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The Search for Analysis in Judicial Ethics or Easy Cases Don't Make Much Law

Steven Lubet

Northwestern University School of Law, slubet@law.northwestern.edu

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The Search for Analysis in Judicial Ethics or Easy Cases Don't Make Much Law

Most violations of judicial ethics appear to be inadvertent. Aside from the few cases where judges deliberately violate the law or otherwise dishonor their positions, the overwhelming majority do their best to live within the ethical strictures that judging places upon them. Although much needs to be done about the deliberate misbehavior, there is little that can be said about the few bad actors.¹ They must be discovered, apprehended, and removed from the bench, but this is more a problem of enforcement than of analysis.²

Violations persist, however, even among the well-intentioned, for a variety of understandable reasons. First, until recently, relatively little attention has been paid to the subject of judicial ethics. Except in times of scandal, the subject has more or less lain dormant. The sub-

* Professor of Law, Northwestern University. B.A. 1970, Northwestern University; J.D. 1973, University of California at Berkeley (Boalt Hall). The research for this work forms part of a larger project that has been supported by the Chicago Bar Foundation and the Julius Rosenthal Fund. I am indebted to my colleague Robert Burns for his comments on an earlier draft of this essay and to Michael Antonello for his research assistance.

In the course of this paper I will often express opinions about the state of the general understanding of legal ethics. These impressions have been gathered over the course of several years of lecturing at judicial conferences and counseling individual judges on the subject of judicial ethics. Although anecdotal data must always be slightly suspect, I believe that my numerous discussions with judges form a solid basis for understanding their concerns and beliefs, if not their actual behavior.

1. Cases on "bad actors" fall into several categories, including: (1) actual corruption, *see, e.g., ex rel. Oklahoma Bar Ass'n v. Haworth*, 593 P.2d 765 (Okla. 1979) (judge gave lenient treatment to convicted felon in return for felon's father's agreement to campaign for a certain candidate for public office); (2) other law-breaking, *see, e.g., In re Haggerty*, 257 La. 2, 241 So.2d 469 (1970) (pattern of willful misconduct, including illegal gambling); (3) abusive conduct toward litigants and others, *see, e.g., In re Scott*, 377 Mass. 364, 386 N.E.2d 218 (1979) (abusive language on the bench); and (4) misuse of judicial office for personal gain, *Steinberg v. State Comm'n on Judicial Conduct*, 51 N.Y.2d 74, 409 N.E.2d 1378, 431 N.Y.S.2d 704 (1980) (judge arranged loan transactions in his chambers).
2. *See Lubet, Judicial Ethics and Private Lives*, 79 Nw. U.L. REV. 983 (1985).

ject of judicial ethics is not part of any law school curriculum,³ there is currently no text or treatise available on the subject,⁴ and since 1980 the number of scholarly articles devoted to judicial ethics is probably under a dozen.⁵ While judicial ethics has become an increasingly frequent topic at judicial educational seminars, it is still far from being a constant presence. For example, the American Bar Association conducts seminars for appellate judges approximately three times each year, but in the last five years, ethics topics have been on the program only twice.

Second, many of the rules governing judicial behavior are of the technical, "malum prohibitum" variety.⁶ For example, it is not inherent in the job that judges must refrain from acting as fiduciaries,⁷ or that a judge must decline to appear as the guest of honor at a fund-raising event for a charity.⁸ Moreover, as is always the case with technical rules, interpretation becomes an exercise in fine line drawing,

