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The Frenchman who buys his liter of vin ordinaire at the corner épicerie engages, in the eyes of the civil law, in a far different transaction from the vintner who distributes the same wine at wholesale. One of the major characteristics of the law of France, and most other countries in the civilian tradition, is the clear distinction made between “commercial” and “civil” law. Two separate statutory codes of law exist, the “commercial code” or “code of commerce” to govern what we might call business transactions, and the “civil code,” whose provisions generally apply to what we might call “consumer” transactions. Furthermore, not only do the applicable laws differ, but in most countries separate courts are established to handle the two different classes of cases.

How do the two codes differ in substance? Details, of course, vary, but in general the commercial code emphasizes the swift and certain enforcement of transactions, while the civil code is more concerned with the protection of “the weak, the ignorant, and the imprudent.” Professor Schlesinger provides several illustrative examples drawn from the German law. In “commercial” matters, silence is more easily construed as acceptance of an offer than in “civil” matters, only mer-

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1 The adjective “civil” is an invitation to confusion because of its dual usage. “Civil law” may describe the entire system of the law of continental Europe in contradistinction to the “common law” of the Anglo-American legal tradition. The phrase also, however, may be used more restrictedly to describe the body of law encompassed in a “civil code” as opposed to, for instance, “commercial law” encompassed in a “commercial code.” The context will indicate which usage is intended in this review.

2 Indeed in France, two of the three judges of the commercial court of first instance are merchants, appointed on recommendation of chambers of commerce and industry, and a special class of lawyers, the agréés, handle cases therein. R. SCHLESINGER, COMPARATIVE LAW 337 (1970) [hereinafter cited as SCHLESINGER].

3 Id. 404. See also Schlesinger, The Uniform Commercial Code in the Light of Comparative Law, 1 INTER-Am. L. Rev. 11 (1959).

4 SCHLESINGER, supra note 2, at 404-05.

chants may issue negotiable promissory notes; oral sales contracts by merchants tend to be enforceable, those by others not; although contractual penalties for non-performance are valid, such provisions in contracts governed by the civil law are subject to reduction by the courts, those made by merchants are not.

Indeed, the development of a separate body of commercial law occurred during the Middle Ages as a reaction to those very sorts of provisions in the Roman law which today we might call consumer protections. As Professor Schlesinger points out, merchants in dealings among themselves found intolerable such features as irksome interference with freedom of contract, restrictions on assignments, usury laws, over-indulgent protection of debtors, the absence of negotiability, and cumbersome and slow judicial procedures. Thus arose the "law merchant" as a customary and recognized separate law of commerce in the Western World. Though severely attacked on the continent, the distinction remains firm and clear.

Thus, in Europe, the outcome of many a controversy turns upon the question whether the transaction involved is "commercial" or "civil" in nature. Problems obviously abound, and important differences in the appropriate tests exist among the several civil law jurisdictions. Generally, the determination tends to turn upon whether the transaction is inherently commercial in nature, a "merchantile act," or whether it was engaged in by parties who have the quality of "merchants." We would, I venture to say, characterize the distinction as one between "consumers" and "consumer transactions" on the one side, and "businessmen" and "business transactions" on the other. And of course, there are wonderfully mixed transactions, the classic classroom example

6 Thus, in transactions not covered by the commercial code, the holder in due course doctrine, so much mooted in this country, does not exist. See Hartman & Walker, The Holder in Due Course Doctrine and the Consumer, 77 Com. L.J. 116 (1972). Cf. Uniform Consumer Credit Code §§2.403-04 [hereinafter cited as UCCC]; National Consumer Act §§2.405-06 [hereinafter cited as NCA]; HOGAN & WARREN, supra note 5, at 343-65 ("Negotiability in Consumer Transactions").


