RULERS, VICTIMS, EDUCATORS, OR PARTNERS? JUDGES' PERCEPTION OF THEIR RELATIONSHIP WITH LAWYERS

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ABSTRACT

Judges often face lawyer misbehavior in court. Such misbehavior, and the way judges address it, are pressing issues, which challenge all courts. However, the current literature on the legal profession and legal education lacks a systemic analysis of judges' perceptions of lawyers' behavior in their courtrooms, of the ways in which judges are influenced by lawyers' misbehavior, and of the ways in which they respond to it. This Article fills this gap by empirically analyzing judges' perceptions of lawyers' misbehavior, how it influences judges' work environments, the methods they use to cope with it, and the constraints they face in dealing with such behavior.

The data is based on two studies: A survey circulated among presiding judges, and a qualitative study which included dozens of interviews with retired judges. We analyze the original empirical data we gathered using public choice theory and new institutionalism.

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We found that judges acknowledge that lawyers' misconduct is frequent. However, although judges have many means to control lawyers, most refrain from using such means, instead using oral reprimand almost exclusively. Judges do so because they believe that using more severe methods might yield negative results for them since the judicial system will not support them against lawyers' backlash.

Moreover, though most judges declare that they succeed in maintaining decorum in their courtroom, they largely agree that "other judges" have a problem in attaining that goal, that lawyers' misbehavior has a negative impact on judges' work environments and well-being, and that the judicial system does not adequately deal with this problem.

This study will help researchers better understand judges' perceptions and behavior and shed light on the reasons behind judges' choices when they are confronted with unruly lawyers—issues that have been at the heart of a fierce academic debate in recent decades.

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I. INTRODUCTION

"Lawyers sometimes act as if they need a sandbox," stated a judge in a survey we conducted among presiding judges. Another judge noted on the other hand that "it is not the role of the court to 'educate' [lawyers]." These are just two examples of how judges perceive lawyers' behavior in court, and how judges perceive their own role in dealing with lawyer misbehavior.

Given the central role of the judge-lawyer relationship in court, the ever-growing number of lawyers,[1] and the civility problem,[2] it is not surprising that a large body of literature, both theoretical and empirical,[3] deals with this relationship. The literature addresses many aspects of the attorney-judge relationship including the power of the judiciary to enact ethical rules governing lawyers' behavior,[4] judges' reporting of lawyers' misconduct to disciplinary bodies,[5] the way judges question lawyers during oral arguments,[6] and more.[7]

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1 Eyal Katvan, *The 'Overcrowding the Profession' Argument and the Professional Melting Pot*, 19 INT'L J. LEGAL PRO. 301, 302-06 (2012).

2 The civility problem is widely recognized in the United States. *See, e.g.*, *Civility Matters*, AM. BD. TRIAL ADVOC. FOUND., https://www.abota.org/Foundation/Lawyer_Resources/Civility_Matters/Foundation/Professional_Education/Civility_Matters.aspx [https://perma.cc/763B-FP3N] (last visited Sept. 10, 2023); *see also* Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1150, 1157 (2011); Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531, 531-32 (1994); David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 248-50 (2013); Donald E. Campbell, *Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 109 (2011). For a U.S. perspective on the global aspects of regulating lawyers, see Carole Silver, *What We Know and Need to Know About Global Lawyer Regulation*, 67 S.C. L. REV. 461, 465 (2019).

3 *See infra* Part II.

4 Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1308-14 (2003).

5 Judith A. McMorrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1433-39 (2004).

6 *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 305-36 (2013).

7 *See, e.g.*, Mark A. Lemley, Su Li & Jennifer M. Urban, *Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?*, 66 STAN. L. REV. 1121, 1123-24 (2014); Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of*

However, the literature on the legal profession and legal education lacks a systemic analysis of judges' perceptions of lawyers' behavior in their courtrooms[8] and the way they respond to lawyers' misbehavior.[9] This void in the literature is both puzzling and, at the same time, understandable. It is puzzling because judges' perceptions of lawyers' behavior in court, rather than the lawyers' actual behavior, influence judges' decisions, such as holding a lawyer in contempt, reporting the lawyer to a disciplinary body, and so on. It is therefore crucial to understand judges' perceptions of lawyers' behavior if we hope to understand their actions toward lawyers. The void in the literature is also understandable because judges in most countries tend not to answer questionnaires or talk to researchers about their work, which makes it difficult to obtain data that relates directly to their perceptions of lawyers' behavior.

Our research aims to fill this critical void in the appraisal of judges' working environment and behavior by using public choice theory and new institutionalism to analyze original empirical data we gathered in Israel. The data focuses on judges' perception of lawyers' behavior in court, judges' reactions to various forms of uncivil behavior by lawyers, and the factors that influence judges' decision-making in determining how to handle lawyer misbehavior. Our data will help researchers better understand judges and shed light on the reasons behind judges' choices when confronted with unruly lawyers.

Beyond its material novelty and importance, this research has methodological importance because it is one of the first research projects to sample all judges in a specific judicial system—in our case, the Israeli judicial system.[10]

In our research, we used two independent and complementary methods: a survey and an interview. First, we used data from a vast

Federal Judges' Views on Allocution in Sentencing, 65 ALA. L. REV. 735, 750-51 (2014).

8 *But see* Stephen L. Wasby, *As Seen from Behind the Bench: Judges' Commentary on Lawyers' Competence*, 38 J. LEGAL PRO. 47, 50 (2013). Wasby's article is one of the few exceptions to this rule.

9 McMorrow et al., *supra* note 5, at 1473.

10 Past surveys in Israel were not authorized by the Israeli Judicial Authority, and therefore for judges to answer them was a breach of Section 34 of the Code of Ethics for Judges. *See* § 34, Code of Ethics for Judges, 5767-2007 (Isr.), https://www.gov.il/BlobFolder/legalinfo/code-of-ethics-for-judges/en/ETHICS.pdf. As a result, most judges declined to participate.

survey conducted by the authors and Chemi Ben-Noon.[11] The survey, which was the first to receive the consent of the Israeli Judicial Authority, was sent to all Israeli judges; it received responses from 148 judges (constituting more than 20% of all Israeli judges). In the survey, we asked judges to answer questions relating to their perceptions of lawyer misconduct in court and their response to such misconduct.

Second, we used qualitative data gathered through dozens of personal, semi-structured interviews with retired Israeli judges.[12] In the interviews we asked judges about their experiences regarding lawyers' misconduct in court, the effects of such misconduct, and the various methods they utilized throughout their careers to handle such misconduct.

In analyzing the data, we employed two theoretical frameworks. First, we used public choice theory, which focuses on the self-interests of public decision makers, such as regulators, legislators, and, in our case, judges. Lawyers' misbehavior affects judges' self-interests, and the choice between different responses to this behavior will be influenced by the way each response could affect these self-interests.

Second, we used a neo-institutional framework. According to neo-institutionalism, institutes are "humanly devised constraints that shape human interaction. [T]hey . . . are the framework within which human interaction takes place."[13] Institutions affect human behavior in two ways. First, institutions set rules that circumscribe an individual's ability to act according to their inner preferences. Thus, judges act according to rules laid down by courts, whether they are general legal rules or rules intended specifically for judges. Second, institutions affect inner preferences directly.[14] In our case, judges think as part of the legal community and, more specifically, aim to think and act as judges do. Therefore, the preferences of individual judges will match the preferences of the larger judge community.

