asserted a new basis for

³⁴⁴ See, e.g., S. 1506, 91st Cong., 1st Sess. (1969).

³⁴⁵ Articles which argue that Congress' impeachment power is probably exclusive include: Otis, *A Proposed Tribunal: Is It Constitutional?* 7 U. KAN. CITY L. REV. 3 (1938-39); Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849 (1938); Comment, *Judicial Responsibility*, 21 RUTGERS L. REV. 153 (1966); Comment, *supra* note 278. Articles which argue that the Constitution permits Congress to establish new mechanisms of judicial discipline include: Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution* (pts. 1-3), 28 MICH. L. REV. 485, 723, 870 (1930); Comment, *Judicial Trial and Removal of Federal Judges*, 20 TEXAS L. REV. 352 (1942); Comment, *Removal of Federal Judges—New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*, 13 U.C.L.A.L. REV. 1385 (1966); Comment, *Removal of Federal Judges—Alternative to Impeachment*, 20 VAND. L. REV. 723 (1967).

³⁴⁶ 398 U.S. 74 (1970).

³⁴⁷ *Id.* at 77. The Council's order noted that Judge Chandler had been sued unsuccessfully in both a civil and a criminal action and that he had twice refused requests to disqualify himself in certain cases. Surely, however, these facts alone, unaugmented by any examination of the merits of the controversies, did not warrant the conclusion that Judge Chandler would fail to discharge the duties of his office. The assumption kindest to the Judicial Council is that it acted from some secret motivation.

³⁴⁸ See 28 U.S.C. § 332(d) (1970).

³⁴⁹ See *Chandler v. Judicial Council of the Tenth Circuit*, 382 U.S. 1003 (1966).

its action: the statutory power to make rules for the division of business among a district court's judges when the judges themselves "are unable to agree on the adoption of rules or orders for that purpose" ³⁵⁰

The action of the Judicial Council provided, at best, a makeshift remedy for whatever misconduct or disability the Chandler case involved. Because Judge Chandler retained his office at least in name, no new judge could be appointed to consider the cases that he was thought unfit to hear. Instead, the workload of the other judges of the District Court increased. Moreover, although the Council offered to give Judge Chandler a hearing after it had filed its initial order, there were no established procedures for the Council to follow. ³⁵¹ This lack of procedural regularity provided a significant argument for Judge Chandler when, once again, he sought a writ of mandamus from the Supreme Court. Judge Chandler's principal argument to the Supreme Court, however, was one that would have applied even if he had been disciplined by a body established for that purpose and limited by carefully drawn procedural safeguards. He maintained that the Judicial Council had usurped the power of impeachment, a power that the Constitution gives exclusively to Congress.

The Supreme Court ultimately avoided the constitutional issue and held that because Judge Chandler had not exhausted all other remedies, he had not "made a case for the extraordinary relief of mandamus" ³⁵² In the course of its opinion, however, the Supreme Court intimated that had it reached the merits, Judge Chandler might well have lost anyway:

There can, of course, be no disagreement among us to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters. As to these things—and indeed an almost infinite variety of others of an admin-

³⁵⁰ See 28 U.S.C. § 137 (1970).

³⁵¹ The same objection applies to other informal remedies for judicial misconduct—such as reassignment by a court's presiding judge, who may determine that an associate judge's courtroom demeanor qualifies him to hear only pretrial motions, forcible detainer actions, and habeas corpus proceedings.

³⁵² 398 U.S. at 89.

istrative nature—can each judge be an absolute monarch and yet have a complex judicial system function efficiently? . . . [I]f one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.³⁵³

Dissenting, Justices Black and Douglas argued that the Judicial Council had effectively deprived Judge Chandler of his office, and in my view their argument was persuasive. The office of a United States District Judge surely encompasses more than a salary, a temporary “token” caseload, and the power to have one’s name listed at the beginning of each volume of the Federal Supplement. The middle portion of that volume is more important, and despite the argument of at least one Supreme Court Justice to the contrary, the object of the Judicial Council was certainly to prevent Judge Chandler from deciding cases.³⁵⁴ I agree with Justices Black and Douglas—and with Alexander Hamilton, Joseph Story, and James Kent as well³⁵⁵—that the only constitutional way to accomplish this objective is through the extraordinary mechanism of impeachment. Although I would rather the Constitution had not been written that way, I believe that impeachment was made a cumbersome and formal procedure quite deliberately. The purpose of the framers was to promote judicial independence, and their restrictions on use of the impeachment process would have been of little avail if Congress could, by simple majority vote, establish a broader, speedier, and more effective mechanism for removing unwanted judges.

To say that impeachment is the only constitutional way to remove a federal judge from office is not, however, to say that impeachment must remain the exclusive mechanism of judicial discipline. Many forms of discipline do not deprive a judge of the powers of his office, particularly the power to hear and decide cases. I do not accept some of the broader assertions of Mr. Justice Douglas’ opinion:

Under the Constitution the only leverage that can be asserted against [a federal judge] is impeachment . . . [T]here is no

³⁵³ *Id.* at 84-85.

³⁵⁴ Mr. Justice Harlan filed a separate concurring opinion and argued that Judge Chandler had not been deprived of his office; the Judicial Council had merely required him to eliminate his backlog before being assigned new cases. Any attempt to characterize the Council’s action as a housekeeping matter, however, overlooks the Council’s express reliance on Judge Chandler’s involvement as a defendant in civil and criminal litigation and its reliance on his refusal to disqualify himself in certain cases. It also overlooks the fact that Judge Chandler’s backlog was less than that of other judges in his district. Finally, this position overlooks the fact that, unless modified by affirmative action, the Council’s order would remain in effect after Judge Chandler had eliminated his backlog.