8 See Note, supra note 2, at 245.

9 SCHLESINGER, supra note 2, at 337, 378, 406. The determination of the merchant status of a party is, in fact, much facilitated by the existence in most civil law countries of a commercial register. Id.
being, it appears, the opera singer who buys securities from a brokerage house.\textsuperscript{18}

At one time, in the Anglo-American legal tradition, things were rather much the same. The story is familiar to most American students of commercial transactions.\textsuperscript{14} In medieval and post-medieval England, as on the continent, the law merchant and mercantile courts were recognized as a separate substantive and procedural element. Then, under the commonly attributed leadership of Lords Coke and later Mansfield, the common law court struggled for and won supremacy on both counts, and incorporated both the work of the mercantile courts and their doctrines into its all-encompassing embrace.\textsuperscript{16}

The unitary nature of the common law of commerce was capped by the wide adoption in the late 19th and early 20th centuries of the Negotiable Instruments Act and the Uniform Sales Act. Both acts were lump-concept enactments, which made no particular differentiation between mercantile and consumer transactions. And similarly, while the Uniform Commercial Code (UCC) is not totally devoid of recognition of the differing statuses,\textsuperscript{16} its provisions are largely unitary in nature.\textsuperscript{17}

Nevertheless, both in court decisions\textsuperscript{18} and in statutory enactments, both actual and proposed,\textsuperscript{20} the past twenty years in the United States have seen an increasingly clear recognition of the fact that the legal needs and expectations of businessmen in transactions \textit{inter se} and the legal needs and expectations of the retail consumer simply are not always of one track. Perhaps, for all its difficulties, the frank dichotomy of the law of continental Europe reflects a profound truth.

Professors Hogan and Warren have seized upon this evident truth both in titling and in structuring their new casebook—the latest in a marked spate of fresh offerings in the commercial transactions field.\textsuperscript{21}

\textsuperscript{18} \textit{Id.} 408. I believe I should prefer the favorite example of my colleague, Professor Aronstein, who delights to speculate on the rightful “consumer” status of the retail purchaser of a Mercedes-Benz for, say, $8,750 cash.


\textsuperscript{16} See Thayer, \textit{supra note 10}.

\textsuperscript{17} The decision not to deal with most consumer issues was deliberate, to avoid a potentially violently controversial issue. 2 G. Gilmore, \textit{Security Interests in Personal Property} 1093 (1965). The UCC does provide, in effect, that in the event of conflict between its provisions and consumer legislation, the latter prevails. UCC §§2-102, 9-201.


\textsuperscript{19} See CCH \textit{Consumer Credit Guide} passim.

\textsuperscript{20} \textit{E.g.}, UCCC; NCA.

\textsuperscript{21} In addition to \textit{Hogan \& Warren}, just within the past five years have appeared, to my knowledge, E. Peters, \textit{Commercial Transactions} (1971); V. Countryman
The preface itself makes clear the operative theme:

As the title of this book indicates, we see consumer transactions emerging as a proper, even necessary, object of inquiry for commercial lawyers. Whether our business law will eventually break down into two largely distinct bodies of doctrine, one governing commercial transactions and other consumer transactions, we are not prepared to predict. But trends are strong enough in this direction to justify a course orientation that invites the student's attention to the divergencies arising between statutory and judicial treatment of consumer as opposed to commercial matters.22

Like Saint Nicholas, the authors get straight to their work. The beginning pages23 take up at the outset two of the more perplexing areas of the Code involving the distinction mentioned in the preface. The first involves the famous "battle of the forms" and the attempted peace settlement provided by UCC section 2-207(2) in transactions "between merchants." Those seeking a shade of difference will be gratified by the use of American Parts Co. v. American Arbitration Association24 instead of Roto-Lith Ltd. v. F.P. Bartlett & Co.25 (A characteristic of the work is to pick fresh and recent cases, which, indeed, is what one would expect for a course focused on such a recent statute. For example, in the approximately 300 pages constituting the negotiable instruments section of the book, over half the reprinted cases were decided within the past five years, and only five predate 1960, including Peacock v. Rhodes and Gill v. Cubitt.) Immediately, in the notes following, the authors raise this theme of the casebook: "Why does UCC § 2-207(2) operate only in transactions 'between merchants'?" 26

Likewise, in the immediately following section, the authors take up a case27 turning on the issue whether an Arkansas soybean farmer is a "merchant" within the meaning of UCC section 2-201(2), providing for an exception to the Statute of Frauds. Here, too, by the use of relevant and penetrating notes, the authors raise various definitional


22 Hogan & Warren, supra note 5, at xv-xvi.
23 Id. 1-16.
25 297 F.2d 497 (1st Cir. 1962). Of course, this case cannot be ignored entirely. It is noted on page 11.
26 Hogan & Warren, supra note 5, at 11.
and policy questions about the "merchant" status, and at the same time expand discussion to cover generally the subject matter of the case.