11 Some of the results of this survey were published in Hebrew. *See, e.g.*, Chemi Ben Noon, Boaz Shnoor & Eyal Katvan, *Judges' Perceptions of Lawyers' Behavior in Court*, 20 HAMISHPAT L.J. 11, 28-48 (2015) (Hebrew).

12 Section 34 of the Code of Ethics for Judges prohibits sitting, acting judges from answering questionnaires or participating in academic interviews without the prior consent of the Chief Justice. *See* Code of Ethics for Judges, *supra* note 10, § 34. We could not secure approval for the oral interviews, and therefore we conducted the interviews with retired judges who are not subject to the above rules.

13 DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3-4 (1990).

14 Thomas A. Koelble, *Review: The New Institutionalism in Political Science and Sociology*, 27 COMPAR. POL. 231, 232-33 (1995).

Our research focuses on judges' perspectives and is not meant to portray an objective situation. It could very well be that objective observers would interpret the situation differently. However, knowing what judges feel, and understanding the reasons for these feelings, is crucial for improving judges' working environment and, thus, the overall courtroom atmosphere.

We found that judges think that lawyers' misconduct is a frequent phenomenon that is worsening due to the judges' perception that the quality of lawyers is deteriorating. Many judges also think either that lawyer misconduct occurs mainly in criminal and family courts or is caused by a small group of problematic lawyers that the system cannot handle. Although judges may control lawyers through many means, most judges use oral reprimand because they feel that using more severe methods might yield negative results, and that the judicial system will not support them against lawyers' backlash. Moreover, though most judges in our survey declare that they personally succeed in maintaining decorum in their court, they widely opine that "other judges" do have a problem in attaining that goal, that lawyers' misbehavior negatively impacts judges' work environment and well-being, and that the judicial system does not adequately deal with this problem.

In the second part, we compare lawyer-judge relations in Israel to lawyer-judge relations in the United States. We also briefly compare Israel and the United States' judicial systems, structures, and key players. These comparisons show that our studies' conclusions have meaningful implications for studies of the U.S. system. In the third part, we present two models, the public choice model, and the neo-institutional model, on which we based our hypotheses regarding how judges perceive lawyers' behavior and decide how to respond. In the fourth part, we present the results of our empirical studies and examine our hypotheses. In the fifth part, we summarize our conclusions.

II. JUDGE-LAWYER RELATIONS: BETWEEN A ROCK AND A HARD PLACE

The judge-lawyer relationship plays a major role in the courtroom. Judges spend much of their time ensuring that lawyers advance the case at hand. In doing so, they discipline lawyers,[15] report

[15] *See, e.g.*, Zacharias & Green, *supra* note 4, at 1310-13.

misconduct to the Bar,[16] and generally ensure that lawyers help deliver justice, instead of interfering with it. While regulating lawyer conduct, judges try not to harm or delay justice,[17] sour the court's atmosphere,[18] or harm the clients or lawyers. As we shall see, along with their obligations to conduct a fair trial, maintain judicial ethics and courtroom temperament,[19] and uphold the law, judges are also subject to other commitments and various interests, which may be personal or judicial.

Lawyers are also bound by a combination of obligations and loyalties owed to their clients, the opposing party, opposing counsel, society, and the court. This situation necessitates rules of conduct which restrict lawyers' behavior, particularly if there is a possible conflict between their client commitments and ethical obligations—that is, between their obligation to represent a client's claims and their obligation to assist the court in achieving justice.[20] The boundaries in this context are not always clear, and some lawyers exploit this lack of clarity.

Lawyer misconduct can cost the other party, the judge, and the entire justice system by delaying the proceedings, muddying legal and factual questions, aggravating the other party and the witnesses, and so on. Lawyers' actions almost always influence the judges' working environment, emotions, and thinking processes. Thus, they can be an influential factor in judicial decision-making. Moreover, judges use

16 AM. BAR ASSOC. COMM. ON PROFESSIONALISM, ". . . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUE-PRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 37-38 (1986). *But see* Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMCK L. REV. 537, 539-41, 546 (2009) (arguing that judges report lawyers only rarely, and even full compliance with the reporting requirements will not use significant judicial resources); McMorrow et al., *supra* note 5, at 1435 ("Judges are not a significant source of reporting misconduct to the bar disciplinary apparatus.").

17 McMorrow et al., *supra* note 5, at 1427-28.

18 Greenbaum, *supra* note 16, at 548-49.

19 *See, e.g.*, Norman L. Greene, *A Perspective on "Temper in the Court: A Forum on Judicial Civility"*, 23 FORDHAM URB. L.J. 709, 715-16 (1996).

20 MODEL CODE OF PRO. RESP. r. 3.1-3.5 (AM. BAR ASS'N 1983). In Israel, Section 54 of the Bar Association Act stipulates, "[i]n fulfilling his duties the lawyer shall act for the good of his client with loyalty and dedication, and shall assist the Court in its work." § 54, The Bar Association Act, 5721-1961 (1961) (Isr.), http://main.knesset.gov.il/EN/About/History/Documents/kns4_advocates_eng.pdf. Rule 2 of the Israeli Bar Rules (Professional Ethics) stipulates, "[a]n advocate shall represent his client faithfully, diligently and boldly, while maintaining fairness, the honor of the profession and respect for the court." Israeli Bar Rules (Professional Ethics), 5746-1986 (1986) (Isr.), https://www.gov.il/blobFolder/dynamiccollector-resultitem/iba-rules-bsp/he/regulatory-docs_iba_rules_bsp.docx.

various means to control such behavior in order to ensure the efficiency of the proceedings and serve the interests of justice.

In Israel, as in the United States, court proceedings are adversarial and involve three key players (excepting the jury in the U.S. system): the judge who oversees the proceedings and issues rulings on a dispute or aspects of it (subject to the role of the jury); the parties to the dispute; and the lawyers who represent them. We focus only on one dimension of this triangular relationship: judge-lawyer relations. This relationship, which extends well beyond the courtroom, is multifaceted and complex. It begins in law school and continues throughout the entire career of lawyers and judges.[21]

A. Law School as a Common Background

In the first place, lawyers and judges share a common background. In the United States, all appellate judges and most trial judges worked previously as lawyers.[22] The same applies to the Israeli judiciary; almost all judges were licensed lawyers until their appointment.[23] Some were lawyers who served as legal aides to judges and a small minority were professors of law,[24] but all judges studied law at the same institutions. Law schools socialize law students into the profession; lawyers and judges come from the same community.

B. Judges' Involvement in Admission to the Bar

In the United States, judges are involved in the process of admitting new members to the Bar, and in many states the judiciary is responsible for the process. In Israel, however, the Bar governs the process. The committee that prepares Bar exams includes four lawyers, three judges, and two law professors (who are usually also members of the Bar).[25] In both countries, judges influence lawyers'

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21 BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 27-33, 35-38 (2010).

22 *Id.* at 3.

23 Sections 2-4 of the Israeli Courts Act state that a person can be appointed to be a judge only if they served as a lawyer or as a law professor. §§ 2-4, Courts Act, 5744-1984 (Isr.)

24 Currently, less than ten Israeli judges (out of more than 700) are previous law professors who did not serve as lawyers prior to their appointment.

