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A Report on Judicial Ethics

By Gray Thoron

ABSTRACT: While the ethics of the American judiciary cover a broad spectrum, both good and bad, the general over-all level of judicial ethical performance is relatively high. Most judges are honest and honorable. Where dissatisfaction is apparent, it is far more frequently directed at judicial competence than at judicial integrity and ethics. Corruption, dishonesty, susceptibility to political pressure, and other ethical lapses are, however, not unknown, and on very rare occasions have been extremely bad. The ethical obligations of the judiciary extend far beyond the basic essentials of honesty, impartiality, and fairness. Judges must not only avoid evil or wrongdoing, but must also avoid any appearance or suspicion of impropriety, both on the bench and in private life. Selected ethical problems are identified together with some of the areas where significant ethical lapses are to be found. While our judiciary has done well in meeting its ethical obligations, improvement is still needed. The best assurance for high ethical performance comes from insistence upon outstanding integrity from those selected for judicial office.

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A DEMANDING critic will never be wholly satisfied with the ethical performance of any segment of any society. Our American judiciary, both state and federal, provides no exception. In the area of judicial ethics, we can find, as one would expect, a very broad spectrum of both good and bad. At one end of this spectrum, there are judges of unusual competence, devotion, and integrity, who more than meet our highest aspirations for judicial performance. At the opposite end, there have been (though fortunately only rarely) some outrageously shocking and callous instances of judicial corruption or dishonesty. In between, as most informed observers will agree, we will find for the vast majority of judges a relatively high over-all level of integrity and ethical standards, especially when compared with the situation in so many other areas of American life.

Public satisfaction with judicial performance depends on judicial competence as well as judicial honesty and ethics. Both are essential ingredients for an effective and respected judiciary. To the extent that complaints are directed at the judiciary, they are far more frequently aimed at the professional competence and judgment of those who serve on our courts than at their ethics and honesty. Thus, the general reputation of our judges for honor and integrity appears to be substantially greater than their reputation for ability and learning. There have always been, and still are, a great many thoroughly honorable and honest men on the bench throughout the country. There are, however, far too few distinguished courts and outstanding judges.

Although many suggestions have been advanced for improving the caliber of our judges, no ideal or wholly acceptable solution has yet been proposed. Experience has shown that we get our best judges when those who are responsible for judicial nominations insist on candidates with strong professional and personal qualifications. The point to be stressed here is that substantially less improvement is needed in the area of honesty and ethics than in the area of professional competence and qualifications.

Honesty and Corruption

The most basic question respecting the ethical performance of our judiciary naturally relates to honesty and integrity. How honest are our judges? Of all the ingredients of ethical performance, this is the most fundamental. The general answer to this question must be, as already indicated, a strongly affirmative one. In court after court, trial as well as appellate, state as well as federal, our judges have shown themselves to be on the whole thoroughly honest and honorable individuals, fully deserving of the public confidence in which most courts and most judges are generally held.

This is not to say that individual exceptions do not exist. Corruption and dishonesty, though rare, are not unknown. In a well-known article published in 1931, the late Jerome Frank, a respected and perceptive legal realist, who subsequently served with distinction on the federal appellate bench, bluntly stated: "Crooked judges exist. 'Fixed' decisions are realities." Unfortunately, this observation is still true. One very recent example comes from Oklahoma, where three judges of the Supreme Court of that state were found to have been involved in a bribery situation of the worst sort. This led to the impeachment and removal of one of the judges and to the resignation of another. The third escaped removal from office only because his term on the bench had ended.

1 Jerome Frank, "Are Judges Human?", 80 University of Pennsylvania Law Review 17 (November 1931), p. 34.
expired by the time his wrongdoing became known. Similar instances have on occasion been found elsewhere.

In the same article, Frank also candidly recognized that a few who hold judicial office are subject to some degree of political control, "dec[ing] . . . the way the boss tells [them] to decide." This is a charge that is heard periodically, especially in areas where relatively corrupt political machines have dominated the process of judicial selection. In evaluating this charge, it is difficult to separate fact from fiction. I have personally discussed the problem with a number of experienced and informed lawyers and judges in whose integrity and judgment I have full confidence. I conclude that though the charge is often made without real justification, there are occasions when it is almost certainly valid. There are judges, though again relatively few, who have so handled themselves as to raise reasonable suspicions that their impartiality and integrity fail to measure up to the standards set by most of their judicial colleagues. Any judge who allows himself to be approached or influenced by a political boss or clubhouse leader with respect to a matter before him, or who unduly favors a party with special political connections, is a disgrace to the bench. There appear to be few such morally deficient individuals currently in judicial office. There should be none.