These first sixteen pages thus set and reflect the theme promised by the title of the casebook. But more than that, this initial short chapter reflects in microcosm virtually all the salient characteristics of this important addition to the range of offerings in the increasingly popular "integrated" commercial law field.

First, the book is significantly selective in its subject matter coverage, as its relatively short length indicates. True, its first three parts are structured in the traditional breakdown of sales, negotiable instruments, and secured transactions. (The final part 4, in accordance with the theme of the book, is entitled "Consumer Credit." But within each major division, only a limited number of topics are dealt with. The first sixteen pages, for example, constitute the totality of the treatment of the whole process of "Formation and Formalities in Sales Agreements," the title of this opening chapter. The whole process of the documentary sale, including bills of lading and letters of credit, is disposed of in two pages. The formal requisites of negotiability under the UCC also cover two pages. No attempt is made to deal with sight drafts, trade acceptances, or other instruments to which the drawee is not a bank. On the other hand, certain areas, presumably deemed of particular significance by the authors, are at least as fully covered as in commercial transactions casebooks generally. The issue of "quality" in sales contracts, with its attempted unraveling of the relationships between warranty and tort, occupies almost twenty percent of the entire book.

Some sixty pages are devoted to the general area of rate regulation, including explorations of the theory of usury and the time-price doctrine. The intricacies of the bank collection process are quite fully treated, complete with three cases predictably difficult for many students.

Second, the authors have eschewed any marked deviation from a classic presentation. Examples of the several documents used in commercial transactions will have to be supplied by the instructor on his own; very few appear in the casebook itself. (Parenthetically, I

28 As with most recent "commercial transactions" casebooks, Hogan and Warren's offering can be used in separate courses covering only part of the material. Thus, the preface contains specific suggestions for selections from the casebook to be used in a separate course on sales and sales financing, and on negotiable instruments. A few of the recent casebooks labeled "commercial transactions" in fact are not so comprehensive in scope, e.g., V. COUNTRYMAN & A. KAUFMAN, supra note 21, which is devoid of any traditional sales materials (other than documentary sales), or E. PETERS, supra note 21, which deals with negotiable instruments only in a long, solely textual chapter at the end.

29 This reflects, presumably, an author's decision on the controversy over the proper allocation of Article 2 between the contracts and the commercial law course. See Clifford & Smith, Book Review, 48 Tex. L. Rev. 862, 863-69 (1970).

30 The last two sections of the "Quality" chapter deal with federal regulation of quality, and more specifically the role of the Federal Trade Commission, and with the area of "risk of loss." Typically, in this latter subject matter area, the first matter to be taken up is the distinction in UCC §2-509 between the "merchant" and non-merchant seller and the reasons therefor.

31 The few forms reproduced are in the consumer field (Master Charge card and agreement, Regulation Z forms), and in dealer-bank assignment of chattel paper.
might say that while it is in my judgment imperative that students be exposed to the real-life documents of commerce, I rather approve of the apparent assumption of the authors that such documents drawn from the locale of the particular law school will be more meaningful to the students—to the extent that any documents can be meaningful without actual experience in their use.) Moreover, the casebook will require the instructor to present vividly in his own manner the underlying stuff of commerce of which commercial transactions are made. Unlike, say, the attempt of Speidel, Summers, and White to bring, through extensive use of text, the flavor of business to the classroom, Hogan and Warren concentrate their limited space on the law. The notes after cases of course contain from time to time problems for students to wrestle with, but they are relatively stark in detail, as opposed to the major focus, say, of Nordstrom and Lattin on the problem technique as the heart of the pedagogical method. Even the index and tables are spartan: no separate table exists for references to particular sections of the UCC or other statutes. There is no teacher’s manual and no special statutory supplement. Of course each student will have to use in addition to the casebook his own copy of the UCC and probably at least the Uniform Consumer Credit Code (UCCC). The casebook does contain in an appendix the Consumer Credit Protection Act of 1968 and Regulation Z thereunder, as well as, less accountably, a draft of the New England Bankcard Association Operating Rules.

