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SPEECH

JUDICIAL INDEPENDENCE: IS IT IMPAIRED OR BOLSTERED BY JUDICIAL ACCOUNTABILITY?

CARMEN BEAUCHAMP CIPARICK & BRADLEY T. KING

INTRODUCTION

Good afternoon. It is so wonderful to be here among friends, colleagues, students, faculty, and alumni. What a delightful day it has been! I met with all the 1Ls and their professors. I visited the clinics and was so very inspired by the quality of their work and their professionalism. I also met with the Ron Brown Prep students and the LALSA students and was again inspired by this wonderful next generation of leaders in our communities and in the profession. Lunch with the faculty was fun, informative, and stimulating. It always helps us in the courts to be aware of the concerns of the Academy, and I thank you, Dean Simons, for the opportunity to speak with the faculty.

And, how wonderful it is for all of us and the Law School that our Chief Judge Jonathan Lippman is here and Associate Judges Victoria Graffeo and Susan Read. Welcome to St. John’s.

What a great honor it is for me to stand before you today as the fourth Honorable Joseph W. Bellacosa Distinguished Jurist-in-Residence. I will do my very best this evening to contribute in a meaningful fashion to an important and sometimes misunderstood subject: that of judicial independence and judicial accountability.

My discussions with the law school earlier this year were memorialized in two letters, the first from the Honorable Joseph W. Bellacosa, my good friend and truly distinguished jurist-teacher-dean, who wrote: “You will be the first alum (alumna) to honor Alma Mater and to honor me.” The truth is, Judge

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† Bradley T. King is a former Law Clerk to Court of Appeals Judge Carmen Beauchamp Ciparick.
Bellacosa and Alma Mater, it is you who honor me. The second letter was from then Acting Dean Andrew Simons, who wrote: “I look forward to the next wonderful installment of this enriching program.”

Well, Andy, tonight I will continue the conversation and the discussion begun so eloquently by my sister and ever-phenomenal former Chief Judge of the State of New York, the Honorable Judith S. Kaye. She spoke about new court initiatives and innovations resulting in the creation of problem-solving courts and laid before us a formula for saving lives and improving public safety while delivering justice. The following year, we heard from the Honorable Frank Williams, Chief Justice of Rhode Island, who, like Judge Kaye before him, did a full day with students and faculty culminating in a colloquium interspersing his judicial commentary with his Lincoln expertise involving the suspension of the writ of habeas corpus during the Civil War and its application to contemporary executive/judicial branch tensions. And then, of course, earlier this year, we were graced with a visit from former American Bar Association President and Michigan Supreme Court Justice Dennis Archer, who addressed the role of the bar in helping to protect the independent functioning of the judicial branch.

Tonight, we will continue the tradition of this stellar program that celebrates our former Dean Bellacosa’s many contributions to the law school, the judiciary, and the legal profession. As a result of some brainstorming with Judge Bellacosa and others, I have chosen to continue the discussion of judicial independence and its corollary judicial accountability, and I particularly want to focus on how it is enhanced by an effective system of judicial discipline which we in New York are so very fortunate to enjoy.

First, however, a disclaimer on my part. Before being named to the Court of Appeals in 1993, I served at the behest of the Honorable Governor Mario Cuomo as a member of the New York State Commission on Judicial Conduct. I served from 1985 to 1993 as a judicial member, of whom there were four of eleven members, mostly lawyers, appointed by the Governor, the Chief Judge and the leaders of the State Senate and Assembly. During

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those eight years as a Commission member, I was privy to every complaint filed with the Commission. I signed off on the many hundreds that were dismissed as being meritless on their face, sought to investigate others, voted charges on some, assigned referees to hear and report, heard arguments on motions to affirm and disaffirm such referees' findings, and ultimately made determinations on questions of misconduct and penalty to be imposed. I witnessed first-hand the complexity of the issues presented and how much attention was paid to the need to balance judicial discipline with judicial independence. During those years, there was always a robust discussion as to whether an obvious and substantial judicial error or series of errors should be investigated. One interesting aspect of that discussion was the Commission's authority under a rule it promulgated to dismiss and caution a judge for violations of the ethics standards that did not warrant formal proceedings.\(^2\) It was felt that if the Commission overlooked an error (and dismissed the complaint), would it be doing a disservice to the judge by not privately cautioning the judge to be aware of the error? Before cautioning a judge, however, the Commission first had to investigate and obtain a response from the judge. A dismissal and caution thus became an informal nonpublic disciplinary sanction which could be used in future cases under certain circumstances. A judge who received such a caution about a single error might avoid a more serious disciplinary proceeding in the future (that would be based on a series of such errors) if the judge heeded the advice.

