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FOREWORD

The recent revival of public interest in the unofficial activities of members of state and federal judiciaries has prompted legislatures, judicial conferences, and bar associations to reconsider their prior codifications of the norms of judicial behavior. It seems appropriate that there be provided a record of the issues considered in these revisions. This issue of *Law and Contemporary Problems* is intended to fulfill that function in a collection of articles by authors who have observed these recent inquiries and the controversies which produced them.

What happened to cause several judges—some in the highest places—recently to be reprimanded for their unofficial involvements? Few would suggest that in each of these controversies, the individual judge had knowingly refused to observe clear ethical prohibitions. A few judges had engaged in activities which would be deemed unacceptable in any period. But of greater concern are those who were subjected to public criticism when their most readily identifiable failing was a lack of perception of the extent to which a shift in public sentiment had rendered unacceptable activities which formerly were presumed to be proper. While judges should perhaps be held to a level of sensitivity which perceives such a change in public sentiment, they can reasonably demand that the prevailing formal statements of ethics provide guidance for their efforts to structure their private lives. The recent revision of ethical codes is a tacit admission that prior standards no longer provide the direction needed by judges. Thus, the objective of the new standards should be to reflect more accurately the public expectation.

The recent rethinking in this area has focused on two questions: What substantive norms should be imposed? Who should have responsibility for enforcement of these? As Judge Irving R. Kaufman suggests in his article, regulation which is too confirming is to be deplored. A judge should be insulated from certain influences, particularly those of a political or financial nature. But he should be left free to function in his community so that his decision-making reflects an understanding of the conditions which prevail in the litigants' world. The greatest difficulty is met in attempting to define precisely how this balance in exposure is to be achieved. Most of the authors of the following works would neither deny to judges the opportunity to diversify their social existence nor deprive society's institutions of

the benefit of the judicial mind. Thus, lecturing and writing by judges is not proscribed. It is agreed, however, that greater care must be taken to inform the judicial conscience of the public expectation in those areas where an extra-judicial involvement might suggest an absence of impartiality in decision-making.

The articles by Justice Tom C. Clark, Senator Sam J. Ervin, John H. Holloman, III and Carl L. Shipley debate the respective roles of the legislature and the judiciary in controlling judicial behavior. Focusing primarily upon the federal judiciary, this debate presents the threshold question of whether the constitution permits legislative regulation other than through the impeachment power. On another level is the question of whether legislative power includes the power to remove judges for derelictions in office which do not involve violations of a pre-existing statute.

Against the background of this controversy, it must be asked whether the judiciary has the capacity to perform adequately the regulatory function which would be necessary to satisfy the recently surfaced public concern with judicial ethics. Certainly the traditional forms of judicial machinery cannot accommodate the investigative, prosecutorial, and enforcement functions involved. Initial efforts to establish a separate administrative agency controlled by the judiciary have been made. Mr. Braithwaite's article describes the operation of some of these. But even if the needed enforcement machinery can be formed, a question remains whether the judiciary should accept responsibility for the formulation of ethical standards. The standards for conduct perhaps are best devised by a body structured to permit formal input from community sources. Otherwise, the ethical scheme is vulnerable to the criticism that it is self-protective.

It might seem that the entity which bears enforcement responsibility would have significant impact on the level of public confidence in the judiciary. This confidence, however, is in large measure determined by factors not related to the enforcement function. On one level, meaningful control of conduct of an ethical nature must depend heavily upon self-enforcement. A crucial determinant of the level of judicial ethics is the quality of the persons selected to act as judges. Thus, any attempt to affect judicial ethics is incomplete without attention to the manner in which judges are chosen. On another level, it can be suggested that the quality of decision-making may ultimately determine the level of public confidence. Controversies involving judicial ethics are often indicative of a more general dissatisfaction with either the quality or nature of judicial decisions. Revision of the ethical standards themselves or the manner of their enforcement is likely to produce only temporary modulation of the level of popular concern. The real restoration of public confidence may come only when judicial decisions themselves do not produce a negative reaction in those who are in a position to stimulate public debate.

February 1, 1971 JOHN C. WEISTART