

## SELF-REGULATION OF JUDICIAL MISCONDUCT COULD BE MIS-REGULATION<sup>1</sup>

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Judge Harry T. Edwards has written a lucid and seemingly logical plea for the judiciary to be granted exclusive self-regulation over all matters of judicial misconduct that fall short of crimes or impeachable offenses.<sup>3</sup> His essay demonstrates the seriousness with which he regards misconduct that would bring shame to the federal judiciary. He believes that the judiciary as a whole is the best institution to ascertain and take measures against individual aberrant judges who are guilty of various forms of misconduct, and I have no doubt of the sincerity of his belief. Yet when we look at claims for self-regulation in other professions--in medicine and in the police force, for example--we find historically that progress only takes place when outside lay persons are included on or even dominate ethics and misconduct boards. Otherwise the general operating rule is "cover it up." No matter what the profession, any charge that a fellow professional is guilty of malpractice is a prima facie invitation to other professionals to retreat to a guild mentality, denying that the infraction took place. The impetus to cover up is not primarily due to friendship toward the accused but rather to a general perception that disclosure would lead to public disrespect of the profession as a whole. The guild mentality is self-protective at the group level, and results in trumping honest disclosure in all but the most egregious cases that would leak to the public anyway. With respect to guild mentality, I know of no compelling distinction for judges from doctors or police officers. Given the low salaries society gives to judges, public esteem is correspondingly an extremely important job benefit.<sup>4</sup> We perhaps demand too much of human nature if we expect judges to be unconcerned with the loss of public prestige that results from admitting that cases of serious judicial misconduct are not extraordinarily rare.

But placing these general misgivings to one side, my particular quarrel with Judge Edwards' essay has three aspects: first, that his perception of the problem may be distorted due to the legal culture in which he is perhaps unselfconsciously immersed; second, that he places an untenably narrow positivistic interpretation on the "good behavior" language of the Constitution; and third, that his failure even to mention what may be one of the most significant areas of judicial misconduct, namely, lack of candor in judicial opinions, proves a certain institutional blindness to misconduct that undercuts his entire plea. I conclude this essay by suggesting that lack of candor is just an example, although perhaps the most important one, of the danger of entrusting solely to the judiciary the policing of its own members.

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<sup>3</sup> Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765 (1989).

<sup>4</sup> Indeed, the low salary a judge receives magnifies the importance to the judge of the softer values of public esteem and trust. Judges can be expected to want to preserve these values. In this respect, judges are closer to police officers (who also have low salaries and among whom coverups are routine) than they are to doctors (who have made considerable advances in ethical training and evaluations at the clinical level, in addition to being subject to review by hospital ethics boards which were more or less forced upon doctors by the public).

## I. THE JUDICIAL SELF-REGULATORY CULTURE

Judge Edwards' article reveals a microcultural bias that affects his entire approach to his subject. In the course of criticizing the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,<sup>5</sup> he says that its difficulties "reflect the legislature's naiveté about judicial problems."<sup>6</sup> The theory of the Act, he writes, is that by "instituting formal procedures intended to promote and expedite legitimate complaints against errant judges," people will be encouraged to make complaints by assurance "that their petitions will be considered seriously."<sup>7</sup> Then he adds: "However, in reality, the formality only encourages disappointed litigants to make unfocused, non-legally grounded charges . . . . Reports show that most complaints come from litigants who have lost cases before the accused judge."<sup>8</sup> I contend that this passage betrays a distinct bias against all complaints of judicial misbehavior. It is clear to any impartial observer that litigants who win a case will not file complaints against the judge who awarded them the favorable decision. No matter how serious a judge's misconduct, the odds are overwhelming that winning litigants will "leave well enough alone." To do anything else might jeopardize the favorable result in the case. Therefore, practically the only complaints will come from "disappointed litigants."

Because Judge Edwards must surely appreciate the fact that only disappointed litigants tend to file misbehavior complaints, his observations reveal an underlying guild mentality: "How dare these people criticize our individual performance as judges? They are nothing but disgruntled malcontents. They have no idea how hard we work for the public good, and that in every case one party has to lose." Judge Edwards dismisses all complainants summarily by this sour grapes view of them.<sup>9</sup> His bias operates to prejudice any future complaint, no matter how meritorious. His position reveals his own prejudice against complaints in general--a prejudice that hardly supports his position that judges are the best neutral adjudicators of the misbehavior of their colleagues.

Evidence that the "sour grapes" attitude is part of the judicial micro-culture and not peculiar to Judge Edwards can be found in the way the federal judiciary has implemented the 1980 Act. The clear purpose of the Act was to alert the judiciary to situations of judicial misconduct or disability in the interests of the effective and expeditious administration of justice.<sup>10</sup> The Act permits "any person" to be a complainant;<sup>11</sup> the complainant is obviously a facilitator of the

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<sup>5</sup> 28 U.S.C. § 372(c) (1982 & Supp. V 1987).