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3. Of course, there is no judicial equivalent to the Multi-state ethics exam that is given to virtually every aspiring lawyer.
 4. I hope to remedy this omission in the near future with the publication of a treatise on judicial conduct and ethics. The book will be co-authored by Professor Jeffrey Shaman of the De Paul University College of Law and Professor James Alfani of the Florida State University College of Law. It will be published by Kluwer Law Book Publishers of America.
 5. A number of articles were published in the early 1970s when the Code of Judicial Conduct was initially debated and adopted by the American Bar Association. It is instructive to enumerate the post-1980 literature as a measure of the amount of interest in the field. I may have missed a few, but see S. LUBET, *BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES* (1984); Bradbury, *Judicial Morality in a Democracy*, CAL. LAW., Sept. 1985, at 10; Brooks, *How Judges Get Into Trouble: Judicial Ethics and Discipline Today*, JUDGES J., Summer 1984 at 4; Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1986); Lubet, *supra* note 2; Markey, *The Delicate Dichotomies of Judicial Ethics*, 101 F.R.D. 373 (1984); Shaman, *Off-The-Bench Conduct*, 57 PA. B.A.Q. 24 (1986); Shaman & Bégué, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process*, 58 TEMP. L.Q. 755 (1985); Nathanson, *The Extra-Judicial Activities of Supreme Court Justices: Where Should The Line Be Drawn?* (Book Review), 78 NW. U.L. REV. 494 (1983).
 6. See, e.g., *In re Durr*, 1 Ill. Cts. Com. 13 (1973) (practice of law); *In re Babineaux*, 346 So.2d 676 (La. 1977) (outside business activity); *In re Morrissey*, 366 Mass. 11, 313 N.E.2d 878 (1974) (acceptance of gifts); *In re Guay*, 101 Wis. 2d 171, 303 N.W.2d 669 (1981) (failure to meet financial disclosure requirements); *In re Kading*, 74 Wis. 2d 405, 246 N.W.2d 903 (1976) (failure to file financial disclosure reports as required by court rule).
 7. CODE OF JUDICIAL CONDUCT Canon 5D (1972) ("A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties.").
 8. *Id.* Canon 5B(2) (A judge "should not be a speaker or the guest of honor at an organization's fund raising events, but he may attend such events."). In my own random and completely unscientific survey of state court judges, the revelation of this restriction is generally met with absolute consternation. The language of the

and where fine lines will be drawn is notoriously difficult to predict. The law is relatively well settled that a judge may allow his or her name to appear on the letterhead of a charitable organization, but not if the name and office are being used to solicit contributions.⁹ It is not difficult to see how this distinction might elude an individual, and thus give rise to an inadvertent violation.

Compounding the problem is the fact that most judges have nowhere to turn for advice.¹⁰ Although about twenty states and the Federal Judicial Conference have established "advisory" committees,¹¹ in most jurisdictions advisory opinions are either unavailable or hard to find. Even where advisory bodies exist, the scope of their authority is often vague or the precedential value of their opinions is uncertain.¹² In any event, it appears that no state has made a practice of circulating advisory opinions, other than upon request, or of reporting them regularly in an indexed manner. In the absence of a developed mechanism, such as the "Formal Opinions" of the American Bar Association, no coherent body of interpretation has developed.¹³

All of this is not to say that judges themselves are without blame regarding their general ignorance of the rules that govern their profession. Having ridden the judicial ethics circuit for several years, I have observed that nation-wide, judges de-emphasize the importance of ethical issues.¹⁴ The introduction of the subject is often met with polite smiles that are clearly indicative of a prevailing "good judges

Canon is unambiguous, but judges simply cannot believe that the rule exists—or that it applies to them.

9. Fed. Advisory Comm. on Judicial Activities, Advisory Op. No. 35 (May 8, 1974); cf. Fed. Interim Advisory Comm. on Judicial Activities, Advisory Op. No. 22 (March 30, 1971) (earlier opinion, modified by Opinion No. 35, holding that a judge's name should not be used on the letterhead of fund-raising literature). These opinions are contained within the Code of Judicial Conduct for United States Judges which is published by the Judicial Conference of the United States.
10. See Markey, *Judicial Need for the 80's: Schooling in Judicial Ethics*, 66 NEB. L. REV. 417 (1987).
11. The advisory committee established by the Federal Judicial Conference is called the Federal Advisory Committee on Judicial Activities.
12. See *In re Kapcia*, 389 Mich. 306, 205 N.W.2d 436 (1973) (court rejected Commission's recommendation of removal).
13. This is not to say that there are no research tools available. The Judicial Conduct Reporter is a looseleaf service published quarterly by the Center for Judicial Conduct Organizations. It contains summaries of recent opinions as well as short topical articles. The American Judicature Society has published the Judicial Discipline and Disability Digest, with supplements to date. The Digest contains short summaries of both reported opinions and unreported determinations.
14. I will not detail the states in which I have lectured on judicial ethics because I do not want my criticisms to appear to be aimed at any particular jurisdiction. For those who may be curious, I have taught at conferences from coast to coast and in every region of the country. Some have been mandatory state court educational meetings, and some have been meetings of broader groups such as the American Judicature Society and the Conference of Judicial Conduct Organizations.

don't need to listen" attitude. Moreover, this attitude extends beyond behavior exhibited during occasional attendance at required lectures. Of the thousand or so judges to whom I have lectured in the last two years, it is my observation that perhaps half have not even read the Code of Judicial Conduct. More than once I have shown the Code to a state supreme court justice who was obviously being made aware of its contents for the first time.

