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Prosecuting Judges for Ethical Violations: Are Criminal Sanctions Constitutional and Prudent, or Do They Constitute a Threat to Judicial Independence?

Abraham Abramovsky*

Jonathan I. Edelstein†

*Fordham University School of Law

†Attorney in Private Practice

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Prosecuting Judges for Ethical Violations: Are Criminal Sanctions Constitutional and Prudent, or Do They Constitute a Threat to Judicial Independence?

Abraham Abramovsky and Jonathan I. Edelstein

Abstract

This Article examines the constitutional and practical issues surrounding the prosecutions of judges for ethical violations. The first part of this Article will focus on the Garson prosecution as an example of unwarranted prosecution of judges for violation of ethical codes. The second part examines cases elsewhere in the United States in which judges and other public officials have been prosecuted for violations of ethical codes. Finally, the third part discusses the threats to judicial independence that exist even under the current American legal Framework, as well as the growing tendency to blur the line between civil and criminal liability. The Article concludes that these factors, in combination with the fact that the code of judicial ethics was never intended to be a basis for criminal liability, militate against the use of such codes to define offenses under New York law.

KEYWORDS: judicial independence, prosecute, judges, ethics, ethical violations, criminal sanctions

**PROSECUTING JUDGES FOR ETHICAL
VIOLATIONS: ARE CRIMINAL SANCTIONS
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INDEPENDENCE?**

BY ABRAHAM ABRAMOVSKY*

JONATHAN I. EDELSTEIN**

I. INTRODUCTION.

On March 30, 2006, the New York Court of Appeals made legal history by reinstating eight counts of an indictment against former Justice Gerald Garson.¹ In six of these counts, which had previously been dismissed by the Kings County Supreme Court,² Judge Garson was accused of receiving reward for official misconduct under Section 200.25 of the Penal Law, in that he allegedly obtained or agreed to obtain a benefit in return for violating his duty as a public servant.³ This is hardly an unusual charge to be leveled against an allegedly corrupt public official - but in Judge Garson's case, the "duty" he was accused of violating was based purely upon the New York State Code of Judicial Ethics. Specifically, it was alleged that Justice Garson acted criminally by conducting improper *ex parte* communications and by accepting fees for referring unrelated cases to a private attorney.⁴

This was only the second time in New York, and the fourth time

* Professor of Law, Fordham University School of Law. J.S.D., Columbia University, 1976; LL.M., Columbia University, 1972, J.D., Buffalo Law School, 1971. The author participated in the defense of *People v. Gerald Garson* in the Kings County Supreme Court.

** Attorney in private practice. J.D., Fordham University School of Law, 1997. The author participated in the defense of *People v. Gerald Garson* in the Kings County Supreme Court.

¹ See *People v. Garson*, 2006 N.Y. LEXIS 616 (Mar. 30, 2006) ("*Garson III*").

² See *People v. Garson*, 4 Misc. 3d 258 (Sup. Ct., Kings Co. 2004) ("*Garson I*").

³ See PL § 200.25.

⁴ See notes 36-48 *infra* and accompanying text.

anywhere in the United States,⁵ that a judge was prosecuted for violating ethical strictures that were not explicitly forbidden by a penal statute. In all three previous cases, the appellate courts had held that such attempts were improper, characterizing them as violations of the principles of separation of powers and judicial independence.⁶ In the *Garson* case, however, the Kings County District Attorney was ready to try again, claiming that a 1977 amendment to the New York State Constitution explicitly incorporated the ethical rules into the duties of a judge.⁷

The Kings County Supreme Court rejected this argument, holding that the considerations of judicial independence, separation of powers and constitutional vagueness that informed the previous cases were still valid.⁸ This decision was unanimously affirmed by the Second Department of the Appellate Division.⁹ However, the New York Court of Appeals granted the District Attorney's application for leave to appeal,¹⁰ and in a 6-1 decision, concluded that the rules of judicial conduct "set forth a constitutionally mandated duty upon the judiciary and, when combined with the additional factor of receiving a reward. . . may serve as a basis for prosecution under Penal Law ' 200.25."¹¹ The majority found that "to hold otherwise. . . would lead to the incongruous result of insulating judges from criminal liability under Penal Law ' 200.25 because they have a formal body of rules governing their conduct while subjecting other public servants. . . to criminal liability for similar conduct."¹²

In a powerful dissent, however, Judge George Bundy Smith argued that the New York code of judicial ethics was never intended to form a basis for prosecution and that it was an unconstitutionally vague predicate for criminal liability.¹³ He argued that, even though the courts may have a legitimate concern with protecting the integrity of the bench and the prosecution may have "amassed a great deal of damning evidence" against Justice Garson, "what is at issue is whether or not the Rules of Judicial Conduct can be used as a predicate for criminal prosecution."¹⁴ He answered this question in the negative, arguing that erring judges could be

⁵ See notes 122-218 *infra* and accompanying text.

⁶ See *People v. La Carrubba*, 46 N.Y.2d 658, 662-65 (1979); see also *State v. Perez*, 464 So. 2d 737, 743-44 (La. 1985); *Clayton v. Willis*, 489 So.2d 813, 818-20 (Fla. App. 1986).

⁷ See notes 58-60 *infra* and accompanying text.

⁸ See *Garson I*, 4 Misc. 3d at 262-68.

⁹ *People v. Garson*, 17 A.D.3d 695 (2d Dept. 2005) ("*Garson II*").

¹⁰ See *People v. Garson*, 2005 N.Y. LEXIS 1903 (June 24, 2005).

¹¹ *Garson III*, 2006 N.Y. LEXIS 616, at *1.

¹² *Id.* at *19.

¹³ See *id.* at *45-57 (Smith, J., dissenting).

¹⁴ *Id.* at *48.

adequately punished without criminalizing violations of the ethical code and that any incremental gain in deterrence was outweighed by the specter of “criminal prosecutor[s] becoming the judge[s] of when and how a rule of judicial conduct becomes criminal.”¹⁵

Judge Smith’s criticism of the majority opinion was well taken. Despite the majority’s attempt to minimize the impact of its holding,¹⁶ the decision marks a dramatic shift of power from judges to prosecutors, with local prosecutorial agencies having the ability to selectively pursue indictments against judges for violation of broadly worded ethical rules.¹⁷ Moreover, by shifting judicial disciplinary authority toward the District Attorney’s office, it may well undermine the separation of powers as well as the role of disciplinary boards in regulating the American judiciary.¹⁸

Accordingly, this Article will examine the constitutional and practical issues surrounding prosecutions of judges for ethical violations. The first part of this Article will focus on the *Garson* prosecution as an example of unwarranted prosecution of judges for violation of ethical codes, and discuss the shortcomings of the Court of Appeals’ decision. The second part will examine cases elsewhere in the United States in which judges and other public officials have been prosecuted for violations of ethical codes. This part will also analyze the manner in which the courts have dealt with considerations of constitutional vagueness, judicial independence, separation of powers and the potential for vindictive prosecutions. Finally, the third part will discuss the threats to judicial independence that exist even under the current American legal framework, as well as the growing tendency to blur the lines between civil and criminal liability. The article will conclude that these factors, in combination with the fact that the code of judicial ethics was never intended to be a basis for criminal liability, militate against the use of such codes to define offenses under New York law.

¹⁵ *Id.* at *59-61.

¹⁶ *See id.* at *26-27. In particular, the majority acknowledged that unlimited criminal liability for violations of the Rules of Judicial Conduct was problematic, but opined that “criminal prosecution [under PL ‘ 200.25] rests not on a violation of the Rules alone but on the acceptance of a benefit for violating an official duty defined by the Rules.” *Id.* at *27. The majority characterized this as a “critical distinction” that “alleviates. . . the concern that to allow criminal prosecution of ethical violations under Penal Law ‘ 195.00(2) would create an ‘awkward and often unseemly’ landscape where different groups would likely ‘jockey for prosecutorial priority or advantage.’” As discussed at notes 105-08 *infra* and accompanying text, however, the extraordinarily broad definition of “benefit” under Section 10.00(17) of the Penal Law means that this “critical distinction” in fact has no practical meaning.

¹⁷ *See* notes 281-84 *infra* and accompanying text.

¹⁸ *See* notes 199-218 *infra* and accompanying text.

II. THE GARSON PROSECUTION.

The investigation of Kings County Supreme Court Justice Gerald Garson was a product of an ongoing probe into corruption in the Brooklyn courts. On January 24, 2002, Justice Victor I. Barron was indicted on charges of demanding a \$115,000 bribe to approve a settlement in favor of an infant.¹⁹ The indictment, which was the result of a two-year investigation, opened a Pandora's box of charges against other Brooklyn judges. Within two months after the indictment, no fewer than eight judges in Kings County were under investigation for activities ranging from nepotism, patronage and outright bribe receiving to moonlighting as private counsel.²⁰ A 29-member commission headed by Professor John D. Feerick of Fordham Law School was empaneled to recommend reforms to enhance judicial ethics throughout the state.²¹ On February 8, Justice Ann T. Pfau, a long-time official in the New York Office of Court Administration and a key assistant to Chief Administrative Judge Jonathan Lippman, was appointed administrative judge in Kings County Supreme Court with a mandate to clean up an alleged culture of corruption.²² Her appointment led to additional internal probes of judges, private attorneys and Brooklyn public officials with ties to the courts.²³

It was during this period that Frieda Hanimov, a matrimonial litigant in Brooklyn, became dissatisfied with her treatment by Justice Garson. Hanimov, whose matrimonial action was pending in front of Judge Garson, had lost custody of her children to her husband. She was then allegedly told by her attorney, Paul Siminovsky, that she had lost the case because her husband had bribed the judge, and that she could obtain a more favorable ruling if she made a better offer. Siminovsky introduced her to Nissim Elmann, a Brooklyn businessman who was allegedly able to influence Garson by bribing him.

At that point, Hanimov contacted the Kings County District Attorney and became, in her words, an "undercover mom."²⁴ In cooperation with

¹⁹ See William Glaberson & William K. Rashbaum, *Indictment of a Brooklyn Judge Provides Details of Seemingly Routine Corruption*, N.Y. Times, Jan. 25, 2002, p.B3.

²⁰ See Joe Maloney, *Judge: We'll Clean Up Courts*, Daily News (N.Y.), Feb. 26, 2002, p.18.

²¹ See Daniel Wise, *Commission Recommends Reforms for Judicial Elections*, N.Y.L.J., Dec. 4, 2003, p.1.

²² See Daniel Wise, *Pfau Takes Pesce's Brooklyn Court Post*, N.Y.L.J., Feb. 8, 2002, p.1.

²³ See, e.g., *In re Feinberg*, 2005 N.Y. LEXIS 1464 (2005) (removing Kings County Surrogate Michael Feinberg from the bench for giving lucrative guardianships to a close associate and permitting him to take excessive legal fees); see also *In re Garson*, 17 A.D.2d 243 (1st Dept. 2005) (requiring Justice Michael Garson, a cousin of Gerald Garson, to disgorge \$163,000 he looted from his aunt's guardianship estate).

²⁴ Ms. Hanimov awarded herself this appellation on her web site,

the District Attorney's office, she conducted a number of consensual recordings of conversations with Elmann and Siminovsky. These recordings focused the District Attorney's investigation on an alleged conspiracy in which Elmann, Siminovsky, Justice Garson, and his clerk Paul Sarnell gave favorable matrimonial rulings in return for bribes.

As a result of information provided by Hanimov, the District Attorney's office obtained permission to conduct electronic surveillance and video recording in Judge Garson's robing room.²⁵ A number of conversations between Garson and Siminovsky were recorded, but none of them yielded evidence of bribery.²⁶ Instead, they yielded evidence of certain ethical improprieties, including improper *ex parte* conversations and acceptance of referral fees for referring unrelated cases to Siminovsky.²⁷ In addition, the monitoring of Justice Garson's robing room and wiretaps on Siminovsky's and Elmann's cell phones revealed that Siminovsky frequently treated Garson to meals and drinks, although there was no evidence that these meals were exchanged for any judicial favors.²⁸

On February 24, 2003, Siminovsky was arrested, following which he agreed to cooperate with the prosecution and was debriefed.²⁹ At that time, he stated that he had obtained favorable treatment in return for benefits, but was unable to provide specific instances.³⁰ He did, though, make allegations that would form the basis of later charges against Judge Garson, stating that he had provided the judge with meals and drinks in exchange for *ex parte* advice and that he had given the judge fees for referring matrimonial clients to him.³¹ However, Justice Garson did not preside over any of the cases he referred to Siminovsky.³² Therefore, the referral fees constituted private transactions between attorneys rather than transactions made in return for favorable judicial treatment of Siminovsky's clients.³³

<http://www.friedahanimov.org> (last visited July 13, 2005).

²⁵ See Order of Ann T. Pfau dated December 9, 2002, in *People v. Gerald Garson*, Ind. Nos. 3515/03 and 5332/03 (Sup. Ct., Kings Co.) (on file with author). This order was subsequently renewed on February 3, 2003 and March 7, 2003.

²⁶ See Affidavit of Deputy Chief Investigator George Terra dated February 3, 2003, in *People v. Gerald Garson*, Ind. Nos. 3515/03 and 5332/03 (Sup. Ct., Kings Co.) ("Feb. 3 Terra Aff.") (on file with author), ¶¶ 18-22.

²⁷ See *id.*

²⁸ See *id.*, ¶¶ 22-24.

²⁹ See Affidavit of George Terra dated March 7, 2003, in *People v. Gerald Garson*, Ind. Nos. 3515/03 and 5332/03 (Sup. Ct., Kings Co.) ("Mar. 7 Terra Aff.") (on file with author), ¶¶ 15-16.