<sup>6</sup> Edwards, *supra* note 1, at 789.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> In 1986, there were 277 complaints under the Act. The chief judges acting alone dismissed 229 of them, and the remaining 48, 39 were dismissed by the judicial councils. In only 8 cases was corrective action taken. The one remaining case was withdrawn. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judges?*, 37 EMORY L.J. 45, 59 (1988).

<sup>10</sup> See 28 U.S.C. § 372(c)(1) (1988).

<sup>11</sup> 28 U.S.C. § 372(c)(1) (1988).

statutory purpose and not a party in interest.<sup>12</sup> Since there may be some persons who want to report instances of judicial misconduct but may be afraid to reveal their identities--such as lawyers, clerks, court employees, and (in a smaller community) prominent civic leaders or businesspersons -- encouraging these people to file complaints would be consistent with, if not required by, the purpose of the Act.<sup>13</sup> Yet in one case, two lawyers were publicly reprimanded and fined \$500 each for filing disciplinary charges against a judge.<sup>14</sup> The "model rules" prepared by a special committee of a conference of the chief judges of the various courts of appeals to implement the Act would appear to deter anyone, lawyers included, from filing complaints.

The model rules specifically require that the complainant sign the complaint and verify it under oath or declaration.<sup>15</sup> The special committee explained that "this requirement is probably not of the greatest importance," but said that it "may deter occasional abuse of the complaint process."<sup>16</sup> Was the special committee candid in its explanation? Surely the price for deterring "occasional abuse" could tend to be destructive of the purpose of the Act. Requiring a signature and verification could deter all complainants who might selflessly want to improve the justice system but who are afraid of revealing their identity for fear of reprisals.<sup>17</sup> Nevertheless, all the circuits that have issued rules and forms implementing the 1980 Act have adopted the requirement of identification of the complainant.<sup>18</sup>

Although at the present writing all circuits apparently have issued forms substantially similar to the model forms suggested by the Chief Judges, the Third Circuit experimented with its own rules and forms for the period 1984-1987. The direction it took did not improve the task of complainants. Indeed, the Third Circuit's version was substantially more restrictive and intimidating than the Chief Judges' model.<sup>1</sup>

The insistence that a complainant disclose his identity and assume the risk of an indictment for perjury seems sharply at variance with Judge Edwards' own characterization of the intent of

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<sup>12</sup> For example, there is no provision for changing the result in a complainant's lawsuit, nor for awarding the complainant damages, if the complainant's charge of judicial misconduct is found to be meritorious.

<sup>13</sup> The Act does provide for notice to the complainant of decisions taken, an opportunity to appear at certain proceedings, and an opportunity to petition for review if dissatisfied with the disposition of the complaint. 28 U.S.C. § 372(c) (1988). Surely these privileges are available to a complainant who might choose anonymity.

<sup>14</sup> In re Complaint of Judicial Misconduct, 2 Ct. Cl. 255, 262 (1983).

<sup>15</sup> ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY 8 (Rule 2(f)) (Federal Judicial Center 1986).

<sup>16</sup> *Id.* at 10.

<sup>17</sup> Information from anonymous sources still may be considered by the chief judges in their role as chairpersons of the circuit judicial councils; the 1980 Act does not revoke that practice. *See id.* at 11. But the Act itself cannot be triggered by an anonymous complainant when the implementing rules require signature and verification.

<sup>18</sup> See U.S. Ct. of App. 2d Cir. Appendix (Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officer Under 28 U.S.C. § 372(c) Rule 2(f)), 28 U.S.C.A. (1990); U.S. Ct. of App. 3d Cir. Appendix V, Rule 2(f), 28 U.S.C.A. (1990); U.S. Ct. of App. 4th Cir. Appendix I, Rule 2(f) 28 U.S.C.A. (1990); U.S. Ct. of App. 8th Cir. Appendix IV, Rule 1, 28 U.S.C.A. (1990); U.S. Ct. of App. 11th Cir. Addendum III, Rule 2(f), 28 U.S.C.A. (1990); Rules of the United States Court of Appeals for the Federal Circuit, Governing Complaints of Judicial Misconduct or Disability 3 (Rule 2(f)) (1987).

