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## THE *REAL* ISSUES OF JUDICIAL ETHICS

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The Canons of Judicial Ethics remind me of the old joke about the drunk who's crawling around on all fours under a lamp-post one night. A policeman comes along and asks him his business and the drunk explains that he's looking for a lost quarter. So the policeman offers to help and pretty soon they're both crawling around looking for the coin. After about a half hour of this, the policeman gets fed up and asks: "Are you sure you lost the quarter around here?" "Oh, no," answers the drunk, "I dropped it over in the alley, but it's too dark to look there."

So, too, it is with the Canons of Judicial Ethics. The Canons focus on the tensions and potential conflicts that are most easily detected by an outside observer. For example, pretty much everyone agrees that a judge should not sit in judgment on a case on appeal if he participated in the decision below.<sup>1</sup> Similarly, everyone agrees that a judge may not sit in judgment in a case where he participated as a party or a lawyer.<sup>2</sup> Of course, those are just two of the most obvious examples; we have plenty of rules and precedents saying that a judge may not participate in a case where doing so would create the appearance of impropriety.

I should mention at the outset that I'm not a fan of this approach to judicial ethics, nor do I believe that it's necessary or inevitable. Take the two examples I've given. As you will recall, in the early days of the Republic the justices rode circuit, and some of the cases they heard in

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1. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a) (1990).

2. See *id.* Canon 3(E)(1)(b) (former lawyer), Canon 3(E)(1)(d)(i)-(ii) (party and current lawyer).

the lower courts would later come before the Supreme Court, so they occasionally reviewed their own decisions.<sup>3</sup> No one thought this was much of a problem. As to the second example, consider *Marbury v. Madison*.<sup>4</sup> The issue that led to the landmark opinion in that case arose because a commission signed by President Adams, and counter-signed by the Secretary of State, wasn't delivered before Adams left office and Jefferson became President.<sup>5</sup> The Secretary of State later said that he was really sorry not to have delivered the commission, but he was much too busy.<sup>6</sup> Small wonder he was busy: He was holding down two jobs—Secretary of State and Chief Justice. This was, of course, Marshall himself.<sup>7</sup> So Marshall ruled in an important case where he was involved in the underlying dispute.<sup>8</sup>

The approach to disqualification reflected in *Marbury v. Madison* and cases of that era was based on the common law notion that an integral part of the judge's job is to set aside whatever personal interests and biases he might have, and to decide cases impartially on the merits.<sup>9</sup> If a judge felt that he could not set aside personal biases in a particular case, he would recuse himself.<sup>10</sup> But the primary obligation was to summon the internal fortitude to rise above personal considerations and decide cases impartially on the merits.

I'm not going to argue here that we ought to go back to a regime where a judge's ethical obligation consists entirely of setting aside his personal biases and interests, no matter how serious a conflict he might appear to have. What I do want to point out is that the modern approach, with its focus on *appearance* of impropriety, overlooks the most frequent and important ethical issues judges face. Many of these issues are dull, so get ready to be bored. Nonetheless, they represent the bread and butter of judicial life.

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3. See Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1762 (2003).

4. 5 U.S. (1 Cranch) 137 (1803).

5. See *id.* at 138.

6. See Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607, 625 (2001).

7. See *id.* at 609-10 n.7. Professor Bloch hypothesizes that Marshall's involvement in setting up the case went far deeper than that. Her article is a great piece of historical detective work; well worth reading.

8. Michael Stokes Paulsen, *Marbury's Wrongness*, 20 CONST. COMMENT. 343, 350 (2003) (criticizing Marshall for his participation in *Marbury*).

9. The parties, in fact, could not challenge a judge's decision to sit on a case. See WILLIAM BLACKSTONE, ESQ. 3 COMMENTARIES ON THE LAWS OF ENGLAND 361 (William S. Hein & Co., Inc., reprint of 1st ed. 1992) (1768).