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See *id.*

At the time of his debriefing, Siminovsky also agreed to have his conversations recorded. Pursuant to this agreement, prosecutors recorded him engaging in *ex parte* discussions with the judge.³⁴ In addition, he was recorded via video surveillance placing a box of cigars in Justice Garson's desk.³⁵

Shortly thereafter, the Kings County District Attorney's office obtained an indictment charging Justice Garson with several counts of official misconduct,³⁶ receiving reward for official misconduct³⁷ and receiving unlawful gratuities.³⁸ This indictment was later withdrawn in substantial part and superseded by another indictment.³⁹ The top count of the second indictment was bribe receiving in the third degree,⁴⁰ a class D felony punishable by up to seven years' incarceration, predicated upon Justice Garson's receipt of cigars from Siminovsky.⁴¹ The precedent-setting aspect of the indictment, however, lay in the six counts of receiving reward for official misconduct. Of these, five were predicated upon Judge Garson's alleged receipt of referral fees, and the sixth was grounded upon the alleged receipt of benefits for conferring *ex parte* advice.⁴²

Under New York law, the offense of receiving reward for official misconduct is committed when a public servant "solicits, accepts or agrees to accept any benefit from another person for having violated his duty as a public servant."⁴³ As the prosecution acknowledged, there was no statute, in the Penal Law, Judiciary Law or elsewhere, defining receipt of private referral fees or conferral of *ex parte* advice as a violation of a judge's

³⁴ *See id.* It should be noted that Deputy Chief Investigator Terra described Justice Garson's alleged conduct as unethical rather than criminal in nature, attesting that the recorded conversations demonstrated that he was prone "at the very least to violate the judicial and attorney code of ethics." *See* Feb. 3 Terra Aff., *supra* note 26, ¶ 24.

³⁵ *See* Pretrial Omnibus Motion in *People v. Gerald Garson*, Ind. Nos. 3515/03 and 5332/03 (Sup. Ct., Kings Co.) (on file with author).

³⁶ *See* N.Y. PENAL LAW § 195.00 (McKinney 2005).

³⁷ *See id.* § 200.25.

³⁸ *See id.* § 200.35.

³⁹ *See* Ind. No. 5332/03 (Sup. Ct., Kings Co.) (on file with author). The second indictment did not completely supersede the first, in that certain charges from the first indictment remained intact. The two instruments were subsequently consolidated.

⁴⁰ *See* N.Y. PENAL LAW § 200.10.

⁴¹ *See* Ind. Nos. 3515/03 and 5332/03 (Sup. Ct., Kings Co.) (on file with author).

⁴² *See id.*

⁴³ *See* N.Y. PENAL LAW § 200.25. In contrast to the crime of bribe receiving, this offense relates to receiving gratuities for having violated one's public duty in the past, as opposed to striking a bargain to violate it in the future. *See* William J. Donnino, *Practice Commentaries to PL § 200.25*, 39 McKinney's Cons. Laws of N.Y. 262 (2000); *see also* *People v. Stokner*, 152 Misc. 2d 463, 464 (Sup. Ct., Queens Co. 1991); *People v. Garson*, 4 Misc. 3d 258, 261 (Sup. Ct., Kings Co. 2004).

duties as a public servant.⁴⁴ Instead, the prosecution contended that the duties of a judge, for purposes of the official misconduct statute, could also be defined by the ethical rules promulgated by the Chief Administrator of the Courts.⁴⁵ Specifically, the prosecution contended that the New York code of judicial conduct prohibited both the rendering of *ex parte* advice⁴⁶ and the lending of the prestige of judicial office for private purposes,⁴⁷ and that violations of these prohibitions in exchange for a benefit could be punished under the Penal Law.⁴⁸

Justice Garson's attorneys sought dismissal of these charges through several procedural devices. These included a plenary action for prohibition under Article 78 of the Civil Practice Law and Rules and a pretrial omnibus motion in the Kings County Supreme Court. In making these motions, the defense contended that the District Attorney's use of ethical rules as a predicate for charges of receiving reward for judicial misconduct was barred by the Court of Appeals' 1979 decision in *People v. La Carrubba*.⁴⁹ In *La Carrubba*, Suffolk County Court judge Gioanna La Carrubba was charged with official misconduct based on her dismissal of a traffic ticket issued to a personal friend.⁵⁰ As in the Garson case, the prosecution in *La Carrubba* alleged that this action constituted a violation of the code of judicial ethics, and therefore of a duty clearly inherent in the nature of the defendant's office.⁵¹

Judge La Carrubba was convicted of official misconduct by a Suffolk County jury, but a 5-2 majority of the Court of Appeals ruled that her conviction must be set aside. The *La Carrubba* court began by analyzing the history of the official misconduct statute, which was a consolidation of more than 30 prior statutes punishing specific acts of misconduct by public servants.⁵² The court noted that it "[did] not appear. . . that any of these sections was ever used as the basis for proceedings against a Judge to enforce ethical standards or any duty not prescribed by statute."⁵³

The Court of Appeals then addressed the prosecution's main contention: that the rules of judicial ethics defined a duty so clearly inherent in the

⁴⁴ See Response to Pretrial Omnibus Motion in *People v. Gerald Garson*, Ind. Nos. 3515/03 and 5332/03 (Sup. Ct., Kings Co.) (on file with author).

⁴⁵ See *id.*

⁴⁶ See 22 NYCRR § 100.3(b)(6).

⁴⁷ See 22 NYCRR § 100.2(c).

⁴⁸ See Response to Omnibus Motion, *supra* note 44.

⁴⁹ 46 N.Y.2d 658 (1979).

⁵⁰ See *id.* at 661.

⁵¹ See *id.* at 663.

⁵² See *id.* at 662.

⁵³ See *id.*

nature of a judge's office that violation thereof could be punished as a crime. It rejected that argument in the following terms:

Our address to this contention begins with noting that “[it] is for the legislative branch of a state or the federal government to determine, within state or federal constitutional limits, the kind of conduct which shall constitute a crime and the nature and extent of punishment which may be imposed therefor.” Even by explicit provision the Legislature may not delegate the essentially legislative function of definition of a substantive criminal offense. In the present instance, however, there has not even been an attempted delegation by the Legislature, for it has neither incorporated nor otherwise adopted the provisions of the Code of Judicial Conduct. Here the attempt is by the District Attorney alone, unaided by any legislative enactment, to import a definition of judicial duty based on ethical standards. . . . While there can be no doubt of the authority of bar associations to promulgate enforceable ethical standards or of the Appellate Division to incorporate such standards in rules of court, neither the bar associations nor the Appellate Division is empowered to discharge the legislative responsibility to define the elements of a crime.⁵⁴

The court noted further that ethical rules and penal statutes serve different purposes, and that the promulgation of ethical rules did not give fair notice to judges that violation might be subject to criminal penalties.⁵⁵ In addition, the court noted the special role of the Commission on Judicial Conduct in disciplining judges, and found that it would be both unseemly and damaging to judicial independence to have prosecutors “jockeying” with the commission for a role in judicial discipline.⁵⁶ Therefore, the *La Carrubba* court concluded that unless judicial conduct was explicitly prohibited by statute, it could not be used as the basis for a charge of official misconduct under the Penal Law.⁵⁷

The prosecution in *Garson* responded to the defendant's reliance on *La Carrubba* by arguing that it was no longer good law. Specifically, the prosecution relied upon a 1977 amendment to Article VI, Section 20 of the New York Constitution, which provided that judges shall “be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals.”⁵⁸ The prosecution argued that, by promulgating this amendment, the New York Legislature explicitly incorporated the rules of judicial ethics into the duties of a judge,

⁵⁴ *Id.* at 663.

⁵⁵ *Id.* at 663-64.

⁵⁶ *Id.* at 665.

⁵⁷ *See id.* at 664-65.

⁵⁸ *See* N.Y. Const. art. VI, § 20(4).

and violation of those rules after 1977 constituted a violation of a judge's duties as a public servant.⁵⁹ In addition, the prosecution argued that Justice Garson's case was distinguishable from *La Carrubba* because he was charged with receiving a benefit in return for his misdeeds.⁶⁰

The defense countered by arguing that the 1986 constitutional amendment did not supersede *La Carrubba*. It noted both the Chief Administrator's statement that the judicial rules should not be used as a basis for criminal liability⁶¹ and the Court of Appeals' statement that the legislature may not delegate the function of defining an offense "even by explicit provision."⁶² Thus, the defendant contended that even an amendment to the state constitution providing that judges must be "subject to" the rules of judicial conduct could not operate as a delegation of the power to define a criminal offense.⁶³ Furthermore, the defense contended that because the rules of judicial ethics included broadly worded aspirational standards such as the requirement that judges act courteously and avoid even the appearance of impropriety, it could open the door to limitless prosecution.⁶⁴

Finally, the defendant contended that Justice Garson's alleged receipt of a benefit did not constitute grounds for distinguishing his case from *La Carrubba*.⁶⁵ Specifically, he noted that even though *La Carrubba* was charged under section 195.00(2) of the Penal Law rather than section 195.00(1), this prong of the statute also required that the defendant obtain or seek a benefit on behalf of herself or a third person.⁶⁶ Moreover, he argued that the issue of receiving benefits was explicitly discussed by the *La Carrubba* court and found to be an insufficient reason to warrant the incorporation of ethical rules into the official misconduct statute.⁶⁷ Therefore, the defense contended that the judge's alleged receipt of a benefit did not constitute a valid basis to reject the holding of the *La Carrubba* court.⁶⁸

On April 29, 2004, Justice Steven Fisher of the Kings County Supreme Court issued a decision dismissing the charges of receiving reward for

⁵⁹ See Response to Omnibus Motion, *supra* note 44.

⁶⁰ See *id.*

⁶¹ See Preamble to Title 22, Chapter 100 of the New York Code of Rules and Regulations.

⁶² See *La Carrubba*, 46 N.Y.2d at 663.

⁶³ See Reply to Pretrial Omnibus Motion in *People v. Gerald Garson*, Ind. Nos. 3515/03 and 5332/03 (Sup. Ct., Kings Co.) (on file with author).

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See *id.*, citing *La Carrubba*, 46 N.Y.2d at 665.

⁶⁸ See *id.*

official misconduct.⁶⁹ The court rejected the prosecution's argument that the 1977 constitutional amendment amounted to a legislative overruling of *La Carrubba*, holding that, even if the amendment conferred the power to define elements of crimes upon the Chief Administrator of the Courts, that "authority. . . has not been effectively exercised."⁷⁰ The court noted that, in the preamble to the very rules that the prosecution sought to enforce as elements of official misconduct, the Chief Administrator explicitly stated that they were not designed as a basis for criminal prosecution.⁷¹ This made it "evident. . . [that] the Rules. . . are intended to provide a structure for regulating judicial conduct through the Commission [on Judicial Conduct], and not through criminal prosecution."⁷²

In addition, Judge Fisher noted that the Code of Judicial Conduct was "in large measure, a compilation of ethical standards, goals and aspirations that are stated in broad and general terms."⁷³ These included, *inter alia*, requirements that judges act patiently and courteously with litigants, promote public confidence in the judiciary and require high ethical standards of their staff.⁷⁴ The court concluded that "[t]he notion that Rules like these can define an element of a crime is untenable," in that they were too broadly worded to give fair notice of the conduct that was prohibited.⁷⁵

Justice Fisher then examined the specific rules underlying the charges of receiving reward for official misconduct and concluded that they were precisely the type of generalized regulation that should not give rise to criminal liability.⁷⁶ He noted, for instance, that the rule against improper *ex parte* communications "list[ed] five separate and broadly worded exceptions," and that due to its vagueness, it would be "problematic when employed to define an element of a crime."⁷⁷

The rule against "lend[ing] the prestige of judicial office to advance the

⁶⁹ *People v. Garson*, 4 Misc. 3d 258 (Sup. Ct., Kings Co. 2004).

⁷⁰ *See id.* at 263.

⁷¹ *See id.* at 265, *citing* Preamble to Title 22, Section 100 of the New York Code of Rules and Regulations.

⁷² *Id.* at 266.

⁷³ *Id.* at 263.

⁷⁴ *See id.* at 263-64, *citing* 22 NYCRR " 100.1, 100.2(a), 100.3(b)(3).

⁷⁵ *Id.* at 264.

⁷⁶ *See id.* at 264-65.

⁷⁷ *See id.* at 265. As an example of the potential overbreadth of the rule, Justice Fisher cited the disciplinary case of *Matter of Levine*, 74 N.Y.2d 294 (1989), in which a judge was disciplined for "having communications with a non-party former political leader about an adjournment in a pending case." *See Garson*, 4 Misc. 3d at 265 (*citing Levine*). Given that many judges in New York are elected officials, it is apparent that criminalizing their *ex parte* communications with political figures might be seized upon as a convenient tactic by rival candidates for judicial office or prosecutors from the opposing political party.

private interests of the judge or others” was also found by Judge Fisher to be too general to constitute a basis for criminal conduct.⁷⁸ The court noted, *inter alia*, that judges had been disciplined under this rule for “interced[ing] in . . . criminal cases for the purpose of seeking lenient treatment for the defendants,”⁷⁹ and that the Court of Appeals had extended it in some circumstances to unintentional conduct.⁸⁰ In sum, it determined that *La Carrubba* was still good law.⁸¹

Nor did the court accept the prosecution’s contention that Justice Garson was “being prosecuted, not merely for violating a Rule, but for accepting a benefit for having done so.”⁸² It noted that “the Court of Appeals brushed aside a similar argument in *La Carrubba*,” on the ground that most unethical conduct could be regarded as an attempt to obtain some sort of personal benefit.⁸³ Moreover, the court found that acceptance of a benefit is only one element of the offense with which Justice Garson was charged, and that such acceptance could not constitute criminal conduct unless the prosecution could separately prove that he violated his duties as a public servant.⁸⁴

In sum, Justice Fisher found that “the District Attorney has pointed to no instance in which a Judge in this State has been successfully prosecuted for a crime of which an essential element was the violation of a Rule of the Chief Administrator of the Courts,” and that sanctions against judges for violating such rules had hitherto been applied only in disciplinary proceedings.⁸⁵ Therefore, the court held that the evidence before the grand jury was not legally sufficient to support the charges of receiving reward for official misconduct.⁸⁶

The prosecution filed a notice of appeal from the trial court decision, and on March 18, 2005, the case was argued before the Second Department of the Appellate Division.⁸⁷ At oral argument, the prosecution contended that

⁷⁸ See *Garson I*, 4 Misc. 3d at 265.

⁷⁹ *Id.*, citing *Matter of Kiley*, 74 N.Y.2d 364 (1989).

⁸⁰ *Id.*, citing *Matter of Sims*, 61 N.Y.2d 349, 358 (1984).