Congress in passing the 1980 Act--"to promote and expedite legitimate complaints against errant judges." <sup>19</sup> But if Judge Edwards wants to use the Form as a guillotine to separate legitimate from illegitimate complaints,<sup>20</sup> Judge Aldisert, who wrote an introduction to the experimental Rules of the Third Circuit that were in effect from 1984 to 1987, wanted the form to do the work of weeding out improper attempts to seek review of the substantive merits of the case. He claimed that the Rules "provide an efficient and fair procedure to delineate the important distinction between a genuine complaint of judicial misconduct and an improper attempt to seek review of the substantive merits of a case or controversy." <sup>21</sup> The distinction may be "important" to Judge Aldisert, but I doubt that it will ever be clear. Indeed it becomes increasingly fuzzy as the gravity of the judicial misconduct increases. A complainant will very likely believe that the presiding judge, who in her view misbehaved, rendered a clearly unjust verdict.<sup>22</sup>

She may indeed believe that the misbehavior caused the unjust verdict, and that the unjust verdict constitutes at least some evidence of the misbehavior. She will thus find it almost impossible to separate her complaint about the misconduct from her view that the decision itself was unjust on the merits. She may well believe that as soon as the other judges read her complaint, they will spot the clear injustice in the ruling almost as if it were an uncontrovertible fact. In this regard, she is a typical member of the public, secure in the belief that the adjudicatory system normally produces just result.<sup>23</sup> She is almost certain to be bitterly disappointed. She may lack the mindset of lawyers and judges who have learned through experience that the system produces many unjust results, that in practice law and justice can be entirely different things.

The Edwards-Aldisert-Third Circuit approach reflects this insider view. Their approach appears to assume that the public shares the profession's cynical views about justice. Nothing else explains Judge Aldisert's notion that the very form the Third Circuit has implemented will unerringly guide a complainant to bifurcate her convictions regarding a judge's misbehavior and the obvious unjustness of that judge's ruling.

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<sup>19</sup> Edwards, *supra* note 1, at 789.

<sup>20</sup> To be sure, one might construe the word "legitimate" so as to justify the complaint form: the form is set out the way it is to weed out illegitimate complaints. But the word "legitimate" always begs the question--especially so in the present context where the ultimate deciders of what is or is not "legitimate" are the colleagues of the person accused of misconduct. In any event, there are other equally possible constructions of the word "legitimate" in the statute-- for example, that Congress really wants to give legitimate complaints a chance of succeeding, and not that it wants to ensure at all costs that illegitimate complaints be discouraged.

<sup>21</sup> Third Circuit Rules, *supra* note 17, at iii (Introduction by Chief Judge Ruggero J. Aldisert).

<sup>22</sup> Of course, a complainant might feel that the verdict was "against the law." Clearly, disappointed litigants should not be able to use the Act as a quasi-appellate procedure. The Act itself states that a complaint should be dismissed if found to be "directly related to the merits of a decision or procedural ruling." 28 U.S.C. § 372(c)(3)(A)(ii) (1988). But a decision against the law is not necessarily a decision against justice. Accordingly, in the text I have talked only about decisions that appear to be contrary to justice.

<sup>23</sup> For an example of a law professor's outrage at a decision that seemed to him clearly at variance with law and justice, see Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 IOWA L. REV. 503 (1991).

Both Judge Edwards' attempt to use the rules to weed out illegitimate complaints and Judge Aldisert's attempt to separate misbehavior from unjust results--and the additional fact that neither of them for a moment questions the propriety or over-deterrence of criminal prosecution for perjury if a complainant steps over their lines--illustrate not so much the jurisprudential futility of attempting to have any form do this kind of heavy work, but rather the judges' own cultural presuppositions. If they have made the path to complaining about judicial misbehavior rocky, narrow, incoherent, and fraught with peril, they presumably have done so not out of absent mindedness but rather because they want to discourage complaints.

The judges' efforts appear to have worked. Professor Carol T. Rieger has reported on the implementation of the 1980 Act.<sup>24</sup> From October 1981, the effective date of the Act, through June 1986, only 309 complaints were filed under the Act--an average of 65 complaints per year.<sup>25</sup> "Corrective action" was taken only in 8 cases--less than 3% of the complaints filed. Professor Rieger comments on the nature of this "corrective action":

Not all circuits make their decisions public, so it is not possible to tell what all of these "corrective actions" might be. In the dispositions which are public, some simply make the cryptic comment that "appropriate corrective action has been taken," without revealing the nature of the conduct or the remedial action. Most of the other public dispositions under the "Corrective Action Taken" label indicate that the Chief Judge has talked with the judge or magistrate against whom a complaint was filed, and he or she expressed regret about how the particular action or words complained of were interpreted by the complaining party, and an intention not to do it again.<sup>26</sup>

In sum, the very procedures set up by the judiciary betray a distinctly unfavorable disposition toward complaints about misbehavior of their fellows. These procedures provide no reassurance that judges can or should self-regulate cases of judicial misconduct. But if his normative appeal fails, Judge Edwards has a constitutional string to his bow.

## II. THE CONSTITUTIONAL ARGUMENT

Judge Edwards turns to the Constitution to argue that, like it or not, only judges can judge the misbehavior of judges. He contends that the Constitution mandates that the judiciary retain the exclusive power of self-regulation for all acts of judicial misconduct that fall short of crimes or impeachable offenses.

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<sup>24</sup> Rieger, *supra* note 7.