10. See *id.*

The first ethical issue I want to examine has to do with work allocation—the amount of time and effort judges spend on cases, particularly small cases.<sup>11</sup> Judicial caseloads have increased tremendously over the last few decades, and they continue to do so. When I graduated from law school in 1975 I clerked for the Ninth Circuit, and at that time each judge disposed on the merits of approximately 210 cases per year.<sup>12</sup> In 2002, the number stood at 492 cases per active judge, and the Ninth Circuit is far from the busiest court of appeals in the country.<sup>13</sup> That dubious honor goes to the Eleventh Circuit, which decided 843 cases per judge in 2002.<sup>14</sup> Just imagine what that means: Every judge of the Eleventh Circuit signed off on the merits disposition of 2.3 cases a day, every day of the year—weekends and holidays included.

Add to this the fact that not all cases are created equal. Most judicial work is routine and dull, involving issues that are of no consequence to anyone other than the parties. Only a few cases raise difficult and interesting issues—the kind of issues that make for an important judicial opinion. When lawyers seek appointment to judicial office, they generally think of the interesting cases as the core of judicial work; none I know seeks judicial office so he can spend his days, nights, weekends and holidays slogging through an unending stack of routine, fact-intensive and largely (in the grand scheme of things) inconsequential cases.

Human nature being what it is, there is a strong tendency to devote a disproportionate amount of judicial time to the big cases and to give short shrift to the small ones. There's actually a lot to be said for this. Preparing a precedential opinion requires a significant amount of time because such an opinion not only decides the dispute between the parties, but also sets the course of the law for innumerable cases to come. So you are justified in spending most of your time on the big cases, because you really do have a serious responsibility: A rushed and

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11. Much of the background on work allocation and internal functioning of the court comes from my personal observations. For further discussion on this topic, see Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371 (1988). From 1972 to 1982, Judge Markey was Chief Judge of the Court of Customs and Patent Appeals; from 1982 to 1990, he was the first Chief Judge of the Court of Appeals for the Federal Circuit. See Fed. Judicial Ctr., *Judges of the United States Courts: Markey, Howard Thomas*, at <http://air.fjc.gov/servlet/tGetInfo?jid=1479> (last visited August 16, 2004).

12. See Admin. Office of the U.S. Courts, *Management Statistics for United States Courts 1980*, at 9 (1980).

13. See Admin. Office of the U.S. Courts, *2002 Federal Court Management Statistics*, at 20 (2002).

14. *Id.* at 24.

sloppy opinion can cause major problems for a lot of people down the road. Yet, the small cases, too, have a legitimate claim to a fair share of judicial time and attention.

An important part of the judicial function thus consists of allocating one's time between the big and small cases—and this is a decision judges make almost implicitly and with no possibility of complaint by the parties affected. In fact, no one knows precisely *how* judges allocate their time among the cases assigned to them, but the risk that small and seemingly unimportant cases will be given insufficient attention is ever-present.

People might assume, if they think about such issues at all, that there's no real problem—because most cases are, in fact, easy. This points to an important paradox in the process of judging. In one sense, most cases *are* very easy. In a different sense, though, there are *no* easy cases. Most cases are easy in that, if you took any three judges in the federal judiciary, no matter how diverse their judicial philosophies, and asked them to look closely at the record, the applicable caselaw and the arguments of the parties, you'd get a unanimous result every time.<sup>15</sup> But all cases are difficult in the sense that it takes time and attention to get to the point of decision. You have to make sure you know the record and the arguments; you have to be confident that you have the latest caselaw and understand exactly what it says. All of this takes a fair degree of concentration and effort, even in the easy cases.

Most of the time—nine times out of ten, maybe more—when you're done, you reach the obvious result. And so it seems almost pointless to go to the trouble again and again and again, only to come up with the result you could have guessed from the beginning. It's a bit like banging your head against a padded wall. But then, once in a while, it turns out that what looked like an easy case is actually quite difficult, because of a small fact buried in the record, or a footnote in a recent opinion. After more than two decades of judging I have found no way to separate the sheep from the goats, except by taking a close look. But how close a look any one judge takes in a particular case is strictly a matter of the judge's own conscience. It's one of the embedded ethical issues that no one ever talks about.