⁸¹ *Id.* at 265-66.

⁸² *Id.* at 266.

⁸³ *Id.*, citing *People v. La Carrubba*, 46 N.Y.2d 658, 665 (1979).

⁸⁴ See *id.*

⁸⁵ *Id.*

⁸⁶ See *id.* at 267. The court upheld one count of official misconduct on the theory that Judge Garson had violated a statutory duty, imposed by Section 18 of the Judiciary Law, by accepting cigars in return for giving *ex parte* advice to Siminovsky. See *id.* at 267-69. It dismissed two other counts of official misconduct as duplicative, but let stand one count of receiving unlawful gratuities and one count of bribe receiving in the third degree. See *id.* at 260-61, 267-70.

⁸⁷ See Daniel Wise, *NY Prosecutors Argue to Restore Felony Counts Against Judge*,

Justice Fisher's interpretation of the law would undermine the ability of the state government to attack corruption in the courts.⁸⁸ The Kings County District Attorney's representatives also argued that the trial court's interpretation would lead to discrepancies in which people who offered rewards to judges could be prosecuted while the judges who received the gratuities could not.⁸⁹ The defense countered that Justice Fisher's interpretation, which was consistent with *La Carrubba*, was necessary to preserve judicial independence and prevent prosecutorial overreaching.⁹⁰

On April 25, 2005, the Second Department affirmed the Kings County Supreme Court's decision in a brief memorandum.⁹¹ Citing *La Carrubba*, the court held that "[a]n indictment in which the defendant's duty as a public servant, an essential element of the crime of receiving reward for official misconduct, is defined solely by reference to the Rules of Judicial Conduct. . . is insufficient."⁹² Subsequently, however, the New York Court of Appeals granted the prosecution's application for leave to appeal and, on March 30, 2006, issued a decision reversing the holdings below and reinstating the charges of receiving reward for official misconduct.⁹³

The six-judge majority began its analysis by noting that, in enacting Section 200.25 of the Penal Law, "the Legislature. . . left for factual resolution whether a public servant has 'violated his duty,'" and that proof of a public servant's duties could be adduced in the form of expert testimony or violation of a code of rules.⁹⁴ Therefore, it reasoned that exclusion of the Rules of Judicial Conduct from the scope of judicial duties would "create a new void – the immunization of judges from criminal prosecution when they receive an illicit benefit after violating a Rule Governing Judicial Conduct."⁹⁵ Since such a holding would "run[] counter to the legislative objective of deterring public servants from, and prosecuting them for, abusing their positions,"⁹⁶ the majority "conclude[d] that the People may rely on the Rules Governing Judicial Conduct to prove

N.Y.L.J., Mar. 21, 2005, p.1.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *People v. Garson*, 17 A.D.3d 695 (2d Dept. 2005).

⁹² *Id.* (citations omitted).

⁹³ *People v. Garson*, 2006 N.Y. LEXIS 616 (Mar. 30, 2006).

⁹⁴ *Id.* at *14-15.

⁹⁵ See *id.* at *16; see also *id.* at *19 (stating that a contrary holding "would lead to the incongruous result of insulating judges from criminal liability under Penal Law ' 200.25 because they have a formal body of rules governing their conduct while subjecting other public servants - whose duties are not defined in either Penal Law ' 200.25 or any express code of conduct comparable to the Rules - to criminal liability for similar conduct").

⁹⁶ See *id.* at *19-20.

the element of a judge's 'duty as a public servant' within the meaning of Penal Law ' 200.25."⁹⁷

The majority then went on to find, contrary to the Supreme Court and the Appellate Division, that *La Carrubba* was not controlling as to the facts at bar.⁹⁸ First, the majority ruled that the Code of Judicial Conduct at issue in *La Carrubba* was "merely a compilation of ethical objectives and exhortations," whereas the subsequently enacted Rules were "a fundamental objective standard of how judges must conduct themselves."⁹⁹ The "objective" nature of the Rules, combined with the 1977 constitutional amendment making compliance mandatory, provided sufficient notice that they were part of New York judges' duties and "addresses the concern that the prosecutor could use an advisory, aspirational code of ethics to help prove an element of the crime."¹⁰⁰ Moreover, the statement in the preamble to the effect that the Rules "are not designed or intended as a basis for. . . criminal prosecution" was "not controlling of a statute or rule's terms but. . . simply a useful aid for interpreting them where there is ambiguity."¹⁰¹

The majority also found a second "key difference" between the *Garson* prosecution and *La Carrubba*. Specifically, the majority opined that in *La Carrubba*, "the Penal Law was effectively being used as a vehicle to pursue claims of ethical improprieties" against a judge who violated her "duties to avoid the appearance of impropriety and to act impartially."¹⁰² In contrast, "the criminal prosecution [in *Garson*] rests not on a violation of the Rules alone but on the acceptance of a benefit for violating an official duty defined by the Rules."¹⁰³ The majority further explained its reasoning as follows:

Had the judge as a public servant violated ethical duties alone – without accepting a benefit for the violation – and had the action not otherwise been prohibited by the Penal Law, the public servant would be subject only to discipline in a proceeding brought by the Commission on Judicial Conduct. This critical distinction alleviates many of the concerns we had in *La Carrubba*, including the concern that to allow criminal prosecution of ethical violations under Penal Law ' 195.00(2) would create an "awkward and often unseemly" landscape where different groups would

⁹⁷ *Id.* at *21.

⁹⁸ *See id.* at *21-28.

⁹⁹ *Id.* at *22, *25.

¹⁰⁰ *See id.* at *25-26.

¹⁰¹ *See id.* at *25, citing McKinney's *Statutes* ' 122.

¹⁰² *See id.* at *26-27.

¹⁰³ *Id.* at *27.

likely “jockey for prosecutorial priority or advantage.”¹⁰⁴

The majority’s attempt to distinguish *La Carrubba*, however, fails in at least five respects to withstand scrutiny. First, the requirement that a public servant accept or agree to accept a “benefit” in order to be prosecuted under PL ‘ 200.25, which the majority described as a “critical distinction,” is in fact no distinction at all. Pursuant to Section 10.00(17) of the Penal Law, a “benefit” means “any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.”¹⁰⁵ Therefore, a judge need not realize any personal gain in order to accept a “benefit;” instead, all that is necessary is that he acquiesce in a gain or advantage being realized by a third party.

This being so, it is difficult to imagine how the facts of *Garson* could be distinguished on this basis from those of *La Carrubba*. To be sure, Judge La Carrubba did not intend to realize any personal gain from her unethical conduct, but she did intend that her friend obtain a “gain or advantage” - namely, the dismissal of a traffic summons.¹⁰⁶ Therefore, Judge La Carrubba intended to obtain a “benefit” within the definition of the Penal Law - and, as the *La Carrubba* court noted, most unethical conduct can be so categorized because it is intended to benefit *someone*.¹⁰⁷ Indeed, *La Carrubba* cannot even be distinguished from *Garson* in terms of the elements of the underlying statute, because the offense with which Judge La Carrubba was charged similarly requires proof that the defendant acted with “intent to obtain a benefit or deprive another person of a benefit.”¹⁰⁸

Second, while some of the Rules of Judicial Conduct might be more specific or “objective” than the code at issue in *La Carrubba*, they still contain numerous broadly worded “ethical objectives and exhortations.”¹⁰⁹ As pointed out by the Supreme Court, the Rules of Judicial Conduct require *inter alia* that judges “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary”¹¹⁰ and that they be “patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others.”¹¹¹ Such admonitions are hardly “objective” standards of conduct - and, although the majority paid lip service to the problematic

¹⁰⁴ *Id.* at *27-28.

¹⁰⁵ PL ‘ 10.00(17).

¹⁰⁶ *See La Carrubba*, 46 N.Y.2d at 661.

¹⁰⁷ *See id.* at 665.

¹⁰⁸ *See* PL ‘ 195.00.

¹⁰⁹ *See Garson III*, 2006 N.Y. LEXIS 616, *22.

¹¹⁰ 22 NYCRR ‘ 100.2(1).

¹¹¹ 22 NYCRR ‘ 100.3(3).

effect of prosecuting judges for such “ethical improprieties,”¹¹² it provided no meaningful basis to distinguish between them and the more specific prohibitions contained in the Rules. As Judge George Bundy Smith wrote in his powerful dissent, the majority opinion effectively renders “prosecutor[s]. . . the judge[s] of when and how rule[s] of judicial conduct become[] criminal.”¹¹³

Judge Smith’s dissent also highlights yet a third basis on which the majority opinion falls short: specifically, the issue of notice. As the dissenting judge argued:

There is nothing in the preamble [of the Rules on Judicial Conduct] to suggest that criminal prosecution can result from any violation of the Rules. Further, the preamble explicitly states that the criminal prosecution should not result from the Rules. Consequently, defendant was not on notice that the rules of conduct could result in criminal prosecution.¹¹⁴

Moreover, Judge Smith noted that “[t]here appear to be no statutes and no cases that hold that a judge can be held criminally liable for failure to comply with the Rules of Judicial Conduct.”¹¹⁵ Thus, even assuming *arguendo* that the preamble was not binding on the courts, its existence precluded a finding that judges were on *notice* of the possibility that ethical lapses might result in prosecution.¹¹⁶

Fourth, the dissenting judge noted that Article III, section 1 of the New York State Constitution vests the legislative power in the Senate and Assembly, and that “[t]he legislative power cannot be passed on to others.”¹¹⁷ As such, the Legislature had no power to delegate to the Commission on Judicial Conduct the authority to define criminal offenses, and “[t]he clearest reading of 22 NYCRR Part 100 is that it consists of rules governing judicial conduct, not criminal statutes passed by the Legislature.”¹¹⁸

Finally, the dissent argued that “[i]t is simply incorrect that judges are immune from the criminal law if the Rules of Judicial Conduct do not authorize a criminal action,” and cited other statutes under which erring

¹¹² See *Garson III*, 2006 N.Y. LEXIS 616, *27.

¹¹³ *Id.* at *59 (Smith, J., dissenting).

¹¹⁴ *Id.* at *41-42.

¹¹⁵ *Id.* at *48.

¹¹⁶ See *id.* at *54-59. Moreover, Judge Smith argued that the preamble is “the key which opens the mind of the lawmakers as to the mischiefs which are intended to be remedied by the statute. . . [it] is entitled to great respect though it is not conclusive.” See *id.* at *58, citing *McKinney’s Statutes* ‘ 122.

¹¹⁷ See *id.* at *40, quoting *Darweger v. Staats*, 267 N.Y. 290, 305 (1935).

¹¹⁸ *Id.* at *41.

judges can be, and are, prosecuted.¹¹⁹ Judge Smith contended that incremental gain in deterrence is outweighed by the new uncertainty as to which ethical violations might subject judges to criminal sanction, the empowerment of prosecutors to selectively file charges against sitting judges, and the diminution of the Commission on Judicial Conduct's role in judicial discipline.¹²⁰ The impact of these factors upon judicial independence will be discussed further in subsequent parts of this Article.

III. AMERICAN JURISPRUDENCE CONCERNING ETHICAL VIOLATIONS BY PUBLIC OFFICIALS.

The issues raised in *Garson* are relatively novel to American jurisprudence, because there have been few attempts to prosecute public officials based solely on ethical violations. This is particularly true of attorneys and judges, who are traditionally subject to internal discipline and whose prosecution implicates separation of powers concerns.¹²¹ For the most part, even serious ethical lapses by such officials have been punished administratively rather than through criminal prosecution, unless their acts fall within the ambit of a specific criminal statute.¹²² In an extreme case, a Nebraska county judge who practiced in his own court was disciplined administratively because he was not shown to have taken bribes or otherwise acted corruptly.¹²³

Beginning about 1960, however, several factors combined to create a public perception of a need for greater judicial discipline.¹²⁴ Prior to this time, it was widely believed that judicial rulings were guided by common-law precedent and the "broadly shared values" of society.¹²⁵ This belief began to erode during the upheavals of the civil rights era, as judges increasingly challenged both the precedent of prior courts and the

¹¹⁹ *Id.* at *61.

¹²⁰ *See id.* at *59-61.

¹²¹ *See* notes 188-218 *infra* and accompanying text.

¹²² Needless to say, conduct that *is* violative of a specific criminal statute can be a basis for criminal prosecution even if it also constitutes a violation of an ethical rule. *See, e.g., People v. Lynch*, 176 Misc. 2d 430, 437 (Sup. Ct., Rockland Co. 1998) ("[e]thical impropriety may coexist with criminal conduct and the existence of the former does not preempt the imposition of criminal sanction for the violation of a penal statute"); *see also* William E. Nelson, *The Integrity of the Judiciary in Twentieth Century New York*, 51 Rutgers L. Rev. 1 (1998) (noting that "[n]o one has ever doubted that a judge who is caught accepting bribes to determine the outcome of cases should be thrown from the bench and sent to prison").

¹²³ *See Nebraska State Bar Ass'n v. Wiebusch*, 45 N.W.2d 583 (Neb. 1951).

¹²⁴ *See* Nelson, *supra* note 95, at 34.

¹²⁵ *See id.*

consensus of society.¹²⁶ As the public became increasingly aware that judges had no ironclad rules to guide their decisions, it began to seek outside controls as a restraint on judicial power.¹²⁷

These factors, in other words, “made it necessary to ‘erect something new with which to convince the public, and perhaps even the judges themselves, of the special dignity and integrity of the bench.’”¹²⁸ In order to maintain full confidence in the often subjective nature of the judicial decision-making process, “[j]udges. . . had to abide by standards of conduct on a plane much higher than those for society as a whole’ in order to preserve ‘the integrity and independence of the judiciary.’”¹²⁹ Judicial ethics, “in short, had to be made pure.”¹³⁰

One effect of such higher standards was the creation of formal judicial disciplinary commissions, such as the 1975 establishment of the New York Commission on Judicial Conduct.¹³¹ Furthermore, in a number of cases, prosecutors sought to enforce these standards with the threat of criminal liability.¹³² In most cases where prosecutors have sought to enforce ethical codes through criminal sanction, they have utilized penal statutes prohibiting official misconduct, contending that such ethical codes are part of public officials’ duties. All but three of these cases have resulted in decisions in the defendants’ favor, and the analysis of the courts has focused on three issues: separation of powers, the extent of legislative authority that can be delegated to administrative agencies, and the possibility of frivolous prosecutions.