Hence, we have a problem. Judges run afoul of their Code out of ignorance or inattention. The Code itself is often vague and policy-oriented.¹⁵ There is no reliable interpretive literature. Although long term solutions may be available, they offer little assistance in the short run. Academics will probably increase the volume of their work on judicial ethics, but undoubtedly, it will take years for even the most practical literature to filter down to the trial court level. Advisory bodies may be established in those states where they are now lacking,¹⁶ but again there will be a time lag before the bodies are understood and utilized. Even more to the point, newly established advisory bodies will still need guidance. On what analysis will their advice be based?

FACING THE NEED FOR ANALYSIS

To be effective, a code of ethics must ultimately be self-enforcing. To be self-enforcing, it must be internalized. To be internalized it must carry with it a method for application to external facts. In other words, those who wish to follow the Code must be able to provide their own answers to questions of interpretation. This requires analysis, and, to prevent idiosyncratic interpretation, the method of analysis must be predictable.

Ethical codes generally, and the Code of Judicial Conduct in particular, serve at least two functions. One function is legislative or statutory. That is, the Code defines the crimes of the profession in such a manner as to make them legally punishable. This function is largely instrumental, as it does not rest strictly upon the understanding of the Code's provisions. As shorthand, I call this the "proscriptive" function.

The second function of the Code, which I call the "prescriptive" function, is to set standards to guide or educate. In this manner the Code serves not so much as a vehicle or tool, but rather as a statement

15. CODE OF JUDICIAL CONDUCT, *supra* note 7, Canon 2 ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.").

16. A recent, unpublished poll of the Illinois judiciary indicated overwhelming support for the establishment of an advisory body. The results of this poll—a twelve to one endorsement—have been forwarded to the Illinois Supreme Court, but no action has been taken as of this writing.

of moral order. To satisfy this purpose of the Code, understanding is essential.

These two functions can be observed throughout the Code of Judicial Conduct. Since the Code is mandatory,¹⁷ every provision is potentially punitive, but some are more proscriptive than others. As a general proposition, rules that prohibit discrete, finite or malum in se behavior can be characterized as more proscriptive, while the more open-textured or "attitudinal" provisions are more prescriptive in nature. Thus, the requirement that judges refrain from bribe-taking or extortion¹⁸ calls for less knowledge and analysis than does the command to avoid the appearance of impropriety.¹⁹ Everyone understands that extortion is wrong. The relevant provision is included in the Code not only to reinforce the common understanding but also to serve as a legislative basis for discipline. Personal impropriety, however, is an open-textured term with no similarly shared normative meaning.

The above distinction may also be drawn in terms of deliberate and inadvertent conduct. Certain code violations—again consider extortion or bribery—can only occur as a result of the willful conduct of the judge. In such cases, the Code's function is to deter through punishment. No amount of education or understanding will be effective, since an evil mind is a prerequisite to the transgression. In contrast, other violations, such as impatience or discourtesy,²⁰ are usually inadvertent. Judges can be taught to conform their conduct. However the distinction is denominated, the point remains that the Code covers many sorts of conduct, and that different violations call for different levels of juridic analysis.

Consider the Ten Commandments, an ancient code that is both proscriptive and prescriptive. Some of its strictures, like "Thou shalt not kill," are relatively absolute. In these cases, there is comparatively little need for interpretation or analysis. Killing, absent legal justification, is universally understood to be morally wrong. While analysis is required to understand the possible exceptions or justifications, the act or idea of killing is easily condemned.

Other Commandments, however, are less precise: "Thou shalt honor thy mother and father." Well, yes. But how? Under what circumstances? There must be exceptions, but what are they? Do step-parents count? As Commandments (and rules) become less absolute and less precise, as they become more concerned with future compliance and less with past acts, there develops a correspondingly greater

17. See Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 796, 803 (1972).

18. CODE OF JUDICIAL CONDUCT, *supra* note 7, Canon 2A.

19. CODE OF JUDICIAL CONDUCT, *supra* note 7, Canon 2.

20. CODE OF JUDICIAL CONDUCT, *supra* note 7, Canon 3A(3).

need for analytic method. The Commandment against killing works fairly well; very few people violate it in the course of their normal lives, even in the absence of a developed literature. On the other hand, the Commandment to honor one's parents appears not to be so well regarded, and surely it would take an enormous campaign of public education in order to make parental honor more commonplace. That is, until the concept of "parental honor" becomes apparent, well-known and predictable, it is unlikely that we will see a marked increase in its observation among the young.