Third, the casebook appears to expect, and does demand a good deal from both student and instructor. On the jurisprudential issue whether commercial transactions should be used as a vehicle to explore the larger philosophical considerations of codification generally or the proper use of codes or statutory interpretation, the authors here have opted for a focus primarily on the law. They make this clear at the outset, in dealing, immediately after the first case, with the problem of use of the Code’s comments and of its legislative history. One paragraph is devoted to the former question, nine paragraphs to the latter. A question may be raised whether, by downplaying consideration of certain aspects of the Code as a whole, the student will fail to perceive the underlying themes which bind the Code (and in a sense commercial law) together, such as the pervasive and sometimes overlooked prin-

32 R. SPEIDEL, R. SUMMERS & J. WHITE, COMMERCIAL TRANSACTIONS (1969). One example is the excellent second chapter of this casebook, “Attributes of the Lawyer Who Practices Commercial Law Badly.” Another good example is the prototype transactions of check collections, export transactions, and automobile financing contained in the supplement to E. FARNSWORTH & J. HONNOULD, supra note 21.


34 Compare, for example, the general introduction of E. FARNSWORTH & J. HONNOULD, supra note 21, the first chapter of D. KING, C. KUENZEL, T. LAUDER, N. LITTLEFIELD & B. STONE, supra note 21, and the first two chapters of R. SPEIDEL, R. SUMMERS & J. WHITE, supra note 21, containing extensive discussions of the nature and sources of commercial law, the history of the UCC, and of UCC methodology.
ciples contained in Article 1. It comes down to, I should suppose, a matter of style. In its first three parts, at least, this is a crisply written, no-nonsense casebook.

However, the paramount distinguishing characteristic of this new addition to the commercial law offerings is its frank and frequent treatment of the provocative dichotomy revealed by its title and portrayed at the beginning of this review. This is done in a variety of ways. Deliberate selection seems to have been made of subject matter areas where the difference in treatment between businessmen and consumers can be usefully explored, such as the already discussed “merchant” exception to the Statute of Frauds. Consumer issues are also unfailingly and thoroughly raised in appropriate cases when dealing with traditional areas of commercial law. Thus, almost half of the holder in due course discussion is devoted to “Negotiability in Consumer Transactions.” The materials dealing with the default provisions of Article 9 commence with a substantial excerpt from Professor Caplovitz, explore considerations of the due process and equal protection clauses’ application to the traditional creditors’ remedies, and analyze the statutory solutions of the UCCC.

In addition to these treatments of the consumer in context, the authors have elected to treat, in a separate part 4, the thorny area of “Consumer Credit.” Three areas are singled out for treatment: rate regulation, disclosure of finance charges, and limitations on creditor agreements and practices. Here the student may most clearly be introduced to the largely statutory recognition of the need for special protection for consumers. Consequently, the authors have in this part included considerable amounts of non-case material which should focus the student’s attention on the complex economic and political issues involved and the intense technical difficulties that may be involved in their resolution. In addition to the Truth in Lending Act and Regulation Z reproduced in an appendix, the text itself contains a sizeable

35 See, e.g., Haukland, Uniform Commercial “Code” Methodology, 1962 U. ILL. L.F. 291. Symbolically, the HOGAN & WARREN index contains no entry for “course of dealing” or “usage of trade.” That is not to say, of course, that any study of “commercial law” should be “lured into the comfortable trap” of focusing only on the UCC. Dauer, Book Review, 13 B.C. IND. & COM. L. REV. 193, 195 (1971). As this review has indicated, Hogan and Warren have ranged well out from the UCC into other applicable statutes and doctrines. Compare the approach of E. Peters, supra note 21, which deliberately incorporates into its field of “commerce” materials dealing with service and construction contracts and real property transfers. See Miller, Book Review, 40 FORDHAM L. REV. 746 (1972).

36 For a thoughtful and extensive discussion of the appropriate inclusion of materials for extensive policy analysis and skills training, see Wallace, Book Review, 66 NW. U. L. REV. 404 (1971).

37 Caplovitz, Breakdowns in the Consumer Credit Market Place, 26 BUS. LAW. 795 (1971).

38 For a brief presentation of one of the authors’ views on the teaching of this area, see Hogan, Book Review, 56 CORNELL L. REV. 365 (1971). See also Roundtable on Commercial Law, supra note 11, at 331-36 (remarks of Professor Warren). For other options as to course placement of consumer transactions material, see Dole, Book Review, 71 COLUM. L. REV. 1350 (1971).
section exploring such intricacies as the coverage of the Act and the proper determination of the amount of the finance charge. And of course, provisions of the UCCC (but not the National Consumer Act) are held up for examination at numerous appropriate points: cross-collateral, gross price disparity, referral sales, door-to-door solicitation, cooling-off periods, are only a few examples from “Limitations on Creditor Agreements and Practices.”