The observations in the preceding paragraph should not be understood as in any way questioning the honesty and integrity of the great majority of those who owe their judicial office to a dominant political leader. On the whole, judges so selected have not only shown complete independence once they have assumed judicial office, but also a thoroughly acceptable over-all level of ethical performance. Complaints are frequently heard that those responsible for judicial nominations have tended to allow political considerations to outweigh considerations of judicial fitness and professional merit. Such complaints, however, are usually directed at the level of professional competency of the politically selected candidate and substantially less often at his integrity or honesty.

A basic ethical requirement closely related to honesty is fairness or impartiality. Judges must dispense even-handed justice. This does not, however, mean that every litigant can expect every honest and fair-minded judge to react the same way to any particular matter. Judges with certain backgrounds and experience are prone to have different approaches and sympathies in dealing with certain types of litigation. Such policy-orientation is a fact of life. Areas in which it has played a significant role include the personal-injury field, government regulation of business, civil liberties, matrimony law, and the administration of criminal justice.

Ordinarily, such differences in approach or sympathy involve no ethical lapse or inadequacy. The issues which judges must resolve are often complex and novel. Closely balanced competing policy considerations, each fully supported by a line of well-reasoned and persuasive precedents, may be available to justify a decision either way. Chief Justice John Marshall, in the early days of our federal judiciary, championed one judicial philosophy, and his successor Chief Justice Roger Brooke Taney another. Similarly, different judges today can be expected to react in different ways to matters of current legal controversy. All that we can ask of each judge is that he make his decision within the framework of our legal system, and as honestly, fairly, and conscientiously as he can. It is possible, however, that particular views or prejudices may be so strongly or passionately

\(^2\) *Ibid.*, p. 34.
held as to make the holder unfit for judicial office. Men of strong prejudices do not normally make good judges. The problem with such individuals would usually be one of judicial fitness and temperament, rather than a matter of honesty and integrity.

**Canons of Judicial Ethics**

The ethical obligations of the judiciary obviously extend far beyond the basic essentials of honesty, impartiality, and fairness. It is not enough that judges avoid evil. They must also so regulate their conduct, both on and off the bench, as to avoid any appearance of evil or impropriety. Our courts would be rapidly brought into disrepute if either the legal profession or the general public should fail to have confidence in the integrity and impartiality of those who hold judicial office. Such confidence can only be earned and maintained if the conduct and reputation of our judges are beyond reproach. Suspicion of judicial impropriety can likewise seriously undermine public confidence in our courts and judges. Thus, conduct which tends to give rise to such suspicions must also be avoided.

High standards of professional morality and ethics stem primarily from individual conscience, and not from legislation. Nevertheless, most professions have found it desirable to formulate codes of acceptable professional conduct. Such codes involve no reflection on the honesty and integrity of those they seek to guide. Rather they recognize a strong professional ethical obligation to meet standards substantially in excess of mere avoidance of dishonesty or illegality.

Two such codes of general application have been developed by the legal profession. In 1908 the American Bar Association approved its first Canons of Professional Ethics, following the lead of certain state bar associations which had promulgated such codes in the period between 1887 and 1906. In 1924, the American Bar Association approved its Canons of Judicial Ethics. The Committee which drafted the Canons for the judiciary was composed of both judges and lawyers, with United States Chief Justice William Howard Taft as its chairman. As their preamble states, the spirit of these Canons should provide "a proper guide and reminder for judges," and indicate "what the people have a right to expect" from the judiciary. These Canons deal not only with the ethics of judicial performance on the bench, but also with what is expected of a judge as regards conduct in everyday private life.

In evaluating the degree of adherence to the Canons of Judicial Ethics, it is helpful to refer at the outset to a 1952 report, prepared by Judges Orie L. Phillips and Philbrick McCoy as part of an extensive survey of the legal profession conducted under the auspices of the American Bar Association. With respect to judicial conduct, this report began the summary of its conclusions as follows:

The answers as a whole [to a comprehensive questionnaire dealing with judicial selection and judicial conduct], and the general comments in particular, indicate the healthy condition of the Bench throughout the nation, when measured by the adherence of the judges to the Canons of Judicial Ethics which formed the basis for our inquiry. Judges are human, and it is perhaps to be expected that there should be some deviations in every State. While the Committee did not take a judicial census, the impression is strong that, in proportion to the total number of judges in all states, there are relatively few who fail to adhere to their oaths of office or to faithfully discharge their judicial obligations.\(^3\)

At the same time it was recognized that in certain areas, there appeared to be

"flagrant" disregard of the Canons "in too many particulars," especially as a result of "political pressures." Improvement in judicial conduct was referred to as an "imperative need" where such lapses existed.4

Judicial Performance

One important area in which ethical performance is not always all that it should be involves the matter of dignity, restraint, patience, and good manners. The Canons of Judicial Ethics wisely admonish each judge to be temperate, patient, considerate, and courteous and to make it his duty to see that court proceedings are conducted with fitting dignity and decorum. Nevertheless, some otherwise fine and competent judges have been notorious for their lack of patience, sarcasm, intemperate outbursts, or harassment of counsel. Such conduct may well be a normal human response to the pressures of a difficult trial or an overcrowded calendar, or to some apparent or actual impropriety or inadequacy on the part of counsel. No matter how strong the provocation, judicial behavior of this kind is always regrettable. Bad manners, sarcasm, lack of civility or restraint, and intemperance of utterance have no place on the bench under any circumstances. Such conduct tends to interfere with the fairness of the proceeding in which it occurs, and in a number of instances has been a cause for reversal on appeal. It also reflects adversely on the judicial temperament of the judge in question, and will tend to undermine confidence in his impartiality and fairness.