The same likelihoods hold true regarding rules of judicial ethics. The rules that are relatively absolute and proscriptive tend to be followed even in the absence of widespread knowledge or analytic understanding. Most judges do not steal or otherwise violate the criminal law.²¹ When the proscriptive rules are not followed, it is frequently as a consequence of intentional misbehavior.²² No amount of analysis or interpretation will prevent that sort of wrongdoing, and after-the-fact punishment is probably the only remedy. The prescriptive rules are another matter. In order to avoid impropriety, judges must know what the improprieties are. Short of providing an exhaustive list, the only way to respond to this query is to provide judges with an analytic tool.

HOW AND WHY THE COURTS HAVE FAILED

In the context of judicial ethics, the necessary, apparent, well-known, and predictable rules can only come from the courts. Although commentators and advisory bodies analyze issues of judicial ethics, only the courts can speak with certainty and authority. Moreover, only the courts, through their opinions, have ready and immediate access to a wide judicial audience. Finally, judges have a tendency to discount outside opinions as "non-binding," in an obvious reference to the binding rulings of the higher courts.²³ In any event, courts that have occasion to rule on issues of judicial misconduct clearly have both

21. CODE OF JUDICIAL CONDUCT, *supra* note 7, Canon 2A. Regarding the duty of obedience to the law see Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct*, 1986 ARIZ. ST. L.J. 379.

22. See, e.g., *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978) (judge retained court costs of defendants in traffic cases); *In re Larkin*, 368 Mass. 87, 333 N.E.2d 199 (1975) (judge twice attempted to give an illegal campaign contribution to the governor).

23. I can cite no authority for this proposition; it is strictly my observation, although it is based upon significant contacts with judges from many jurisdictions. Interestingly, I have found that trial judges are the least likely to be interested in academic opinions, while judges who sit on higher courts are more open. Perhaps this is because reviewing judges are less concerned with reversal and consequently worry less about conflicts between academic opinions and those of the higher courts.

the opportunity and the duty to set forth standards and analysis to guide their fellow judges.

Unfortunately, many courts appear to view misconduct cases only as distasteful obligations, and not as opportunities for helpful explication. This often leads to a disproportionate preoccupation with the facts of the case at hand, and a corresponding lack of emphasis on policy questions and legal principles. Judges who read such opinions are left, at best, with an understanding of a single sort of proscribed conduct, but without a guide for the evaluation of future behavior.

For example, a recurring problem in judicial discipline is the question of whether a judge can be sanctioned for conduct that is legal where committed but illegal in the judge's home state. The Code of Judicial Conduct provides that judges must obey the law²⁴ and avoid even the appearance of impropriety,²⁵ but it does not explain the relationship, if any, among law, propriety, and geographic jurisdiction. Thus, with regard to such jurisdictionally diverse issues as gambling and consensual sexual conduct, judges are left in the classic prescriptive quandary. What does the Code require of the well-meaning judge?²⁶

Two courts that have had occasion to consider this issue have given us little in the way of useful methodology. In *In re DeSaulnier*,²⁷ the Supreme Judicial Court of Massachusetts considered numerous disciplinary charges against a judge, including the complaint that he had gone on gambling junkets to Las Vegas in the company of a Massachusetts bail bondsman.²⁸ Although the printed opinion and appendix contain over twenty pages of facts, only a single sentence is devoted to explanation of the gambling charge: "Furthermore, public gambling and being a judge are completely incompatible."²⁹

While it is true that the gambling charge was the least of Judge DeSaulnier's transgressions,³⁰ the court's offhand treatment of the issue created more analytical problems than it solved. Why is public gambling incompatible with being a judge? Is it only casino gambling that must be avoided, or is pari-mutuel betting also off-limits? Did the company of the bondsman make the gambling worse, or would it have been just as bad without him? Does the rule hold true only in the United States, or would it apply to Monte Carlo as well? Would it

24. CODE OF JUDICIAL CONDUCT, *supra* note 7, Canon 2A ("A judge should respect and comply with the law . . .").

25. CODE OF JUDICIAL CONDUCT, *supra* note 7, Canon 2 ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.").

26. See Lubet, *supra* note 21.

27. 360 Mass. 787, 279 N.E.2d 296 (1972).

28. *Id.* at 806, 279 N.E.2d at 306-07.

29. *Id.* at 812, 279 N.E.2d at 310.