Upon my elevation to the Court of Appeals, I had to relinquish my position on the Commission, as Commission determinations are reviewed in the Court of Appeals. For the first year or so on the court, I recused from such reviews as I had participated in the matters below but eventually I joined the six members of my court in passing on judicial misconduct determinations. Since I have been at the Court of Appeals, close to sixteen years now, the court has heard challenges to thirty-nine Commission determinations, accepting Commission determinations and the precise disciplinary sanctions determined by the Commission in thirty-six of those cases. And in the other three cases, determinations were modified from removal to censure or admonition.

I would like to begin with the proposition that:

**JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY ARE NOT MUTUALLY EXCLUSIVE**

Throughout the years, there have been differing opinions expressed about what makes a judge fully independent. My view is that an independent judge is one who is accountable to the rule of law, and specifically to those fundamental precepts of due process that exist to ensure impartial decisionmaking and justice for all who come before the judge. In my thirty-one years as a judge, I have found that the great majority of our judges perform their duties well, are dedicated and diligent, and most professional. Most understand the need for accountability to the public, the bar, the litigants, their colleagues, and the greater community. All are subject to rules governing judicial conduct and most function effectively within the rules.

There are those few, however, who have been the subject of judicial discipline, some for acts of abuse of power and corruption of the judicial office. No reasonable person would quarrel with the view that they deserved removal from the bench. But disciplining judges for judicial error has created a stir in judicial circles. It is this stir which I will address.

When judges are disciplined, as they have been, for fundamental legal errors, we experience the intersection of judicial independence in decisionmaking and judicial accountability. A new jurisprudence is developing in this area, the contours of which are being defined by the New York State Commission on Judicial Conduct and our State Court of Appeals.

Many scholars have engaged in the project of mapping judicial motivations and determining how and to what extent non-legal factors, such as ideology and background, influence, overtly or implicitly, the relative independence of judicial decisionmaking.\(^3\) Such an interdisciplinary sojourn is beyond the scope of this lecture, but I shall endeavor to engage you in another sort of analysis. Drawing upon my many years of experience as a trial judge, Judge of the Court of Appeals, and

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\(^3\) For an excellent summary of “attitudinal” studies and others that attempt to describe the factors, both legal and non-legal, that may influence judicial decisionmaking, see Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in *Judicial Independence at the Crossroads* 22–27 (Stephen B. Burbank & Barry Friedman eds., 2002).
Like my former colleagues, Chief Judge Kaye and Judge Bellacosa, who have tackled the topic in the past, I recognize that the term "judicial independence" is a somewhat amorphous concept and is thus easily misunderstood. Certainly, no one would seriously argue that judges' decisionmaking is—or ever could be—entirely independent. To the contrary, judges are constrained by precedent, constitutional and statutory language, and other institutional norms, such as the need to fully articulate one's decisions in coherent and logical opinions. This is as it should be, for our system exists to ensure that we issue decisions that, above all, demonstrate impartiality and fidelity to the rule of law.

It is fitting to have this discussion on this first Monday in October as Justice Sonia Sotomayor joins her colleagues on the United States Supreme Court bench. As you all witnessed this summer, comments that then-Judge Sotomayor had made in extra-judicial speeches, along with her participation in an appellate decision that she understood to be governed by case law, provided much fodder for some members of the United States Senate Judiciary Committee in questioning her capacity for impartiality and decisional independence. Many rejected these attacks as unfounded and, ultimately, the attacks were unsuccessful. Regardless, they raised questions amongst the bench, bar, and public regarding what it means to engage in truly independent decisionmaking.

The concept of judicial accountability, too, is capable of engendering some misunderstanding. Chief Judge Jonathan Lippman, upon receiving the United State Supreme Court's William H. Rehnquist Memorial Award for Judicial Excellence last year, remarked that in addition to decisional independence of individual judges, the courts' institutional independence must also be respected—"the right of the courts as a co-equal branch of

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government to govern ourselves . . . .” In that regard, he noted, interest groups have “distorted” the concept of accountability to suggest to the public that judicial decisions are no different than those issued by the political branches of government. This is an unfortunate development since it threatens the public’s confidence in the judiciary’s ability to fulfill its core constitutional function as protector of the rule of law.

Our own Professor John Q. Barrett has likewise commented that there are at least two salient aspects of an independent judiciary: the first is institutional and the second decisional autonomy. My focus today will be on decisional autonomy and the role of the New York State Commission on Judicial Conduct, a constitutionally-created body that, in my opinion, has improved judicial accountability through enforcement of the Rules Governing Judicial Conduct.

These rules are contained as part of the Rules of the Chief Administrator of the Courts. They were adopted after consultation with the Administrative Board of the Courts, comprised of the four Presiding Justices of the Appellate Divisions and the Chief Judge, and were approved by the Court of Appeals. The rules provide guidance and notice to judges of basic ethical standards which govern a judge’s conduct both on and off the bench. As stated in the Preamble to the Rules, they are to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The baseline standards set by the rules promulgated by the Unified Court System and enforced by the Commission greatly facilitate the exercise of a jurist’s decisional independence. When the public is secure in the knowledge that judges are subject to inquiry on a meritorious complaint of misconduct, it is much more willing to accept judicial decisionmaking, a result that

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6 See id.
redounds to the benefit of both society and its judiciary. Thus, as Judge Kaye has said, writing in the Hofstra Law Review, “People respect the law and are willing to live by the law, only as long as they believe that it operates fairly and effectively.”