<sup>25</sup> *Id.* at 46. Compare the statistic that between 1984 and 1987, following the decision in *Pulliam v. Allen*, 466 U.S. 522 (1984) (attorney's fees may be awarded when a plaintiff wins a suit against a judge for injunctive or declaratory relief), approximately 1500 cases were filed against state judicial officers. McMillion, *Restoring Judicial Immunity*, 76 A.B.A. J. 107 (1990).

<sup>26</sup> Rieger, *supra* note 7, at 58-59 (footnotes omitted).

## A. The Reductionist Move

Judge Edwards devotes most of his essay to an analysis of the good behavior clause of article III, which states that judges "shall hold their Offices during good Behaviour." I would imagine that a normal reading of this clause suggests that a badly behaving judge must not be allowed to stay in office. Not so, says Judge Edwards. He finds in the impeachment clauses in articles I and II the sole means and standard for removing judges from office; hence, any judge who is not successfully impeached may remain in office despite the apparent meaning of the good behavior clause. The standard for impeachment is "high crimes and misdemeanors," and the means is Congress. However, Judge Edwards would not drain the good behavior clause of all meaning. He believes that it stands for a basic principle, one that he finds meritorious--the principle of judicial independence. This appears to be a rather magical principle in Judge Edwards' hands, because once it is produced, the actual words of the clause disappear.

Judge Edwards bolsters his vanishingly narrow interpretation of the good behavior clause by reference to both the principle of judicial independence and the doctrine of separation of powers. Because he finds the notion of judicial independence to be derived from the good behavior clause itself--the very clause he is trying to construe--it hardly constitutes independent support for his position. Judge Edwards' argument is severely reductionist: clause X boils down to principle Y, then principle Y rises up to lop off anything in clause X inconsistent with principle Y. In his hands, the good behavior clause in effect reads: "judges shall hold their offices during good or bad behavior."

To bolster a weak position, Judge Edwards shifts his ground to the doctrine of separation of powers. He finds that the "principle of judicial independence is actually an outgrowth of the separation of powers doctrine,"<sup>27</sup> To be sure, Judge Edwards admits that "the Constitution says nothing about separation of powers per se; it speaks only of the assignment of powers."<sup>28</sup> He further concedes that each branch has the power to check the actions of the others.<sup>29</sup> But "checking" is apparently one thing and "meddling" another, according to Judge Edwards. "Checking" is consistent with the doctrine of separation of powers but "meddling" is not. Although the Constitution says nothing about meddling, apparently "separation of powers" for Judge Edwards is precisely equivalent to "thou shalt not meddle."

If history has taught us anything about checking and meddling, it is that when Branch A of government tries to supervise the activities of Branch B, Branch A always characterizes its own actions as checking, whereas Branch B invariably characterizes the very same actions as meddling. Surely the words "checking" and "meddling" are merely clashing forms of rhetoric. Yet Judge Edwards gives us an example--one that illuminates his general outlook. Lower federal courts, he states, have prudentially refrained from deciding cases involving internal congressional affairs even though jurisdiction for judicial action might otherwise be found.<sup>30</sup> "We are reluctant to meddle in the internal affairs of the legislative branch," said one such

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<sup>27</sup> Edwards, *supra* note 1, at 767. His use of the word "actually" in this sentence suggests an abandonment of his previous reliance on the good behavior clause as establishing judicial independence.

<sup>28</sup> *Id.* at 781.

<sup>29</sup> *Id.* at 782.

<sup>30</sup> *Id.* at 784.

court.<sup>31</sup> Judge Edwards quotes his own concurrence in a recent case: "Reciprocal respect for the courts suggests that Congress should, and arguably must, be equally reluctant to impose its preferences on the judiciary's governance of its internal affairs."<sup>32</sup> Putting aside the question of what is "internal" -- even though such a question points up the tautology of the entire construction -- the message Judge Edwards and his colleagues are actually sending to Congress is: we didn't meddle with you, so don't meddle with us.

But as we examine this example, we see that its reasoning hides under a reciprocity mask the possibility that it was judicial fear of congressional interference with the judiciary that gave rise to this "prudential" judicial doctrine of nonmeddling in the first place. If so, the entire argument is self-consuming. We can hardly credit judicial passivity in these cases to some "legal" doctrine; it is rather a perceived (and perhaps from the viewpoint of the players a rational) self-protection mechanism. The courts may have decided not to "meddle" (as Congress might perceive it) in internal congressional affairs for the very reason that such self-restraint might ward off congressional "meddling" (as the judiciary might perceive it) in judicial affairs. This kind of don't-scratch-my-back-and-I-won't-scratch-yours surely has nothing to do with justice, the Constitution, or checks and balances (except for the most devout followers of Alexander Bickel), but it has everything to do with judges watching out for themselves. Surely then, what amounts to another example of guild mentality should not count as a constitutional reason to eviscerate the good behavior clause.