30. The judge was also charged with influencing the disposition of cases and various financial improprieties. *Id.* at 812-13, 279 N.E.2d at 310.

apply to gambling on a cruise ship in non-territorial waters? In short, what is it about legal gambling that might lead to judicial discipline, and how should judges evaluate their conduct in the future?

In *In re Tschirhart*,³¹ the Michigan Supreme Court considered charges against a judge who, in the course of visiting a legal Nevada brothel, had become involved in an altercation with a taxi driver. Upon his return to Michigan, the judge gave a series of newspaper interviews about the incident that were considered "defiant, flippant, and disparaging."³² The Michigan Supreme Court adopted the decision of the state Judicial Tenure Commission and censured the judge for his coarse remarks, without consideration of his participation in the act of prostitution.³³ The court made no reference at all to the concurring opinion of one commissioner, who stated: "The fact that brothels are legal in the state of Nevada does not permit a Michigan judge outside his jurisdiction to participate. . . . A visit of a Michigan judge to a Nevada brothel is judicial misconduct for a Michigan judge."³⁴

In both cases the courts declined to reach questions that were not necessary to their decisions. It was certain that Judges DeSaulnier and Tschirhart were going to be disciplined, without regard to their out-of-state conduct, and those issues were consequently relegated to dicta or less. While this approach is generally a sound adjudicative principle,³⁵ it leaves much to be desired when discussing judicial discipline.

In the typical case, courts are primarily interested in reaching a decision; once the matter is resolved, the discussion of additional issues would be speculative and would do nothing to advance the interests of either party. Regarding judicial discipline, however, courts of review have an additional responsibility to set or articulate standards for the lower courts. This responsibility may be constitutional, as in Illinois,³⁶ or statutory as in the federal system.³⁷ In any event, and even in the absence of specific statutory or constitutional text, the superior position and greater visibility of the higher courts create both an opportunity and duty to exercise a teaching and guidance function

31. 422 Mich. 1207, 371 N.W.2d 850 (1985).

32. *Id.* at 1210, 371 N.W.2d at 852.

33. *Id.* at 1207, 371 N.W.2d 850.

34. *Id.* at 1212, 371 N.W.2d at 853.

35. As is well known, the United States Supreme Court will generally decline to address constitutional questions when they are not necessary to reach a decision on the merits. *International Ass'n of Machinist v. Street*, 367 U.S. 740, 750 (1961).

36. The Illinois Supreme Court has the constitutional duty to "supervise" the entire state court system. *People ex rel. Harrod v. Illinois Courts Comm'n*, 69 Ill. 2d 445, 372 N.E.2d 53 (1977).

37. 28 U.S.C. § 372 (1982).

regarding judicial behavior.³⁸

It is not unheard of for higher courts to enhance their decisions by articulating prescriptive rules, particularly where institutional issues are involved. In the area of law enforcement, for example, it may be necessary for opinions to do more than resolve a particular conflict. The most famous instance of judicially drawn guidelines is no doubt the *Miranda* decision,³⁹ where the United States Supreme Court set forth rules to be followed thereafter by every police officer in the country.⁴⁰ The articulation of the *Miranda* warnings was not essential to the resolution of the case; *Miranda*'s confession could have been ruled inadmissible without the establishment of a sweeping rule. The point is that the Court resolved a widespread problem by laying down requirements for future conduct.

The United States Supreme Court is, of course, primarily a constitutional tribunal; the very breadth of its responsibility explains the policy-making nature of many of the Court's decisions. It goes without saying that other courts do not possess as wide a warrant as the Supreme Court, but state supreme courts, or "courts on the judiciary" where they exist,⁴¹ do exercise a comparable function with regard to overseeing the activities of the judges within their jurisdiction or scope of supervision.

EASY CASES DON'T MAKE MUCH LAW

Why, then, do so many judicial opinions fail to provide the necessary level of guidance? One reason is surely that once cases of judicial misconduct are presented to a reviewing court, they tend to be simple. By the time that a case of judicial misconduct reaches a reviewing court it typically has been subjected to substantial filtering. Every state has a judicial conduct organization whose duty it is to review and evaluate complaints. The effective functioning of these bodies leads to a variety of results, all of which tend to limit the "data" from which appellate courts may shape their opinions regarding judicial conduct.

First, the conduct organizations handle the time-consuming obligation of investigating and rejecting frivolous and other non-meritorious complaints. These decisions are not reported, and indeed are often kept confidential.⁴² Unlike the ordinary legal process, no individual is entitled to pursue a complaint for judicial misconduct, and as a general rule, no appeal is available when a complaint is terminated at the investigatory stage.⁴³ Consequently, the opportunity for a jurisprudence

38. See *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985).

39. *Miranda v. Arizona*, 384 U.S. 436 (1966).