25 The Bar Association Act, *supra* note 20, § 40.

appointment to multidistrict cases[26] and other positions, thus impacting lawyers' careers even after their admission to the Bar.

C. Lawyers' Involvement in the Appointment of Judges

In the United States, lawyers are involved in the appointment and promotion of judges,[27] whether informally—as contributors to judges' campaigns or as advisors and lobbyists—or formally—as part of the appointing body. In Israel, judges are chosen by a nine-member committee: the minister of justice (who acts as the chairperson); another minister; two Knesset members (traditionally one from the coalition and another from the opposition); three Supreme Court justices; and two lawyers who represent the Israel Bar Association.[28]

D. Lawyers' Involvement in Regulating Judges

In the early 2000s, relations were cold between the Israeli Judicial Authority ("IJA") and judges and the Israeli Bar and lawyers.[29] This rift reached its lowest point in 2002, when the Bar initiated a public survey among all lawyers asking them to rate individual judges.[30]The Bar claimed that some judges abused their power or neglected their duties, that lawyers and parties to a case had no avenues to complain about such incidents, that the IJA was unwilling to accept any criticism of judges, and that the survey was the only avenue available for lawyers to deal with such judges.[31] This initiative was vehemently opposed by the judges, and caused the judiciary to suspend all cooperation with the Bar until a new chairperson was elected.[32] However, in response to the Bar's claims, the Knesset established (with the

26 Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105, 109 (2010).

27 Nelson Lund, *May Lawyers Be Given the Power to Elect Those Who Choose Our Judges? "Merit Selection" and Constitutional Law*, 34 HARV. J.L. & PUB. POL'Y 1043, 1045-46 (2011).

28 Israeli judges have tenure and cannot be removed from office while maintaining good behavior. Judges retire at the age of 70. *See* § 7, Basic Law: Judgement (Isr.); §§ 11-13, Courts Act, 5744-1984 (Isr.).

29 Eli Salzberger, *The Conspiracy of Israeli Jurists: About the Israeli Bar Association and Its Allies*, 32 MISHPATIM 43, 44 (2001) (Hebrew).

30 Daphna Avnieli, *Who Will Control the Judges*, 9 MISHPAT UMIMSHAL 387, 406 (2006) (Hebrew).

31 For similar sentiments among U.S. lawyers, see Greene, *supra* note 19, at 715.

32 Avnieli, *supra* note 30, at 407.

judiciary's halfhearted consent) the Ombudsman's Office of the Israeli Judiciary in 2003.[33] The Ombudsman deals with complaints about judges' behavior, and its recommendations are weighed heavily when considering a judge's promotion.[34] In some cases, the Ombudsman's recommendations have even led to a judge's resignation.[35]

E. Regulating Lawyers (and Their Behavior)

In the United States and most U.S. state jurisdictions, judges are responsible for regulating lawyers' behavior in court[36] and enforcing ethical rules that apply to lawyers.[37] Judges also evaluate lawyers' professionalism[38] and case management.[39]

In Israel, on the other hand, the Israeli Bar is a statutory body governed by the lawyers themselves.[40] Only members of the Bar are allowed to practice law and judges leave the Bar upon judicial appointment.[41] The Bar has the authority to issue binding ethical rules[42] and

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33 *See generally* THE OMBUDSMAN OF THE ISRAELI JUDICIARY - DECISIONS AND OPINIONS ON JUDGES' CONDUCT: A CONSOLIDATION OF THE OMBUDSMAN'S DECISIONS (2003-2019) (Eyal Katvan ed., 2020).

34 *See generally* Tamir Gaziel, *The Supervision of Judicial Officials' Conduct in Israel: A Proposal to Power Division Between an Auditor, the State and the Ombudsman for Judges and The State Comptroller*, *in* OVERSEEING STATE AUTHORITIES – A COLLECTION OF ARTICLES IN HONOR AND IN MEMORY OF JUSTICE ELIEZER GOLDBERG 283 (Aharon Barak, Anat Horovitz & Hanna Ofek-Ghendler eds., 2023) (Hebrew).

35 Limor Zer-Gutman, *The Accountability of Judges in Israel*, 9 MISHPAT UMIMSHAL 329, 338 (2006) (Hebrew).

36 *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 805 (1992); *see, e.g.*, Jack T. Camp, *Thoughts on Professionalism in the Twenty-First Century*, 81 TUL. L. REV. 1377, 1392 (2007). For a critical discussion of the assumption that judges should regulate lawyers, see Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 150 (2010).

37 Wald, *supra* note 36, at 161-71; Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 10-13, 19 (2005). Judges' responsibility for enforcing lawyers' ethical rules could lead to anomalies, such as when an accused lawyer has been appointed as a judge. *See* Andrew E. Brashier, Comment, *Ex Parte Alabama State Bar: Who Has Jurisdiction When Judges Act Unethically as Lawyers?*, 33 AM. J. TRIAL ADVOC. 187, 189 (2009)).

38 *See generally* Wasby, *supra* note 8.

39 Monroe H. Freedman, *Professional Discipline of Death Penalty Lawyers and Judges*, 41 HOFSTRA L. REV. 603 (2013).

40 The Bar Association Act, *supra* note 20, §§ 6, 8, 9, 11. Before the founding of the Bar Association in 1962, the judiciary's involvement in supervising lawyers and in their disciplinary proceedings was much more substantial.

41 *Id.* § 20.

42 *Id.* § 109(4).

control the disciplinary committees,[43] which are composed only of lawyers.[44] There are two tiers of disciplinary committees: regional and state committees. The parties may appeal regional committees' decisions to the state committee, and they may appeal state committees' decisions to the district court. The decisions of the district court may be appealed to the Supreme Court but only with the Supreme Court's leave, which is rarely given. Thus, judges in Israel are hardly involved in regulating or disciplining lawyers. Moreover, Israeli judges cannot expel lawyers from the court if they disrupt the proceedings. In Israel, therefore, unlike the United States, judges do not directly control the ethical code or its implementation.

In all matters related to the enforcement of proper conduct inside the court, however, judges have many options for responding to inappropriate lawyer behavior. The judge may issue an official sanction, such as imposing expenses or reporting to the Bar Association; an informal sanction, such as a written reference to a lawyer's action within a ruling; or a verbal reference, made either publicly in the courtroom or privately in chamber.[45] Naturally, a judge's personality or courtroom conduct may also prevent inappropriate lawyer behavior.[46]

Regarding offensive statements made during a judicial hearing, Israeli judges may resort to two kinds of action. First, during the judicial proceeding itself, the presiding judge may impose costs against one of the parties,[47] including personal fines against the lawyers;[48] delete statements from pleadings, thus denying the option of raising certain issues before the court;[49] charge a party with contempt of court;[50]

43 *Id.* § 2(3).

44 *Id.* §§ 14(a), 15(a).

45 Eyal Katvan & Boaz Shnoor, *Between Civility and Reputation, Following C.A. 1104/07 Kheir v. Gil*, 15 HAMISHPAT L. REV. 71, 81-82 (2010) (Hebrew).

46 Wald, *supra* note 36, at 161.

47 *See, e.g.*, BankC (DC Hi) 558-08 Croitoru v. The Official Receiver, ¶ 16 (2010) (Isr.) (on file with author) ("In the context of the proceedings before me, I will use my discretion, which requires me to levy a significant fine against Mrs. Croitoru in favor of [the debtor's attorney], who was hurt through no fault of his own because of the fight between the debtor and his ex-wife."); *see also* Ronit Gurevitch, *Incitement in Written Pleadings Could Result in Damages*, 20 BEDLATA'IM PTUHOT 11, 11 (2007) (Hebrew).