A. Delegation of Legislative Authority.

The decision most analogous to *Garson*, albeit not involving a judge, may be the Minnesota case of *State v. Serstock*.¹³³ The defendant in *Serstock*, a deputy Minneapolis city attorney, was accused of “ticket

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *Id.* at 34-35.

¹²⁹ *Id.* at 35.

¹³⁰ *Id.*

¹³¹ *See* Gerald Stern, *Judicial Error that is Subject to Discipline in New York*, 32 Hofstra L. Rev. 1547, 1548-49 (2004). Prior to the establishment of the Commission, judicial discipline was conducted on an *ad hoc* basis by the appellate courts. *See id.* It should be noted that Stern himself was the first chairman of the Commission, and was so influential concerning judicial discipline in New York that the tribunal was known colloquially as the “Stern Commission.”

¹³² *See* notes 133-218 *infra* and accompanying text.

¹³³ 390 N.W.2d 399 (Minn. App. 1986) (“*Serstock I*”), *rev’d in part*, 402 N.W.2d 514 (Minn. 1987) (“*Serstock II*”).

fixing,” but his activities didn’t involve the quid pro quo of dismissal for money normally associated with fixing tickets.¹³⁴ Instead, he “dismissed or wrongfully delayed numerous parking tickets and moving violations as a personal favor” for two local people to whom he was financially indebted,¹³⁵ and also improperly dismissed tickets charging offenses that occurred outside Minneapolis.¹³⁶ There was no indication that he received forbearance of his debts or any other financial consideration in return for these dismissals.

In the absence of any evidence of bribery, the prosecution charged Serstock with misconduct as a public officer under Minnesota law.¹³⁷ This statute prohibits a public officer, while acting in his official capacity, from performing “an act which he knows is in excess of his lawful authority or which he knows he is forbidden by law to do in his official capacity.”¹³⁸ The prosecution’s theory was that “Serstock knew [his] actions were in excess of his lawful authority. . . because they were flagrant violations of the Code of Professional Responsibility and the Ethics Code of the Minneapolis City Attorney.”¹³⁹ As in *Garson*, the prosecutor argued that these ethical codes “may be used to define the ‘lawful authority’ which may not be ‘exceeded’ by a public officer,” and that “a violation of either of these codes of conduct by a Minneapolis city attorney is *ipso facto* a violation of [the official misconduct statute].”¹⁴⁰

The Minnesota Court of Appeal disagreed. Although it suggested that a “properly promulgated rule or regulation of an administrative agency” may have the force of law and define a legal duty,¹⁴¹ it noted that the ethical code promulgated by the Minnesota Supreme Court was prefaced by an order providing that violations “shall be subject to discipline or disbarment in the manner provided by rules of this court.”¹⁴² Thus, the court concluded that “[v]iolations of the code were therefore intended to subject an attorney to disciplinary proceedings, not criminal charges,” and that there was no indication that the legislature intended ethical violations without more “to form the basis of a criminal charge of official misconduct

¹³⁴ *Serstock I*, 390 N.W.2d at 401.

¹³⁵ *See id.* at 401 & n.1.

¹³⁶ *See id.*

¹³⁷ *See* Minn. Stat. ‘ 609.43(2).

¹³⁸ *See id.*

¹³⁹ *Serstock I*, 390 N.W.2d at 401.

¹⁴⁰ *Id.* at 402 (emphasis in original).

¹⁴¹ *Id.* at 404, citing *People v. Samel*, 451 N.E.2d 892, 896 (Ill. App. 1983) (“an agency exercising its rule-making power gives expression to legislative policy and thus performs a quasi-legislative function”).

¹⁴² *Id.* at 403, quoting Minn. Supreme Court Order (Aug. 4, 1970).

against a public attorney.”¹⁴³

The court further held that the ethics code of the Minneapolis City Attorney’s office “is not the product of any type of legislative function [but] is simply the conditions of employment which are required of employees by their employer.”¹⁴⁴ Moreover, permitting criminal prosecution solely for violation of the ethical code might give rise to irresponsible charges:

An examination of the conduct which would become criminal under the State’s theory demonstrates the impossibility of its position. The Ethics Code of the Minneapolis City Attorney prohibits city attorneys from giving “rude” or “discriminatory treatment” to any person; they may not “lose impartiality” or “impede government efficiency.” Attorney employees cannot engage in any other employment without giving notice, nor “accept any gift.” They cannot engage in any “infamous, immoral or notoriously disgraceful conduct,” make public comment on any matter of “office policy” or lobby for or against any proposed legislation. We do not think the legislature intended such actions by public attorneys to be crimes under section 609.43(2). In addition, we are unwilling, in this instance, to rely upon prosecutorial discretion as the sole safeguard between public attorneys and a multitude of dubious criminal charges.¹⁴⁵

Therefore, “an allegation that a public attorney simply violated an “ethics code” promulgated by his employer does not state a criminal offense” under the Minnesota official misconduct statute.¹⁴⁶

The Court of Appeals did find, however, that Serstock could be prosecuted for exceeding his geographic jurisdiction, which was established by statute rather than disciplinary rule.¹⁴⁷ The matter was then taken to the Minnesota Supreme Court, which extended the Court of Appeals’ holding by dismissing the indictment outright.¹⁴⁸ The *en banc* court agreed with the Court of Appeals’ reasoning that neither the Code of Professional Responsibility nor the Minneapolis ethics code were intended

¹⁴³ *Id.*

¹⁴⁴ *See id.* at 404.

¹⁴⁵ *Id.* at 404. Many commentators have noted the dangers of using essentially regulatory codes to enforce criminal liability. *See, e.g.,* John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal?” Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 200 (1991) (noting that “the criminal sanction is increasingly used by regulators as a preferred enforcement tool without regard to the traditional limitations on its use”). Coffee argues that, “once everything wrongful is determined to be criminal, society’s ability to reserve special condemnation for some forms of misconduct is either lost or simply reduced to a matter of prosecutorial discretion.” *Id.* at 201.

¹⁴⁶ *See Serstock I*, 390 N.E.2d at 404.

¹⁴⁷ *See id.* at 404-05.

¹⁴⁸ *See Serstock II*, 402 N.E.2d at 515.

to form the basis of criminal prosecution.¹⁴⁹ It also voiced concern that, by requiring proof of an ethical violation as part of the prosecutor's burden, such prosecutions would require lower courts to determine whether ethical violations occurred and compromise the Supreme Court's role as the sole arbiter of attorney discipline.¹⁵⁰

The *Serstock* decision therefore involved circumstances remarkably parallel to those of *Garson* - i.e., an ethical code that was promulgated under statutory authority but specifically stated that it was not intended as a basis for criminal prosecution. As the prosecutor in *Garson* noted, this set up a potential paradox. On the one hand, such an ethical code is promulgated by an agency that has been given the statutory power to define an attorney's duty, and a violation of the code by a public attorney would arguably be tantamount to a violation of his public trust. On the other hand, the authors of the code specifically stated that they did not intend it to define public officers' duties for purposes of criminal liability. The *Serstock* court resolved this dilemma by treating the delegation of legislative power as total: i.e., that the code *in its entirety* was an expression of legislative policy, including the limitations on its use for prosecutorial purposes.

This resolution could provide a blueprint, not only for Minnesota and New York, but for the 25 other states whose codes of judicial ethics are modeled after the 1990 ABA Model Code of Judicial Conduct. The preamble to that code, which has been adopted verbatim in 27 states, provides that it is "designed to provide guidance to judges... and to provide a structure for regulating conduct through disciplinary agencies," but "is not designed or intended as a basis for civil liability or criminal prosecution."¹⁵¹ By the reasoning of *Serstock*, the adoption of this language by a court or administrative body that is legislatively empowered to regulate judicial conduct is tantamount to its adoption by the legislature itself. Accordingly, adoption of the 1990 Model Code arguably represents a legislative decision to remove ordinary ethical violations from the ambit of the criminal law.

A closer question is presented in the 22 states where the code of judicial ethics is silent as to whether it is intended to be enforced by criminal

¹⁴⁹ See *id.* at 516-17. The court noted that, even assuming *arguendo* that the intent of the ethical provisions was ambiguous, the rule of lenity dictated that this ambiguity be resolved in the defendant's favor. See *id.* at 516, citing *State v. Haas*, 159 N.W.2d 118, 121 (Minn. 1968).

¹⁵⁰ *Id.* at 517 n.2. The Supreme Court additionally dismissed the count charging *Serstock* with exceeding his geographic jurisdiction, but did so on the technical ground that the indictment was insufficiently specific as to the statutory duty he violated. See *id.* at 518.

¹⁵¹ See ABA Model Code of Judicial Conduct, Preamble-Terminology (1990).

sanction.¹⁵² This question was answered in the negative by the Supreme Court of Louisiana in *State v. Perez*,¹⁵³ in which a district attorney and judge were prosecuted for colluding in the unlawful discharge of a grand jury.¹⁵⁴ The Plaquemines Parish district attorney, Leander Perez, was accused of official misconduct in connection with a grand jury that was investigating corruption in the parish.¹⁵⁵ After the grand jury foreman received a letter suggesting that members of the district attorney's family be indicted for illegal real estate transactions, Perez met with the supervising judge, Eugene E. Leon, Jr., and agreed that the grand jurors be discharged.¹⁵⁶ Subsequently, Perez empaneled another grand jury and secured indictments of the letter's author and the former grand jury's foreman.¹⁵⁷

When the truth came out and Perez and Leon were themselves indicted, they moved for a writ of prohibition enjoining their prosecution, which the Louisiana Court of Appeal granted.¹⁵⁸ On appeal, the Supreme Court reinstated some of the charges, which accused Perez and Leon of violating certain duties imposed upon them by statute.¹⁵⁹ However, the court rejected the prosecution's argument that Disciplinary Rule 7-103 of the Louisiana Code of Professional Responsibility "imposed an affirmative duty upon the district attorney not to institute the extortion charges against [the foreman and letter-writer] in bad faith and without probable cause."¹⁶⁰ Instead, it held that in light of the traditional discretion afforded to district attorney's in bringing criminal charges, a charge of malfeasance could not be based on an ethical rule alone without "a specific provision of law."¹⁶¹

¹⁵² The majority of these states have adopted codes of judicial ethics predicated on the 1972 ABA Model Code, which did not contain a preamble. Montana is currently the only state that has not adopted a code of ethics based on the 1972 or 1990 model codes. See Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Independence and Accountability*, 32 Hofstra L. Rev. 1245, 1246 n.4 (2004). Montana's ethical rules are still based largely on the ABA's 1924 Model Canons of Judicial Ethics.

¹⁵³ 464 So. 2d 737 (La. 1985) ("Perez II").

¹⁵⁴ See *id.* at 739.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 739 & n.1. The letter "charged the [Perez] family. . . with illegally obtaining oil properties of the Parish," and "observed that civil litigation [to recover the properties] would be lengthy and suggested that if the grand jury were to bring indictments against the Perezs, the family might be persuaded to return some of the oil properties." *Id.* at 739.

¹⁵⁷ See *id.* The facts of the case, which set forth a classic tale of parish corruption, are set out at greater length in the Court of Appeal decision reviewed by the Louisiana Supreme Court. See *State v. Perez*, 450 So. 2d 1324, 1327-35 (La. App. 1984) ("Perez I").

¹⁵⁸ See *Perez I*, 450 So. 2d at 1338-39.

¹⁵⁹ *Perez II*, 464 So. 2d at 741-43, 744.

¹⁶⁰ See *id.* at 741.

¹⁶¹ *Id.* at 744. The majority also rejected a concurring argument that, since the Louisiana

The Florida courts have similarly held, although the state judicial code of ethics is silent as to the imposition of criminal liability, that ethical violations alone cannot form the basis for prosecuting a county judge.¹⁶²

In Iowa, the code of judicial conduct is unique in providing that ethical violations *can* subject judges “to the imposition of criminal and civil penalties in the manner provided by law.”¹⁶³ There is no reported decision, however, in which an Iowa judge has ever been prosecuted solely for a violation of the code of ethics. And even if such a prosecution were instituted, it wouldn’t necessarily pass muster in the courts. In Delaware, for instance, a court dismissed charges of official misconduct against a state banking commissioner that were predicated solely upon his violation of administrative conflict-of-interest rules, even though the legislature had provided that “[s]ome standards of this type are so vital to government that violation thereof should subject the violator to criminal penalties.”¹⁶⁴ The court concluded that, absent a legislative determination as to *which* ethical lapses might warrant criminal sanction, the conflict-of-interest rule could not be considered a “duty. . . [so] clearly inherent in the nature of [the defendant’s] office” as to be a basis for an official misconduct charge.¹⁶⁵

The courts of Illinois have indicated in *dicta* that public attorneys may be charged with official misconduct based on a violation of any “statute, supreme court rule, administrative rule or regulation, or tenet of the Code

attorney disciplinary rules were “rules of [the Supreme] court promulgated under its exclusive authority to regulate the practice of law, [they] have the force and effect of substantive law.” *See id.* at 745 (Dennis, J., concurring). Louisiana courts have reached similar holdings in determining that police operations manuals and the state real estate commission’s ethical rules did not define legal duties such that their violation could be prosecuted as malfeasance. *See State v. Hessler*, 570 So.2d 95, 96-97 (La. App. 1990) (police officer who failed to follow procedures for protecting prisoners, resulting in an assault on a prisoner in his charge, could not be prosecuted for malfeasance); *see also State v. Passman*, 391 So.2d 1140, 1144 (La. 1980) (director of real estate commission could not be prosecuted for issuing licenses to friends without regard to their test scores, because he had no express statutory duty to institute and practice fair testing procedures).

¹⁶² *See Clayton v. Willis*, 489 So. 2d 813, 818-20 (Fla. App. 1986); *see also* notes 153-61 *infra* and accompanying text (discussing *Clayton* at length).

¹⁶³ *See* La. Code ‘ 602.1609. The Iowa judicial ethics code is otherwise based on the 1972 ABA Model Code.