A closely related issue is the tendency to delegate essential aspects of the judicial function to staff.<sup>16</sup> At the time I clerked, each federal

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15. See Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 856 (1991).

16. See Markey, *supra* note 11, at 378-79.

circuit judge had one secretary and two law clerks. Then, in the early 1980s, the staff complement was increased to five, made up of two secretaries and three law clerks. Sometime in the 1990s, judges were allowed to substitute a law clerk for one of the secretarial positions; I believe most circuit judges take advantage of this option, so that now judges generally have four clerks. In the Eleventh Circuit, by special dispensation, judges have been allocated an additional clerk, apparently because they have not sought the increase in judicial positions that their caseload would justify.

During the same quarter-century, there has been a steep increase in the number of central staff attorneys. In 1975, our court had a skeletal central staff whose function was largely to process motions; all merits cases were handled in chambers by judges and their elbow clerks. Today we have something like seventy staff attorneys, all located in our headquarters in San Francisco, and they process approximately forty percent of the cases in which we issue a merits ruling. When I say process, I mean that they read the briefs, review the record, research the law and prepare a proposed disposition, which they then present to a panel of three judges during a process we call “oral screening”—oral, because the judges don’t see the briefs in advance, and because they generally rely on the staff attorney’s oral description of the case in deciding whether to sign on to the proposed disposition. An oral screening panel meets for two or three days each month and during that time disposes of a hundred and fifty cases, sometimes more.

The increase in caseload coupled with the proliferation of staff creates a constant temptation for judges to give away essential pieces of their job.<sup>17</sup> The pressure is most severe in the small and seemingly routine cases, especially those handled through the screening process. After you dispose of a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders and the urge to say okay to whatever is put in front of you becomes almost irresistible. The temptation is heightened by the fact that the staff attorneys who present these cases are very experienced and usually get it right. It often takes a frantic act of will to continue questioning successive staff attorneys about each case, or to insist on reading key parts of the record or controlling precedent to ensure that the case is decided by the three judges whose names appear in the caption, not by a single staff attorney.

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17. *See id.*

A similar temptation exists as to the bigger cases. Writing opinions is a difficult, time-consuming, exacting process.<sup>18</sup> It is a reality of current judicial life that few judges draft their own opinions from scratch. Generally, the judge will give instructions about how a case is to be decided and what points the opinion should make, but the initial drafting is almost always left to a clerk. The draft opinion, when it lands on the judge's desk some weeks later, is generally pretty good—after all, we pick only the best law students as clerks. On reading the opinion, the judge may be able to detect any obvious flaws in reasoning, and he'll certainly be able to make some word edits. But this casual read is a far cry from the time and effort required to study the opinion closely, deconstruct its arguments, examine key portions of the record and carefully parse the precedents—all the things a judge must do before he can call the opinion his own. Nevertheless, if the judge chooses merely to fiddle a bit with an opinion drafted by his clerk and then circulate it, nobody is the wiser. And we do occasionally get opinions circulated that look like they were written by someone a year out of law school with no adult supervision. The only guarantee one can have that judges are not rubber-stamping their law clerks' work product is each judge's sense of personal responsibility.

Let me now turn to the issue that has been alluded to several times already by Professors Fried,<sup>19</sup> Freedman<sup>20</sup> and Butler,<sup>21</sup> among others. I'm talking about the cases where a dispassionate application of the law to the facts leads to a result that the judge doesn't like. I want to put aside the close case where the law is murky enough so the judge might find a principled way to reach a result he considers just.<sup>22</sup> I also want to put aside the controversial case where the morally offended judge applies the correct law but then makes noise to spark political efforts to change the law.<sup>23</sup> Rather, I pose the more mundane—but far more common—case where the law is fair, no one in particular has an axe to

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18. See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1371-76 (1995) (discussing the difficulties of judicial rhetoric); Fred A. Bernstein, *How to Write it Right*, CAL. LAW., June 2000, at 42, 81.

19. Professor Charles Fried, Remarks at the Hofstra University School of Law Legal Ethics Conference—Judging Judges' Ethics (Sept. 14, 2003) (videotape on file with Hofstra Law Review).