40. *Id.* at 444.

41. NEB. CONST. art. V, § 28 (1980); Ill. Sup. Ct. R. 51 (rescinded July 1, 1971).

42. *Shaman & Bégué*, *supra* note 5, at 756.

43. ILL. ANN. STAT. ch. 110A, § 753e(6) (Smith-Hurd 1985) (contains no provision for

to develop is substantially limited by the winnowing process.⁴⁴

It is true that judges' time need not be overly consumed in the defense of frivolous complaints, but there is an associated cost. In an ordinary civil case an aggrieved party generally may pursue even a meritless claim at least through a first appeal.⁴⁵ As vexing as this may be in many cases, it does give appellate courts the opportunity to expound upon the nature of the various causes of action. In the area of judicial discipline, a court could perform its teaching function just as well in the course of dismissing a bad complaint as it could in upholding a good one.

Moreover, the exclusion of frivolous complaints from the formal judicial system must necessarily—if only by reason of probability—also exclude some number of valid but novel complaints as well. Again, this is probably an acceptable price to pay for the protection of so fragile an institution as the judiciary, but the result is that we do not see the law of judicial ethics developing in the same dynamic fashion as do many other doctrinal areas.

In the case of non-frivolous complaints, most judicial conduct bodies have available a wide range of relatively mild remedies that can be employed in less serious cases. Thus, private reprimands or short suspensions may be agreed to by judges, either out of contrition or in an effort to avoid bad publicity. These cases, of course, will never come before a court, and so, for very good reasons, another set of opportunities to develop the law of judicial ethics is lost.

Finally, we come to the cases that do reach the reviewing courts. As a consequence of the screening process, these cases, almost by definition, will be meritorious as a matter of law and relatively serious as a matter of fact. In a word, they tend to be easy.

One feature that frequently makes disciplinary cases easy is the

any appeal proceedings; however, note that an administrator may petition the court for leave to file exceptions within 21 days after service of the order terminating action); NEB. REV. STAT. § 24-721 (1985) (contains no provision for any appeal proceeding when the action is terminated).

44. In 1985 a total of 4782 complaints against judges were disposed of in the 50 states and the District of Columbia. Of these, 4113 were simply dismissed after investigation or an initial screening, and an additional 507 were resolved privately or informally. Only 61 cases, slightly more than 1.5%, were the subject of public disposition. See "Center Surveys JCO Complaint Disposition, Budget and Staff for 1985," Vol. 8, No. 4 Judicial Conduct Reporter 1, 3 (Winter 1987).
45. See, e.g., ILL. ANN. STAT. ch. 110A, paras. 301, 303, 602, 604 (Smith-Hurd 1985). *But see* FED. R. CIV. P. 11 (which states that an attorney's signature on a pleading or motion is a warrant by him that it "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . ."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1986) (which states that when representing a client, a lawyer shall not "[k]nowingly advance a claim or defense that is unwarranted under existing law)

presence of numerous or repeated acts of misconduct. As we saw earlier in *In re DeSaulnier*,⁴⁶ it is not unheard of for the mere recitation of charges against a judge to run over a dozen pages. The specific charges against Judge DeSaulnier included conspiring to influence pending cases, seeking wrongful reimbursement of expenses, practicing law, holding a broker's license, serving as a bank director, associating with and borrowing money from a bail bondsman whom the judge also supervised, and public gambling.⁴⁷

Other examples abound. In *In re Lawrence*,⁴⁸ the judge was accused of assigning cases to attorneys with whom he had financial ties, holding an interest in a liquor license, accepting free representation from an attorney, making misrepresentations to the county board and improperly retaining campaign funds.⁴⁹ Similarly, in *In re Yaccarino*,⁵⁰ the judge was charged with misconduct in eight separate cases, including threatening and demeaning witnesses, commenting in open court on his own financial dealings, invoking personal and religious beliefs not legally relevant to the case, using crude language from the bench, directing offensive and harsh remarks to counsel, humiliating litigants, using the power and authority of his office in an attempt to influence other public officials, owning an interest in two liquor licensees, and developing a personal interest in the subject matter of a proceeding before him.⁵¹

Why is it a problem that the cases are so easy? How much energy or analysis needs to be expended in disciplining a judge whose misconduct requires thirty-two pages merely to recite?⁵² Were we dealing exclusively with intentional wrongdoing, of course there would be no problem—egregious and repeated misconduct would simply be punished and the proscriptive aspect of judicial ethics would be well served. The difficulty is that most cases, as in the illustrations above,

46. 360 Mass. 787, 279 N.E.2d 296 (1972).