Public confidence is a necessary, but not exclusive condition for decisional independence. To be truly independent, a judge must ground his or her decisions in the rule of law, striving always to, as Judge Bellacosa so cogently put it, “moor their oath-bound work steadfastly to lasting principles” and thereby “serve society and the litigants before them with intellectual and personal integrity and stubborn neutrality.” Because a judge “has no constituents, save The Law itself,” real decisional independence occurs when a judge is willing to follow The Law where it leads, regardless of his or her personal preferences.

Some discussions of judicial independence have fostered the impression that judicial accountability and independence are diametrically opposed one to another. Calls for holding “activist judges” accountable to the popular will frequently recur when

10 See Charles Gardner Geyh, Rescuing Judicial Accountability from the Realm of Political Rhetoric, 56 CASE W. RES. L. REV. 911, 916 (2006) (“A system of judicial accountability that reassures a sometimes-skeptical public that judges are doing their jobs properly and yet respects the judiciary's independence can forestall resort to more draconian and counter-productive forms of court control.”); Frances Kahn Zemans, The Accountable Judge: Guardian of Judicial Independence, 72 S. CAL. L. REV. 625, 635 (1999) (“A legitimate mechanism of judicial discipline actually enhances judicial independence because it contributes to the public’s willingness to grant authority to the courts.”).

11 Kaye, supra note 4, at 710.

12 Bellacosa, supra note 4, at 2385, 2401.


14 See AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY, 12 (2003), available at http://www.abanet.org/judind/jeopardy/pdf/report.pdf (noting that “judicial independence, then, must be tempered by judicial accountability” and that “the phrase ‘judicial accountability’ . . . can be employed in the service of those who would . . . obliterate judicial independence and the rule of law altogether by intimidating judges into contorting the law to reach results popular with temporary majorities of the public”).
one side or another is unsuccessful in a hotly contested litigation. The implication is that judicial decisionmaking that has not resulted in a particular preferred outcome should be amenable to some sort of discipline. That of course would give judicial disciplinary bodies dangerous power and would impair the independence of the judiciary. An even greater risk to judicial independence would be the use of alternatives to the Commission system by a Governor who might be inclined to invoke the antiquated legislative removal of a judge for an unpopular decision.

Indeed, the Founders envisioned judicial independence as a means of ensuring accountability not to the partisan clamor of the day, but to lasting legal principles that were to be neutrally applied to all members of the community.\textsuperscript{15}

Accordingly, it is important not to speak about judicial independence and accountability in purely functional terms. For the nature of judging presupposes that one side or another will be disappointed by the outcome of any given case—at best, judges can only have a fifty percent approval rating. Instead, we must view both concepts as means to serve the same end—ensuring equal justice under the law to all.\textsuperscript{16} When a judge exhibits the stubborn impartiality and neutrality that Judge Bellacosa has spoken of, the judge has acted in a manner that is fully independent and accountable.\textsuperscript{17} When personal interests, partisan affiliations, or fear of public reprisal cloud the decisional process, however, the judge has failed on both counts.\textsuperscript{18}

This is not to say, however, that there may not be an inherent tension between the enforcement of judicial conduct rules and independent decisionmaking.\textsuperscript{19} Any system of judicial

\textsuperscript{15} See H. Jefferson Powell, \textit{The ThreeIndependences}, 38 U. RICH. L. REV. 603, 612 (2004) ("Judges who fail to maintain and respect the difference between judicial and extrajudicial reasoning are not independent in the American constitutional sense, no matter how secure their positions and how respected their judgments, for those judgments will necessarily be subservient to something other than the people's law.").


\textsuperscript{17} See Bellacosa, \textit{supra} note 4, at 2401.

\textsuperscript{18} See Geyh, \textit{supra} note 10, at 916 ("[P]roperly employed, accountability merely diminishes a judge's freedom to make herself dependent on inappropriate internal or external influences that could interfere with her capacity to follow the rule of law.").

\textsuperscript{19} See Lubet, \textit{supra} note 13, at 65 ("[T]here are situations in which the possibility of discipline most definitely does endanger the independence of the
discipline carries with it the potential to constrain judges from deciding cases in an absolutely independent manner.\textsuperscript{20} We expect judges to comport themselves in a manner consistent with the solemn responsibility they have to mete out equal justice in cases potentially implicating the rights not just of the parties before them, but—because of the precedential effects of judicial rulings—of those throughout the state and the nation.\textsuperscript{21} New York, like every other state—has established a method of enforcing a mode of judicial discipline that fosters public confidence in its courts.\textsuperscript{22} In my view, that effort has largely succeeded in balancing the rights of judges to decide independently within the bounds of the law while remaining accountable to standards of conduct that are consistent with the due process that the dispensing of equal justice requires.