¹⁶⁴ *See State v. Green*, 376 A.2d 424, 427-28 (Del. Super. 1977). The rule allegedly violated by the defendant required him to disclose loans received from any business subject to state regulation. *See id.* at 428.

¹⁶⁵ *See id.* (noting that “[s]pecification of such ethical standards and appropriate sanctions for their violation is a legislative function, not one to be performed by a court in a prosecution for official misconduct”). At least one Delaware court, however, has drawn a distinction in cases where the defendant profits personally from unethical conduct, holding that public officials have an inherent duty “not to profit personally from the services and property of [a] public agency.” *See Howell v. State*, 421 A.2d 892, 897 (Del. 1980).

of Professional Responsibility.”¹⁶⁶ Moreover, the Illinois courts have held that an administrative regulation need not contain an explicit penalty clause in order to form the basis of an indictment for official misconduct.¹⁶⁷ This liability, however, is predicated upon the same reasoning set forth in *Serstock* - i.e., that an administrative agency acting under legislatively granted rule-making authority “gives expression to legislative policy.”¹⁶⁸ Given that the Illinois Code of Judicial Conduct, unlike its ethical rules for attorneys, explicitly states that it is not intended as a basis for prosecution,¹⁶⁹ this rationale may preclude Illinois *judges* from being prosecuted for ethical violations only.

Perhaps the only true exception outside New York to the general rule of non-prosecution for purely ethical violations is the state of Wisconsin. Two recent Court of Appeal decisions in Wisconsin have held that official misconduct prosecutions could be predicated on ethical rules or even employee handbooks. In *State v. Chvala*,¹⁷⁰ the defendant, a state senator, was accused of using public employees to conduct private political work on behalf of himself and the Democratic Party.¹⁷¹ In October 2002, he was charged with official misconduct on the theory that, *inter alia*, the Senate Policy Manual prohibited legislative workers from being assigned to campaign work during duty hours.¹⁷²

Citing a commission report providing that a public employee’s duty “may be imposed by common law, statute, municipal ordinance, regulation and perhaps other sources,” the Wisconsin Court of Appeal found that “a legislator’s duty under [the official misconduct statute] may be determined by . . . the Senate Policy Manual.”¹⁷³ Therefore, a legislative rule prohibiting “political activity [by state employees] during working hours,” combined with explanatory materials issued by the Clerk of the Senate, were found to define the defendant’s legal duties sufficiently for criminal liability.¹⁷⁴ The companion case of *State v. Jensen*,¹⁷⁵ which involved

¹⁶⁶ See *People v. Weber*, 479 N.E.2d 382, 383 (Ill. App. 1985).

¹⁶⁷ See *People v. Samel*, 451 N.E.2d 892, 896-97 (Ill. App. 1983) (police officer could be charged with official misconduct for procuring “the name and address of a specified vehicle registration number owner by means of a computer check. . . for purposes other than law enforcement”).

¹⁶⁸ *Id.* at 896.

¹⁶⁹ See Ill. Sup. Ct. Rules, Art. I, Preamble (adopting the language of the 1990 ABA Model Code preamble).

¹⁷⁰ 678 N.W.2d 880 (Wis. App. 2004).

¹⁷¹ See *id.* at 885.

¹⁷² See *id.*

¹⁷³ *Id.* at 888.

¹⁷⁴ See *id.* at 889; see also *id.* at 889-90 (finding that “[the defendant’s] duty as a legislator is sufficiently delineated in the Senate Policy Manual. . . such that a reasonable person would

similar charges against several Republican members of the State Assembly, likewise found that the Assembly Employee Handbook, various explanatory notes and an opinion of the State Ethics Board were sufficient sources of legal duty to form the basis of official misconduct charges.¹⁷⁶

On June 22, 2004, the Wisconsin Supreme Court granted leave to appeal in both *Chvala* and *Jensen*.¹⁷⁷ Three of the seven judges recused themselves from consideration of the merits.¹⁷⁸ The court's 2005 decision was issued by the remaining four judges, two of whom voted to reverse on vagueness grounds while two voted to affirm.¹⁷⁹ Because the court was evenly divided, the Court of Appeal rulings stood,¹⁸⁰ but their value as precedent has been greatly weakened.¹⁸¹

Moreover, the Wisconsin cases are not entirely analogous to those involving judges, because the ethical rules of a legislature are distinguishable from those of the judiciary. Given that the determination of criminal liability and punishment is a uniquely legislative province, a legislative body can be presumed to know what sanctions it intends to impose at the time it establishes a rule. If the legislature believes that the sole sanction for rule violations should be internal discipline, it has full power to exempt its members from criminal liability. Where legal and judicial ethics are at issue, however, silence is more ambiguous. American case law to date provides slim support for the argument that codes of judicial ethics can form the basis of prosecution absent specific statutory authorization.

be aware that using discretionary powers to obtain a dishonest advantage over others by waging partisan political campaigns with state resources violates one's duty as a public official").

¹⁷⁵ 681 N.W.2d 230 (Wis. App. 2004).

¹⁷⁶ See *id.* at 239-40. The language of the Assembly handbook and explanatory memoranda were essentially identical to the Senate materials at issue in *Chvala*.

¹⁷⁷ See *State v. Chvala*, 684 N.W.2d 136 (Wis. 2004); *State v. Jensen*, 684 N.W.2d 136 (Wis. 2004).

¹⁷⁸ See Steven Walters, *Three Justices Recuse Themselves: Bare Majority to Hear Two Cases Involving Legislator Misconduct*, Milwaukee Journal Sentinel, Jan. 6, 2005, p.B1. One of the three justices, David Prosser, stated that he was recusing himself because the defendants were former colleagues in the state legislature, while the other two justices did not specify their reasons for withdrawing. See *id.*

¹⁷⁹ See *State v. Chvala*, 693 N.W.2d 747 (Wis. 2005); *State v. Jensen*, 694 N.W.2d 56 (Wis. 2005).

¹⁸⁰ See *id.*

¹⁸¹ See Phil Brinkman & Dee J. Hall, *High Court Ruling Lets Criminal Cases Proceed: Deadlock on Key Issue Lets Appeals Decision Stand*, Wisconsin State Journal, Mar. 24, 2005, p.A1 (noting the lack of guidance provided by the Supreme Court rulings).

B. Possibility of Frivolous Prosecutions.

Another concern cited by courts in limiting criminal liability is the possibility of prosecutions for minor, innocuous ethical violations. Although this possibility exists with respect to nearly all public ethical codes, it is especially great where legal or judicial ethics are concerned. This is because codes of ethics for lawyers and judges are, and are intended to be, expressions of values as well as concrete rules of conduct.¹⁸²

The preamble to the 1990 ABA Model Code of Judicial Conduct, for instance, states that it contains both binding obligations and “hortatory rules,” designed to foster the principle that “judges. . . must respect and honor the judicial office as a public trust.”¹⁸³ The Model Code of Professional Responsibility is even more explicit:

The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules. . .¹⁸⁴

As such, even the mandatory Disciplinary Rules - which, unlike the Canons and Ethical Considerations, are explicitly intended to form the basis of disciplinary action¹⁸⁵ - contain such broad and generalized requirements as avoiding “even the appearance of impropriety”¹⁸⁶ and refraining from the use of letterheads that are not “in dignified form.”¹⁸⁷ Likewise, judges cannot hold membership in organizations that practice unlawful discrimination¹⁸⁸ and “shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others.”¹⁸⁹ If these are enforced as the basis of criminal liability, then discourteous judges or lawyers with undignified letterheads might potentially become felons.

This concern was relied upon by the Florida Court of Appeals in *Clayton v. Willis*,¹⁹⁰ which granted an injunction prohibiting prosecution of a county judge for violation of ethical and procedural rules. The defendant, Judge Wiley Clayton, had incurred the wrath of the district attorney by, *inter alia*, releasing criminal defendants on their own recognizance *ex parte*, conducting plea colloquies without the presence of the prosecution, and

¹⁸² See notes 172-78 *infra* and accompanying text.

¹⁸³ See ABA Model Code of Judicial Conduct, Preamble (1990).

¹⁸⁴ See ABA Model Code of Professional Responsibility, Preliminary Statement (1980).

¹⁸⁵ See *id.*

¹⁸⁶ *Id.*, DR 9-101.

¹⁸⁷ *Id.*, DR 2-102(A).

¹⁸⁸ See ABA Model Code of Judicial Conduct, Canon 2(C)

¹⁸⁹ *Id.*, Canon 3(B)(4).

¹⁹⁰ 489 So. 2d 813 (Fla. App. 1986), *rev. denied*, 500 So. 2d 546 (Fla. 1986).

failing to assess the minimum penalties for traffic offenses.¹⁹¹ Rather than referring these matters to the judicial disciplinary committee, the district attorney's office indicted Clayton on 23 misdemeanor counts of misconduct in office, as well as two unrelated felony charges.¹⁹²

As the Court of Appeal found, the charges against Judge Clayton represented an extraordinary abuse of power that "reveal[ed] the principal weakness of the grand jury system - the propensity of well-intentioned jurymen in the hands of an irresponsible prosecutor to be led down any path."¹⁹³ Indeed, the prosecution was not brought under any statute but under the common law of England, which was incorporated into Florida criminal law in areas "where there is no existing provision by statute."¹⁹⁴ After a survey of English cases dating from the eighteenth and nineteenth centuries, the Court of Appeal concluded that the common law crime of misconduct in office, when predicated on discretionary acts, required proof of a corrupt motive.¹⁹⁵ The court additionally found that, even if the common law offense could be interpreted to include such acts, it was unconstitutional as applied to violations of judicial ethics:

This court is concerned about the prosecutor's use of the indictment process in this case to level charges which are fatuous and patently without merit. For example, in the absence of bribery or corrupt influence, it cannot be a crime for a judge to release a defendant on his own recognizance; it cannot be a crime to withhold adjudication of guilt or waive court appearances; it cannot be a crime to fail to have a court reporter present on all occasions; it cannot be a crime to amend a judgment or correct a record; it cannot be a crime to dismiss a case or to fail to fingerprint a defendant. If these matters are crimes, virtually every judge in Florida, including the respondent, is subject to indictment at the whim and caprice of a disgruntled or ambitious state attorney.¹⁹⁶

The court "firmly reject[ed] and repudiate[d] these contentions"¹⁹⁷ and

¹⁹¹ See *id.* at 820-28 (reproducing the indictment).

¹⁹² See *id.* at 814-15.

¹⁹³ See *id.* at 819.

¹⁹⁴ See *id.* at 816, citing Fla. Stat. ' 775.01. The British cases cited by the court drew a distinction between nonfeasance, which could be prosecuted regardless of the defendant's motive, and misfeasance, which required corrupt motive. This distinction was drawn as early as *Crouther's Case*, 2 Hawk P.C. 116 (Q.B. 1599), which held that a constable could be indicted for failing to raise a hue and cry upon learning that a burglary had been committed at night. In contrast, "[t]he only punishment at common law for nonministerial, discretionary acts was impeachment, absent corrupt circumstances." *Clayton*, 489 So. 2d at 817, citing 1 William L. Burdick, *The Law of Crime*, ' 272a (1946).

¹⁹⁵ See *Clayton*, 489 So. 2d at 817.

¹⁹⁶ *Id.* at 818-19.

¹⁹⁷ *Id.* at 819.

adamantly stated that the criminal courts are not the place to deal with such trivialities. Accordingly, it dismissed the charges against Judge Clayton, without prejudice to consideration by a judicial disciplinary board.¹⁹⁸

C. Separation of Powers.

Separation of powers is a concern in any criminal prosecution brought against a public employee, but especially so where the defendant is a judge. In cases where administrative officials or law enforcement officers are prosecuted, the executive branch is prosecuting members of a different agency. A criminal prosecution of a judge, however, sets up a direct confrontation between the executive and the judiciary. As such, this raises the possibility selective prosecution by the executive to intimidate judges or to punish judges whose attitudes and rulings are deemed contrary to government interests.

Separation of powers concerns, along with the need to prevent frivolous prosecutions, played a critical part in the *Clayton* decision. The opinion of the Florida Court of Appeal was permeated with the concern that “disgruntled or ambitious” prosecutors might take advantage of nebulous ethical rules to intimidate or obtain revenge against judges.¹⁹⁹ Terming the case a “classic example of . . . misuse of the judicial process for political purposes,”²⁰⁰ the court concluded its holding by “observ[ing] that the complete independence of the judiciary of this country is essential to the preservation of the Constitution.”²⁰¹ The court stated further that “[i]t should never be forgotten that one of the first charges in contained in the Declaration of Independence was that the tyrannical sovereign . . . made Judges dependent on his Will alone, for the tenure of their offices.”²⁰² Therefore, in order to protect the constitutional separation of powers, the *Clayton* court required proof of a corrupt motive where a judge was charged with common-law misfeasance as opposed to an offense defined by statute.²⁰³

Likewise, in *Serstock*, the Minnesota Supreme Court cited separation of

¹⁹⁸ Indeed, when the matter came before a proper disciplinary forum, the only sanction levied upon Judge Clayton was a reprimand. See *In re Clayton*, 504 So. 2d 394 (Fla. 1987). He subsequently resigned from the bench.

¹⁹⁹ See *Clayton*, 489 So. 2d at 819.

²⁰⁰ *Id.* at 818.

²⁰¹ *Id.* at 819, citing *In re Proposed Disciplinary Action*, 103 So. 2d 632, 634 (Fla. 1958) (finding that the Florida Bar could not institute disciplinary proceedings against a judge for the sole purpose of removing him from office).

²⁰² *Id.* at 819-20.