48 CivA 5090/07 Atari v. State of Israel (2008) (Isr.); CivA 6185/00 Hana v. State of Israel, 56(1) IsrSC 366, 377-80 (2001) (Isr.).

49 *See, e.g.*, LCivA 7535/16 Dahari v. Lederman (2016) (Isr.).

50 *See, e.g.*, CrimA 7174/09 Raifman v. Erez (2009) (Isr.). Regarding the issue of judicial contempt in the United States, see Louis S. Raveson, *Advocacy and*

issue a public reprimand;[51] or employ other means.[52] We refer to these as a "procedural sanctions." The second mechanism is filing a disciplinary action with the Bar Association.

Empirical and theoretical studies conducted in the United States reveal that, in practice, judges tend not to sanction the lawyers who appear before them, despite having the authority—and in some cases the obligation—to do so.[53] Judges even avoid issuing written statements openly asserting that lawyers—and young ones in particular—acted inappropriately if such a statement might harm the lawyer's career, unless the misconduct might surface during later proceedings or an appeal.[54] When judges issue written statements, they tend to downplay their own criticisms to avoid damaging an attorney's career.[55]

Systematic studies on this issue have not yet taken place in Israel, but there is anecdotal evidence that judges follow norms dictating that they not apply sanctions. Between 2007 and 2013, judges annually submitted an average of fewer than thirteen complaints to the Bar Association.[56] Moreover, a review of the legal press, which publishes and highlights court sanctions against lawyers, indicates that such complaints are rare.[57] A recent Israeli Supreme Court ruling strongly

Contempt: Constitutional Limitations on the Judicial Contempt Power—Part One: The Conflict Between Advocacy and Contempt, 65 WASH. L. REV. 477, 485-89 (1990).

51 For a public condemnation by the court, see, for example, CivC (MC TA) 29385-07 Clal Ins. Co. Ltd. v. Azaria, PM 577 (2010) (Isr.).

52 Regarding use of the Law for the Amendment of the Rules of Procedure (Examination of Witnesses) (1957), for the protection of one's reputation, see CivA 3614/97 Yizhak v. The Israeli News Co. Ltd., 53(1) PD 26, 83 (1998) (Isr.).

53 McMorrow et al., *supra* note 5, at 1454 ("By looking at what judges do—the sanctions imposed—when confronted with attorney conduct and the language they use in imposing those sanctions, we see a picture of judges who are not aggressively seeking to regulate the legal profession as a whole."); *see also* McMorrow, *supra* note 37, at 38 ("The federal judges appear to embrace what can be called a minimal encroachment approach to attorney regulation."); Wald, *supra* note 36, at 162 (noting that "the judiciary exercises its enforcement power in the latter sense only reluctantly and infrequently"); Greenbaum, *supra* note 16, at 539-41. *But see* Wald, *supra* note 36, at 161 (noting that "while all judges have the power to enforce rules of conduct, they generally lack the power to discipline lawyers").

54 Wasby, *supra* note 8, at 90-93.

55 *Id.*

56 In a letter to one of the authors, dated October 3, 2013, the IJA stated, "It is possible that other decisions were submitted and not saved in the database of the IJA and therefore were not included in the count." Letter from IJA, Off. of Legal Adv., to Boaz Shnoor (Oct. 3, 2013) (on file with author).

57 *See, e.g.*, Lilach Daniel, The Defense Attorney Expressed Himself in Blunt Words and a Brash Style-and Was Criticized, TAKDIN (June 4, 2018),

reinforced this norm, holding that courts should refer violations of the rules of ethics by lawyers to the Bar Association rather than address the violations themselves.[58]

According to the literature, a judge's response to inappropriate lawyer conduct is influenced by many factors, the most important of which is the impact of such behavior on the proceedings and on the integrity of the judicial system. Other influential factors include the case's facts; the judge's views on attorney misbehavior; the history of relations between the judge and the lawyer in general and in the case at hand; and the lawyer's reputation.[59] In choosing how to respond, judges try to focus on the lawyers themselves, so that their response does not affect the parties to the proceedings.[60]

III. THEORETICAL FRAMEWORK

Given the complexity of relations between judges and lawyers that stems from the structure of the legal system, it is necessary to also examine the barriers that may prevent judges from responding to courtroom attorney misconduct and the factors that may facilitate judicial action in the face of such misconduct.

Drawing on two analytical models for judicial behavior—the public choice model and the neo-institutional model—we will present the theoretical considerations that may affect a judge's response to a lawyer's misbehavior during litigation. Some of these considerations are public and judges will refer to them openly in their decisions, while other considerations are hidden from the public and might even be unconscious.

The public choice model, which is widely accepted in analyzing judicial behavior,[61] claims that "self-interest rules behavior in public

http://www.takdin.co.il/Article/Article?Id=6029362 [https://perma.cc/UJ3D-5V26] (a judge criticizing a defense attorney for harsh language); Itamar Levin, *Fine for a Lawyer Who Defamed a Claimant*, NEWS1 (May 23, 2018), http://www.news1.co.il/Archive/001-D-402682-00.html [https://perma.cc/G7JE-G4WC] (a judge levied a fine against a lawyer who swore at the prosecutor).

58 LCivA 9930/17 Hanna v. Al Madamein Inc. v. Hanna (2018) (Isr.).

59 McMorrow et al., *supra* note 5, at 1452, 1466; *see also* McMorrow, *supra* note 37, at 43-47.

60 McMorrow et al., *supra* note 5, at 1466-67.

61 Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior*, 2011 U. ILL. L. REV. 1753, 1753 (2011).

as well as private transactions."[62] It asserts that public decisionmakers—whether legislators, regulators, or judges—try to maximize their own self-interest rather than the public interest.[63] Judicial behavior is a public transaction made by judges who try to maximize their self-interest. Although Israeli judges have tenure, and though judges in general do not have pecuniary interests in the outcome of their cases, each judge has preferences based on their own ideologies and interests, which they will try to promote in the course of her judicial work.[64] Moreover, judges will try to maximize their own leisure, prestige, chances of judicial promotion, work satisfaction, and the quality of their work environment.

The neo-institutional model focuses on institutions and asserts that human behavior is bound by them. Institutions are "the humanly devised constraints that shape human behavior . . . . [They] are the framework within which human interaction takes place."[65] Institutions are the rules and norms, formal and informal, that shape human behavior. Judges work within the constraints of legal and judicial institutions. They are bound, for example, by the formal norm of working within the limits of law; they are constrained by the informal social norms of their legal education and membership in the legal community; and they are influenced by the social, professional, and ethical norms that exist in the judicial community and the norms of the court in which they serve.

A judge who notices a lawyer's misbehavior must decide how to react. In deciding how to react, the judge will thus be influenced by personal and institutional considerations. One constraint that affects

62 Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 827 (1990).

63 For a critical analysis of public choice theory regarding judicial decisions, see *id.* It seems that Epstein's analysis relates much more to the adjudicative function of the judge, and much less to the disciplinary function, with which we deal here. While in their adjudicative role, a judge's well-being and esteem are usually not affected by the parties' behavior and the judge's worldview has to do with the decision and therefore will influence it (as Prof. Epstein agrees). The judge's disciplinary function is usually activated only after their well-being or esteem has been endangered by a lawyer's behavior, and the judge's decision will have nothing to do with their worldview.