In short, Professors Hogan and Warren have given us more than a renamed rose. This is a casebook which has adopted a forthright recognition of the business-consumer dichotomy as an underlying central theme of orientation for the basic commercial law course. It may be that with such patent “relevance” we may well kindle an unsuspected student interest in the legal principles and policies sustaining the world of commerce generally. It may well be that such a world can be more fully respected as one that is just and fair when it openly recognizes in its structure the differing positions of its participants. The civil law has long done so. Now we of the common law seem on a path that will soon enable us to join our brethren of the European tradition in raising, in a novel context, the much-beloved toast, “vive la différence.”

As already mentioned, note 11 supra, the rigidity and formalism of the present sharp distinctions in the civil law between the two codes is the subject of much debate. A recognition of the considerable differences between merchant and consumer does not by any means require the advocacy of any slavish imitation of the European models. For a perceptive discussion, see Schlesinger, The Uniform Commercial Code in the Light of Comparative Law, 1 Inters-Am. L. Rev. 11, 42-58 (1959). He concludes that the drafters of the UCC wisely rejected any wholesale adoption of the civil law substantive dichotomy. Cf. R. Pound, Jurisprudence 73-75 (1959). For a vigorous discussion by notables in this field of the proper interplay between consumer protection and facilitation of dealings of merchants, see Roundtable on Commercial Law, supra note 11.
Unfortunately, the eye-catching title of this monograph implies too much. Before the first page is turned, one sees the specter of a black-robed conspiracy "to protect their own." The judges are destined to be prejudged by those who read no further than the dust jacket. Interestingly, a portion of the foreword seems almost to belie the title, as its writer comments:

Encouraging, too, to those active in the legal process is the conclusion which one might derive from Mr. Braithwaite's work that there is a relatively small incidence of actual judicial misconduct—at least in the states studied—an incidence, however, whose relative rarity perhaps occasions the greater shock when it does occur and is, properly, made a matter of public record and press headlines.¹

Nevertheless, the title notwithstanding, Mr. Braithwaite's treatise is imperative reading for all who are concerned with improving the administration of justice.

This study is the product of a research project initiated by the American Bar Association's Standing Committee on Judicial Selection, Tenure and Compensation. In its final form, research was limited to a study of five states to determine the manner in which they cope with the problems of judicial misconduct, incompetence, and disability. The five states—California, Illinois, Missouri, New Jersey, and New York—were selected because of marked differences in procedures used to deal with these perplexing questions.²

The project's basic approach was to develop case histories of situations involving judges who had been removed from office for incompetence, disability, or misconduct. It was impossible to use the same techniques or the same sources of information in all states. Basically, however, the staff turned to conventional legal materials, judges, trial lawyers, court personnel, court records, and confidential records as well as news reports. Mr. Braithwaite is the first to acknowledge that it was impossible to use scientific methodology and style of research. Rather, it was necessary to approach the situation more as a careful

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² Id. xv.
reporter. This did not prove to be a drawback, however, because the author has carefully drawn the line between reporting and editorializing.

In each case the investigation sought to resolve seven basic questions: (1) what was the nature of the problem; (2) how did the legal community learn of it; (3) what, if anything, was done about it and by whom; (4) what procedures were used to resolve the problem; (5) what agency was responsible for a final determination of the case; (6) what was the ultimate outcome; and (7) how long did it take to resolve the problem.

The monograph is divided into four parts. The first takes an overview of the entire perplexing situation that faces both the federal and state judiciaries. Each has had problems ranging from occasional positive acts of misconduct to the more usual, but less dramatic, cases of impropriety such as habitual tardiness, failure to carry one's share of the work, arbitrary use of power, extreme rudeness, and clowning on the bench.

As Mr. Braithwaite points out, the difficulty is not that there are a great number of cases of judicial misconduct, or that such cases are serious in nature. Rather, they cause concern because: (1) judges have an unusual role in society and the community expects more of them than it does of other public officers; thus, the damaging consequences of judges' indiscretions are far out of proportion to their actual seriousness; (2) disabling illness or weakened mental faculties have made it impossible for some judges to fulfill their duties and yet they may be unbeatable at the polls in those states that have judicial elections; and (3) the traditional procedures for dealing with the problem have proved to be unsatisfactory. As stated by Maurice Rosenberg:

A judge need not be vicious, corrupt, or witless to be a menace in office. Mediocrity can be in the long run as bad a pollutant as venality, for it dampens opposition and is more likely to be tolerated. Judicial office today demands the best possible men, not those of merely average ability . . . .