²⁰³ See *id.* at 817-18.

powers concerns in dismissing a case brought against a deputy city attorney.²⁰⁴ Although the city attorney's office was part of the executive rather than the judicial branch, any prosecution predicated on violations of the code of legal ethics implicated the courts' authority over disciplinary actions against attorneys.²⁰⁵ Specifically, the court was "concerned that adopting the Code of Professional Responsibility or the Rules on Professional Conduct as a guideline for the misconduct statute would disrupt this court's sole authority to determine attorney discipline."²⁰⁶ In other words, prosecution of public attorneys for ethical violations alone would, at least under some circumstances, place prosecutors or lower courts in the position of arbiters of legal ethics, and would undermine the Supreme Court's exclusive jurisdiction to construe ethical rules.²⁰⁷

In *Chvala* and *Jensen*, though, the Wisconsin Court of Appeal, whose decisions were affirmed by the Supreme Court of Wisconsin, held that separation of powers did not bar prosecution of legislators for violation of the legislative code of ethics. In *Chvala*, the defendants, who were members of the Wisconsin State Senate, contended that the separation of powers doctrine precluded them from being prosecuted for violating Senate policies regarding the personal use of legislative staff.²⁰⁸ The Court of Appeal, however, determined that the separation of powers considerations relevant to prosecution of legislators were embodied in the "speech and debate" clause of the Wisconsin Constitution, which protected only acts integral to the legislative process.²⁰⁹ Accordingly, the court found that the use of Wisconsin Senate staff for private campaign work, in violation of Senate ethical rules, was not an activity protected by the speech and debate clause.²¹⁰

The Court of Appeal also engaged in an analysis of whether the prosecution of legislators for violating internal rules would infringe on the legislature's "core area of authority," either through executive interference with the legislature's functioning or through the judicial interpretation of legislative rules.²¹¹ It determined that, since the rules in question involved public funds and were not integral to the legislative process, they fell

²⁰⁴ See *State v. Serstock*, 402 N.W.2d 514, 516-17 (Minn. 1987).

²⁰⁵ See *id.* at 517 n.2.

²⁰⁶ *Id.*

²⁰⁷ See *id.*

²⁰⁸ See *Chvala*, 678 N.W.2d 880, 892 (Wis. App. 2004).

²⁰⁹ *Id.* at 892-93, citing Wis. Const. art. IV, § 16.

²¹⁰ *Id.* at 893-94 (stating, *inter alia*, that "Chvala is not being prosecuted for his legislative acts or for personnel decisions integral to the execution of those acts").

²¹¹ See *id.* at 894.

within a zone of power shared by the executive branch.²¹² Moreover, because the legislative rules were clear on their face, their interpretation by the courts would violate no constitutional prerogative of the legislature.²¹³ The companion case of *State v. Jensen*,²¹⁴ which involved substantially similar prosecutions directed at members of the Wisconsin House of Representatives, engaged in identical analysis and conclusions with respect to House rules.²¹⁵

It should be noted, though, that even the *Chvala* and *Jensen* courts indicated that separation of powers might bar prosecution for ethical violations under certain circumstances - i.e., where the ethical rules in question involve core areas of a non-executive branch's power.²¹⁶ In the case of the judiciary, separation of powers might therefore bar official misconduct prosecutions predicated on violation of ethical rules that are integral to the process of judging. These would include, *inter alia*, rules requiring judges to be faithful to the law in rendering decisions, to maintain order and decorum in the courtroom or to refrain from engaging in certain *ex parte* communications.²¹⁷ This means that, even under the *Chvala* rationale, it is likely that a court would look askance at a prosecution such as that in *Clayton*, where a vengeful prosecutor essentially indicted a judge for making erroneous legal decisions.²¹⁸

Chvala and *Jensen*, which involved legislators, are also distinguishable in other respects from cases involving judges. Given that legislators have the power to enact and repeal criminal statutes, they are in a unique position to determine the scope and application of such statutes. If a state legislature wishes to rewrite the state's official misconduct statute so as to preclude prosecutions of its members for violating internal ethical rules, it can do so at any time. Thus, since legislators control the degree to which such statutes apply to them, separation of powers concerns are less of a concern when they are prosecuted. In contrast, judges cannot unilaterally rewrite criminal statutes, and separation of powers considerations become especially compelling when they are prosecuted by executive officials based on a broad interpretation of a statute enacted by the legislature.

Moreover, given that executive agencies have more day-to-day

²¹² *See id.*

²¹³ *See id.*

²¹⁴ 681 N.W.2d 230 (Wis. App. 2004).

²¹⁵ *See id.* at 244-45.

²¹⁶ *See Chvala*, 678 N.W.2d at 893; *see also Jensen*, 681 N.W.2d at 244.

²¹⁷ *See, e.g.*, 22 NYCRR § 100.3 (setting forth ethical obligations of New York judges with respect to courtroom conduct).

²¹⁸ *See* notes 179-87 *supra* and accompanying text.

interaction with the courts than with the legislature, the potential for a chilling effect from cross-branch prosecutions is greater when a judge is charged. Legislatures establish the legal and policy framework within the executive must operate, but the courts scrutinize - and sometimes overturn - its daily activities. Thus, an adversarial mindset often develops within the executive in which courts are seen as obstructing justice.²¹⁹ As such, it is exceptionally important that boundaries on prosecuting judges be created and enforced.

It is, of course, necessary to prosecute judges on certain occasions. Judges are no more above the law than members of the executive and legislative branches, and a judge who engages in bribe receiving or similar criminal conduct threatens the integrity of the government as a whole. Nevertheless, separation of powers considerations argue compellingly in favor of limiting such prosecutions to cases where judges are given clear statutory warning that their acts are subject to criminal penalty.

IV. CIRCUMSCRIBING THE PROSECUTION OF JUDGES: A PRUDENTIAL AND CONSTITUTIONAL NECESSITY.

It is apparent from the above that American courts have shown great reluctance to expand the scope of prosecutorial discretion in cases involving judges. Indeed, in the absence of a clear penal statute, the courts have been even less willing to hold judges criminally liable for official misconduct than they have with public officials from the executive and legislative branches. It is contended that this reluctance is entirely appropriate in light of the policies underlying criminal law, the practical concern with preventing vindictive prosecutions and, constitutional principles of judicial independence, and that the New York Court of Appeals' decision in *Garson* represents a dangerous departure from sound precedent.

1. Criminal Liability For Violations Of Judicial Ethics Would Not Serve The Purpose Of The Criminal Law.

Professor Sanford Kadish has argued that "the criminal law is a highly specialized tool of social control. . . that when improperly used is capable of producing more evil than good."²²⁰ Historically, the criminal law has

²¹⁹ See, e.g., Aviva Abramovsky, *Traitors in Our Midst: Attorneys who Inform on Their Clients*, 2 U. Pa. J. Const. L. 676, 688 (2000) (discussing prosecutors who view the criminal justice system as an impediment).

²²⁰ See Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 *Annals Am. Acad. Pol. & Soc. Sci.* 157, 169 (1967).

“expressed both a moral and a practical judgment about the societal consequences of certain activity.”²²¹ This judgment was twofold: that the act was inherently immoral, and that it caused harm to society at large rather than only to particular individuals.²²² In contrast, wrongs done to specific individuals without culpable intent were “for amelioration in the tort system.”²²³

Over time, a third category of prohibited conduct arose: behavior that was not intrinsically immoral but was regulated “to serve some perceived public good.”²²⁴ Typically, this behavior was controlled through civil and administrative regulations.²²⁵ In recent decades, however, criminal sanctions have increasingly encroached into the regulatory and tort spheres, prompting the criticism that the law has become “overcriminalized.”²²⁶

As set forth above, American rules of judicial ethics generally fell into the category of administrative or regulatory offenses, to be punished by professional discipline.²²⁷ This may be due in part to the fact that the rules contained in ethical codes go far beyond what is traditionally viewed as immoral. Many rules of judicial ethics are designed to maintain the decorum and public stature of the judiciary rather than to prevent immoral conduct.²²⁸ Others were designed to “put a fence around the law”²²⁹ - i.e., to prohibit conduct that appears improper or is conducive to impropriety while not being immoral in itself.²³⁰ Thus, criminal enforcement was reserved for acts specifically made punishable by the legislature, while enforcement of other ethical regulations was left to courts and professional disciplinary boards.²³¹

The extension of criminal penalties to such essentially regulatory

²²¹ Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, 27 *Champion* 28, 29 (2003).

²²² *See id.* at 29-30.

²²³ *Id.* at 29.

²²⁴ *See id.*

²²⁵ *See id.* at 30-31.

²²⁶ *See id.*

²²⁷ *See* notes 94-103 *supra* and accompanying text.

²²⁸ *See, e.g.*, 22 NYCRR “ 100.2(a) (requiring judges to act in a manner that promotes public confidence in the judiciary), 100.3(b)(2) (requiring judges to be “patient, dignified and courteous” to litigants, counsel, witnesses and court personnel).

²²⁹ The concept of putting a fence around the law originates with rabbinic rulings that imposed rules and restrictions greater than what the law required, in order to prevent people from straying into gray areas where they might inadvertently break the law. *See* Moses Maimonides, *Mishneh Torah*, Sanhedrin 24:4, at 73 (outlining the concept of placing a fence around the law by means of extralegal sanctions).

²³⁰ *See, e.g.*, 22 NYCRR ‘ 100.3(b)(6) (prohibiting improper *ex parte* conversations).

²³¹ *See* notes 94-103 *supra* and accompanying text.

offenses poses serious problems of equity.²³² Professor Sara Sun Beale has noted that “common features of overcriminalization” include the following five pitfalls:

- (1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs).²³³

If the discretion of law enforcement authorities is sufficiently unrestrained, criminal penalties for such regulatory offenses may be “so wantonly and so freakishly imposed that [they are] like being hit by lightning.”²³⁴

Overcriminalization and its attendant ills also offend the principle of *nullum crimen sine lege*, or “no crime without law.”²³⁵ Since regulatory offenses tend to be broadly defined and subject to discretionary enforcement,²³⁶ they are vulnerable to judicial expansion without adequate warning to defendants.²³⁷ This is especially so in the case of an offense such as the New York official misconduct statute, which is subject to almost limitless expansion depending on prosecutors’ and courts’ interpretation of the “duties of a public servant.”²³⁸ Such judicial interpretation, if left unchecked, can effectively amount to *ex post facto* lawmaking.²³⁹

²³² See generally Sara Sun Beale, *From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747 (2005).

²³³ *Id.* at 749.

²³⁴ *Id.* at 758.

²³⁵ See John Hasnas, *Ethics and the Problem of White-Collar Crime*, 54 Am. U. L. Rev. 579, 589-90 (2005).

²³⁶ See Stephen F. Smith, *Proportionality and Federalization*, 91 Va. L. Rev. 879, 885 (2004).

²³⁷ See Hasnas, *supra* note 224, at 589.

²³⁸ See notes 43-48 *supra* and accompanying text.

²³⁹ See Hasnas, *supra* note 224, at 589-90. Professor Hasnas identifies four corollaries to the principle of *nulla crimen sine lege*:

“(1) a ban on retroactive criminal lawmaking; (2) a ban on the judicial creation of new common law crimes; (3) a requirement that a criminal offense is clearly enough defined to give citizens adequate notice of what conduct is prohibited and to establish clear guidelines governing law enforcement; and (4) a requirement that the language of a criminal offense be strictly construed in favor of the defendant (the rule of lenity).”

Id. He contends that the combination of these rules prevents *ex post facto* punishment and is “reflective of the central values of liberal societies.” See *id.* at 590. Another commentator has similarly argued that the doctrine of *nulla poena sine lege* consists of “(1) making statutory law the exclusive source of criminalization; 2) prohibition of criminalization by analogy; 3) prohibition of *ex post facto* laws; and 4) a requirement of definiteness of

The excesses of overcriminalization frequently result from prosecutorial authorities' attempts to expand their duties from the punishment of crime to more general protection of the public good.²⁴⁰ Such a "policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*."²⁴¹ Indeed, the signs of such a policy-based approach in the *Garson* case are apparent from the majority's arguments for applying criminal sanction to violations of judicial ethics.²⁴² Specifically, the majority contended that criminal sanctions were necessary to protect the integrity of the bench, assist state agencies in maintaining clean government and maintain public confidence in the judiciary.²⁴³ These are fundamentally regulatory goals, of the type that are commonly achieved through civil and administrative enforcement and professional discipline.

By claiming the right to act in furtherance of these goals and interpreting the official misconduct statute accordingly, the Kings County District Attorney's office effectively assumed a regulatory mandate despite the fact that the sanctions at its command were inappropriate for such a role. And as Judge Smith noted in his dissent to *Garson*, the majority essentially endorsed the Kings County prosecutors' claim to be the primary enforcer of these regulatory goals, by making the prosecution "the judge of when and how a rule of judicial conduct becomes criminal."²⁴⁴

Prosecutors' assumption of a regulatory mandate may also lead to overcriminalization in that they lack the technical expertise to regulate the bench. If prosecutions for violations of judicial ethical codes are permitted, relatively few cases are likely to come to prosecutors' attention directly. Instead, as with the *Garson* case, the matters will be brought to the prosecutors' notice by disgruntled parties or counsel. In order to determine whether to bring charges in such cases, the prosecutors will have to sift through conflicting accounts of the incident and determine whether the judge has acted permissibly or crossed the line into unethical conduct.

This is not a task that criminal prosecutors are equipped to perform, particularly where the judge's conduct falls into a gray area in the ethical

criminal statutes." See Stanislaw Pomorski, *Reflections on the First Criminal Code of Post-Communist Russia*, 46 Am. J. Comp. L. 375, 384 (1998).

²⁴⁰ See Bruno Simma and Andreas L. Paulus, *Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Postivist View*, 93 A.J.I.L. 302, 303 (1999).

²⁴¹ See *id.*

²⁴² See *Garson III*, 2006 N.Y. LEXIS 616, *20-21.

²⁴³ See *id.* at *21 ("The Rules are a compendium of regulations that insures the integrity of the judiciary and the resultant confidence and impartiality that must repose in the justice system").