## B. The Positivist Move

As we have seen, because Judge Edwards believes that the sole basis to remove a judge is through the impeachment process, he gives no independent meaning to the good behavior clause. There is perhaps some support for his argument as a narrow positivistic stance. If positivism (of the decidedly Austinian variety) says that "law" only has "bite" where there is a remedy, and rules without remedies are not "law,"<sup>33</sup> one might say that only the impeachment clause, in this context, provides a remedy (removal from office). Hence, compared to it, the good behavior clause is just a placeholder (or just "positive morality" in Austin's classic sense).

Yet we do not have to be originalists to acknowledge that the Framers were not Austinian positivists. I think it is quite realistic to attribute to them a natural law (or right reason, Blackstonian) perspective that a judge should not hold office if the judge engaged in behavior so bad that he could no longer properly be called a "judge." Even if the Framers had never

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<sup>31</sup> Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984), cert. denied, 469 U.S. 1105 (1985).

<sup>32</sup> Edwards, *supra* note 1, at 785 (quoting Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1108 (D.C. Cir. 1985) [hereinafter "Hastings I"] (Edwards, J., concurring), cert. denied, 447 U.S. 904 (1986)).

<sup>33</sup> The exact opposite, by the way, of Justice Marshall's reasoning in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marbury had a "right," therefore he had a right to a "remedy," but not from this Court).

adverted<sup>34</sup> to some of the following possibilities, so long as we attribute rationality to their intentions we can say with some confidence that they would have regarded at least certain kinds of judicial misconduct to be destructive of the title "judge." These kinds of judicial misconduct may fall short of "high crimes or misdemeanors"--they may not be criminal at all—yet nevertheless constitute such nongood behavior as to make the actor a nonjudge. Take, for example, a judge who decides cases according to (a) the flip of a coin, (b) the comparative wealth of plaintiff and defendant, (c) the comparative size of contributions by counsel to the judge's nomination,<sup>35</sup> or (d) friendship with certain attorneys who appear before him. These forms of conduct clearly violate the "good behavior" requirement though not the impeachment standard. Thus the sole basis for removing such judges appears to be the good behavior clause. Can there be any doubt that such judges, if they engage in one or more of those kinds of behavior, should not remain in office? Indeed, once one visualizes and takes seriously these particular forms of judicial misconduct that fall short of high crimes or misdemeanors, one marvels once again at the intellectual comprehensiveness of the Framers in actually providing language -- the good behavior clause -- that should give Congress a check-and-balance power to remove false or dishonest judges.<sup>36</sup>

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<sup>34</sup> It is not at all unusual to attribute to someone a particular purpose that never crossed that person's mind. This is the point of Wittgenstein's famous observation, "Someone says to me: 'Shew the children a game.' I teach them gaming with dice, and the other says 'I didn't mean that sort of game.' Must the exclusion of the game with dice have come before his mind when he gave me the order?" L. Wittgenstein, *PHILOSOPHICAL INVESTIGATIONS* § 70 (attached slip) (1953). Probate judges often make this move in deciding what the testator would have intended had he or she known certain facts (which occurred after the testator's death).

<sup>35</sup> even though federal judges do not run for office, counsel may support a judge through public advocacy and behind-the-scenes support for the judge during the nomination process. (Many practicing attorneys are afraid to speak out against nominees to the federal bench because of possible reprisals against them if the nominee they oppose is appointed.) In the context of many state courts, the potential for abuse is more obvious: a judge may decide in favor of counsel who contributed more to the judge's campaign for office. See *Sixty Minutes: Justice for Sale?* (television program on the Texaco-Pennzoil litigation, of Dec. 6, 1987).

<sup>36</sup> Given the "high tone" style of the Constitution, the Committee on Style might well have decided not to put the matter negatively ("judges who misbehave shall be removed from office") but rather positively (judges "shall hold their Offices during good Behavior"). Judge Edwards argues that a misbehaving judge does not necessarily have to be removed from office. See Edwards, *supra* note 1, at 794-95. There are other sanctions, such as progressively lightening the misbehaving judge's case docket, so as to cut down the opportunities for mischief. But this kind of "punishment" can backfire; a "lazy" judge who simply wants to draw full salary for doing as little work as possible might be positively encouraged to misbehave so that his workload will be deliberately reduced. So long as his misbehavior falls short of an impeachable offense, he may succeed in maximizing his hourly income. His example may have a deleterious effect on honest and overworked judges. Thus, by reading out of the good behavior clause the ultimate penalty of removal from office, Judge Edwards may have succeeded only in setting up an intolerable situation where misbehavior is actually rewarded by reducing the miscreant judge's workload. Compare the complaint recently filed with the Judicial Review Council of Connecticut alleging that Judge Edward F. Stodolink "has voiced his disdain of personally adjudicating matrimonial disputes and has frequently threatened attorneys with the likelihood of an unsatisfactory result if forced to preside over such disputes." Complaint of Theodore Kamasinski Against Judge Edward F. Stodolink of the Danbury Superior Court (Oct. 23, 1990).