³⁵⁵ See Stolz, *supra* note 271, at 662.

power under our Constitution for one group of federal judges to censor or discipline any federal judge It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of "hazing" having no place under the Constitution.³⁵⁶

Indeed, Mr. Justice Douglas himself gave a partial answer to these assertions. The Justice declared that "if [judges] break a law, they can be prosecuted,"³⁵⁷ and Mr. Justice Black added that "judges, like other people, can be tried, convicted, and punished for crimes" ³⁵⁸ Unfortunately, these statements may not be entirely accurate, for the immunity that protects judges from civil liability for acts undertaken in the performance of their official duties has occasionally been extended to criminal prosecutions as well.³⁵⁹ Nevertheless, a judge's common law immunity can be altered by statute, and the statements of Justices Black and Douglas do seem accurate in the context of the problem that they were discussing. Congress' power of impeachment does not preclude the prosecution of a judge who accepts a bribe or otherwise violates a criminal statute of general applicability.³⁶⁰

This article has argued that much judicial misconduct constitutes contempt of court, a criminal act.³⁶¹ Were a federal disciplinary tribunal empowered to punish judges for this offense, the tribunal's actions would, I think, be valid even under the relatively stringent reading of the Constitution suggested by Justices Black and Douglas. A tribunal confined by the Black-Douglas view of the Constitution would, of course, hold less power than many of the state disciplinary tribunals created in recent years. Such a tribunal could not punish judges for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute,"³⁶² nor could it devise special standards for judicial officers concerning stock and real estate ownership, the

³⁵⁶ 398 U.S. at 136-37, 140 (Douglas, J., dissenting).

³⁵⁷ *Id.* at 140.

³⁵⁸ *Id.* at 141-42 (Black, J., dissenting).

³⁵⁹ As the rule is usually stated, "[A] judge can not be held criminally liable for erroneous judicial acts done in good faith But he may be held criminally responsible when he acts fraudulently or corruptly." *Braatelian v. United States*, 147 F.2d 888, 895 (8th Cir. 1945). Because most criminal statutes are confined by the requirement of *mens rea* and do not purport to punish acts done in good faith, a judge's immunity from prosecution for acts done in good faith is of little practical importance. *See, e.g., McFarland v. State*, 172 Neb. 251, 109 N.W.2d 397 (1961) (judge imprisoned for contempt when he issued a writ of habeas corpus knowing that he lacked authority to do so).

³⁶⁰ *See, e.g., United States v. Manton*, 107 F.2d 834 (2d Cir. 1938), *cert. denied*, 309 U.S. 664 (1940).

³⁶¹ *See* text accompanying notes 274-77, 340 *supra*.

³⁶² *See* CAL. CONST. art. VI, § 18(c)(2) (constitutional standard for censoring or removing a judge from office).

authorship of books, articles, and lectures, or other noncriminal matters. Instead, the tribunal would enforce only criminal laws that applied to judges on the same terms as other individuals. Moreover, such a tribunal would not be able to remove a judge from office even when the judge had engaged in criminal conduct; that power would belong exclusively to Congress. Despite these restrictions, the Constitution does seem to permit the creation of a disciplinary system for federal judges, a system that would be adequate for all but the most severe cases of courtroom misconduct and that would have a significant effect in these extreme cases as well.

C. *The Significance of Courtroom Misconduct by a Trial Judge in Contempt Proceedings Against a Litigant or Attorney*

Leonard B. Boudin has said of the "Chicago Eight" trial:

[A] fair evaluation . . . indicates that the defendants and their lawyers intended a traditional approach, that of winning the case, and of behaving firmly but with at least as good a behavior as typifies the criminal bar generally; and that they did not intend to disrupt the processes of the court or to drive the judge mad. The truth is that the defendants and their counsel were literally shocked, driven by Judge Hoffman (with the most charitable interpretation of the trial judge's behavior) into an emotional response which they never intended, and from which, I think, they never completely recovered.³⁶³

Mr. Boudin's allegations raise a significant question: If the "Chicago Eight" defendants and their lawyers did engage in what would otherwise constitute contemptuous conduct, might this conduct be excused by a showing that the trial judge had himself provoked it through his own serious misbehavior?³⁶⁴

³⁶³ *Disruption, Discipline and Due Process in the Trial Court*, 1 HUMAN RIGHTS, No. 2, at 132, 134-35 (July 1971) (proceedings of a symposium at the Annual Meeting of the American Bar Association, Section of Individual Rights and Responsibilities, St. Louis, Mo., Aug., 1970). The trial of the Chicago Eight may suggest that misconduct by defendants and defense attorneys sometimes arises from a tense interpersonal situation in which the prosecutor and trial judge play leading roles. As Professor Harry Kalven concludes, "One strong impression from the Chicago transcript is that we are watching a domestic comedy where the . . . parties can't stand each other, can't escape each other and, above all, can't let each other alone." Kalven, *Confrontation Comes to the Courtroom*, 1 HUMAN RIGHTS 10, 21 (1970). Professor Geoffrey Hazard adds, "To some who observed the 'Chicago Eight' trial, one of the appalling things was the noisome patter of witticism and jokes by Judge Hoffman. It is conceivable that if he had consistently avoided playing it like a minstrel show, the defendants might not have played it like a circus." Hazard, *Securing Courtroom Decorum*, 80 YALE L.J. 433, 446 (1970). Compare Sir Francis Bacon's statement, "Judges ought to be more learned than witty," quoted in *Myers v. George*, 271 F.2d 168, 172 (8th Cir. 1959).