20. Professor Monroe H. Freedman co-directed the Conference and gave welcoming remarks.

21. Professor Paul Butler, Remarks at the Hofstra University School of Law Legal Ethics Conference—Judging Judges' Ethics (Sept. 14, 2003) (videotape on file with Hofstra Law Review).

22. See Paul Butler, *Should Radicals Be Judges*, 32 HOFSTRA L. REV. 1203 (2004) (based on Conference talk).

23. See Bob Egelko, *High Court Justice Crusades for Mercy*, S.F. CHRON., Aug. 10, 2003, at A2 (describing Justice Kennedy's speech calling for the elimination of mandatory-minimum sentences).

grind, but the judge believes that the result dictated by precedent is unjust.

Most people would say that the judge in that situation must put aside his personal feelings about the result and decide the case in accordance with the law. But I also think that most would agree that the judge faces a conflict of obligations—the obligation to apply the law impartially, and the obligation to do justice. We generally reconcile these obligations by saying that justice is served when judges apply the law impartially, regardless of the personal views of the decision-maker.<sup>24</sup>

So far so good. But what if a judge comes across a case where a straight-forward application of the law leads not merely to a result he doesn't like, but to what he believes is a shocking injustice? May a judge bend the rule of law to avoid a truly monstrous result? Might he have an ethical obligation to do so?

In theory, it's easy enough to say that a judge may never bend the rules to avoid a particular result, no matter how bad. But consider this example: You are reviewing a criminal appeal where a young man has been convicted of murder and sentenced to life without the possibility of parole. You examine the record and find that the evidence linking the defendant to the crime is quite flimsy—witness identifications are tentative and contradictory, and there is no circumstantial evidence whatsoever. The only solid piece of evidence supporting the conviction is what is known as a jailhouse confession—the testimony of an inmate who shared a cell with the defendant while he was awaiting trial, and who swears that the defendant confessed to the murder (a confession the defendant denies making). You read this testimony closely and find it transparently unconvincing. It contains no authenticating information that the witness could only have obtained from the real killer. And, of course, the witness has been given a sweetheart plea bargain in exchange for his testimony.

Applying the rules of appellate review in an objective manner, you would have to affirm the conviction. After all, the jury is the trier of fact and it was entitled to return a guilty verdict based on the jailhouse confession alone. Yet, what if you believe, to a moral certainty, that the confession is a fabrication and that the defendant didn't do it? Must you affirm the conviction and let a young man you believe to be innocent

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24. See, e.g., Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227 (2004) (based on Conference talk) (“Justice is judging according to the law and the judge who ignores (more rightly, defies) law to do what he thinks is justice, acts unjustly.”).

spend the next eighty years, or whatever time is left to him on earth, locked up in a ten-foot by fifteen-foot cell?

Or, if you're not moved by this hypothetical, consider the case where the defendant is convicted of multiple brutal murders of small children—crimes of which he is doubtless guilty. And let's say you're convinced that, if the defendant is released, he will surely do it again and again. As it happens, however, this defendant has a slam-dunk argument that the prosecution's entire case against him rested on the product of a technical procedural violation. In such circumstances, do you have an obligation to set the defendant free and possibly condemn unknown children to death by torture, or may you put justice above the law and find a way to affirm the conviction?<sup>25</sup>

I used to think that questions like these had an easy answer—you apply the law conscientiously and don't worry about the consequences. But I'm no longer sure. I now wonder whether this isn't false modesty, a kind of hubris: I will accept whatever result the law calls for, no matter how much it hurts somebody else. A troubled conscience is certainly not pleasant, but the real-life, brutal consequences of an unjust judicial decision are suffered by others—the innocent kid who wastes his life in a prison cell, or the future victims of the slasher released on a technicality.

I am reminded that among the most reviled participants in the Third Reich's persecution of Jews and other minorities were the German judges who enforced the Nuremberg laws. These judges claimed as justification that they were simply applying the law.<sup>26</sup> Our collective assessment seems to be that the judges shirked their responsibility—that they should have used their power and authority to undermine unjust laws. Do American judges have a similar ethical obligation? I'm not going to suggest an answer here because it's a tough question. Instead, I'll simply point out that this is the kind of ethical question that matters, that makes a difference. It arises all the time and yet the Canons of Judicial Ethics have no answers.