### III. A TEST CASE: CANDOR IN JUDICIAL OPINIONS

There is one form of judicial misconduct that I think clinches the case against Judge Edwards' position: lack of candor in judicial opinions. One of the worst things a judge can do is to ignore or misstate the critical facts or critical legal issues in a case. Since this kind of misconduct is not generally considered a "crime" nor an impeachable offense,<sup>37</sup> it would fall squarely within the realm of judicial misbehavior that Judge Edwards leaves to the judiciary to regulate.

Surprisingly, Judge Edwards does not even mention lack of candor as a form of judicial misbehavior in an essay that lists many other forms of judicial misconduct. His omission is, I think, part of the (perhaps unselfconscious) guild mentality that I mentioned earlier, for I have not come across any essay or book by any judge that considers seriously the problem of lack of candor in opinion-writing. I suggest that this thundering silence is not due to a general lack of awareness of the problem, but rather reflects a deeply imbedded fear that such a matter is the dirtiest of linen that should not be displayed in public. Consider a recent, gutsy speech given to the Federal Circuit Judicial Conference by one of the nation's leading scholars on judicial ethics, Professor Monroe Freedman:

Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.<sup>38</sup>

Professor Freedman wrote a letter to me in which he stated that at the luncheon immediately following his speech, a judge sitting next to him said (apropos of the passage above quoted), "you don't know the half of it!"<sup>39</sup>

The possibility of judges changing the facts of a case came home to me in connection with a federal habeas petition I filed in the Seventh Circuit.<sup>40</sup> In its detailed recitation of the facts of the

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<sup>37</sup> This is the current state of the law -- even though the misconduct may result in deliberately incarcerating an innocent person or in another form of substantial injustice. It is a far cry from the origins of common law in England. In earliest English law not only was immunity of judges not recognized, but review of judicial decisions was in the form of a personal action against the judge. The consequences of a false judgment, a malicious judgment, or an action outside the judge's authority were severe for the judge and the jurisdiction he represented. Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201, 205 (1980).

<sup>38</sup> M. Freedman, Speech to the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), reprinted in 128 F.R.D. 409, 439 (1989).

<sup>39</sup> Letter from Monroe Freedman to Anthony D'Amato, Oct. 14, 1989 (quoted with the permission of Professor Freedman).

case, a three-judge panel of the Court of Appeals omitted mention of earwitness testimony for the prosecution that established the time of the murder as occurring when the defendant was proved to be a mile and a half away tending patients in a hospital.<sup>40</sup> The earwitness' testimony was prominent in the jury trial and it was uncontroverted. By omitting a primary fact that proved the defendant was not at the scene of the crime -- and by ignoring other facts which also proved that the defendant could not have committed the crime -- the Court of Appeals was able to construct possible guilt out of circumstantial evidence.<sup>41</sup>

I presented a paper at an international conference in honor of Jacques Derrida detailing the evidence in this case and specifying the Court's omission of the primary exculpatory fact (as well as several other critical omissions and distortions). The paper was entitled "The Ultimate Injustice: When a Court Misstates the Facts."<sup>42</sup> This paper was reported at length in the "At the Bar" column of The New York Times.<sup>43</sup> Many attorneys, judges, and law professors who saw the Times column wrote to me. A New York attorney, who was formerly an Administrative Law Judge, said in reference to one of his cases, "I have been shocked to find that the courts invented testimony to support their conclusions."<sup>44</sup> A Florida attorney wrote, "I have received opinions in which the appellate court has deliberately misstated the facts in order to make a difficult and complex question disappear, in order to justify a judicial vigilantism, or in order simply to bolster a decision which the appellate court would have made in any event."<sup>45</sup> The attorney candidly added, "I have been both the beneficiary and the victim of such tactics."<sup>46</sup> A Georgia lawyer wrote, "I have had a similar experience where the appellate court simply fabricated the facts."<sup>47</sup> A final example is from a Boston attorney who says that the Supreme Judicial Court of Massachusetts "engaged in almost precisely the sort of legerdemain you are reported to have criticized."<sup>48</sup>

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<sup>40</sup> *Branion v. Gramly*, 855 F.2d 1256 (7th Cir. 1988), *rehg. denied*, No. 87-3052 (Sept. 2, 1988), *cert. denied*, 109 S. Ct. 1645 (1989). Judge Frank Easterbrook wrote the opinion of the Court of Appeals, joined by Judges Manion and Eschbach.

<sup>41</sup> It should be acknowledged here that the posture of the case before the Seventh Circuit was a petition for a writ of habeas corpus and calls for the evidence to be evaluated in the light most favorable to the prosecution, rather than a full review as if on direct appeal. However, even this standard would require some discussion as to why the earwitness testimony was not dispositive.