\textbf{THE ROLE OF THE COMMISSION ON JUDICIAL CONDUCT}

Turning now to a specific discussion of our New York State Commission on Judicial Conduct, a short history is in order. In 1977, the electorate overwhelmingly voted to establish the New York State Commission on Judicial Conduct.\textsuperscript{23} By that action, the people created a body that would, according to Article VI, § 22(a) of our constitution, “receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance . . . of any judge or justice of the unified court system.”\textsuperscript{24} At the time, it was clear that the traditional methods for enforcing judicial discipline—impeachment\textsuperscript{25} and legislative removal\textsuperscript{26}—were cumbersome processes, subject to

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\item See Geyh, \textit{supra} note 10, at 916; see also JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS § 1.04, 1-10 (4th ed. 2007) (hereinafter “Alfini”) (“Because judicial independence is an integral part of our legal system, the argument that it is threatened by a system of judicial discipline cannot be lightly dismissed.”).
\item See Bruce Fein & Burt Neuborne, \textit{Why Should We Care About Independent and Accountable Judges}, 84 \textit{JUDICATURE} 58, 58 (2000).
\item See N.Y. CONST. art. VI, § 22.
\item See N.Y. CONST. art. VI, § 22(a).
\item See N.Y. CONST. art. VI, § 24.
\item See N.Y. CONST. art. VI, § 23.
\end{enumerate}
\end{footnotesize}
partisan influence, and largely ineffective because they permitted only one draconian sanction—removal. An earlier method, trial before the New York Court on the Judiciary, had failed to measure up because—being composed entirely of judges—that court was subject to the criticism that its membership would be overly solicitous to the needs of accused jurists and because it was convened only after certain scandals had erupted and lacked any centralized staff.

In contrast, the Commission’s structure is designed to streamline the disciplinary process, professionalize the disciplinary system, and add an investigative capacity that earlier disciplinary forums lacked. The Commission’s eleven members, appointed by representatives of each branch of government, represent different segments of the community. The four gubernatorial appointees include one attorney, two non-lawyers, and one judge. The Chief Judge selects one Appellate Division Justice and two judges from courts other than the Court of Appeals or Appellate Divisions. And each legislative leader selects a person other than a judge or retired judge. The Commission members serve staggered four-year terms, which maintains continuity in the membership.

Also, the statutory authority to employ an adequate number of staff allows the Commission to develop state-wide uniformity in the enforcement of the ethics standards and an institutional expertise in the area of judicial discipline.

The composition of the Commission is “expressly designed to be non-partisan and independent.” Given the broad subpoena power and investigative capabilities that the Commission has at its disposal, such independence is essential. It does not appear,

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27 See ALFINI, supra note 20 at § 1.04, at 1–9; see also The Task Force on Judicial Selection & Court Merger, Judicial Accountability and Judicial Independence: The Judge Lorin Duckman Case Should Not Be Referred to the State Senate, 51 THE RECORD 629, 631 (1996) (“The legislative removal process [in New York] proved far too cumbersome, expensive and time-consuming to be an effective means of overseeing the judiciary.”).

28 See The Task Force on Judicial Selection & Court Merger, supra note 27, at 646–47.

29 See id. at 632, 648.

30 See N.Y. JUD. LAW § 41(7) (McKinney 2010).


except in the rare instance, that the Commission has attempted to enforce so-called "decisional accountability" by intruding on the discretion of individual judges. Nor would it be proper for the Commission to do so since New York's Rules Governing Judicial Conduct begin with the premise that "[a]n independent and honorable judiciary is indispensable to justice in our society."  

The Commission has been primarily concerned with enforcing standards of "behavioral accountability," or the ways and means in which judges comport themselves regardless of the relative merits or demerits of the decisions they ultimately reach in a given case. Those merits or demerits are reviewable through the traditional appellate process. While critics argue that the Commission has interfered with the exercise of judicial discretion, the Commission's authority is limited to disciplining judges for flagrant errors that by their nature violate one or more of the ethics rules applicable to judges.

Although in its first two decades the Commission faced criticism among judges for disciplining certain court rulings and procedures, at this point it is recognized that the Commission has authority to discipline (subject to review in the Court of Appeals) certain actions of judges, including the failure to advise a defendant of the right to counsel, the failure even to make an attempt to ascertain whether a defendant qualifies for assigned counsel, the failure to consider statutory factors in the Criminal Procedure Law for purposes of setting bail, the setting of outrageously high bail for the purpose of coercing guilty pleas, and other abuses of bail. There is no dispute any longer whether judges who engage in such improper conduct may be disciplined because the Court of Appeals has upheld Commission determinations that held individual judges accountable.