64 Shepherd, *supra* note 61, at 1765-66; Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39 (1993); Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 357 (1999); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 81-779 (2009).

65 NORTH, *supra* note 13, at 3-4.

the judge is the need for judicial efficiency. Judges want their cases to run smoothly, without delays, and with minimal intervention on their part.[66] This need is rooted in their institutional constraints, since the judicial system caseload encourages judges to successfully resolve as many cases as possible in the shortest possible time.[67] This institutional constraint is especially salient in the Israeli judicial system, where judges are constantly assessed for efficiency.[68] Therefore, the neo-institutional model would predict that judges will seek to deter lawyers from any misbehavior that impedes the successful and efficient resolution of cases.[69] However, judges will also attempt to achieve efficiency by forgoing intervention in the judicial process.[70] For example, scholars have claimed that judges refrain from formally disciplining lawyers because it could result in appeals that delay the proceedings.[71]

The public choice model also dictates that the need for judicial efficiency affects the way judges react to lawyers' misbehavior. Judges' efficiency positively influences their promotion chances in Israel. [72]Efficiently resolving cases—and the problems associated with the cases, such as a lawyer's misbehavior—means spending less time doing judicial work, thus maximizing the judge's leisure.[73] Because judges seek to maximize their leisure and chances of promotion, they will try to respond to lawyers' misbehavior in a way that, on the one hand, allows the case to run as smoothly as possible, and on the other,

66 Anglo-American judges are used to being passive and therefore do not initiate actions against unruly lawyers, but rather wait for the other party to do so. Wald, *supra* note 36, at 168-69.

67 For example, the EU's Commission for the Efficiency of Justice is dedicated to the promotion of that aim. *About the European Commission for the Efficiency of Justice*, COUNCIL OF EUR., https://www.coe.int/en/web/cepej/about-cepej [perma.cc/G6QQ-MMJB] (last visited Jan 2, 2024).

68 Carmel Horowitz, *No Justice and No Efficiency*, 21 HASILO'AH 41 (2020).

69 McMorrow et al., *supra* note 5, at 1436-37, 1439-40, 1446-47, 1451, 1463; Wald, *supra* note 36, at 168.

70 McMorrow et al., *supra* note 5, at 1444.

71 Wald, *supra* note 36, at 168, 170; *see also* Robert B. Tannenbaum, Comment, *Misbehaving Attorneys, Angry Judges, and the Need for a Balanced Approach to the Reviewability of Findings of Misconduct*, 75 U. CHI. L. REV. 1857, 1857 (2008).

72 Alon Jasper, *System Judges: The Rise of the Judicial Bureaucracy and Its Implications*, 11 M'AASEI MISHPAT 167, 189-90 (2020) (Hebrew).

73 Posner, *supra* note 65, at 2.

requires minimal time and effort.[74] Judges also tend to react more severely to misbehavior that wastes judicial time.[75]

With respect to judicial efficiency in the enforcement of proper lawyer conduct, judges are often unable to observe most lawyers' activities that take place outside the courtroom. Even in the courtroom, judges are often unaware of the causes of the lawyer's behavior and cannot act unless they conduct an investigation.[76]

A second constraint is judges' interest in preserving the judicial process, ensuring courtroom decorum, and conducting proceedings that focus on the matter at hand.[77] This interest stems primarily from judges' own self-interest. Proceedings that focus on substance and preserve the court's dignity, as opposed to an antagonistic and unfocused atmosphere, contribute to a pleasant work environment for the judge.[78] They also make the courtroom a pleasant place for lawyers, thus increasing the likelihood that lawyers will support judges' promotion in the future.

Aside from the impact of judges' self-interest on courtroom dynamics under the public choice model, judges' interest in maintaining courtroom decorum is also part of the institutional norm of courts. Courts seek the respect of the other branches of government and the citizens who appear before them, and one means towards achieving this end is to ensure the dignity and fairness of proceedings.[79] Dignity and fairness also help prevent wasting the court's time.[80] Presumably, therefore, judges are more proactive in preventing activities that undermine the dignity and fairness of proceedings than activities that do not impinge on the court's dignity.[81]

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74 *Cf.* Jennifer D. Bailey, *Why Don't Judges Case Manage?*, 73 U. MIAMI L. REV. 1071 (2019).

75 McMorrow et al., *supra* note 5, at 1445, 1463.

76 Wald, *supra* note 36, at 164-65.

77 McMorrow et al., *supra* note 5, at 1440-41.

78 Disciplinary enforcement with respect to lawyers could lead to hostile courtroom relations, which entail a cost for judges. Wald, *supra* note 36, at 170; *see also* RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 55, 91-105 (2008).

79 United States v. Anonymous, 215 F. Supp. 111, 113 (E.D. Tenn. 1963); Anderson v. Dunn, 19 U.S. 204, 227 (1821); McMorrow et al., *supra* note 5, at 1440-41.

80 Jenkins v. Tatem, 795 F.2d 112, 113 (D.C. Cir. 1986); McMorrow et al., *supra* note 5, at 1451-52.

81 McMorrow et al., *supra* note 5, at 1443-45, 1462-63.

Third, judges are constrained by the institutional norm that lawyers have relative latitude in the courtroom to represent their clients' interests and the norm of not punishing clients for their lawyer's misdeeds.[82] These principles stem from one of the basic principles of justice, namely, that every person is entitled to suitable representation in court. For judges, this is a particularly important consideration given that nearly all judges were lawyers in the past (and in the United States they are still members of the Bar), and judges largely still view themselves as such.[83] Lawyer latitude also embodies the principle of freedom of expression, which is a fundamental value in Israel[84] and the United States. Freedom of expression during judicial proceedings is critical since its restriction could deter the parties and their lawyers from fully and avidly presenting their case before the judicial authority, potentially resulting in injustice. To illustrate, the Israeli legislator granted immunity from defamation lawsuits for statements made during judicial proceedings, and when a libel suit regarding defamation in the court reached the Supreme Court, the Court referred the plaintiff to the Bar Association and the disciplinary committee.[85] Given that this practice reflects Israeli norms regarding lawyer freedom of expression, it is understandable that judges are reluctant to impose restrictions on a lawyer's freedom of expression.

A fourth constraint is that judges do not believe they have a duty to address attorney misconduct.[86] The judge's role, in their eyes, is to

82 *See* Wasby, *supra* note 8, at 54-56. The court might sometimes think that the only effect of disciplining the lawyer will be to hurt the client. *See* Wald, *supra* note 36, at 164-66.

83 BARTON, *supra* note 21, at 14, 133.

84 *See, e.g.*, HCJ 73/53 Kol Ha'am Inc. v. Minister of Interior, 7 IsrSC 871, 876-78 (1953) (Isr.); CivA 214/89 Avnery v. Shapira, IsrSC 43(3) 840, 857 (1989) (Isr.); HCJ 372/84 Klopfer-Naveh v. Minister of Educ. and Culture, 38(3) IsrSC 233, 238-39 (1984) (Isr.); HCJ 10203/03 Nat'l Census v. Att'y Gen., 62(4) IsrSC 715, 760-764, 854-853 (2008) (Isr.); KHALID GHANAYIM, MORDECHAI KREMNITZER & BOAZ SHNOOR, LIBEL LAW: DE LEGE LATA AND DE LEGE FERENDA 61-68 (2005) (Hebrew); Aharon Barak, *The Tradition of Freedom of Speech in Israel and Its Problems*, *in* MIVHAR KTAVIM 531 (Hayim H. Cohen & Yitzhak Zamir eds., 2000) (Hebrew).