47. *Id.* at 808-14, 279 N.E.2d at 308-11.

48. 417 Mich. 248, 335 N.W.2d 456 (1983).

49. *Id.* at 251-52, 335 N.W.2d at 457.

50. 101 N.J. 342, 502 A.2d 3 (1985).

51. *Id.* at 354-73, 502 A.2d at 9-19. See also *In re Troy*, 364 Mass. 15, 306 N.E.2d 203 (1973) (lying under oath, using pressure to gain a political contribution, filing a false statement, neglecting judicial duties, misusing the services of a court employee, and obtaining free legal services from lawyers); *In re Carillo*, 542 S.W.2d 105 (Tex. 1976) (obtaining goods in exchange for welfare payments, failure to recuse, assisting in the unlawful receipt of county funds, using county employees and equipment on his own property, and six instances of misappropriating county funds); *In re Seraphim*, 97 Wis. 2d 485, 294 N.W.2d 485 (1980) (acceptance of favorable automobile rentals, failure to report gifts, five separate incidents of "unprivileged and nonconsensual physical contacts with offensive sexual overtones," and four separate incidents of commenting on the merits of pending proceedings).

52. See *In re Yaccarino*, 101 N.J. at 354-86, 502 A.2d at 9-26.

involve a mixture of intentional and unintentional violations.⁵³ The result is that the unintentional violations tend to get lost in the shuffle, as does the opportunity for prescriptive explication.

In *Yaccarino*,⁵⁴ for example, the New Jersey Supreme Court found that the respondent judge had exploited his position by attempting to purchase a parcel of real estate that was the subject of a proceeding over which he was presiding. Moreover, the judge "attempted to conceal his wrongdoing by a pattern of conduct that at the very least could lead a knowledgeable individual to believe that there was an attempt to have persons suborn perjury and to have evidence of wrongdoing destroyed."⁵⁵ Once the facts were determined, this transgression represented the classic "easy case" for the appropriateness of discipline. Indeed, the court itself referred to this conduct as touching "directly upon the administration of justice and the integrity of the judicial process."⁵⁶

On the other hand, the *Yaccarino* case also involved a finding that the judge had on several occasions demeaned witnesses, insulted attorneys, and injected his own personal views into his adjudications. These offenses, as they aggregated, were discussed strictly in the context of factual determinations. The offending conduct was either recited or summarized, and from that the court concluded that Judge Yaccarino had violated the applicable Canons.⁵⁷

53. In this context the term "unintentional" may be somewhat too strong. Most of the less culpable conduct, such as injecting one's irrelevant personal beliefs into the adjudication, was consciously undertaken. In most cases, however, it should be obvious that the judge was acting in good faith with no wrongful purpose. Thus, violations, such as misappropriation of funds, evidence not only specific intent but moral culpability as well. On the other hand, violations of the intemperate or "poor judgment" sort—berating witnesses, failure to recuse, or insulting counsel—may fall under the standard definition of intent but are not otherwise indicative of an intention to violate the standards to which judges are held.

54. 101 N.J. 342, 502 A.2d 3 (1985). I use this case as an illustration primarily because the opinion is both recent and extensive. Many other cases, from many other states, might serve as well. Moreover, given the length and factual complexity of the *Yaccarino* matter, it is not my intention to fault the New Jersey Supreme Court simply because they did not increase the length of their opinion by discussing the issues that I have raised above. Indeed, the court obviously went to great lengths to do justice in the individual case. Still, my broader point holds; the prescriptive function was not served as it might have been.

55. *Id.* at 386, 502 A.2d at 26.

56. *Id.* at 373, 502 A.2d at 19.

57. Regarding the judge's demonstration of bias and hostility toward a witness, for example, the court stated:

Based upon our independent assessment of the record, the evidence demonstrated beyond a reasonable doubt that, in their totality, respondent's comments in this matter were such that he threatened the defendant and expressed a personal bias and hostility against him that was wholly inconsistent with the judicial obligation to remain objective and neutral. This evidence also demonstrated beyond a reasonable doubt

It is obvious that as a proscriptive matter the charge of exploiting the judicial office for financial gain is far more serious than is the problem of occasionally insulting witnesses. The New Jersey Supreme Court recognized this by referring to the financial self-dealing charge as its "most critical focus."⁵⁸ It does not follow, however, that the same priority holds with regard to the prescriptive aspect of judicial ethics.