The early controversy derived primarily from the relative novelty of subjecting any judge to discipline for violating the fundamental rights of litigants. Indeed, prior to the establishment of the Commission it was rare that any judges were subject to any sort of discipline whether based on their good faith, is investigating the conduct of a Judge, the commission is acting within the scope of its authority and a subpoena issued pursuant thereto is not subject to challenge." (internal quotation marks omitted).

33 See ALFINI, supra note 20, at § 1.04, 1-11.
35 See ALFINI, supra note 20, at § 1.04, 1-11.
decisional conduct or otherwise. Only twenty-three judges were
disciplined by "the patchwork system of ad hoc judicial
disciplinary bodies" in the one-hundred years prior to the
Commission's creation. In contrast, in approximately thirty-
three years, since the creation of the Commission, 751 judges
have been publicly disciplined and 157 removed from office.37
One commentator has noted that the lack of discipline in general
during those early years, for egregious legal errors in particular,
was most likely due to a lack of a systematic means of
investigating judicial impropriety and to the fact that the only
authorized sanction for any misconduct was, as I indicated
earlier, removal.38 The concept, however, of disciplining a judge
for certain decisions is not new. As early as 1895, New York
courts recognized that a judge's decisions could be a basis for
discipline if they were based on an intentional violation or
disregard of the laws. However, the possibility of predicking a
judicial misconduct case on an erroneous legal ruling—or series
thereof—was essentially non-existent.39

All that changed with the Commission system. Now a non-
partisan body can authorize a dedicated staff to investigate
complaints that allege conduct that violates the court system's
rules governing judicial conduct.40 If the Commission determines
that charges need to be brought, a hearing is conducted, presided
over by a referee to hear and report with recommendations. The
full commission, including its four judge members who could be
expected to have a deep-seated commitment to the value of
judicial independence, presides over a formal argument, the
results of which (and the full record) are ultimately reviewable at
the judge's option to the highest state court, the New York State
Court of Appeals, which is vested in ensuring the maintenance of
an independent judiciary.41 Thus, judicial independence was

36 See N.Y. STATE COMM'N ON JUDICIAL CONDUCT, 2009 ANNUAL REPORT 34
(2009).
37 See id. at 41.
38 See Gerald Stern, Is Judicial Discipline in New York State a Threat to
Judicial Independence?, 7 PACE L. REV. 291, 304 (1987); see also In re Droege, 129
A.D. 866, 882, 114 N.Y.S. 375, 386–87 (1st Dep't 1909) (holding that removal for
legal error is appropriate if conduct was based on "unworthy or illegal motives" or
evidenced "ignorance... a perverted character, or... a lack of judicial qualities").
39 See Stern, supra note 38.
40 See N.Y. JUD. LAW § 44 (1)-(2) (McKinney 2010).
41 See id. at § 44(4), (7).
built into the Commission system.\textsuperscript{42} Not surprisingly, the body of law that has developed in the past thirty years on the subject of judicial discipline based on legal error has managed to effectively balance our state's commitment to impartial and independent judicial decisionmaking with accountability to one—and only one—constituent, the rule of law.

When judges decide according to the rule of law, they are behaving in both an independent and accountable manner. Judges in our system are only granted independence so that they can serve the public by deciding cases fairly, impartially, and in accordance with the law.

Turning now to:

\textbf{THE COURT'S ROLE IN DECIDING THE COMMISSION'S AUTHORITY}

Defining just what class of errors should be subject to discipline is a delicate process that must pay careful heed to both the legal and factual context in any given case lest judges be disciplined for exercising their lawful discretion in novel or unpopular ways or for just making mistakes.\textsuperscript{43} Certainly, discipline based on a mere judgment call while exercising permissible judicial discretion would be beyond the Commission's reach. The challenge to traditional notions of judicial independence inherent in imposing discipline based on a jurist's exercise of his or her most fundamental duty—the duty to decide—has led at least one law review commentator to describe as "earthshaking" the disciplining of judges who violate litigants' fundamental rights.\textsuperscript{44} Earthshaking perhaps in the 1970s, but

\textsuperscript{42} Commentators have concluded that the inclusion of judicial members on JCOs is one of several effective means of safeguarding judicial independence. See ALFINI, \textit{supra} note 20, at § 1.04, 1-11 ("[The system operates essentially through self-regulation. In every state system, judges are included in the composition of judicial conduct commissions . . . ."); Cynthia Gray, \textit{The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability}, 32 \textit{Hofstra L. Rev}. 1245, 1248–49 (2004) ("The extensive involvement of other judges on the conduct commissions and in the review of judicial discipline cases ensures that the perspective of the judiciary and deference to its independence is reflected in the decision whether to find misconduct based on legal error.").