²⁴⁴ See *Garson III*, 2006 N.Y. LEXIS 616, at *59 (Smith, J., dissenting).

code. The difficulty of resolving such ambiguous conduct has been noted in the related area of attorney ethics, particularly where an attorney's ethical obligations intersect with the criminal law.²⁴⁵ Specifically, it has been noted that attorneys who assert privilege over corporate documents in the context of criminal investigations have sometimes been treated by prosecutors as conspirators in a cover-up.²⁴⁶ In such circumstances, it has been noted that "there are often real difficulties in determining whether [attorneys' conduct] should be treated as a crime. . . a tort, a violation of procedural rules, a professional ethics violation, or as merely aggressive (and perhaps even commendable) litigation tactics."²⁴⁷

The judging process is not immune from such ethical gray areas. Although judges are required to refrain from partiality,²⁴⁸ they are by no means passive actors in the litigation process.²⁴⁹ Twentieth-century reforms to American rules of civil procedure have increasingly cast judges as "manager[s] of the case," with an active role in moving the litigation through the pretrial process and facilitating a settlement.²⁵⁰

The limits of this facilitating role are in controversy within the judicial profession. Some commentators, for instance, argue that judges are entitled to conduct *ex parte* conversations with litigants during settlement negotiations, including discussion of the reasonableness of settlement offers and the probable strength of their opponents' case.²⁵¹ Others, in stark contrast, believe that such conduct is unethical and amounts to coercion of the parties and their attorneys.²⁵² This dispute cannot be resolved by reference to the plain language of the code of judicial ethics, since the rule governing *ex parte* communications does not explicitly speak to settlement negotiations.²⁵³ Indeed, the rule contains a catchall exception permitting judges to "initiate and consider *ex parte* communications when authorized by law to do so," thus providing courts with authority to

²⁴⁵ See Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 Am. Crim. L. Rev. 9, 13 (2005).

²⁴⁶ See *id.*

²⁴⁷ See *id.*

²⁴⁸ See 22 NYCRR § 100.3(b)(1).

²⁴⁹ See R. Lawrence Dessem, *The Civil Justice Reform Act: The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 St. John's L. Rev. 799, 800 (1993).

²⁵⁰ See Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265, 1271 (1983).

²⁵¹ See Steven Flanders, *Blind Umpires: A Response to Professor Resnik*, 35 Hastings L.J. 505, 511-14 (1984) (describing the debate within the judicial profession about how aggressively a judge is entitled to facilitate settlements).

²⁵² See, e.g., Judith Resnik, *Managerial Judges*, 96 Harvard L. Rev. 376, 413 (1982).

²⁵³ See 22 NYCRR § 100.3(b)(6).

adjudicate the ethical boundaries of such communications.²⁵⁴

Given the uncertain boundaries of permissible *ex parte* communication by judges, the bludgeon of criminal liability is uniquely unsuited to enforce these limits. Moreover, prosecutors' offices lack the technical expertise to make judgments about when judges may communicate *ex parte* and when they may not. This is a judgment more appropriately made by judicial conferences and disciplinary boards and enforced through rulemaking and professional discipline. It is not the kind of dispute that can or should be resolved by prosecutors acting on the complaint of parties or attorneys who feel that a judge has wronged them. Applying the criminal law in these and similar areas constitutes the inappropriate use of criminal sanction by an authority not technically equipped for regulatory enforcement. This can hardly be described as fair either to the judicial process or the judges who face such inappropriate criminal charges.²⁵⁵

2. Prosecutions For Judicial Ethics Violations Would Chill Impartial Judging.

The possibility of vindictive prosecutions, as exemplified by the *Clayton* case,²⁵⁶ would likewise constitute a great concern if prosecutors had open-ended discretion to indict judges for ethical violations. Indeed, prosecutions of sitting judges even for explicitly criminal conduct are controversial, at least in the Federal context. Since the United States Constitution guarantees Federal judges life tenure and provides a specific means of removal via impeachment,²⁵⁷ it has been argued that the Government is constitutionally forbidden from prosecuting judges unless and until they have been impeached.²⁵⁸

Although life tenure is not guaranteed to most state judges, impeachment or similar removal procedures are contained in most state constitutions. In addition, the interests protected by such procedures - i.e., judicial independence and separation of powers - are recognized as fundamental

²⁵⁴ See 22 NYCRR ' 100.3(b)(6)(e).

²⁵⁵ See *Garson III*, 2006 N.Y. LEXIS 616, *59-60 (Smith, J., dissenting) (arguing that judges may now risk criminal liability, at the discretion of prosecutors, if they "advise[] a relative or friend that a particular lawyer is well suited to handle a case" or where they "recommend one [law] school over another").

²⁵⁶ See notes 179-87 *supra* and accompanying text.

²⁵⁷ See U.S. Const. art. III, ' 1 (stating that judges shall hold office "during their good behavior"); art. II, ' 4 (specifying impeachment as the procedure for removing all "civil officers of the United States").

²⁵⁸ See generally Steven W. Gold, *Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement*, 53 Brooklyn L. Rev. 699 (1987).

state constitutional values.²⁵⁹ The same considerations that militate against prosecution of sitting Federal judges are present whenever a judge is subjected to prosecution, regardless of the jurisdiction in which charges are filed.

Some commentators have contended that separation of powers and judicial independence can be adequately protected by prosecutorial discretion. In the aftermath of the impeachment of United States District Judge Alcee Hastings, for instance, former Justice Department prosecutor Reid H. Weingarten argued that the exacting centralized review processes of the Department of Justice would preclude the possibility of vindictive prosecutions.²⁶⁰ Given that the rulings of the Federal judiciary have become an increasingly politically charged issue, and given that the ultimate decision as to whether to prosecute a Federal judge lies with a politically appointed Attorney General, there is some room to quibble with Weingarten's conclusion. Even if Weingarten is correct in the Federal context, however, many or even most state prosecutorial agencies do not have a review process similar to that undertaken by the Department of Justice. In many states, including New York, criminal prosecutions are conducted primarily by county officials,²⁶¹ who are answerable only to their county electorates and are not subject to meaningful review by higher officials. As such, there are fewer constraints on local prosecutors who might be tempted to indict judges in order to pursue political rivalries or remove judges who rule against them too frequently.

The history of the removal processes that do exist in New York provides empirical evidence that local prosecutors have been willing to use them for vindictive purposes. One of the most striking examples is that of former Kings County Supreme Court Justice Lorin Duckman.²⁶² Judge Duckman aroused the opposition of the District Attorney's office due to his perceived leniency toward criminal defendants and brusqueness with prosecutors. Accordingly, the District Attorney began to keep a dossier on Judge Duckman, obtaining transcripts of numerous court appearances in order to use them against him at an opportune time.²⁶³

Such an opportune occasion arose when Justice Duckman granted the

²⁵⁹ See notes 179-208 *supra* and accompanying text.

²⁶⁰ See Reid H. Weingarten, *Judicial Misconduct: A View From the Department of Justice*, 76 Ky. L.J. 799 (1988).

²⁶¹ See N.Y. Const. art. XIII, " 13(a)-(c). Although the New York State Attorney General may also conduct prosecutions under certain circumstances, his power is limited by Section 63 of the New York Executive Law, and the primary prosecuting authorities are the county district attorneys.

²⁶² See *In re Duckman*, 92 N.Y.2d 141 (1998).

²⁶³ See *id.* at 158 (Titone, J., dissenting).

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routine bail application of Benito Oliver, who appeared in his court on misdemeanor charges.²⁶⁴ Three weeks later, while he was out on bail, Oliver fatally shot his girlfriend, Galina Komar.²⁶⁵ The shooting prompted a media storm focusing on Judge Duckman, whose perceived leniency toward Oliver was portrayed as a contributing cause of Komar's death.²⁶⁶ Former Judge Vito Titone of the New York Court of Appeals described the ensuing events:

The lurid newspaper coverage was followed only a few days later by a letter from the State Senate Majority Leader to the State Commission on Judicial Conduct demanding that petitioner's fitness be investigated immediately. At the same time, Governor Pataki initiated his own "investigation" of petitioner. These actions by two of the State's most powerful elected officials were part of a larger political climate in which Judges were increasingly being scapegoated. Beginning around the time of the Komar killing and continuing throughout the spring and fall of 1996, journalists specializing in sensational reportage and politicians anxious to capitalize on public fear combined to lay the blame for urban crime at the feet of "criminal coddling" Judges.

As the onslaught from the media continued, the Governor's office sent representatives to the Kings and Bronx County District Attorneys offices, apparently to obtain additional negative background material on Judge Duckman. These representatives were given access to one or more files containing transcripts of proceedings before Judge Duckman, which appear to have been ordered and preserved for some unspecified future use. Notably, some of these transcripts involving dismissed criminal charges were shown to the Governor's investigators without regard to the confidentiality rules that apply to sealed records. Having collected a list of complaints from trial assistants about petitioner's handling of their cases and his mistreatment of individual prosecutors, the investigators compiled a nine-page report that was ultimately forwarded to the Judicial Conduct Commission.²⁶⁷

This was followed by an ultimatum from Governor Pataki to the New York Commission on Judicial Conduct, demanding that it "remove [Justice Duckman] from office within 60 days or the Governor would initiate impeachment proceedings before the State Senate."²⁶⁸ The Commission quickly buckled to the pressure of the Governor and the Legislature and initiated disciplinary proceedings against Justice Duckman. Those

²⁶⁴ *See id.*

²⁶⁵ *See id.*

²⁶⁶ *See id.*

²⁶⁷ *Id.* at 158-59.

²⁶⁸ *See id.* at 159-60.

proceedings ended, as preordained, with the judge's removal.²⁶⁹

The disciplinary sanction was ultimately upheld by a 5-2 majority of the New York Court of Appeals.²⁷⁰ In a strong dissent, however, Judge Titone noted the ominous connotations of the events surrounding Justice Duckman's removal:

The implication of the present disciplinary proceeding is that Judges whose rulings displease the political powers that be may be subjected to a modern-day witch hunt in which their records are combed for indiscretions, their peccadillos strung together to make out a "substantial record" of misconduct and their judicial "sins" punished with the ultimate sanction of removal from office. Indeed, in this case, the inference that petitioner has been removed at least in part because of his interest in protecting individual defendants' rights is reinforced by the Commission's emphasis on his purportedly antiprossecution bias and his statements criticizing the District Attorneys' policies. It is clearly contrary to the goal of judicial independence to suggest that a Judge may be singled out for discipline because of his or her expressed views on questions affecting the criminal justice system.²⁷¹

Noting that "[t]here are few among us who have the courage and fortitude to take judicial stands at the risk of public humiliation and loss of office," Judge Titone warned that the proceeding would have a chilling effect on judicial independence in New York.²⁷² As he stated, "[a] precedent has now been set in which politicians and local prosecutors have demanded the removal of a widely respected sitting Judge for what they perceived as 'criminal coddling' and have *succeeded* in that demand."²⁷³

In at least three other cases, New York judges have faced other sanctions based on unpopular rulings. One such instance is the case of former Criminal Court Judge Bruce Wright, dubbed "Turn 'Em Loose Bruce" by New York City law enforcement officials due to his lenient bail rulings.²⁷⁴ After Judge Wright released the accused shooter of a police officer on bail, pressure from the police union resulted in his permanent reassignment to civil cases.²⁷⁵ A more recent example is the case of Judge Laura Blackburne, a New York County Supreme Court judge who assisted a

²⁶⁹ See *id.* at 160.

²⁷⁰ See *id.* at 145.

²⁷¹ *Id.* at 160 (Titone, J., dissenting).

²⁷² See *id.*

²⁷³ *Id.* at 161 (emphasis in original).

²⁷⁴ See Stuart S. Nagel, *Policy Evaluation and Criminal Justice*, 50 Brooklyn L. Rev. 53, 61 n.16 (1983).

²⁷⁵ See Tom Goldstein, *New York City Bar Association to Probe Reassignment of Criminal Court Judge*, N.Y. Times, Dec. 21, 1974, p.34.

defendant in avoiding arrest by detectives who had come to the courthouse to enforce an unrelated bench warrant.²⁷⁶ As with Judge Wright, a combination of media coverage and political pressure prompted her administrative reassignment to a civil part.²⁷⁷

Even Federal judges have not been immune from political pressure over pro-defense rulings in criminal cases. One such instance in New York occurred when Judge Harold Baer issued a ruling suppressing evidence in the cocaine trafficking prosecution of Carol Bayless.²⁷⁸ What made this ruling even more controversial than most Fourth Amendment suppression rulings was that Judge Baer characterized running from the police as an act that was not inherently suspicious and could, under certain circumstances, be reasonable.²⁷⁹ The matter caught the attention of Congress, and after impeachment proceedings were threatened, Judge Baer seized upon a prosecutorial reargument motion to reverse himself.²⁸⁰

These four examples demonstrate, it is that judges who issue pro-defense rulings in criminal cases can often find themselves in the political line of fire. This has the potential to form a perverse synergy with the interests of prosecutors, who are frequent users of the courts in criminal cases and who benefit from any chilling effect on pro-defense rulings. The availability of sanctions such as removal, impeachment and reassignment already creates the potential for such a chilling effect, but the effect would be enormously magnified if prosecutors could *directly* sanction disfavored judges by means of criminal indictment. This would not only place the ability to enforce political pressure in the hands of those who would benefit the most from its success, but it would threaten judges with the possibility of losing their freedom as well as their livelihoods.

²⁷⁶ See Scott Shifrel et. al., *Judge Taken Down a Notch*, Daily News (N.Y.), June 15, 2004, p.5.

²⁷⁷ See *id.*

²⁷⁸ See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996).

²⁷⁹ See *id.* at 241-42 (noting, *inter alia*, that residents of the neighborhood where the alleged offense occurred “tended to regard police officers as corrupt, abusive and violent”).