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25. *Cf., e.g.*, *Brewer v. Williams*, 430 U.S. 387, 415-29 (1977) (Burger, C.J., dissenting) (arguing that the decision of the Supreme Court to overturn the conviction of an admitted child murderer because of a *Miranda* violation was "intolerable in any society which purports to call itself . . . organized"). Chief Justice Burger may well have been prescient. *See Nix v. Williams*, 467 U.S. 431, 449-50 (1984) (upholding, in an opinion by Chief Justice Burger, the conviction of Williams after retrial).

26. *See, e.g.*, *United States v. Altstoetter*, 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1, 1014 (1951) (quoting defendant Rothenberger: "'The judge is on principle bound by the law. The laws are the orders of the Fuehrer.'").

Lots of ethical questions like these pop up every day in the course of judging but don't show up anywhere in the Canons. Here are a few more examples, briefly stated:

- Do you have an ethical obligation to dissent, even if you know it won't change anybody's mind and will probably anger your colleagues?

- If you've decided a case in favor of a criminal defendant who is incarcerated pending the outcome of his appeal, do you have a responsibility to move the case ahead of other work so he will be released more quickly? Or, if you're going to rule that the giant corporation can evict the old lady because she can't pay the rent, is it okay to put that case at the bottom of the work pile and not get to it until the snow melts?

- If you are writing an opinion and there are inconvenient facts in the record, may you simply leave them out (as lawyers sometimes do), or do you have an obligation to mention them?

- In finding against a party, may you caricature the party's argument (as lawyers sometimes do) to make it seem less persuasive?

- Is it okay to swap votes with another judge—say vote in favor of taking en banc a case he's interested in, in exchange for having him vote with you in a case you're interested in?

- There's a death penalty case, a second petition. The panel votes to let the execution go forward, the en banc vote is tied and you are the last to vote, so your vote is going to be decisive. You are convinced that the Supreme Court will never take the case, so voting "no" means the petitioner will be dead in forty-eight hours. In deciding how to vote, may you take into account the life-and-death consequences of your decision, or are you ethically bound to approach the case as if it were about arbitrability of employment contracts?

- Large and important cases create their own issues. Would anyone today remember John Sirica, Harold Green and Thomas Pennfield Jackson if they had held, respectively, that President Nixon did not need to turn over the White House Tapes, that AT&T did not need to be broken up and that Microsoft was not a monopolist? I'm not saying that Judges Sirica, Green and Jackson made their decisions for improper reasons; I'm saying only that judges are well aware that certain outcomes are far more likely than others to gain them personal notoriety and prestige. Judge Sirica, who before Watergate led an undistinguished judicial career and was known around the D.C. District courthouse as "Maximum John" for his harsh sentencing practices,<sup>27</sup> became Time

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27. See PAUL JOHNSON, MODERN TIMES 651 (Rev'd ed. 1991).

Magazine's Man of the Year for 1973.<sup>28</sup> That's a lot of temptation right there, yet it is seldom recognized as creating an ethical dilemma.

• You are a federal district judge. Naturally, you hope to be elevated to the court of appeals, and some friends in high places have intervened with the White House on your behalf; it looks like you have a good chance of getting the promotion. As you're waiting for the political process to run its course, you preside over a high-profile criminal case where the defendant is convicted, and you have to impose the sentence. You review the presentence report and various other materials, and you conclude that the defendant is entitled to a substantial downward departure from the range calculated according to the Sentencing Guidelines. The Assistant United States Attorney, though, vehemently opposes any downward departure. In determining the defendant's sentence, may you take into account that the Attorney General of the United States has instituted a policy requiring all Assistant United States Attorneys to report downward departures by district judges?<sup>29</sup>

Every magistrate judge is a district judge in waiting; every district judge is a circuit judge in waiting; every circuit judge is an associate justice in waiting; and every associate justice is a chief justice in waiting. Every state judge wants to be re-elected and, hopefully, promoted—perhaps within the state judicial hierarchy, perhaps into the federal judiciary. How does a judge reconcile his personal ambitions with the requirements of principled application of the law and sensitivity to individual justice? The Canons of Judicial Ethics don't begin to address this issue. Indeed, they don't recognize it as an ethical issue at all, yet the temptation to decide cases in a way that will please those in the political process who have the power to appoint, retain and promote judges is one of the most ubiquitous moral hazards facing members of the judiciary.