\textsuperscript{43} See Gray, \textit{supra} note 42, at 1246–47 ("It is not unethical to be imperfect, and it would be unfair to sanction a judge for not being infallible while making hundreds of decisions under often pressure.").

few would dispute that that is precisely what the Commission has the authority to do today; and we, the Court of Appeals, have given it the authority since it is the court that renders public discipline in New York—unless the judge who is subject to discipline chooses not to seek review in the Court of Appeals, then the Commission’s determination stands.

Unlike other high courts that review every decision of judicial conduct commissions, we are limited to hearing only those matters initiated by the judges themselves.45

If a judge does not exercise his or her right to review in the Court of Appeals, we have no jurisdiction to review the Commission determinations. Thus, our legal-error precedents deal with severe judicial misconduct and not more-debatable legal errors. Our court is somewhat hamstrung in developing precedents defining the type of judicial error that constitutes misconduct. Most judges facing either public admonition or censure do not choose to seek review of the Commission determinations in the Court of Appeals. Perhaps one reason is the expense of seeking review; another may be that they choose “to leave well enough alone” and not risk a greater disciplinary sanction. As to the expense, it is the judge’s burden to provide a record of the proceedings before the Commission. Perhaps that expense could be shifted to the Commission or to the court system to alleviate the financial burden on the judge. If more Commission determinations were reviewed, the court would have an even greater opportunity to establish standards for disciplining judges for serious judicial errors.

Nonetheless, certain broad principles have been articulated by the Court of Appeals that, in my view, balance effectively judicial independence and accountability.

THE RULES GOVERNING JUDICIAL CONDUCT

As I stated earlier, New York’s guide in the area of judicial ethics has been the Chief Administrator’s Rules Governing Judicial Conduct. These tell us that “an independent and honorable judiciary is indispensable to justice in our society.”46 They explain how to be both independent and honorable, or as I maintain, both independent and accountable. To do so, a judge

45 See N.Y. JUD. LAW § 44(7) (McKinney 2010).
“shall,” among other things, “respect and comply with the law,” 47 “be faithful to the law and maintain professional competence in it,” 48 “perform judicial duties without bias or prejudice against or in favor of any person,” 49 and “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.” 50 These standards envisage a jurist as the guardian of the public’s legal rights and presume that judges will remain tethered to legal principles when exercising decisional independence. The rules also reflect the close connection between judicial independence and accountability.

THE COURT APPLIED THE RULES TO FLAGRANT PROCEDURAL ABUSES

As established by a trilogy of Court of Appeals cases twenty-five years ago, In re Sardino, In re McGee, and In re Reeves, “a repeated pattern of failing to advise litigants of their constitutional and statutory rights . . . is serious misconduct,” warranting removal. 51 When judges engage in such patently inappropriate behavior, they leave those they serve—the litigants who seek justice in our courts—with the incorrect impression that the legal system is unfair and unjust. 52 It isn’t. Rather, a jurist’s refusal to act in accordance with well-settled fundamental rights is patently unfair.

In this connection, particularly troubling is the failure of certain judges to advise litigants in criminal and family court proceedings of their right to counsel, a right which serves to facilitate the judicial process, not inhibit it. 53 Indeed, “[t]he right to counsel, in practical respects, remains absolutely fundamental

47 See id. § 100.2 (A).
48 See id. § 100.3 (B)(1).
49 See id. § 100.3 (B)(4).
50 See id. § 100.3 (B)(6).
When judges are unwilling to facilitate a litigant’s access to counsel, who can assist the court in assessing the unique factual circumstances present for their review in each particular case, they manifest an unwillingness to remain accountable to the law and thus their capacity for truly independent decisionmaking is open to serious doubt.

One of these three cases concerned a family court judge who had ignored procedures established to assure fair proceedings in family court. The Commission had designated a prominent former Appellate Division Justice as referee to preside at the hearing, take evidence, and report to the Commission. The referee recommended that the charges be dismissed because the judge had made good-faith mistakes or misapprehended the legal issues. Among the judge’s errors was the failure to advise parties of their rights, including the right to counsel and to a hearing. The Commission set aside the conclusions of its own referee and the court agreed with the Commission.

The court stated, “[a]lthough these were errors of law, they cannot be excused on that basis. The errors were fundamental and the pattern of repeating them, coupled with an unwillingness to recognize their impropriety, indicate that petitioner poses a threat to the proper administration of justice.”