³⁶⁴ On the appeal of his contempt conviction, defendant Bobby G. Seale has presented the following argument:

[R]egardless of whether appellants was actually guilty of contempt, the extensive

There have been surprisingly few rulings on the validity of the argument that judicial misconduct is—for one reason or another—significant in evaluating whether a litigant or attorney has been guilty of contempt. Nevertheless, on the infrequent occasions when this argument has been presented, the courts have almost invariably rejected it. As early as 1895, the Indiana Supreme Court considered a case in which a trial judge had called a defense attorney's *voir dire* examination of a prospective juror "absurd." The defense attorney objected that the judge was "trying to belittle him before the jury, and that he would not suffer such a remark to pass without a vigorous protest." The trial judge then repeated his remark, and the defense attorney said, "If that language was used towards me on the street, I would know how to answer it, but here in court I cannot." The Indiana Supreme Court affirmed the defense attorney's citation for contempt of court and said:

The contention of appellant that the language of the judge was provoking, and also detrimental to the interest of his client, and hence he ought to be excused for his conduct, can have no weight or consideration from a legal standpoint. The wrong of the judge, if any, cannot justify the misconduct of counsel. . . .

It is the imperative duty of an attorney to respectfully yield to the ruling and decisions of the court, whether right or wrong, reserving the rights of his client by proper and necessary exceptions thereto. A remedy for the correction of the court's errors, if any, is fully provided by law.³⁶⁵

and egregious pattern of misconduct engaged in by the prosecuting attorneys, the trial judge, and the United States Marshals under the judge's supervision requires that the charges be dismissed. . . . Courtroom decorum, and an atmosphere in which guilt or innocence might have been soberly and fairly tested, were so shattered by the prosecutor and the judge as to leave appellant little opportunity to work further harm. . . . Punishment of all the offending parties might be appropriate but that of course is not possible. Neither the judge, the prosecuting attorneys nor the marshals are before this court or are likely to be brought here. . . . Where, as here, all the offending parties cannot be subject to punishment, and particularly since those who escape are all public officials, the principle of equal protection and elementary notions of fairness demand that appellant not alone be punished.

Brief for Appellant at 155-56, 167-69, *United States v. Seale*, No. 18246, 7th Cir. (decision pending).

The other "Chicago Eight" defendants have argued:

It is reactions to things said or done by the judge or prosecutor that form the basis for these charges. . . . In considering the ultimate tests of contempt, *i.e.*, obstruction and intent, a judgment cannot be made without relating the judge's conduct to the facts which are charged as contempt. The law does not assume litigants are imperturbable and that reactions to judges' misconduct exposes them to punishment without regard to the judge's contribution.

Brief for Appellants at 93-94, *In the Matter of Dellinger*, No. 18294, 7th Cir. (decision pending).

³⁶⁵*Dodge v. State*, 140 Ind. 284, 288, 39 N.E. 745, 746 (1895).

Other state courts have reached the same conclusion, and their language has been equally forceful.³⁶⁶

The United States Supreme Court touched briefly upon the issue in 1952 in *Sacher v. United States*.³⁶⁷ The principal question in *Sacher* was whether the trial judge had been so deeply involved in the controversy that he should have disqualified himself and permitted a different judge to consider whether the defendants, attorneys in a highly publicized prosecution of Communist Party leaders, were guilty of contempt. Over the dissent of Mr. Justice Frankfurter, the Supreme Court affirmed the contempt citations. The case is significant partly because both Mr. Justice Frankfurter and the majority suggested that judicial misconduct could not excuse contemptuous behavior by litigants or attorneys.

Justice Frankfurter said of the record in *Sacher*:

Truth compels the observation, painful as it is to make, that the fifteen volumes of oral testimony in the principal trial record numerous episodes involving the judge and defense counsel that are more suggestive of an undisciplined debating society than of the hush and solemnity of a court of justice. Too often counsel were encouraged to vie with the court in dialectic, in repartee and banter, in talk so copious as inevitably to arrest the momentum of the trial and to weaken the restraints of respect that a judge should engender in lawyers.³⁶⁸

Despite his obvious displeasure with the trial judge's performance, Mr. Justice Frankfurter emphasized that this performance could not affect the defendants' guilt or innocence of the charge of contempt:

Counsel are not freed from responsibility for conduct appropriate to their functions no matter what the encouragement and provocations. Petitioners must be held to strict accountability for the contempts they committed.³⁶⁹

The majority apparently agreed. It said:

Of course, it is the right of counsel for every litigant to press his claim But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal These are such

³⁶⁶ *White v. State*, 218 Ga. 290, 294, 127 S.E.2d 668, 671 (1962); *Spencer v. Dixon*, 248 La. 604, 613, 181 So. 2d 41, 44 (1965); *Gautreaux v. Gautreaux*, 220 La. 564, 574, 57 So. 2d 188, 191 (1952); *State ex. rel. Cheadle v. District Court*, 92 Mont. 94, 100, 10 P.2d 586, 588 (1932).

³⁶⁷ 343 U.S. 1 (1952).

³⁶⁸ *Id.* at 38 (Frankfurter, J., dissenting).

³⁶⁹ *Id.* at 39.

obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case.³⁷⁰

Two years later, in *Offutt v. United States*,³⁷¹ the Court considered another case in which a trial judge had held a defense attorney in contempt after a trial in which the judge had allegedly exhibited bias and hostility toward the defense. On this occasion the Court ruled that because the trial judge had "permitted himself to become personally embroiled with the petitioner," the contempt charge should have been resolved by a different judge.