The treatise makes it clear that "impeachment," available in forty-six states is costly, cumbersome, and is seldom employed. In short, it is an ineffective solution to the problem of the misbehaving jurist and is no solution at all insofar as the ill or senile incumbent is concerned. "Address" (a formal request from the legislature to the governor to remove a judge), available in twenty-eight states, and "recall," found in seven states, are equally ineffective. Thus, within the past decades more than twenty-five states have begun to take another look at the subject of discipline, removal, and retirement of judges.

3 Id. xvi.
4 Id. 8–10.
Part two of the monograph reviews procedures of the five selected jurisdictions in the area of discipline and removal for misconduct, as distinguished from disability.

At the time of the research, Missouri's only formal procedure for the removal of a judge for misconduct was impeachment. This system has since been replaced by a constitutional amendment creating a commission on retirement, removal, and discipline.\(^6\) The study of Missouri's experience reviews three cases of judicial misconduct handled by the impeachment process in recent years.\(^7\) Although the service of all three judges was eventually terminated, the delay and tremendous cost make it evident that such a system is seriously deficient.

New Jersey has approached the problem in a different manner. Although the state constitution gave the supreme court responsibility for the discipline and removal of judges, it provided that it should be done "in such manner as shall be provided by law."\(^8\) For more than two decades the legislature failed to provide the implementing legislation. At the time of the research, the supreme court found it necessary to deal with judicial misconduct under its constitutionally designated jurisdiction over the discipline of persons admitted to the practice of law.\(^9\) Pursuant to that power, the supreme court made the canons of professional ethics binding on lawyers and jurists alike.\(^10\) While the court appeared to lack the power to remove judges, it was able to actively encourage one who misbehaved to remove himself, resign, retire, or mend his ways. This policy was followed with vigor by the supreme court.

In 1970 the New Jersey legislature finally provided implementing legislation which authorized the supreme court to deal directly with judicial misconduct.\(^11\) The procedural routine was not changed greatly. The administrative office remained the investigative agency and all proceedings remained confidential, although today, evidence is taken before a three-judge panel or the supreme court en banc. A judge has the option of a full-dress adversary proceeding if he wishes to contest the allegations against him. However, few have chosen that route.

The New Jersey system has many advantages for dealing with judicial misconduct because the supreme court is the removal-discipline agency as well as the administrative directorate of the state's court system. This clearly helps it to monitor potential problem areas of misconduct. Further, from a public relations standpoint, the supreme court and the administrative offices are a visible, permanent institution constantly available to receive complaints.\(^12\)

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\(^6\) Mo. Const. art. V, § 27.

\(^7\) W. Braithwaite, supra note 1, at 23-37.

\(^8\) N.J. Const. art. VI, § 6, ¶ 4.

\(^9\) Id. § 2, ¶ 3.


\(^12\) W. Braithwaite, supra note 1, at 55.
New York deals with the problem of judicial misconduct on two levels, each with the power to remove and retire judges. A specially constituted Court on the Judiciary (as differentiated from the state's highest appellate tribunal) has jurisdiction to remove judges of the highest appellate court and the five major state-wide trial courts.

The treatise speaks with some dismay of the fact that the Court on the Judiciary has been convened only three times to consider matters brought against four judges, since it became effective in 1948. "It is scarcely credible that of this number [1,200 judges since 1948], only four gave cause for inquiry into their performance or conduct," comments Mr. Braithwaite.

On the other hand, the appellate division of the supreme court (the intermediate appellate court) has jurisdiction over the judges of lower courts in each of the four departments into which the state is divided for administrative purposes. It receives complaints from all usual sources. In addition, the appellate division has the power to originate investigative actions on its own.

The appellate division has the power of removal and discipline. However, the fact that this division also has extensive administrative power facilitates the operation of its discipline and removal procedure by increasing its range of possible formal and informal dispositions. As a result supervision of the judiciary is more effective at this level than in the more formalized Court of the Judiciary.