In 2005, the court considered a request for review of a Commission determination that the Kings County Surrogate be removed for failing to apply statutory requirements in the award of legal fees to counsel to the Public Administrator, a friend of the Surrogate. The key statutory provision overlooked by the Surrogate required counsel to submit an affidavit of legal services prior to the court’s approval of fees. In upholding the findings and conclusions of the Commission, the court held that the Surrogate was obligated to familiarize himself with the governing statute, and in failing to do so, the Surrogate

54 In re Bauer, 3 N.Y.3d at 164, 818 N.E.2d at 1118, 785 N.Y.S.2d at 377.
55 Cf. id. at 162–63, 818 N.E.2d at 1116–17, 785 N.Y.S.2d at 375–76 (describing petitioner’s practice of setting punitively high bail while withholding vital information about the right to counsel in an effort to “defeat” defendants’ exercise of that right); In re McGee, 59 N.Y.2d 870, 871, 452 N.E.2d 1258, 1258, 465 N.Y.S.2d 930, 930 (1983) (noting petitioner’s practice of failing to advise defendants of their right to counsel and that “[o]ccasionally, he would actually discourage those individuals from seeking legal advice”).
56 In re Reeves, 63 N.Y.2d at 110–11, 469 N.E.2d at 1323, 480 N.Y.S.2d at 465.
demonstrated a “shocking disregard for the very law that imbued him with judicial authority.” Although favoritism for a friend permeated the record, the Surrogate argued that his statutory failures constituted mere legal error and not misconduct. The court observed that “the two are not necessarily mutually exclusive . . . [and] a judge’s systematic failure to conform to legal requirements may form the basis for removal.” The court cited a 2004 decision in a case that resulted in a city court judge’s removal for a pattern of procedural abuses that deprived indigent defendants of counsel and coerced guilty pleas.

As we learned just last year, in In re Restaino, an otherwise distinguished judge can prove himself unfit during one intemperate court session in which he disregards the Criminal Procedure Law’s requirements regarding the setting and revocation of bail and deprives forty-six defendants of their liberty simply to redress a minor breach of courtroom decorum, a ringing cell phone—an unfortunate occurrence, to be sure.

As to the severity of disciplinary sanctions, which often is the key issue before the Court of Appeals, the court is concerned with both the “nature and gravity of the proven wrongdoing.” Our court has consistently refused to fashion a “numerical yardstick” by which to measure how much legal error is too much. This is as it should be, for the purpose of imposing judicial discipline is not to punish based on some fixed and unyielding definition of poor judging, but, as the court said, “[for] the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents.”

Judges prove themselves unfit for service when they act with “callous disregard” for those constitutional and statutory provisions that protect an individual’s right to be free from unwarranted governmental restraint, to the establishment and
maintenance of a parent-child relationship, to be presumed
innocent, and to be accorded a fair trial. It is no surprise that
several of the court's legal-error precedents arise in the criminal
and family law contexts, where many litigants are unaware of
the full extent of their rights. The severe consequences and
social stigma attending adverse results in such proceedings
demand that judges adhere strictly to procedural protections at
all times, no matter how trying the circumstances. As stated
famously by Supreme Court Justice Felix Frankfurter in McNabb
v. United States, "[t]he history of liberty has largely been the
history of observance of procedural safeguards."

Judicial independence presupposes that a judge will be able
to render unpopular decisions without fear or favor and that
ability is severely compromised when a judge evidences his or her
willingness to depart from well-settled legal precepts. Such
disregard of clear legal mandates also undermines the public's
right to rely on impartial and neutral decisionmaking, the
bedrock of judicial independence.

Relatedly, jurists are not empowered to use procedural rules
such as the authority to set bail or to dismiss a criminal
complaint for legal insufficiency to punish either side or to dole
out a measure of rough justice in a particular case. The law is
not a guise to be employed to reach results that mesh with one's
personal predilections, uninformed by reasoned decisionmaking.
True judicial independence comes from adhering to the rules of procedure and substance, allowing facts and arguments to develop, and being open to the possibility that one’s perspective on a case can be changed by persuasive advocacy and careful study. When judges fail to adhere to this high standard and improperly invoke legal rules simply to cover their fundamental errors of law, they have not only failed to be accountable to the law, they have proven themselves incapable of discharging the “grave responsibilities” that our society accords to those whom it entrusts to exercise discretion over decisions concerning the public’s fundamental rights of life, liberty, and property.69

When judges ignore fundamental rights, the potential for appellate review of their errors does not mitigate the need to impose discipline.70 Nor does the fact that other judges who have not been disciplined may have engaged in similar improper behavior in the past.71 The fact that prejudice to a particular party whose fundamental rights have been violated may be addressed at the appellate level does not undercut the need to remove or discipline unfit incumbents who may inflict harm upon similarly-situated litigants in the future. The focus here is on ensuring that the public trust in the judiciary remains uncompromised, not in correcting the harm that a deprivation of fundamental rights has caused to one or more particular parties.72 That is solely the function of an appellate court.