The Court noted that it was not concerned with "the reprehensibility of petitioner's conduct and the consequences which he should suffer."³⁷² When the case was retried in accordance with the Court's instructions, however, the significance of the trial judge's misconduct in evaluating the defendant's guilt became a central issue. The district court adopted the conventional position that "improper conduct of a trial judge can never justify or excuse contemptuous conduct of a trial attorney."³⁷³

The district court's opinion in *Offutt* revealed the remarkably authoritarian attitude apparent in many judicial rulings on this issue. To support its position, the court cited such works as *Roberts Rules of Order*, *The Rules of Parliamentary Practice*, *In Silence I Speak: The Story of Cardinal Mindszenty*, and the writings of Gerard Groote, "one of the most learned men of the Fourteenth Century." The court also relied upon

a fundamental principle of life which has been exemplified by the great trials in history . . . Socrates accepted the death sentence of the popular court of Athens . . . Jesus of Nazareth stood mute before Pilate . . . and His silence redounds to His glory . . . Sir Thomas More's farewell to his judges is another magnificent example of the transcendency of meekness over injustice. Chief Justice Coke himself set an example for lawyers when he was called to account before the king. When the king persisted in the assertion of his arbitrary will, Coke appropriately replied, "It would not become me further to argue with your Majesty."³⁷⁴

The Court's position therefore seemed to be that trial judges were en-

³⁷⁰ *Id.* at 9.

³⁷¹ 348 U.S. 11 (1954).

³⁷² *Id.* at 17.

³⁷³ *United States v. Offutt*, 145 F. Supp. 111, 114 (D.D.C. 1956).

³⁷⁴ *Id.* at 114-15.

titled to roughly the same respect as the Kings of England and that lawyers less noble than Christ, Socrates, and More might fairly be imprisoned.³⁷⁵

Although the orthodox view is that judicial misconduct has no bearing on whether a litigant or attorney is guilty of contempt, a number of decisions offer a tentative basis for arguing against this conclusion. As this article has noted,³⁷⁶ appellate courts have usually been quick to disregard prosecutorial misbehavior induced by the misconduct of defense attorneys. The courts have insisted that this "provoked" misconduct could offer no basis for the reversal of a criminal conviction. A few decisions have even extended this analysis to cases of judicial misconduct.³⁷⁷ In these cases, the courts have not insisted that two wrongs can never make a right, that the only proper remedy for courtroom misconduct lies in a respectful appeal through established legal procedures, and that "counsel are not freed from responsibility for conduct appropriate to their functions no matter what the encouragement and provocations." The contrast between decisions involving prosecutors and those involving defense attorneys seems to illustrate a bias in our legal system.

Cases involving prosecutors have, of course, arisen in a different procedural context from those involving defense attorneys. Because the state cannot appeal an unfavorable trial verdict in a criminal case, questions of defense misconduct have ordinarily come before appellate courts in the context of contempt proceedings. And because trial judges seem virtually never to hold prosecutors in contempt,³⁷⁸ questions of prosecutorial misconduct have arisen primarily in appeals from criminal convictions. This difference in procedure merely intensifies one's suspicion of bias. In contempt proceedings, as in other criminal actions,

³⁷⁵ The court's outlook became even more evident when it described the difference between the courtroom and "the playing field":

[T]he trial judge represents the sovereignty of the law and government. If the man who is counsel meets the man who is judge on the street, in the marketplace, or on the playing field, they are governed by the same rules of conduct that apply to other men, and they stand on equal footing. When in court, however, the judge, even in spite of human frailties, still is the representative of the sovereign power, and counsel must always respect the office whatever his opinion of the incumbent. Two wrongs do not make a right, and misconduct cannot obliterate other misconduct. . . .

Contempt usually occurs when self-assertion predominates over respect for authority. There is no place for selfishness or pride in the service of the law. . . . A man is never more upright in mind and heart than when he genuflects before the Supreme Authority. . . . Humility forestalls humiliation.

Id. at 114, 117.

³⁷⁶ See text accompanying notes 107-13 *supra*.

³⁷⁷ See text accompanying notes 237-39 *supra*.

³⁷⁸ See text accompanying notes 164-69 *supra*.

the principal issue is the culpability of the defendant. If an alleged contemnor was subject to intense provocation—provocation that might have caused even a “reasonable man” to forget himself and to do as the defendant did—that circumstance certainly seems relevant in assessing his culpability. When a criminal conviction is appealed on grounds of prosecutorial misconduct, however, the central issue is not the prosecutor’s culpability but whether the defendant was tried in the careful, impartial atmosphere that promotes confidence in the accuracy of his conviction. Prosecutorial misconduct may have had a prejudicial impact even when it arose out of a trying interpersonal situation and, on balance, does not seem seriously culpable. The courts have, however, seemed less ready to explore the issue of provocation in cases in which it was directly relevant than in cases in which it was not—apparently because one set of cases has typically involved prosecutors and the other defense attorneys.

Both lines of cases surely cannot stand.³⁷⁹ Indeed, my own view is that because provocation is more relevant in contempt than in conventional appellate proceedings, neither line of cases should survive.³⁸⁰ So long, however, as the courts continue to excuse prosecutorial misconduct on grounds of provocation when they review the fairness of criminal convictions, their action will lend support to defense claims of provocation in the context of contempt proceedings. The discrimination the courts have manifested in the past and continue to manifest today is unconscionable.

A recent decision by an intermediate appellate court in Illinois suggests a second line of attack upon the conventional view that judicial misconduct is irrelevant in evaluating whether a lawyer or litigant is guilty of contempt. *People v. Pearson*³⁸¹ grew out of a bizarre prosecution for perjury. When the defendant in the case applied for a driver’s license, he correctly listed as his “residence address” the place

³⁷⁹ There is, however, a conceivable distinction: When a defendant seeks reversal on the basis of prosecutorial misconduct that was provoked by misconduct on the part of the defense, it might be maintained that he is attempting to profit from his own wrong. A trial judge does not “profit” in the same sense when he punishes a defendant or defense attorney for misconduct that he himself has induced. This distinction is, of course, highly conceptual; I doubt that any unbiased observer would find it persuasive.

