“Who Can Rein In the Supreme Court?” asks the New York Times. It can, but doesn’t want to.

by Lev Tsitrin

Is there a linkage between adequate discharge of professional duties, and sterling personal ethics? Does an MD implicated in malpractice necessarily unethical – cheating on his wife, for instance? Is artwork made by a libertine of necessity inferior to that made by an artist with impeccably ethical behavior?

The *New York Times*‘ Editorial Board apparently does think that

professional performance corresponds to personal ethics. To be sure, the mouthpiece of the paper's collective mind and conscience speaks not of doctors and artists, but of the justices of the Supreme Court who are "unelected and employed for life – [and] are shielded from the usual mechanisms of democratic accountability, and so they depend on a high level of public trust like no other institution of American government" – but what's the difference? If a doctor with spotless family life can botch a surgery, or an artist with somewhat loose morals – think Benvenuto Cellini, for instance – can produce one masterpiece after another, is there really a link between professional achievement (or lack thereof), and ethics?

And if there is none, why pretend otherwise? Why push a square peg of personal ethics into a round hole of poor professional performance?

Yet this is exactly what the Editorial Board does. According to the *New York Times*' editors, the Supreme Court "has blown through the guardrails courts are expected to observe – showing little respect for longstanding precedent, reaching out to decide bigger questions than it was asked to and relying on a secretive "shadow docket" to make hugely consequential rulings with no public explanation." Clearly, the grievance here is with the professional activity of the court. And how should this round hole in professional actions be filled? With a square peg of personal ethics that has nothing whatsoever to do with judging: "the Supreme Court needs, at long last, a clear, comprehensive and transparent code of ethics. … This would require frequent and detailed reporting of all travel and accommodations they receive … If a justice sells real estate … he or she should be required to identify the buyer; Justice Gorsuch did not, even though his buyer was the chief executive of a major law firm that has regular business before the court. The object of these disclosures is to give the American public as complete a view

as possible into the various potential influences on the court."

Oddly, the editor-sages of the *New York Times* do not even notice that the last sentence guts everything that went before it: adopt the "code of ethics" – and yet "the various potential influences on the court" will still remain! Yes, they will be known to the American public – but what of that? The justices will still make decisions "under the influence," so to speak – the influence of their ideology, and their backers. So what exactly is the use of the "code of ethics"? What's achieved by introducing it?

Well, how about doing something else, *New York Times*' Editorial Board – how about *eliminating* "various potential influences on the court" altogether – by making the court stick to adjudicating parties' argument, rather than let judges concoct their own argument, of necessity pre-selected by the "influences" judges are under? If judicial procedure follows "due process of the law" – as it certainly should – than it is parties' argument that should be weighted on the scales of Lady Justice, not that of the judges, who now take off their blindfold of impartiality to inject into their decisions their ideological and personal "influences," deciding cases with a split vote. Without the "influences," the vote would be unanimous.

In fact, the Editorial Board's lament that "the highest court is not bound by a code of ethics as the lower federal courts are" in itself illustrates the absurdity of suggesting that the "ethics code" could make judges stick to rules – because according to their logic, all should be well in the lower courts since lower courts judges are already bound by the "code of ethics." But if it were so, people would have had no reason to appeal to the Supreme Court – yet that court gets close to 10,000 petitions per year.

My own free speech/property rights case was not taken by the

Supreme Court (it should be noted that the way the Supreme Court chooses cases is deeply unfair – the court's ability to hear cases being limited to the capacity of one judge, the lucky two hundred cases should be chosen by lottery, not by the favoritism of justices' clerks) – but it went through plenty of rehearing and appeals done by lower-court judges who, according to the *New York Times'* Editorial Board were bound by the "code of ethics", And what did those "ethics-bound" judges do? The judge in the Court of Federal Claims replaced in his decision government lawyer's losing argument with the winning argument of judge's concoction. When the government study that cited our case completely demolished the judge's argument, and we refiled in the Eastern district court of New York, the judge there replaced in his decision my lawyer's winning argument with judge's own, losing one. Heads, you lose. Tails, I win!

Mind you, this was done by judges who, unlike the justices of the Supreme Court, were actually bound by the judicial "ethics code" – and I have no reasons to doubt that indeed, they properly disclose all free travel, and all their real estate transactions – which did not prevent them from defrauding me of justice. And when I sued them for fraud, they defended themselves with judges' self-given, in *Pierson v Ray*, right to act from the bench "maliciously and corruptly." If being "corrupt and malicious" goes parallel to the code of ethics, what difference does being "ethical" do? How can it produce procedurally proper judging?

The *New York Times*' editors know this full well – because I told them, many a times. And yet, they keep crying up the red herring of the "code of ethics." Why? Because what they want is not judging "according to law" that produces justice. They want political judging "according to men" – but of a kind that fits their politics. To the *New York Times*, the problem is that the current political judging goes the "wrong" way – which is why the editors squeal from the op-ed page. Once the

political judging starts going the “right” way, all will be good, whether there is a code of ethics, or not.

The *New York Times* could have easily advocated for – and effected – the regime of justice at federal courts, by using its bully pulpit to disclose judicial fraud that is routinely perpetrated on federal benches. But this is not what its Editorial Board is after. The *New York Times* does not want justice – it wants decisions it likes. Accordingly, it cries itself shrill and hoarse, trying to link the un-linkable – the personal ethics, and proper professional performance.

Nice try, *New York Times*‘ Editorial Board – but I’m not buying any of this. Nor should anyone else.

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