It is worth repeating that not every error in the interpretation of procedural rights merits discipline. Discipline is the rare case. It is to be remembered that the Commission does not function as an appellate court, which would be the ordinary and appropriate and almost exclusive channel of review of judicial rulings. Thus, when a judge engages in an effort to interpret an ambiguous statute and interprets it in a manner, the correctness of which is “sufficiently debatable,” discipline

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69 See In re Jung, 11 N.Y.3d at 375, 899 N.E.2d at 933, 870 N.Y.S.2d at 827.
71 See In re Duckman, 92 N.Y.2d at 154, 699 N.E.2d at 879, 677 N.Y.S.2d at 255 (fact that other judge may have engaged in similar misconduct “would be irrelevant”).
72 See In re Jung, 11 N.Y.3d at 374, 899 N.E.2d at 932, 870 N.Y.S.2d at 826.
should never be imposed.\textsuperscript{73} Such was the case in \textit{In re LaBelle}, where a judge's novel interpretation of a criminal procedure law provision allowed him to hold certain defendants without bail, pending psychiatric evaluations. That decision was held to be improper by the Commission, but on review our Court of Appeals held otherwise and pointed out to the Commission that its conclusion was not supported by either statutory or case law. The judge's ruling was not found to be a basis for discipline because—given the ambiguity of the relevant statutory language—the judge's "reading of the statutes one way or the other cannot constitute misconduct."\textsuperscript{74}

We were reminded of a judge's need to abide by binding appellate authority recently in \textit{In re Jung}, where a family court judge continued to adhere to an anomalous policy of requiring incarcerated litigants to specifically request from the court that they be produced at custody hearings and request court appointed counsel within two weeks of their initial appearance, even if a hearing was not to occur until a later date.\textsuperscript{75} As a result of these stringent policies, default judgments were entered, parents lost their custodial rights and some were held in contempt and sentenced, in absentia, to prison terms of six months or more.\textsuperscript{76} After the Appellate Division granted petitions for habeas corpus brought by litigants who were incarcerated for failing to comply with these harsh rules, the judge failed to meaningfully alter his policies, thereby indicating that "even the Appellate Division precedents failed to impress the importance of these due process rights upon [the judge] in any meaningful way."\textsuperscript{77} Thus, it was unsurprising that a unanimous court upheld the Commission's decision to remove this judge since he had "steadfast[ly] adher[ed] to long-standing policies that... seriously compromised the due process rights of litigants."\textsuperscript{78}

Finally, contrition plays an important role in the imposition of an appropriate sanction, and the lack of contrition may be an\footnotesize{
\begin{itemize}
  \item See \textit{In re LaBelle}, 79 N.Y.2d 350, 360, 591 N.E.2d 1156, 1161, 582 N.Y.S.2d 970, 975 (1992).
  \item See id. at 360-61, 591 N.E.2d at 1161, 582 N.Y.S.2d at 975.
  \item See \textit{In re Jung}, 11 N.Y.3d at 368–70, 899 N.E.2d at 928–29, 870 N.Y.S.2d at 822–23.
  \item See id.
  \item See id. at 375, 899 N.E.2d at 933, 870 N.Y.S.2d at 827.
  \item See id. at 375–76, 899 N.E.2d at 933, 870 N.Y.S.2d at 827.
\end{itemize}
aggravating factor. While "[i]n some instances contrition may be insincere, and in others no amount of it will override inexcusable conduct, an "utter failure to recognize and admit wrongdoing [will] strongly [suggest] that, if [a judge] is allowed to continue on the bench, we may expect more of the same."\(^{79}\) Similarly, in a recent case where a judge improperly utilized the summary contempt power codified in Judiciary Law section 755 to punish a litigant whose attorney sought to place on the record the circumstances surrounding an out-of-court encounter with the judge, we at the Court of Appeals suggested that a judge's recognition that such conduct was improper could potentially "forestall the inevitable, unfortunate conclusion that, absent a harsher sanction, more of the same will ensue."\(^{80}\)

Ultimately, judges are human beings working in a complex legal system, under an array of broadly worded rules of conduct. Mistakes, sometimes serious mistakes, are bound to occur. But judges who are open to the possibility that they may have seriously erred may also be able to demonstrate their potential for change.\(^{81}\) In so doing, they manifest a commitment to judicial accountability that provides some evidence of their potential to exercise true judicial independence in the future.

**JUDICIAL INDEPENDENCE REQUIRES JUDICIAL ACCOUNTABILITY**

In sum, judicial independence and judicial accountability need one another. The definition of an independent and accountable judge is one who is faithful to the law, above all else. Our Unified Court System along with the Commission on Judicial Conduct have aided our state's citizens by helping to ensure the maintenance of a judiciary willing to bear the grave responsibility of upholding individuals' fundamental legal rights that is part and parcel of our commitment to judicial independence. I am proud to have been involved, both as a Commission member and Judge, in pursuing and refining the lofty goals of our state's Code of Judicial Conduct and hope that this lecture has provided a helpful overview of that vital system.

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\(^{81}\) See *In re Bauer*, 3 N.Y.3d at 165, 818 N.E.2d at 1118, 785 N.Y.S.2d at 377.