³⁸⁰ To a very limited extent, I think that appellate courts should consider defense misconduct in evaluating claims of prosecutorial misconduct, even when the courts’ task is simply to review the fairness of criminal convictions. The significance of defense misconduct has, however, usually been greatly exaggerated. See text accompanying notes 107-13 *supra* (setting forth more precisely the revisions that I propose in the “provocation doctrine” that appellate courts have applied in cases of prosecutorial misconduct). For the changes that I propose in the traditional doctrine that provocation is irrelevant in contempt prosecutions see text preceding note 398 *infra*.

³⁸¹ 98 Ill. App. 2d 203, 240 N.E.2d 337 (1968).

where he lived. When he applied for a certificate of title for his automobile, he listed as his "legal address" the service station where he had worked for the past fifteen years and where he received most of his mail. No other evidence suggested that the defendant had, in the language of the statute, "with fraudulent intent use[d] a false or fictitious name or address . . . in an application for a certificate of title."³⁸²

The Illinois Appellate Court noted that throughout the trial the trial judge had manifested an intense hostility toward the defense:

Commencing with the first witness, the court shut off [the defense attorney's] questions (which we consider to have been proper ones) characterizing them as "ridiculous"; general objections of the State's Attorney (in the form of "I object") were frequently and consistently sustained without any specification of grounds even when requested by [the defense attorney]; on occasions, the court foreclosed answers to [the defense attorney's] questioning without there having been any objection by the State's Attorney.³⁸³

The defense attorney finally told the court, "I think your bias is showing." The court held him in contempt.

Judicial bias, although an unpleasant subject, is a relevant legal issue, and an attorney should be permitted to discuss it. In my opinion, the defense attorney's statement in *Pearson*, far from being contemptuous, was proper argument. The appellate court, however, rejected this contention and resolved the case on a different ground. The court said of the defense attorney's remark:

This is not a proper statement for him to have made, and he should be ashamed of having made it, but we do not consider it an adequate basis for a contempt citation. We do not mean to be holding that provocation by the court may, in itself, be a defense to a contempt action, nor that contemptuous conduct directed at a court's rulings is excusable merely because the court may have been in error. Nevertheless, we do believe that these factors may be taken into account in ascertaining the state of mind of an alleged contemnor [W]e do not consider [the] comment about bias, made in the heat of battle,

³⁸² ILL. REV. STAT., ch. 95½, § 4-103(d) (1965), as amended, ILL. ANN. STAT., ch. 95½ § 4-105(d), (f) (1971). The Illinois Appellate Court commented:

[I]t completely surpasses our understanding how, on this evidence, the Secretary of State could have initiated prosecution . . . how the State's Attorney could have elected to proceed with the case . . . and, finally, how the court could have found the defendant guilty of perjury.

⁹⁸ Ill. App. 2d at 207-08, 240 N.E.2d at 339.

³⁸³ *Id.* at 211-12, 240 N.E.2d at 341.

lem and simply does not care whether or not his behavior will have obstructive consequences? Might it even be enough that the alleged contemnor does not pause to consider the consequences of his behavior when a reasonable man would do so?

In resolving these questions, the courts should consider the vagueness of most contempt statutes. In general, the narrower and more "specific" the requirement of intent, the less substantial the problem of notice becomes.⁸⁸⁷ In the main, however, courts have failed to examine the variations and combinations suggested by these issues and have talked about intent without explaining what they meant. Until one knows what mental element is required for a contempt citation, it is very difficult to discuss the potential significance of provocation in negating this intent.

This article is not the place for an extended discussion of the principles of construction that should apply in defining the mental element of particular crimes,⁸⁸⁸ and I will therefore not attempt the difficult task of determining when provocation can properly negate an alleged contemnor's intent. Nevertheless, the foregoing analysis does supply a basis for some general observations. As the term is commonly used in the criminal law, intent denotes an awareness of actions, circumstances, and consequences. It does not denote an emotional detachment. Provocation may occasionally affect a person's awareness or cognition as well as his emotions, and in these relatively unusual circumstances, provocation might be significant in evaluating a person's intent. A defendant might, for example, testify quite believably that he did not stop to think when the trial judge unexpectedly insulted him. He did not consider that he was in a courtroom before a jury. His response was a reflex action—just what he would have done if someone had insulted his professional integrity in his office or home or on the street. This testimony should negate the *mens rea* required for a contempt citation.

Ordinarily, however, even in cases of serious provocation, an alleged contemnor would probably remain aware of what he was doing, where he was, and what the likely consequences of his behavior would be. In these circumstances, to say that provocation negated the required intent would be a fiction. When an alleged contemnor has responded to outrageous provocation, criminal punishment may seem

⁸⁸⁷ Cf. *Screws v. United States*, 325 U.S. 91 (1945).