85 § 13(5), Prohibition on Defamation Law, 5725-1965 (1965) (Isr.); LCivA 1104/07 Kheir v. Gil, 63(2) PD 511 (2009) (Isr.); *see also* Katvan & Shnoor, *supra* note 45.

86 W. T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976). *But see In re* Am. Airlines, Inc., 972 F.2d 605, 611 (5th Cir. 1992). For a discussion of the two opposing approaches, see McMorrow et al., *supra* note 5, at 1441-44.

resolve disputes and conduct trials.[87] Addressing inappropriate conduct is not part of this role and is therefore considered a disruption and waste of time.[88] Given that addressing such disruptions comes at the expense of conducting trials and drafting opinions, judges prefer not to waste their time addressing these disruptions. If judges believe that a certain method for addressing inappropriate conduct—submitting a complaint to the Bar Association, for example—is time consuming, they may refrain from doing so, especially if they do not expect a significant positive outcome.[89] Moreover, addressing disruptions by lawyers could be perceived as an effort to educate them and make them civil, which judges may view as the responsibility of law schools and the Bar Association, rather than their own responsibility. This is particularly true in Israel, where courts do not play a central role in the admission of lawyers to the Bar or in disciplinary hearings. Institutional judicial norms are therefore unlikely to favor such measures.

A fifth constraint that might influence judges is their own interest in ensuring that they are viewed as a "good judge" in the eyes of a specific lawyer[90] and by the Bar Association more generally. In Israel, lawyers sit on the committee that appoints judges; in the United States, lawyers are members of judicial search committees and contribute significant amounts to judges' election campaigns. Therefore, being identified as "problematic" or inconsiderate and strict towards lawyers might harm a judge's chances of being promoted. Given that promotion is a primary consideration for tenured judges, and for Israeli judges in particular,[91] they will—according to the public choice model—be very reluctant to take action against lawyers. Accordingly, it is important for judges to know the Bar Association's policy regarding disciplinary action by judges against lawyers.[92] An important

87 Wald, *supra* note 36, at 162; McMorrow et al., *supra* note 5, at 1435, 1439-40; Wasby, *supra* note 8, at 84 (citing Chad Oldfather, who writes that "[t]here are what appear to be fairly high standards governing at least some aspects of lawyering, but what the courts are actually prepared to do anything about is a different matter entirely").

88 McMorrow, *supra* note 37, at 33 ("Since attorney conduct issues are largely derivative in court practice, secondary to the fair resolution of the litigants' claims, the federal courts appear reluctant to address attorney conduct issues unless they will have a consequence in the case at hand.").

89 Johnnides v. Amoco Oil Co., 778 So. 2d 443, 445 n.2 (Fla. Dist. Ct. App. 2001) (cited by McMorrow et al., *supra* note 5, at 1435-36).

90 McMorrow et al., *supra* note 5, at 1435.

91 Shepherd, *supra* note 61, at 1757-58.

92 McMorrow et al., *supra* note 5, at 1435.

indicator of the Bar Association's policy is the extent to which it cooperates in pursuing judges' complaints. If the Bar does not diligently pursue judges' complaints, if judges believe that submitting complaints is inefficient, and if judges are aware that the Bar is not interested in receiving such complaints, then they will regard such measures as a waste of time and will accordingly refrain from acting.[93]

A sixth consideration is the degree of support judges feel they receive from the court system in responding to inappropriate behavior. According to the public choice model, when judges are encouraged by the court system to act against a disorderly lawyer, they might feel that the system regards their action as warranted and that the action is potentially beneficial to their status, and they will take such action.[94] Conversely, if the system will not aid judges in their response to inappropriate behavior, they will surmise that acting might harm their own interests and will therefore refrain from taking measures against disorderly lawyers.[95] Moreover, the signals conveyed by the court system might also affect how judges view the court as an institution. If the system acts strictly towards lawyers with inappropriate conduct or requires that they participate in educational measures, judges might view this discipline as a part of their judicial role.[96] By the same token, lack of enthusiasm on the part of the court system can also lead judges to conclude that they should not waste their time addressing problematic behavior.[97]

A seventh consideration relates to the clients themselves. Most judges worked as lawyers in the past and are well aware of the pressures of being caught between the client and the court, which may sometimes result in unseemly behavior on the part of the lawyer.[98] As

93 *Id.* at 1435-36.

94 *Cf.* Moshe Bar-Niv (Burnovski) & Ran Lachman, Self-Interest in Judges' Time Allocation to Voting Judgements 14-17 (July 16, 2010), https://ssrn.com/abstract=1641376 [https://perma.cc/4RQR-P8HV] (unpublished manuscript). The authors show that Israeli judges' behavior is related to their personal reputation and the instance on which they serve. Israeli judges' promotion is related to the way that the Supreme Court and the Ministry of Justice (two of the bodies represented in the appointment committee) perceive them. Therefore, Israeli judges are likely to act according to the (informal) wishes of these bodies.

95 *Cf.* Shepherd, *supra* note 62, at 1759. "[T]he majority of recent studies find that self-interest concerns such as promotion desires and reversal aversion, influence the decision making of judges with permanent tenure." *Id.* It follows that the same concerns will influence judges' responses to uncivil behavior in court.

96 Ben Noon et al., *supra* note 11, at 40-41.

97 McMorrow et al., *supra* note 5, at 1461.

98 Wasby, *supra* note 8, at 56.

such, judges may identify with lawyers and, in this context, might try to support them or refrain from punishing them for conduct that stems from excessive demands by clients.[99]

In summation, the two models we use to analyze courtroom dynamics indicate that judges are subject to a complex set of considerations and constraints, which are likely to influence their approach to attorney misconduct.

IV. Empirical Studies

To address the lack of data regarding judges' views on lawyers' "courtroom behavior" and the factors that influence judges' responses to attorney misconduct, we conducted two studies: first, a survey among sitting judges and, second, in-depth interviews of retired judges. Because Article 34 of the Israeli Code of Ethics for Judges (2007) prohibits acting judges from answering questionnaires or participating in academic interviews without the prior consent of the chief justice,[100] and because, to the best of our knowledge, no external researchers have yet been granted permission to conduct a survey among sitting judges, we initially approached retired judges who agreed to participate in interviews. We sought their views on lawyers' courtroom conduct and questioned them regarding the measures they had taken to address misconduct.

Shortly after completing our interviews with the retired judges, we—and Professor Chemi Ben-Noon with whom we collaborated—received exceptional, and what we believe to be unprecedented, permission to conduct a survey among sitting judges, perhaps attesting to the importance of this issue in the eyes of the chief justice and the IJA. This questionnaire included a broader range of questions and issues, while overlapping somewhat with the retired judge interview questions regarding attorney conduct and responses to such conduct.

Below we describe the methodologies of both studies, which we conducted among judges across the three Israeli court systems—magistrate courts, district courts, and the Supreme Court—as well as judges of the regional and national labor courts. In the findings section, we present the survey results, followed by the findings of the interviews.