<sup>42</sup> The symposium was entitled "Deconstruction and the Possibility of Justice," and was held at Cardozo Law School, New York City, on October 2, 1989. A slightly edited version of the paper was subsequently published. See D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 Cardozo L. Rev. 1323 (1990).

<sup>43</sup> Margolick, *A Law Professor with a Beef Takes the Judge to Task and the Case to the Public*, N.Y. Times, Oct. 13, 1989, at B5, cols. 1-2.

<sup>44</sup> Letter from Thomas Redmond Matais, Esq., to Professor Anthony D'Amato, Mar. 20, 1990.

<sup>45</sup> Letter from Joel S. Perwin, Esq., to Professor Anthony D'Amato, Oct. 17, 1989. Mr. Perwin in his letter cites a U.S. Supreme Court reversal of one of his appellate cases "which implicitly acknowledged the lower appellate court's factual misstatement by stating the facts in a manner directly opposite to the lower court's statement." See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 n.27 (1985), *revg. Burger King Corp. v. MacShara*, 724 F.2d 1505, 1512-13 (11<sup>th</sup> Cir. 1984).

<sup>46</sup> Letter from Joel S. Perwin, Esq., to Professor Anthony D'Amato, *supra* note 45.

<sup>47</sup> Letter from J. Michael Raffauf to Professor Anthony D'Amato, Oct. 13, 1989. Mr. Raffauf cites the case of *Gilmer v. City of Atlanta*, 864 F.2d 734 (11<sup>th</sup> Cir.), *cert. denied*, 110 S. Ct. 70 (1989).

<sup>48</sup> Letter from Richard L. Dahlen, Esq., to Professor Anthony D'Amato, Oct. 13, 1989.

Every practicing attorney with whom I have discussed the matter of lack of judicial candor has told me of at least one case when it clearly happened to him or to her, and some say that the practice is unfortunately quite common. What good is adversarial argument, one of them asked, if a judge can play God with the facts of a case? Some attorneys have told me that if they had known that the practice of law would be like this, they would have chosen a different profession.<sup>49</sup> Surely when a critical fact is proved and undisputed at trial, the whole legal world seems to crumble when the losing attorney sees no mention of the fact in the judge's written opinion or sees that the judge relied explicitly on a contrary unproved "fact." Hardly anything could be more unfair.

Arguably there is an incentive in the judicial system to misstate the facts of a case. Judges hate to be reversed; many grade their own performance by how small a percentage of their cases are reversed on appeal. By misstating the facts of a case -- if misstatement is necessary to "justify" a desired result -- a judge can all but ensure that her decision will not be reversed on appeal. Higher courts are uninterested in retrying disputations about facts; they are only interested in "law."<sup>50</sup> They will be impatient with arguments of counsel that the facts were otherwise than as found by the trial judge. They say repeatedly that they have no time to plunge into the morass of fact-determination. Hence, a judge who invents or misstates a critical fact in favor of the party to whom she decides to award the decision may well have high confidence that her decision will thus be insulated from reversal by a higher court.<sup>51</sup>

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<sup>49</sup> They also invariably add that they are themselves in no position to blow the whistle for fear of retaliation by the judge they criticize or by the judge's colleagues.

<sup>50</sup> A higher court itself may misstate a written source. Consider the recent decision by the Illinois Supreme Court in *In re Peel*, 126 Ill. 2d 397 (1989), *revd.*, *Peel v. Attorney Reg. & Disciplinary Commn.*, 110 S. Ct. 2281 (1990). An attorney placed on his letterhead the words "Certified Civil Trial Specialist By the National Board of Trial Advocacy." The Illinois Attorney Registration and Disciplinary Commission recommended that the attorney be censured for holding out to the public that he was "certified" as a specialist. In imposing the sanction of censure on the attorney, the Illinois Supreme Court's opinion cited the Webster's dictionary definition of "certificate" as "a document issued by . . . a state agency . . . certifying that one has satisfactorily . . . attained professional standing in a given field and may officially practice or hold a position in that field." 126 Ill. 2d at 405, citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 366 (1986). When the U.S. Supreme Court granted certiorari, the Court's attention was drawn to the elisions in the Illinois Supreme Court's quotation from Webster's. The full quotation is: "a document issued by a school, a state agency, or a professional organization certifying that one has satisfactorily completed a course of studies, has passed a qualifying examination, or has attained professional standing in a given field and may officially practice or hold a position in that field." 110 S. Ct. at 2289, citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 367 (emphasis added to portions omitted from 126 Ill. 2d at 405). In short, the portion of the definition omitted by the Illinois Supreme Court supports the opposite of that court's conclusion; it justifies the attorney's use of "certified" in his letterhead instead of impeaching it.