⁸⁸⁸ A brief but classic treatment of the general problem is MODEL PENAL CODE § 2.02, Comment (Tent. Draft No. 4, 1955).

to have been "calculated to embarrass, hinder or obstruct a court in the administration of justice."³⁸⁴

A contempt citation ordinarily requires a showing of culpable intent,³⁸⁵ but the courts have failed to define the mental element of this crime with precision. The issue is commonly one of statutory construction, and its resolution might vary from jurisdiction to jurisdiction. Nevertheless, contempt statutes often define the crime in terms of behavior that obstructs the administration of justice, and these statutes present at least three sets of issues with regard to the problem of *mens rea*: (1) Must the alleged contemnor's intent extend to the consequences of his conduct? Must he be aware not only of what he is doing but also of the likelihood that this conduct will have some obstructive effect?³⁸⁶ (2) Must the alleged contemnor recognize, or at least advert to, the legal significance of his behavior? If he knows what he is doing and what the probable effect will be, can he nevertheless be excused if he remains unaware that this effect could constitute "obstruction" in the eyes of the law? When contempt statutes are drawn in terms which include large, unresolved "legal" components, is ignorance of the law a built-in excuse? (3) What *kind* of intent must the alleged contemnor have toward each element of the offense? Must he, for example, desire to obstruct the administration of justice, or is it enough that he knows that his conduct will certainly have an obstructive effect? Might it be sufficient that the alleged contemnor adverts to the prob-

³⁸⁴ *Id.* at 211-12, 240 N.E.2d at 341-42.

³⁸⁵ See, e.g., *United States v. Sopher*, 347 F.2d 415 (7th Cir. 1965); *In re Boasberg*, 286 App. Div. 951, 143 N.Y.S.2d 272 (1955); *State v. Goff*, 228 S.C. 17, 88 S.E.2d 788 (1955). But see *Albano v. Commonwealth*, 315 Mass. 531, 535, 53 N.E.2d 690, 692 (1944).

Some opinions suggest that wrongful intent is not required when the defendant's conduct is "per se contemptuous," when the conduct involves "gross discourtesy," or when it is "clearly blameworthy." These same opinions, however, require proof of intent when the defendant's conduct is ambiguous. See, e.g., *Offutt v. United States*, 232 F.2d 69, 71-72 (D.C. Cir.), cert. denied, 351 U.S. 988 (1956); *MacInnis v. United States*, 191 F.2d 157, 160 (9th Cir. 1951), cert. denied, 342 U.S. 953 (1952). Although the language of the opinions seem to me unfortunate, the import of the decisions is clear: a defendant's actions may be so outrageous that no other evidence of contemptuous intention is required; it is only when the defendant's behavior does not "speak for itself" that independent proof of intention becomes necessary. The decisions therefore indicate the kind of evidence necessary to establish a culpable intent; they should not, despite their imprecise language, be read to dispense with a requirement of intent in "gross" or "blatant" situations.

³⁸⁶ Consider, for example, the basic federal statute which proscribes "misbehavior of any person in [the court's] presence or so near thereto as to obstruct the administration of justice." 18 U.S.C. § 401(1) (1970). One possible construction of this statute would be that an intent to "misbehave" is a prerequisite to conviction, but that "obstruction" simply defines the point at which the resulting harm becomes serious enough that criminal penalties are appropriate. My own inclination would be to reject this construction and to require a "specific intent" to misbehave and an "advertance to the risk" of obstruction. Cf. MODEL PENAL CODE § 2.02(3), (4) (Proposed Official Draft, 1962).

inappropriate. In most cases, however, the reason is not that the defendant has failed to realize what he was doing but simply that the defendant's conduct does not seem seriously culpable in light of the behavior of others and the emotional stresses inherent in the situation. The significance of provocation should therefore be faced directly. Obstructive behavior may not merit criminal punishment even when its author has the intent necessary to support a contempt citation. Fortunately, a few decisions do suggest that the courts have gone too far in their assertions that provocation can never be a defense to a charge of contempt.

In re Abse,³⁸⁹ for example, arose when an attorney asked a trial judge to sign an ex parte order. The judge not only refused but said that by submitting the order the attorney had attempted "a dirty trick" and had engaged in "a sneaky practice." The attorney asked for a chance to be heard, but the judge said that he would hold the attorney in contempt if the attorney took any more of his time. When the attorney persisted, the judge proved as good as his word.

The District of Columbia Court of Appeals held that the trial judge's insulting remarks justified the attorney's refusal to remain silent. Since the attorney was personally charged by the judge with unprofessional conduct and no appeal could be taken from the judge's remarks, the attorney could answer the allegations even by direct defiance of the judge's order not to speak.³⁹⁰

If, as *Abse* suggests, there should be a right of reply to personal accusations from the bench, this right should not turn on whether the trial judge's statements were made during a pretrial hearing or during the trial itself. The court emphasized in *Abse* that no appeal could be taken from the judge's remarks, but in a sense, there can never be any appeal from a trial judge's remarks. If a criminal trial ends in conviction, the defendant may of course urge reversal on the ground that the trial judge's statements tended to prejudice the jury. The defense attorney, however, who may have been the subject of the trial judge's comments, has no right to appeal; there can be no appeal if the trial ends in acquittal; and even when an appellate court does consider the trial judge's statements, it will not be primarily concerned with their truth or falsity. Thus the personal interests that the court sought to vindicate in *Abse* are unlikely to be affected by the appellate process, and *Abse* should be read to support

³⁸⁹ 251 A.2d 655 (D.C. Ct. App. 1969).

³⁹⁰ *Id.* at 656.

the right of a lawyer to answer all direct judicial insults—even, when necessary, by statements that in other contexts might be contemptuous.³⁹¹

A more striking illustration of the significance of judicial provocation is *Schlesinger v. Musmanno*.³⁹² Just before the trial of an apparently routine tort action, Judge Michael A. Musmanno asked the parties and witnesses to leave the courtroom. He announced, "Before we proceed in this case, I want to interrogate, and my duties require that I interrogate, counsel for the plaintiff." The judge then asked the following questions:

Hymen Schlesinger, have you ever been a member of the Communist Party?