California's removal and discipline mechanism is operated by the Commission on Judicial Qualifications, a nine-member agency authorized to receive and investigate complaints of judicial misconduct and to recommend appropriate action to the supreme court. The power of discipline or removal, however, remains in the supreme court. In actual practice, few cases reach the supreme court, nearly all being resolved at the commission level.

The commission records and proceedings are confidential unless the supreme court is required to take formal action. Thus, it was impossible for the study to determine which judges had been retired for misconduct or disability. It can be said, however, that in the first nine years of operation the commission has received an average of one hundred complaints a year of which approximately two-thirds were either unfounded or outside its jurisdiction.

The commission, comprised of five judges, two lawyers, and two lay citizens, employs a full-time executive secretary who does most of the investigations of valid complaints. Complaints can be handled both formally and informally. The fact of complete confidentiality and initial informality has led to termination of service, where warranted, early in proceedings.

13 Although there are actually five removal procedures, only two are important enough to warrant attention. See id. 56.
14 Id. 65-66.
15 Id. 81.
The California system is said to be effective in terminating the service of judges guilty of serious misconduct, and in adequately disciplining those whose conduct is less opprobrious. It is also effective in that it operates expeditiously at an acceptable cost. Further, the possibility of impairing judicial independence is minimized because power to make the final decision in contested cases remains with the supreme court. Finally, from the standpoint of public relations, the commission is (as in New Jersey) a permanently constituted visible organization available to receive complaints.

The Illinois Court Commission, consisting of five judges, has the power to remove, discipline, or retire a judge for misconduct or disability. A nine-member Judicial Inquiry Board receives and investigates complaints and when a reasonable basis exists, may prosecute the charges before the commission.

As indicated by the monograph, at present the commission appears to have all the outward requisites of an effective procedure: agency continuity, permanent staff, a hearing agency, and confidentiality of proceedings as well as the backing of the supreme court.

Part Three of the study concerns itself with the related subject of what to do with the judge who, by age, or by mental or physical disability, is unable to perform his judicial functions. Mr. Braithwaite comments that it is unfortunate that judges are no more willing to retire from their active life work than is any other occupational group. Thus, often they must be induced to take that step. Several methods have been attempted, with varying degrees of success, such as adequate retirement pay (seldom available in actual practice), mandatory retirement age (successful if not set too high), or a combination of both which reduces the retirement pay of judges who, although eligible to retire, do not do so by a fixed age.

It is interesting to note, however, that Mr. Braithwaite found that in actual practice some member of the retirement agency usually approached the judge and attempted to persuade him to retire. Often it was necessary to rely upon some member of the family. While it may be effective occasionally, Mr. Braithwaite asks, quite properly, "whether an effectual but inefficient procedure is a satisfactory way to handle the problem."  

Finally, the treatise compares procedures used in the five jurisdictions. No attempt is made to answer definitively the question "which is best?" In fact, the conclusions reached are at once tentative and qualified, as indeed they must be. For this, Mr. Braithwaite is to be congratulated rather than criticized because the study reveals that similar systems oftentimes produce dissimilar results. These differences

16 Id. 99.
17 Id. 115.
18 Id. 146.
can only be explained by that nebulous, but very real factor called "will" or "desire" to make the system work. New Jersey is a case in point. There, the supreme court lacked the necessary tools. Nevertheless, it looked for and found substitutes to resolve the problem.

Considering the overview, the study makes no attempt to pick a "winner." Rather, it attempts to pinpoint the best features for those who desire to take the step of meeting judicial difficulties that range from misbehavior (running the gamut from mere habitual tardiness to actual criminal misconduct) to physical and mental inability to carry the load.