Bad manners and lack of patience on the part of the judge are but one aspect of the broader problem of maintaining courtroom dignity and decorum. The way in which the judge handles himself necessarily has a vital impact on the atmosphere and tone of any trial over which he presides. If the judge lacks dignity, so will the trial. The judge who permits a circus atmosphere in cases before him, or who reaches for personal publicity, is properly subject to strong condemnation. Wherever there is a loss of dignity, there is less public respect for the fairness and integrity of the judicial process. The Ruby trial in Dallas provides an unfortunate recent illustration of a case where the judicial handling of the trial appears to have fallen somewhat short of the standards called for by the spirit of the Canons.

A related matter, which is a subject of great current controversy, involves the propriety of televising trials. Canon 35 condemns this practice as involving improper publicity, destructive of the essential dignity and fairness of the trial process. The United States Supreme Court, by a five-to-four vote, in the recent Billie Sol Estes case held that the televising of the Estes trial operated to deprive Estes of his constitutional right to a fair trial,5 thereby giving added support to the policy of Canon 35 in protecting the dignity and fairness of the judicial process.

The Canons also properly stress the importance of judicial industry, promptness, attentiveness, and diligence. Instances come to mind of judges with poor and undisciplined work habits. There are judges who are notoriously and needlessly slow in deciding some of the matters which come before them. There are also observable differences in the degree of diligence shown by different judges. Habitual lack of punctuality is likewise specifically condemned by the Canons. With some exceptions,

4 Ibid., p. 151.

5 Estes v. Texas, 381 U.S. 532 (1965). The Judicial Canons of the Texas Bar differ in various respects from those of the American Bar Association. Under the Texas Canons, the matter of televising and photographing trials is left to the sound discretion of the trial judge.
the bench appears to meet well its obligations in these respects. This is not to say that judicial minds may not on occasion wander when some verbose or inept lawyer makes a confused or otherwise inadequate or dull presentation. I am personally acquainted with a substantial number of judges in many different states. A very substantial majority of those I know, or whose work I have had the opportunity to observe, are conscientious, hard-working, and thoroughly dedicated to meeting their judicial obligations to the best of their ability.

JUDICIAL DISQUALIFICATION

The problem of judicial disqualification arises periodically and has obvious ethical implications. There are certain instances where all agree that it would be totally inappropriate for a judge to hear some particular matter. No judge should act on a controversy in which he has a direct financial interest or in which a near relative is a party. Canons 13 and 29 so provide, as do many statutes. Other instances, however, are not so clear. It appears to be generally customary for a judge to disqualify himself if he owns stock in a corporation which is a party to a case before him. If his stockholding is very small and in a very large corporation with thousands of stockholders, his financial interest in the outcome of the case may be so small as not to require disqualification, particularly where it would be difficult or impossible to find a substitute judge. Harder problems arise in cases where a relative, or former partner or firm, or a close friend whose hospitality the judge has frequently enjoyed, appears as a party or counsel in litigation before the court on which the judge sits. Former clients who appear as parties present a similar problem.

There is no easy answer to many of the borderline problems in this area. The solution in each case is customarily left to the individual judge's sense of propriety, with the solution differing somewhat from judge to judge. Sometimes a judge's decision not to disqualify himself gives rise to controversy, as in at least one well-publicized instance involving a highly respected member of the United States Supreme Court who decided not to disqualify himself when a former partner appeared in a case before that court. The principal criticism there came from one of the other judges on that court. The answer should depend on a balancing of the following factors: the judge's assessment of his own ability to retain his objectivity and impartiality, custom, the apparent degree of public belief that the judge's decision would not be affected by the specific relationship, and the availability of a substitute judge. Where no substitute judge is conveniently available, the rule of necessity may properly lead the judge to decide against disqualification.