Are you a member of the Civil Rights Congress?

Did you or did you not form the Civil Rights Congress, which is a Communist Front Organization, in your office—the Civil Rights Congress which is part of the movement to overthrow the Government of the United States by force and violence?

The plaintiff's attorney replied that the judge lacked jurisdiction to ask these questions. The attorney then attempted to leave the courtroom, but on the judge's order, court officials restrained him. Judge Musmanno finally concluded the episode with a dramatic pronouncement:

We have formally adjudged you unfit to try a case in this Court as of today, morally unfit. You do not possess an allegiance to the United States. There is sufficient evidence before the Congress of the United States that you made statements that you believe in overthrowing the Government of the United States by force and violence. Because of these sworn statements, which you do not see fit to reply to, we declare you morally unfit to try a case in this courtroom. Therefore, the case will be continued until you purge yourself of contempt or until your client is able to obtain another lawyer.

Judge Musmanno later filed an order directing the lawyer to appear before him on a charge of contempt. The deputy sheriff who attempted to serve this order reported that the lawyer glanced at it, said that he was not accepting any service of process today, threw the paper to the ground, and walked away.³⁹³ Judge Musmanno then issued a bench

³⁹¹ See also *Cooper v. Superior Court*, 55 Cal. 2d 291, 359 P.2d 274, 10 Cal. Rptr. 842 (1961) (establishing an attorney's right to object to judicial conduct even when the attorney has been ordered to remain silent).

³⁹² 367 Pa. 476, 81 A.2d 316 (1951).

warrant for the attorney's arrest. By the time the attorney was arrested and brought before the court, the Pennsylvania Supreme Court had, at the behest of the attorney, directed Judge Musmanno to show cause why a writ of prohibition should not issue against him. In addition, the supreme court had stayed all proceedings in the trial court pending its disposition of the prohibition action. Although Judge Musmanno had notice of the supreme court's orders, he once again conducted a hearing and held the attorney in contempt.

The Pennsylvania Supreme Court ruled that because Judge Musmanno's various orders were "null and void," the attorney's refusal to obey them could not constitute contempt of court.³⁹⁴ The supreme court also advanced an alternate basis for its decision. The court held that a trial judge's misconduct could itself excuse behavior by an attorney that in other circumstances would be contemptuous:

Inasmuch as Judge Musmanno insisted upon questioning petitioner on matters which had no bearing whatsoever on the issue then before him, and even restrained petitioner when he sought to leave the court room, the Judge is not in a position to complain because of petitioner's remarks to him or the manner in which he made them, nor could the Judge properly hold petitioner in contempt for so doing. A judge's conduct should always be above reproach.³⁹⁵

Abse and *Musmanno* were not cases in which a lawyer sought to excuse abusive or insulting courtroom remarks by pointing to a "general atmosphere" of provocation or to judicial misconduct that had occurred long before. In both cases, the alleged contempt consisted of an immediate and direct response to a specific act of misconduct. Moreover, this response did not take the form of insult; for the most part, the alleged contemnors merely refused to obey invalid judicial orders. The significance of *Abse* and *Musmanno* may, however, extend beyond this narrow description of their factual circumstances. When a lawyer is confronted with an utterly tyrannical judge, the proposition that he should respect the judicial office whatever his opinion of the incumbent may seem unduly abstract. A judicial robe cannot always work unlimited magic. The norms of civilized conduct do vary with the circumstances, and in ordinary human terms, a Musmanno is simply not entitled to the same respect as a Solomon. It would be par-

³⁹³ The attorney contended that the deputy sheriff's description of this incident was seriously exaggerated.

³⁹⁴ Cf. *United States v. United Mine Workers*, 330 U.S. 258 (1947).

³⁹⁵ 367 Pa. at 482, 81 A.2d at 319.

ticularly unfair to expect a litigant, unaccustomed to the refinement of courtroom proceedings, to respect the judicial office whatever the teaching of his senses. Moreover, judicial abuse can be so extreme that even a lawyer might be forgiven for thinking of the judge as nothing more than an obnoxious human being.

Although one may be tempted to conclude that contempt is exactly what Judge Michael A. Musmanno deserved, I would not suggest that misconduct by a litigant or attorney could ever be an appropriate response to misconduct by a trial judge. Abusive courtroom behavior is something that I would rather not have happen whatever the circumstances; in that respect, my sentiments correspond to those that lie behind the traditional view that provocation cannot excuse contemptuous behavior.

Criminal punishment need not, however, be society's response to everything that should not happen. The question is one of excuse, not justification. It may be unfortunate that a litigant or attorney has exacerbated a courtroom conflict by responding to abuse with abuse, but before society imposes criminal punishment and escalates the conflict further, it should consider exactly what function it expects the criminal punishment to serve.

That a lawyer or litigant has behaved inappropriately when confronted with judicial abuse offers little indication that he would disrupt the trial process in ordinary circumstances. The lawyer or litigant who responds to judicial provocation therefore does not pose the same danger to the legal system as the lawyer or litigant whose misconduct lacks a direct and understandable impetus from within the courtroom. Moreover, when serious judicial misconduct has eliminated any possibility of a fair trial, the misconduct of a litigant or attorney is likely to add only marginally to the ultimate harm. Because a new trial is almost inevitable, this misconduct cannot affect the tangible interests at stake in the case at hand. Although the lawyer's or litigant's misconduct may tend to diminish even further the dignity and effectiveness of the judicial system, the danger seems far less substantial than that presented by most cases of contempt of court.