One of the apparently minor charges against Judge Yaccarino was that he had, in a particular case, allowed his personal beliefs to intrude upon his decision-making. The court found that in presiding over a child custody matter, the judge had "indicated that his personal views concerning religion took precedence over the law."⁵⁹ Specifically, the judge invoked religious reasons for his rulings several times and told the children's mother "that she had 'an absolute affirmative duty cast upon [her] by [her] God' "⁶⁰ to persuade the children to respect and revere their father. He also injected his personal views on divorce, stating that "he himself was 'uncivilized' since 'I don't believe in divorce.' "⁶¹ It is obvious that the judge was ruling in good faith and meant no harm, and the court recognized as much.⁶² Nonetheless, based upon these and similar remarks, the court found that Judge Yaccarino "invoked personal beliefs not legally relevant to the case, and made irresponsible and reckless statements showing disrespect for and defiance of the law."⁶³

These findings and the conclusion that the judge violated the Code of Judicial Conduct present enormously important and difficult prescriptive questions. To what extent may a judge, acting in good faith, allow his or her religious views to influence judicial decisions? Is it permissible to invoke a party's religion in order to seek compliance with court orders? May any personal references be made at all? At what point does loose talk become irresponsible and reckless? At what point does it violate the Canons?

that respondent's conduct of this case reflected discourtesy, disrespect, and impatience, clearly constituting improper decorum and a lack of dignity, which vitiated the atmosphere of fairness and impartiality. Based upon these findings, we conclude that respondent violated Canons 1, 2A, 3A(3) and 3A(4).

Id. at 354-55, 502 A.2d at 9-10. This passage, with relevant alterations for factual and legal differences, was repeated at the end of the court's consideration of each of the judge's "demeanor" offenses.

58. *Id.* at 373, 502 A.2d at 19.

59. *Id.* at 356, 502 A.2d at 10.

60. *Id.*

61. *Id.*

62. "The respondent made extraordinary efforts to reconcile the father and his children. The judge struggled to assure each party that he understood that party's position." *Id.* at 357, 502 A.2d at 10-11.

63. *Id.* at 357, 502 A.2d at 11.

These are questions that surely must trouble many judges. Once it is recognized that this sort of casual commentary may lead to discipline, the need for analytic guidance becomes acute. After all, judges regularly invoke God when exhorting witnesses to tell the truth. Why does it become unethical to utilize the same device when seeking to enforce visitation?

My point is that this sort of violation is obviously inadvertent. The judge was not trying to take advantage of his office or commit any other wrongful act. Nevertheless, he violated the Code. If other judges in the future are to avoid similar pitfalls, then they must have more in the way of prescription than a simple description of the facts and citation to the Canons.

The New Jersey Supreme Court did not go further because that was unnecessary in order to reach its decision. Judge Yaccarino wasn't rude only once, but numerous times. He didn't merely mention religion, he used it as a rationale for disregarding the law. Moreover, his other, clearly intentional conduct was of itself sufficient to warrant discipline. Viewed strictly in decisional terms, opinions like this are more than adequate. As a guide to future conduct, however, they are maddeningly unsatisfying.

WHERE TO GO, WHAT TO DO

This paper has focused upon the need for analysis in judicial opinions that deal with questions of judicial ethics, but I do not necessarily mean the same sort of analysis that will eventually come from academics. There is surely a need to understand judicial ethics in terms of moral philosophy, just as that discipline has been brought to bear on the subject of legal ethics generally.⁶⁴ While it would no doubt be enlightening, it is not necessary that judges embrace the debate between deontological and teleological views of professional role differentiation. Nor is it necessary for opinions to strive to establish an economic model for recusal. Judges may begin with a more modest approach.

Let me suggest as a minimum level of explication for opinions on judicial ethics that consideration of each charge or violation ought to include discussion of policy, goals, means, costs and solutions. These are ideas that are easily understood and require no complex exegeses. Such analysis may not provide perfect guidance in every case, but it will explain the purpose of the court's ruling and the means by which

64. See, e.g., THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (D. Luban ed. 1983); D'Amato & Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U.L.J. 761 (1983); Burns, *A Lawyer's Truth: Notes for a Moral Philosophy of Litigation Practice*, 3 J.L. & RELIG. 229 (1985); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

the court intends to achieve that purpose in the future. Even in easy cases, that would be a substantial achievement.