How serious are these issues? Let me explain it this way: I file a financial disclosure report every year, telling the world what assets I own, just so litigating parties can confirm that I did not—God forbid—sit in a case involving a corporation whose stock I hold. I find this requirement a nuisance and a bit dangerous and intrusive, because it discloses things about me and my family, and our assets, that I would

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28. See Judge John J. Sirica: *Standing Firm for the Primacy of Law*, TIME, Jan. 7, 1974, at 8.

29. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.170(B); see also Edward Walsh & Dan Eggen, *Ashcroft Orders Tally of Lighter Sentences*, WASH. POST, Aug. 7, 2003, at A1.

prefer to keep private. But I file the report because it's considered an important safeguard of judicial integrity.<sup>30</sup>

Yet I can't imagine that I could possibly be tempted to change my vote in a case because I own stock in one of the parties. I don't claim a special virtue in this, if virtue means resisting temptation. What I'm saying is, I wouldn't be tempted. If money were important to me, I'd be in private practice and, in a month or a week—maybe in an hour—I would make much more than my one hundred shares of AT&T could possibly change in value based on my vote in a case. The idea that I would give up my honest judgment in a case for a few dollars is beyond silly—it's ludicrous and insulting. So many of the things contained within the Canons, the ones most talked about, are wholly irrelevant in practice. They make no difference at all.

But the internal temptations that I described above are ones I confront every day. Giving short shrift to small cases, signing on to the work of staff and calling it my own, bending the law to reach a result I like—and the dozens of other ways in which I feel the pressure to do something unethical, yet wholly undetectable by anyone other than me—all these temptations I must fight off many times every single day.

My problem with the appearance of impropriety standard isn't so much that it's bad on its own terms, though I think it probably is. Rather, the standard promotes the wrong idea—that in order to keep judges from acting unethically, ethical rules must prevent judges from *appearing* to act unethically. It also seems to suggest the converse: that if judges appear to be acting ethically, they probably are. Nothing could be further from the truth. A judge can appear to act ethically and still betray his responsibility in essential respects, and in ways that no one will ever know about. Increasing the number of rules and prohibitions—making sure that judges don't attend conferences at swank resorts with plush golf courses<sup>31</sup>—will do absolutely nothing to increase judicial responsibility where it counts. To the contrary, the more rules you have, the more hoops judges have to jump through to avoid the appearance of impropriety, the more likely they are to feel that the hoop-jumping is the alpha and omega of their ethical responsibilities, and the less likely they are to give careful thought to the job's real ethical pitfalls.

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30. See 5 U.S.C. Appx. §§ 101-102 (2004).

31. See Joe Stephens, *Judges' Free Trips Go Unreported: U.S. Jurists Say They Forgot To Comply With Ethics Law*, WASH. POST, June 30, 2000, at A1 (noting that trips to judicial legal seminars, accepted by judges as gifts, can be valued at \$4500 per judge, and that certain groups were calling for a ban on accepting such gifts).

I know there is a growing tendency to distrust judges—to craft more elaborate ethical rules and restrictions; to expand the scope of what is encompassed within the appearance of impropriety standard; to adopt more and better methods of intruding into judges' private lives—all in a misguided effort to promote ethical judicial behavior. But the hard truth is that none of these things really matters. Judicial ethics, where it counts, is hidden from view, and no rule can possibly ensure ethical judicial conduct. Ultimately, there is no choice but to trust the judges. Maybe we need some external rules, maybe we don't. But, to my mind, we'd all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every aspect of judicial life—obligations that each judge has the unflagging responsibility to police for himself.