99 *Id.* at 56-57.

100 Code of Ethics for Judges, *supra* note 10, § 34.

To understand the methodology, it is first necessary to present a brief overview of the structure of the Israeli judicial system. The Israeli judicial system is a three-tier system. The first tier is comprised of "courts of peace" (or magistrate courts). The court of peace has jurisdiction over nearly all civil suits of up to 2.5 million New Israeli Shekels (about 700,000 U.S. dollars), most criminal cases in which the maximum expected penalty is less than seven years of imprisonment, and nearly all cases concerning family relationships.[101] Virtually all cases are heard by a single judge.

The district court has original jurisdiction over all civil and criminal cases that exceed the court of peace's jurisdiction. The district court also has original jurisdiction over most administrative matters. The district court has appellate jurisdiction over all verdicts of the court of peace, and discretionary appellate jurisdiction over most interim decisions of the court of peace. Most cases are heard by a single judge. However, criminal cases dealing with offenses that carry a maximum penalty of ten years or more of imprisonment and appeals from more serious cases from the court of peace are heard by a panel of three judges.

At the top of the system is the Supreme Court, which consists of fifteen justices. The Supreme Court, sitting as the High Court of Justice, has original jurisdiction over constitutional matters and some administrative matters. The Supreme Court also has appellate jurisdiction over all decisions issued by district courts in their original jurisdiction. It has discretionary appellate jurisdiction over verdicts issued by district courts exercising appellate jurisdiction and interim civil and administrative decisions issued by district courts. Most Supreme Court cases are decided by panels of three justices. However, whenever the Chief Justice of the Supreme Court sees fit, they can decide that the matter will be heard by a larger panel. Some decisions are issued by a single justice.

Alongside the general courts, a two-tier labor court deals with nearly all disputes between employers and employees. The labor courts include regional labor courts and a national labor court, which hears all appeals from the regional courts and has original jurisdiction

101 § 51, Courts Act, 5744-1984 (Isr.). However, in some family matters, most importantly divorce, the religious courts have jurisdiction. Religious court judges are state-appointed experts in religious law. Their appointment procedure, tenure, and benefits are very similar to those of other judges.

in some cases. In rare cases, the Supreme Court hears appeals from the national labor court.

A. The Survey: Methodology

As mentioned, we received authorization from the IJA to distribute our questionnaire to all Israeli judges in the previously described system. After formulating the questionnaire,[102] we delivered it to the IJA, which, in April 2014, sent it to all Israeli judges and registrars via e-mail. The e-mail included a letter written by the authors explaining the questionnaire, requesting cooperation, and including a link to the online survey. Two weeks later, at our request, the IJA sent a reminder to all recipients. One hundred and forty-eight judges and registrars responded to the questionnaire,[103] constituting about 20% of the 726 judges and registrars in Israel.[104] The IJA did not receive the filled-out questionnaires or the data gathered from the responses.

The respondents included 34 judges out of 172 sitting district court judges (20% of district court judges and 24% of the sample); 93 judges out of 462 sitting court of peace judges (20% of the court of peace judges and 66% of the sample); and 14 judges out of 73 sitting labor court judges (19% of the labor court judges and 10% of the sample).[105] Thus, the relative representation of each court system in the sample was roughly proportional to its actual size (with the exception of the Supreme Court, which was not represented in the sample).

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102 This questionnaire was formulated in cooperation with Prof. Chemi Ben-Noon.

103 In order to avoid possible identification of the participants due to the possibility of small number of registrars answering the questionnaire, and because Israeli registrars have judicial authorities, we did not inquire whether the participant is a judge or a registrar.

104 *See* ISR. JUD. AUTH., 2013 ANNUAL REPORT 12-10 (2013), https://www.gov.il/BlobFolder/reports/statistics_annual_2013/he/annual2013.pdf.

105 Six judges did not address this question and one respondent served as a registrar at the execution of writs office. *See id.* (showing data on the number of judges serving in each court).

Table 1: Distribution of Respondents by Age and Gender (in Percentages)

Age	Men	Women	All Respondents
30-39	4.0	7.7	5.7
40-49	44.0	47.7	45.7
50-59	28.0	30.8	29.3
60-69	24.0	13.8	19.3
Total	100	100	100

Women accounted for 47% of respondents, while men constituted 53%.[106] The age distribution, presented in Table 1, indicates that female respondents were on average younger than male respondents. Unfortunately, because no authoritative sources regarding the age distribution of Israeli judges were available, we were unable to compare the sample to the actual age distribution. However, more female judges are gradually being appointed, resulting in older male judges and younger female judges. Our sample seems to reflect this trend (see also Table 2).

Table 2: Distribution of Respondents by Seniority (Years) and Gender (in Percentages)

Seniority	Men	Women	All Respondents
1-9	48.7	52.2	50.0
10-19	42.1	38.8	41.0
20-29	7.9	7.5	7.6
30+	1.3	1.5	1.4
Total	100	100	100

New judges (with up to nine years of service) constituted the largest subgroup, accounting for 50% of the respondents. Here too, women had slightly less seniority than men. The distribution of respondents by seniority is presented in Table 2. Again, no authoritative sources allowed us to compare the sample statistics with the actual distribution of Israeli judge seniority.

106 Three respondents did not address this question.

Among the respondents, 33.1% served in the Tel Aviv District and 18% in the Central District, meaning that about half the respondents were serving in Israel's two largest districts. The remaining judges were distributed across the four other districts. The Tel Aviv District and Jerusalem District were overrepresented among the respondents, while the Southern District and Northern District were underrepresented. The Centraland Haifa Districts were proportionately represented in the sample. Table 3 presents the distribution of judges by district.

Table 3: Distribution by District and Court System Among Respondents and Among the Entire Judicial Community

District	Number of judges in the district[107]	Number of respondents in the district	Percentage of judges in the district relative to all judges in Israel	Percentage of respondents in the district relative to all respondents	Correlation between the sample population and the entire judicial community
Southern	85	9	12.5	6.5	Under-represented
Jerusalem	97	26	14.3	18.7	Over-represented
Tel Aviv	189	46	27.8	33.1	Over-represented
Central	122	25	18.0	18.0	Proportional
Haifa	130	29	19.1	20.9	Proportional
Northern	56	4	8.3	2.9	Under-represented
Total	**679**	**139**	**100**	**100**	

The respondents had an average of 13.47 years of legal experience (with a median experience of 12 years and a standard of deviation of 5.47 years) before becoming judges.[108] Before being appointed as judges, respondents had varied careers: 46% were self-employed; 19%

107 The data in this column are based on the IJA annual report. *See* ISR. JUD. AUTH., *supra* note 106, at 11-13. The figures do not include Supreme Court justices, who are not associated with specific districts. Labor court registrars are also excluded from the data since the relevant information about them is unavailable. Since there are only twelve labor court registrars in the whole country, their exclusion does not affect the distribution significantly.