<sup>51</sup> Perhaps the origin of such judicial misbehavior is a failure of law professors to teach fact-determination in law schools. By concentrating on deductive and pseudo-deductive legal systematization, we deliver the message to those of our students who will someday become judges that facts of cases are uninteresting and that the real intellectual excitement comes from disputing the content of "the law."

Do all judges more or less share in occasional misstating or omission of facts? I believe that the majority of judges are honest persons of great integrity who would not consciously do such a thing. Nevertheless, many judges may feel that their own standing in the community could be undermined by disclosures that other judges invent or misstate facts. The issue here is not which judges have integrity, but rather that the judicial culture itself apparently has little room for countenancing disclosure of misbehavior that could undermine public confidence in the judiciary.<sup>52</sup> I would be far more disposed toward accepting Judge Edwards' plea for judicial self-regulation if I were to see concrete evidence of judges themselves bringing up the matter of candor in opinion-writing and offering practical suggestions as to how self-regulation can curb and eventually eliminate judicial invention or misstatement of facts.

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### Extended Endnotes

<sup>i</sup> The 1984-1987 Complaint Form for the Third Circuit states on the first page that "All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question, use the reverse side of the page. Additional pages are not permitted." United States Court of Appeals (Third Circuit) Judicial Council, Rules of the Judicial Council of the Third Circuit With Respect to Complaints of Judicial Misconduct or Disability 43-46 (Appendix) (Nov. 14, 1984).

The Complaint Form in its entirety will frustrate any filer who attempts to follow these initial instructions. Questions 3, 4 and 5 each have different rules regarding the available room to answer. Question 3 states: "If the space provided is insufficient use the bottom of Page 46." Question 4 requires the complainant to answer the question "in the space provided below." Question 5 specifically directs the complainant to answer the question in the space provided and then to use "the reverse side of the page." The most frustrating question is Question 3. It reads:

Tell your story briefly, including the grounds upon which your complaint is based and the facts supporting them. Describe how the judge or magistrate whose conduct is the subject of the complaint is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If the space provided is insufficient, use the bottom of Page 46.

The "space provided" consists of thirteen ruled lines. The extra space on Page 46 is a blank space containing an additional twelve lines (assuming the same spacing as the previous ruled lines). Because Rule (2) of the Instructions provides that no pages may be added to the Complaint, and because the general rule that one may write on the back of a page is contradicted by the more specific rules accompanying Questions 3, 4, and 5, it is clear--well, clear except to the most intrepid or foolhardy--that the complainant has twenty-five lines, and no more, to "tell your story briefly."

Suppose a disappointed litigant, who believes that the judge misbehaved and may even have a mental disability, tries to tell her story briefly in 25 lines. She soon discovers, after listing "the names of other persons involved, dates, and places," which Question 3 requires her to do, that she has very little space

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<sup>52</sup> Compare Plato's view of "justice" in *The Laws*: institutions of justice exist to stabilize a society rather than do justice; what is impermissible is the appearance of injustice rather than injustice itself. Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 TENN. L. REV. 279, 321-24 (1987).

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remaining to tell what happened. If her story is at all complex, and the grounds of her suspicion are at all impressionistic (rarely will judicial misbehavior be so gross as to be obvious on the face of the record), she will hardly have adequate space. If she believes that the judge either has a mental abnormality or has behaved irrationally or drunkenly, it will be extremely difficult for her to describe the judge's conduct in a few lines while confining herself solely to the reporting of objective facts. Even psychologists find it difficult to describe aberrant behavior in wholly objective, factual terms, and their case studies are not notorious for brevity. Unless the complainant can write with the precision and economy of Jane Austen, she runs the risk of being prosecuted for perjury. And she has further reason to fear the possibility that the persons who will sit in judgment at her perjury trial will be the same judges, or their colleagues, who misconstrued her complaint in the first place.

<sup>ii</sup> At the trial the neighbor said she heard "sounds," and throughout the rest of the trial the prosecutor and defense attorney referred to her testimony as the testimony about the "shots." The assistant prosecutor, in closing, referred to it as the "sounds of the gun." Judge Easterbrook at one point in his opinion included a mention of the next-door-neighbor's testimony in a parenthetical comment on the opinion of district court Judge Getzendanner. He said, "Judge Getzendanner had a different theory: Branion left the Hospital before 11:30 and killed his wife (a neighbor reported hearing a commotion in the Branion apartment before 11:30), returned to the Hospital to establish his presence away from the scene of the crime, and only then picked up his son." 855 F.2d at 1261. Because Judge Easterbrook found that Judge Getzendanner's theory of the crime was erroneous, because he labeled it a "theory," and because he only used the word "commotion," no reader of his opinion could imagine that Judge Easterbrook was referring to the exculpatory fact that the murder occurred when the defendant was a mile and a half away from the scene of the crime, particularly since it was the prosecution that elicited the evidence from its own witness and did not controvert it.