²⁸⁰ See *United States v. Bayless*, 921 F. Supp. 211, 217 (S.D.N.Y. 1996). For details of the political fallout from Judge Baer’s original ruling, see *United States v. Bayless*, 201 F.3d 116, 122-23 (2d Cir. 2000) (stating that “the language in the opinion, referring as it did to widespread police corruption, was perceived by many as an affront to the police and to victims of drug-related crime.”). The Second Circuit noted that the ruling became “a flashpoint for the 1996 Presidential campaign” prompting threats of impeachment and calls for Judge Baer’s resignation, and that President Clinton “defer[red] deciding whether to call for Judge Baer’s resignation until the Judge ruled on the government’s motion for reconsideration.” See *id.* President Clinton’s statement was interpreted by much of the media and the judiciary as “a veiled warning” that “if [the judge] did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation.” *Id.*

The ability to indict judges for ethical violations in the absence of a clear penal statute governing their actions would open the door to exactly this scenario. Under the theory advocated by the Kings County District Attorney and endorsed by the majority in the *Garson* case, for instance, Justice Duckman could have been prosecuted on misdemeanor charges for discourtesy to Assistant District Attorneys and erroneous dismissals of criminal cases, both of which were cited as ethical violations by the Commission on Judicial Conduct in removing him.²⁸¹ Moreover, under the broadly worded provisions of the Penal Law, it would be of no moment that the official misconduct statute requires proof that the defendant intended to acquire a benefit or deprive another of a benefit. Given that the term “benefit” encompasses gain or advantage to third parties, a hypothetical prosecutor could argue that Judge Duckman intended to confer the “benefit” of erroneous dismissal upon the defendants who came before him, or that he intended to deprive the District Attorney’s office of the “benefit” of due process of law.²⁸²

Judge Blackburne would be likewise be indictable under the *Garson* majority’s formulation of the law. Specifically, she could be charged with official misconduct on the basis that she violated the Rules of Judicial Conduct with the intent that the defendant “benefit” by avoiding arrest.²⁸³ In other words, the door would be opened to exactly the sort of vindictive prosecutions undertaken by the Florida prosecutor in *Clayton*. New York judges would be on notice that a sharp word to an Assistant District Attorney, or an erroneous pro-defense ruling later judged unethical at the discretion of the prosecutor, could potentially lead to jail time.²⁸⁴

Indeed, even unsuccessful prosecutions would have a chilling effect. The very process of commencing a criminal investigation against a judge would necessarily impact his ability to function impartially on the bench, and the necessity of defending against criminal charges would deplete his time and financial resources. The commencement of a criminal investigation for ethical lapses, even if it does not ultimately lead to conviction, could be an effective method of harassing disfavored judges in the event that such prosecutions are allowed.

Moreover, as Weingarten notes, the process of investigating a judge

²⁸¹ See *In re Duckman*, 92 N.Y.2d 141, 145 (1998)

²⁸² See notes 105-08 *supra* and accompanying text.

²⁸³ See notes 276-77 *supra* and accompanying text.

²⁸⁴ Needless to say, judges who are discourteous to criminal defense attorneys would not run a similar risk, as defense counsel would not have the power to file criminal charges on their own initiative. Prosecutors, and prosecutors alone, would effectively become the arbiters of judicial decorum in the courtroom.

necessarily involves intrusion into his chambers.²⁸⁵ This could potentially impact the integrity of the judging process, especially if judges become aware that their chambers might be under surveillance. Moreover, surveillance of chambers could affect the rights of innocent parties to litigation, in the event that recorded chambers discussions are disclosed and made public during the course of a criminal proceeding.²⁸⁶

Therefore, an investigation that involves the traditionally confidential precincts of judicial chambers must involve a balancing of rights: society's interest in rooting out judicial corruption must be weighed against judicial independence and litigants' right to privacy. If there is evidence that a judge has committed an explicitly criminal act, such as accepting bribes or extorting kickbacks, then the intrusion on these individual rights is warranted. On the other hand, where the violation in question is merely ethical, the privacy interests of judges and litigants weigh much more heavily, and the resolution of such matters should be left to less intrusive administrative or disciplinary processes.

3. Separation Of Powers Considerations Militate Against Holding Judges Criminally Liable For Mere Ethical Violations.

The considerations counseling against an expansive interpretation of violations of judicial ethics as criminal offenses are also constitutional. Chief among them, as the Court of Appeals stated in *La Carrubba*, is the fact that designation of criminal offenses is a fundamentally legislative function that cannot be delegated even explicitly.²⁸⁷ The Legislature could, within the scope of its powers, make it a crime for a public official to disobey an existing code of ethics or administrative rule.²⁸⁸ However, absent such an explicit pronouncement by the Legislature itself, a criminal offense cannot simply be implied based on the intersection of an ethical code and a broadly worded official misconduct statute.

Therefore, in the absence of actual legislative review and adoption of an existing ethical code as an element of a criminal offense, any imposition of criminal liability for violating administratively promulgated ethical rules would constitute an improper delegation. Indeed, the theory advocated by the prosecution in *Garson*, and endorsed by the Court of Appeals majority, involved several layers of delegation rather than only one. Specifically, the

²⁸⁵ See Weingarten, *supra* note 247, at 806.

²⁸⁶ See *id.*

²⁸⁷ See *People v. La Carrubba*, 46 N.Y.2d 658, 665 (1979).

²⁸⁸ See, e.g., *People v. Blanchard*, 288 N.Y. 145 (1942) (upholding penal statute that criminalized violation of the New York City Sanitary Code).

theory began with an official misconduct statute that made it a crime for a public servant to receive or agree to receive a “benefit” in return for violating his duty. The prosecution then cited an amendment of the New York State Constitution, adopted considerably after the official misconduct statute was enacted, that made judges “subject” to the rules of the Chief Administrator of the Courts. The final layer was the ethical code itself, which was promulgated by the Chief Administrator some time after the constitutional amendment.

Significantly, as noted by Judge Smith in his dissent, the Legislature did not indicate at any point during this process that it intended to criminalize ethical violations as such.²⁸⁹ At the time the official misconduct statute was incorporated into the New York Penal Law, there was no statewide code of ethics for judges, and there had been no attempts to prosecute judges for violation of the then-existing Appellate Division ethical rules. Indeed, as noted by Professor Nelson, the very idea of regulating judicial ethics through formal disciplinary rules was a relatively new one at the time.²⁹⁰ There was no indication that, at the time the Legislature enacted the Penal Law, it intended anything more than a synthesis of previous statutes punishing specific and narrow types of misconduct by public servants.²⁹¹

Nor, at the time of the constitutional amendment at issue, was there any discussion of imposing criminal liability upon judges. Indeed, there was no indication that the amendment was intended to apply specifically to rules of ethics. The state constitution, as amended, spoke broadly of making judges “subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals.”²⁹² Such rules are not limited to the code of judicial ethics, but also include the uniform rules for administration of the trial courts,²⁹³ which cover such matters as assignment of cases, calendar management, discovery, trial and motion practice and court fees.²⁹⁴ One doubts that any prosecutor would seriously suggest that a judge who grants post-note-of-issue civil discovery without good cause thereby commits the crime of official misconduct.²⁹⁵

²⁸⁹ See *Garson III*, 2006 N.Y. LEXIS 616, *54 (Smith, J., dissenting).

²⁹⁰ See Nelson, *supra* note 95, at 34-36.

²⁹¹ See Abraham Abramovsky, *Official Misconduct*, N.Y.L.J., Dec. 22, 1999, at 3.

²⁹² See N.Y. Const. art. VI, § 20(4).

²⁹³ See, e.g., 22 NYCRR parts 200 (providing rules for uniform operation of trial courts in criminal cases), 202 (setting forth rules for Supreme Court civil operations), 208 (detailing rules of the New York City Civil Court).

²⁹⁴ The term “conduct,” broadly interpreted, could be construed to include all these activities.

²⁹⁵ No doubt, if this suggestion had been made during the litigation of the *Garson* appeal,

Moreover, as stated by the New York Office of Court Administration in its history of the judicial system, this amendment was part of a overall constitutional amendment aimed at centralizing of the New York State Unified Court System.²⁹⁶ Although the Unified Court System was first created in 1962,²⁹⁷ the fiscal crisis of the 1970s was a catalyst for substantial administrative reforms. In 1974, a statewide administrator was appointed for the first time to supervise all judicial assignments in New York.²⁹⁸ In 1976, all judges, even in local courts, were made State employees.²⁹⁹ This was followed up the next year by the constitutional amendment package, which “created a fully centralized system of court management under the direction of the Chief Judge and through daily control of the Chief Administrator/Chief Administrative Judge – essentially, a formal constitutional acknowledgment of the 1974 arrangement.”³⁰⁰

Therefore, the overriding rationale of the 1977 amendment was the centralization of New York court administration in Albany. Instead of a patchwork of local courts each operating according to their own rules, New York adopted a system under which uniform rules and a single management system would operate throughout the state. As part of this reform, the Legislature created a new constitutional office - that of chief administrator of the courts - and empowered the holder of that office to make rules. Although one of the rules promulgated pursuant to this amendment was a code of ethics, the Senate and Assembly debates surrounding the amendment show that it was clearly directed at reforming

the District Attorney’s office would respond that the crimes of official misconduct and receiving reward for official misconduct require proof of a “benefit” as well as a violation of a public servant’s duty. *See* Response to Omnibus Motion, *supra* note 34 (arguing that the benefit element provides a sufficient restraint on prosecutorial discretion). However, as noted above, the term “benefit” is broadly defined in the Penal Law to include “any gain or advantage to the beneficiary and. . . any gain or advantage to a third person pursuant to the desire of a beneficiary.” *See* PL § 10.00(17) (emphasis added). More specifically, if a judge is prosecuted for violating the rules of the Chief Administrator of the Courts by granting post-note-of-issue discovery without sufficient cause, the “benefit” element would be satisfied because the party obtaining the discovery would receive a “gain or advantage” with the judge’s desire and consent.

²⁹⁶ *See* Office of Court Administration, *History of the New York State Court System*, available on the Internet, http://www.courts.state.ny.us/community_outreach/history/history_courts.html (last visited April 7, 2005).

²⁹⁷ *See id.*

²⁹⁸ *See id.*

²⁹⁹ *See id.*

³⁰⁰ *See id.*

court administration, with judicial ethics being an afterthought at most.³⁰¹ Moreover, there was no indication that anyone involved in the constitutional drafting process envisioned imposing criminal liability for violation of the Chief Administrator's rules, whether ethical or otherwise.

The code of ethics itself - the third and final link in the *Garson* prosecutors' chain - was likewise promulgated without any indication that violators would be held criminally liable. Indeed, the preamble to the code, which was modeled on the 1990 ABA Model Code of Judicial Conduct,³⁰² explicitly states that it is intended solely as a basis for judicial discipline and not for civil or criminal liability.³⁰³ Thus, even if the combination of the official misconduct statute and the 1977 amendment somehow delegated the power to define criminal offenses to the Chief Administrator - which, under *La Carrubba*, they could not - the Administrator clearly did not regard himself as acting pursuant to such a delegation.³⁰⁴ Under these circumstances, no reasonable judge could be on notice that he might face criminal liability for violating the New York code of judicial ethics.³⁰⁵

It is thus clear that implied criminal liability for judicial ethical violations, through the duct of the official misconduct statute, fails to address either the constitutional vagueness test or the practical considerations of judicial independence and separation of powers. Moreover, the compromise suggested by the Wisconsin Court of Appeal in *Jensen and Chvala* - i.e., that judges may be prosecuted only for ethical violations that are not integral to the process of judging³⁰⁶ - is constitutionally untenable. There is no readily apparent distinction between ethical rules that are integral to the judging process and those that are not. For instance, one of the ethical violations of which Justice Garson is accused - conducting improper *ex parte* communications - could be considered integral to the judicial process because it involves the resolution of pending cases, or it could be considered non-integral because it takes place outside normal courtroom channels. *Ex parte* discussions may, in

³⁰¹ For instance, the primary subject of the Senate debate was a concomitant proposal to abolish elections to the Court of Appeals and replace them with a merit appointment system. See 1977 Senate Journal at 5528-76. To the extent that the other aspects of the amendment were discussed at all, they were portrayed as an "interlinked court reform package," in reference to administrative streamlining rather than discipline. See *id.* at 5563 (statement of Sen. Manfred Ohrenstein). The debate in the Assembly similarly centered on merit appointment of Court of Appeals judges. See 1977 Assembly Journal at 8941-58.

³⁰² See note 140 *supra* and accompanying text.

³⁰³ See 22 NYCRR Part 100, Preamble.

³⁰⁴ See *Garson III*, 2006 N.Y. LEXIS 616, *53-54 (Smith, J., dissenting).

³⁰⁵ See *id.* at *54; see also *Garson I*, 4 Misc. 3d at 272.

³⁰⁶ See notes 205-07 *supra* and accompanying text.

fact, be integral under some circumstances - as when a judge confers individually with the counsel for each party during a settlement conference - but not others. Far from resolving the issue of when judges could be lawfully prosecuted for ethical lapses, a *Chvala/Jensen* compromise would only descend more hopelessly into unconstitutional vagueness.

If the New York State Legislature, or the legislature of any other state, wants to criminalize the violation of judicial ethical codes, the solution is simple: all that is necessary is to enact a penal statute that explicitly makes some or all such violations a criminal offense. The Legislature could have done so at any time, and its failure to take such a step - particularly after the clear notice given by the Court of Appeals' decision in *La Carrubba* - indicates that it considered the existing judicial disciplinary arrangements suitable. In the absence of any legislative judgment that the disciplinary tribunals established under the New York State constitution provide inadequate deterrence, the judgment in the *La Carrubba* case remains sound, and the *Garson* majority's decision to depart from that principle is an unwarranted and dangerous error.

V. CONCLUSION.

The *Garson* prosecution represents the second occasion in New York on which a District Attorney's office has attempted to prosecute a judge for violating an ethical stricture that is not explicitly contained in a penal statute. As with the *La Carrubba* case a quarter-century before, the indictment of Justice Garson represents a clear instance of prosecutorial overreaching, and one that should not have been countenanced by the Court of Appeals majority.

Judicial codes of ethics are intended to preserve the integrity and efficient administration of the court system rather than to serve as a basis for criminal liability and, as such, contain broadly worded aspirational standards rather than explicit prohibitions. As such, they are too vague to meet the constitutional requirement that accused judges be given fair notice of the acts for which they might be held criminally liable. The creation of a system under which prosecutors essentially act as judicial disciplinary authorities also infringes upon the principles of judicial independence and separation of powers.

Moreover, the experience of New York and other states indicates that allowing judges to be prosecuted for violating such open-ended ethical rules invites vindictive prosecutions against judges who are perceived as pro-defense or are otherwise disfavored. The ordeals of Wiley Clayton, Lorin Duckman, Bruce Wright and other judges who have incurred the wrath of local prosecutors shows that broadly worded ethical codes are

vulnerable to misuse for politically opportune reasons. The potential for such prosecutions to chill judicial independence far outweighs any societal interest in stricter enforcement of judicial ethics. Judges should be prosecuted when they have violated a specific penal statute, but on no other occasion.