References have previously been made to the political pressures to which the judiciary may find itself subject. Probably more frequent than attempts to control specific decisions are dictation or quasi-dictation with respect to patronage matters. Judges have occasion to appoint trustees, receivers, masters, referees, special guardians, and the like to aid in the administration of justice. In some areas these patronage appointments have tended to be used politically, and have not always gone to those best qualified by reason of ability or character. There have likewise been instances of excessive judicial liberality in awarding fees and allowances to such appointees. Such practices are strongly

6 See John P. Frank, "Disqualification of Judges," 56 Yale Law Journal 605 (April 1947). Professor Frank's article contains a very helpful analysis of the problems of judicial disqualification and detailed information as to the disqualification practices of judges throughout the country.
condemned by Canon 12, but, nevertheless, still occur. Another practice involving substantial abuse has been the appointment of unqualified law clerks by some judges in response to political pressures, a practice which neither improves the efficiency of judicial performance, nor creates confidence in the integrity of the judicial process.

A very difficult ethical problem has recently been perceptively and candidly discussed by Justice Charles D. Breitel of the New York Judiciary. This is the problem of the judge who without the least improper motivation concludes that justice in a particular case can only be achieved by departing to some extent from the result which would be required if generally accepted legal principles were applied. As Judge Breitel puts it: "The judge knows that he is powerless to do in law what he wants and intends to do, for the sake of a justice he subjectively conceives and desires to achieve." Stated another way, is it "ever right to pursue the end even if the means are traditionally unavailable."

In its crudest form judicial excess, especially at the trial level, may be accomplished by distorting the findings of facts, not too much, but enough so that the applicable rules of law will meet the needs of justice as the judge conceives them. Sometimes it will involve no more than avoiding a statement in an opinion of the real reasons for one's conclusions, thus leaving completely obscured the findings of fact or applicable rules of law on which the determination depends. This is subjectivism, no matter how sincere, at its worst.

The traditional answer to this problem is found in Canon 20, where the judge is admonished that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him.

Many strong judges are not wholly satisfied by this traditional answer in individual cases where they believe that an obvious injustice would otherwise result.

The Judge's Private Life

The judge's ethical obligation is not limited to what he does on the bench. The Canons of Judicial Ethics properly recognize that the judge's personal behavior in everyday life and in his non-judicial activities may be a matter of public concern. For example, there would be little respect for, or confidence in, a member of the judiciary who was a known alcoholic, or a corespondent in a divorce action, or a flouter of traffic laws, or who cultivated friendships with and accepted hospitality from suspected racketeers or women of doubtful morals. As Canon 4 states:

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach. Such obligations are broadly recognized by judges everywhere. While private scandal in judicial life is not unknown, it is certainly rare. Perhaps the most observable deviations arise from the injudicious use of alcohol, but even such cases are not too frequent.

No matter how active politically a judge may have been before his elevation to the bench, he should thereafter totally dissociate himself from all partisan activity. Canon 28 lays down clear
guidelines. He must avoid making political speeches, making or soliciting contributions to party funds, endorsing candidates for public office, participating in party conventions, or serving on any party committee or as a party leader. As this Canon states:

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another.

These standards have certainly been effective in some areas, but not everywhere, in reducing significantly the degree of public participation by judges in partisan political activity. Their spirit, however, has not always been met as completely as it should be. In New York, for example, the Presiding Judge of the Court of Claims resigned his post several years ago to become Republican State Chairman. Now it is reported that he is under consideration for reappointment to the court of which he was formerly a member. Such shuttling between judicial and political office is not to be encouraged.

Another area in which abuses sometimes occur is where the judge uses his office as a springboard from which to run for some elective nonjudicial office. In some states, this practice is more widespread than in others. Canon 30 states that should a judge decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

In most states, this Canon is pretty generally honored, but again not completely. The most publicized example of a judge who flouted this Canon was the late Senator Joseph R. McCarthy, who ran for the United States Senate in 1946 while continuing to hold his position as a Wisconsin circuit judge.

Judges also have special ethical obligations with respect to financial matters and business ventures. For example, Canon 26 admonishes judges not to make personal investments in enterprises which are apt to be involved in litigation before their court and to liquidate any such investments which may have been made prior to the judge’s elevation to the bench. This Canon also condemns the use of information coming to him in a judicial capacity for speculative purposes, and speculation in securities by buying on margin. Part-time judges, who are not forbidden to practice law, are alerted by Canon 31 to be scrupulously careful to avoid conduct in their practice by which they might appear to be utilizing their judicial position to further their professional success. It would be totally inappropriate, for example, for such a judge to practice before other judges in a court of which he himself is a member. Judges must also make special efforts not to live beyond their means and to avoid, as far as possible, going into debt. As with most other aspects of judicial ethics, the judiciary generally appears to honor these obligations.

In this survey, it has not been possible to do more than to identify briefly some of the more important ethical problems which face the judiciary and to try to indicate a few of the areas where significant ethical lapses are to be found. On the whole, the performance of our judiciary in meeting its ethical obligations has been good. It can, however, be improved. In the final analysis, high ethical performance comes from insistence upon outstanding integrity from those selected for judicial office.