The study suggests that the ideal system must meet several criteria.¹⁰

1. Procedures for discipline and removal should have enough flexibility to deal with all of the wide range of problems. They should have a breadth of disposition that ranges from informal treatment, through formal public censure, to termination of office. (2) The procedure must be capable of operating expeditiously with minimum cost and without a public spectacle. Little is gained, and usually much is lost, by having a public proceeding. Practice has shown that, on the one hand, confidentiality protects judges from groundless or trivial charges and also leads to quiet resignations or retirements if the charges are well founded. On the other hand, lack of confidentiality frequently leads to a contest. The reason is obvious, for at that point the judge has everything to gain and nothing to lose by a fight to the finish. Mr. Braithwaite further concludes that the reason for confidentiality is even stronger in the case of disability. (3) An effective permanent staff is imperative. Only such an organization can give continuity to the system. Further, it must be an identifiable agency conveniently available to potential complainants. Accessibility not only provides efficiency, but is a vital link in good public relations. (4) No complaint, however trivial, should be ignored. Each should be acknowledged by letter, even if it does no more than explain why the committee cannot act thereon. (5) In addition to a permanent investigative staff, the agency should have an arm authorized to hold full-dress, confidential, adversary hearings. (6) It is implicit in such a system that final review should be available in the state's highest appellate tribunal. This insures independence of the judiciary. (7) The system not only should have the support of the bar and the judiciary generally, but the firm support of its highest appellate tribunal as well. (8) The disability problem should be resolved by a mandatory retirement age sufficiently low to cover most physical and mental disability problems.²⁰ (9) In addition to a mandatory retirement age, adequate retirement pay must be provided to make retirement a real financial consideration for the judge involved.

¹⁰ Id. 159-67.

²⁰ New Jersey has followed this policy by requiring judges of major courts to retire at the age of 70. Id. 165.
This, of course, would depend upon years of service. Nevertheless, it can be used as an incentive to retire as well.21

The study of the five jurisdictions and their procedures does not pretend to be definitive. Without question, other states have attempted to find their way through the maze. Most have met with varying degrees of failure because they have lacked most, if not all, of the nine essential ingredients referred to above. For example, a few states have created committees within their judicial associations to handle complaints against judges. Upon receipt of a complaint, the matter is studied. If it is deemed to be sufficiently serious, the committee calls upon one or several members of the judiciary to discuss the matter with the "offender." Unfortunately, the bar feels that such committees are not an effective agency and thus seldom uses them. This disenchantment frequently arises because the committee has only the power of persuasion. Its effectiveness is no greater than the willingness of the alleged "offender" to listen to the complaint. The committee has no power to employ informal discipline, much less censure, formal discipline, or removal of judges. Further, there is no permanent, identifiable agency with ready accessibility to the public. Thus, to date, these systems have proven to be an ineffective answer to the problem.

Other states have approached the situation through the rating of judges by means of "bar polls" sponsored by bar associations. Again, this is at best a makeshift answer to a perplexing situation. Under such a system members of the bar are queried about each judge in his judicial district and asked to rate each on such criteria as judicial temperament, judicial ability, honesty, and accessibility. Each judge is furnished with a copy of his own standing in the poll. Otherwise, the result remains confidential.

The true effectiveness of such a system is open to question. First, it is customarily conducted by mail with the usual relatively low incidence of response. Even a response of fifty percent or slightly better would, from statistical methodology, be suspect. Second, there is the danger that it may be no more than a popularity poll. Third, many lawyers maintain an office practice, as contrasted with a courtroom practice. Thus, they must rely upon other members of their firm or other lawyers within their acquaintance to form their opinion. This is not a very reliable method of testing judicial ability or lack thereof. Fourth, judges who often appear to be unavailable, and who might rate rather low in this area, may be unavailable because they are busy trying cases or assisting judges in other areas. Fifth, assuming a judge may rate low in the area of judicial temperament and can or will do something to correct the problem, there may be very little he can do about a

21 In California, retirement pay for a judge who retires after 70 is 50% of the current salary of office, whereas one retiring before age 70 may receive 65% (75% with 20 years of service). In Maine, retirement benefits are waived if a judge refuses to retire by age 71. In Minnesota and North Dakota, a partial waiver is involved if a judge fails to retire by age 73. Id. 120 n.2.
low rating in the area of judicial ability or mediocrity (unless it is caused strictly by laziness). Finally, we reach the crux of the problem: the poll does not provide an effective answer because it is left to the subjective reaction of the members of the bar as well as the subjective reaction of the judge who has been rated. There appears to be little or no connection between such an approach and the need for an effective system of discipline, removal, retirement, and/or tenure in office.

If *Who Judges The Judges?* and the study that produced it conveys nothing more than the following idea, it will be time and money well spent by author and reader alike:

A failure of procedure is a technical legal problem, but a failure of will is a political problem. . . . But it seems clear that however well designed, a procedure cannot operate effectively—indeed probably cannot operate at all—in the face of a failure of will on the part of the legal and political communities.

On the other hand, it also appears that a real determination to confront the problem can in great measure compensate for inadequacies of procedure.\(^2\)

\(^2\) *Id.* 160.