More important than the question of harm is the question of how much the criminal law should expect of mankind. As Professor Herbert Packer has observed, the best course may sometimes be to coexist with evil. We trivialize the criminal sanction when we apply it to everything that we dislike.³⁹⁶ If, in a case of extreme provocation, the

³⁹⁶ H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1969).

temptation to respond in kind might have overpowered even a man of reasonable patience and firmness, use of the criminal sanction seems inappropriate. It would be self-defeating to apply the term criminal to everyone save a handful of saints.

By hypothesis, the trial judge—who the American Bar Association has said “should be the exemplar of dignity and impartiality”³⁹⁷—has yielded to the emotion of the moment. It may therefore be unreasonable to expect something better from a lawyer charged with partisan responsibilities or from a litigant who probably lacks the trial judge’s training and sophistication and who undoubtedly has more at stake.

Considerations of equality also suggest that judicial misconduct should be weighed in determining whether to punish a lawyer or litigant for contempt of court. This article has described various mechanisms for disciplining trial judges and has argued that it might even be appropriate to cite abusive judges for contempt. Nevertheless, it is probably unrealistic to expect any mechanism of judicial discipline to operate as effectively as the summary procedures that the courts now possess for disciplining unruly lawyers and litigants. Moreover, the significance of judicial provocation must be resolved today even in jurisdictions which lack any workable machinery for punishing judicial misconduct.

When a trial judge’s misconduct is at least as serious as that of the person who has been charged with contempt, it is incongruous to send the alleged contemnor to jail and to ignore the trial judge’s behavior on the ground that it is irrelevant to the only question of discipline likely to come before a court. This disturbing spectacle can only reinforce the view that power and position place some men above the law. Although the inequality could be remedied by subjecting trial judges to the same discipline as litigants and attorneys, the more effective and more practical course might be to recognize judicial provocation as a defense to a charge of contempt.

The principle of equality can of course be extended too far; I would not maintain that all wrongdoers should go free whenever one wrongdoer has gone free. The issue, however, is one of systematic discrimination based on the different positions occupied by lawyers, litigants, and trial judges. In practice, the trial judge’s position, which should carry special responsibilities, carries special immunities. Although it is common to maintain that trial judges have an even greater obligation to preserve courtroom dignity than do other par-

³⁹⁷ ABA, JUDGE’S ROLE, *supra* note 102, standard B.1. This standard was approved by the House of Delegates of the ABA in summer, 1971.

ticipants in the trial process, the trial judge's responsibility is usually enforced with moral exhortations while the responsibility of lawyers and litigants is enforced with jail sentences.

This inequality probably does not present a significant constitutional problem; it almost certainly would not violate the equal protection clause to punish a lawyer or litigant whose conduct merited punishment simply because a trial judge whose conduct also merited punishment might escape any sanction. Still, the concept of equality does offer a valid reason to consider judicial misconduct in deciding whether a lawyer or litigant should be punished for contempt.

Every judicial error should not, of course, excuse misconduct by a litigant or attorney; the trial judge's misconduct should have been serious enough that even a man of reasonable patience might have felt a strong temptation to respond improperly. Moreover, even in extreme situations, judicial misconduct should not excuse a response that was disproportionate to the provocation.

The issue does not yield to exact rules. I contend only that a court should not blind itself to the potential significance of judicial provocation. It should consider all the circumstances and should withhold criminal punishment when the alleged contemnor's conduct does not seem seriously culpable. A court should not fear that justice to the defendant in the case at hand will seriously injure judicial authority; judges should not sacrifice their own sense of fairness to formal, abstract notions of courtroom propriety.

III. CONCLUSION

Chief Justice Warren Burger told the American Law Institute in the spring of 1971:

[C]ivility is relevant to judges, and especially trial judges because they are under greater stress than other judges, and subject to the temptation to respond in kind to the insolence and bad manners of lawyers. Every judge must remember that no matter what the provocation, the judicial response must be judicious response and that no one more surely sets the tone and pattern for courtroom conduct than the presider.³⁹⁸

The national publicity that followed the Chief Justice's address did not focus upon his brief remarks about trial judges. Instead it empha-

³⁹⁸Remarks of Warren E. Burger, Chief Justice of the United States, at Opening Session, American Law Institute, May 18, 1971, at 8-9 (unpublished).

sized his characterization—or, perhaps, his caricature—of one sort of defense attorney:

[A]ll too often overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters—including the judges At the drop of a hat—or less—we find adrenalin-fueled lawyers cry out that theirs is a “political trial.” This seems to mean in today’s context—at least to some—that rules of evidence, canons of ethics and codes of professional conduct—the necessity for civility—all become irrelevant.³⁹⁹

It is unfortunate that the public has come to associate courtroom disruption almost exclusively with the misconduct of defendants and defense attorneys. In my view, the misconduct of prosecutors and trial judges presents a much more pressing problem. Although it probably occurs no more frequently than defense misconduct, it is far more damaging to the cause of justice.⁴⁰⁰ Although a defense attorney is an officer of the court, his primary responsibility is to his client. Society does not expect from him the same degree of impartiality that it does from officials who are paid by the state. Nevertheless, the mechanisms that currently exist for disciplining defendants and defense attorneys are quick and powerful, while existing mechanisms for disciplining prosecutors and trial judges are largely ineffective. The political philosophy and personal lifestyle of the “new left” have apparently captured public attention and obscured the central problem. It is time to regain our perspective, to consider the system as a whole, and to seek a fairer balance.

³⁹⁹ *Id.* at 4. Compare Reinhold, “Bar Study Notes Little Court Disorder Despite Burger Views on Unruliness,” *N.Y. Times*, Aug. 9, 1971, at 1, col. 3.

⁴⁰⁰ See text accompanying notes 10-15 *supra*.