108 Thirty-three respondents did not address this question.

were salaried lawyers (thus, combined with the previously self-employed judges, 65% of respondents had worked in private practice); 30% worked for the State Attorney, Military Advocate General, or a government ministry; and the remaining respondents worked for the Public Defense Office or in academia.[109] In Israel, lawyers study law as undergraduates and begin their legal career after earning their Bachelor of Laws (LL.B.) degree. However, among respondents, 65% had an additional academic degree (either another legal degree or an academic degree in another field).[110]

Israeli judges are not officially limited to one area of work, but in practice—usually at the encouragement of the court system—many judges specialize in a specific area, which becomes their main, if not only, area of work. Among respondents, 40% indicated that they worked primarily in civil law, 22% in criminal law, 19% in a combination of areas, and the remainder in various other areas.[111]

Table 4: Distribution of Respondents by Area of Work and Gender (in Percentages)

Area of Work	Men	Women	All respondents
Civil	38.9	41.1	39.9
Criminal	26.0	16.2	22.2
Labor	6.5	13.2	9.5
Family	6.5	7.4	6.8
Mixed	18.2	22.1	19.6
Other or non-responsive	3.9	0	2.0
Total	100	100	100

To address our research questions, we prepared an original questionnaire with sixty-five items.[112] The first section of the questionnaire related to demographic details. The second section described various means of discipline and asked respondents to indicate how often they

109 Nine respondents did not address this question.

110 Seven respondents did not address this question.

111 Three respondents did not address this question.

112 The full text of the questionnaire is available from the authors on request. Four items of the questionnaire relate to a separate study and do not have a bearing on the present study. As such, these items do not appear in the description that follows.

had recently used each of these means. In the third section, judges were asked to indicate the extent to which they agreed with a series of statements regarding the appropriate entity for taking disciplinary action against lawyers. In this series, they were asked which entity should handle lawyer disciplinary problems, the degree to which judges should enforce various forms of discipline, the means they should employ, and their opinions regarding the disciplinary measures of the Bar Association.

In the fourth section, judges were asked about complaints and petitions for recusal submitted against them in recent years. The purpose of this section was twofold: first, to determine how frequently complaints against judges and petitions for recusals are submitted; and second, to assess whether there is a correlation between petitions for recusal and complaints against judges, on the one hand, and the attitudes and conduct of judges, on the other.

The fifth section described various scenarios involving misbehavior, from common occurrences, such as lawyers raising their voice during proceedings, to severe and rare breaches, such as physical violence between lawyers. For each example, judges were requested to indicate how frequent such occurrences were in their courtroom and how they typically responded.

The sixth and final section included an open question: "Is there anything else you would like to add regarding ways of handling attorney misconduct?" Fifty-six judges (37.8% of the sample) responded, and their answers helped us better understand the stories behind the numbers. In our findings section, we expand on the presently presiding judges' comments (which were analyzed separately from the responses of the retired judges' interviews).

B. The Interviews: Methodology

In our second study, we interviewed retired judges using a semi-structured questionnaire. We gathered the names of retired judges using the IJA website. During the fall of 2013, we made a list of all living retired judges who appeared on the website. We succeeded in finding contact information for only some of the judges, and our research assistant, at the time a PhD student in history, contacted the judges to request their participation in a research project on the methods judges use to control their courts. Those who were willing to participate in the study met with our research assistant, who conducted the interview. Generally, the interviews took place at the judges' homes. In all,

we managed to interview thirty-three retired judges between November 2013 and April 2014.

Eighteen of our respondents had been district court judges prior to their retirement,[113] eight had been magistrate court judges, and another four had been family court judges.[114] One of our respondents had served as a Supreme Court justice and two served as judges in the National Labor Court.

Twenty-two of our respondents were male and eleven were female. On average, they had served on the bench for twenty-three years. Ten of them served for more than thirty years, ten served between twenty and twenty-nine years, eleven served between ten and nineteen years, and one judge served for only nine years.

The interview was based on an original semi-structured questionnaire that included twenty-two open-ended questions.[115] The first part of the questionnaire dealt with demographics. Next, we asked the judges to specify the methods they used during their career to deal with unruly and unethical behavior by lawyers. We asked them to describe the most complicated instance of problematic behavior by a lawyer that they had encountered. We also sought their impressions regarding the outcomes of complaints they had made to the Israeli Bar.

V. RESULTS AND DISCUSSION

A. Improper Behavior: Causes and Prevention

1. The Survey's Findings[116]

Before trying to assess the factors that affect the way judges react to lawyers' misbehavior, we wanted to ascertain the types of misbehavior that judges encounter. We listed various forms of misbehavior and asked the judges to indicate how often they encountered each one, using the following six options: never (0), once a year (1), a few times a year (2), once a month (3), once a week (4), a few times a week

113 One of the district judges served as the manager of the judicial system for part of his career.

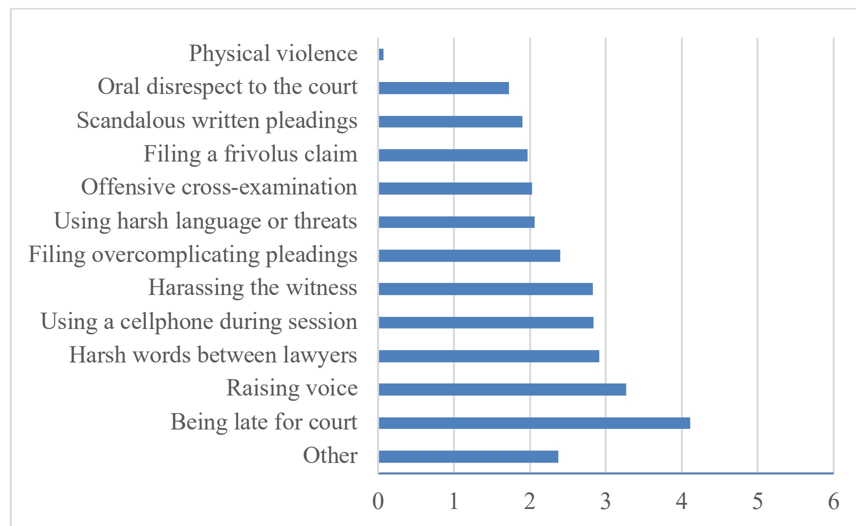
114 Some of the other judges served as family court judges for brief periods. However, only four served as family court judges for most of their career.

115 The full text of the interview questions is available from the authors on request. Some interview questions dealt with other subjects, which have no relevance to this paper.

116 The statistical findings from this survey are on file with the authors.

(5), and every day (6). The results, presented in Graph 1, indicate that judges often encounter misbehavior and especially incivility, including lawyers' tardiness (occurring more than once a week); raised voices; harsh words; cellphone use while proceedings were in session; and harassing witnesses (occurring at least once a month).

Graph 1: Average Frequency of Lawyers' Misbehavior



The judges' assessments regarding the frequency of various types of behavior bore no correlation with personal data or institutional data. However, the longer judges served, the less they tended to report disturbances related to lawyer incivility, such as making threats or using harsh language towards litigants, raising their voice during proceedings, or engaging in harsh exchanges with other lawyers.[117]

This finding can be interpreted in two opposite ways: first, longer-serving judges are able to conduct proceedings in a relatively calm and quiet atmosphere, perhaps because of their experience or perhaps because young lawyers show more respect for relatively older judges; second, longer-serving judges have become so accustomed to offensive behavior by lawyers that they no longer consider it problematic.

117 The statistical significance for various disruptions is as follows: threats or the use of harsh language towards litigants ($p<0.005$); lawyers raising their voices during proceedings ($p<0.005$); and harsh exchanges between lawyers, including the use of abusive language, impertinence, or threats towards another lawyer ($p<0.01$).

In addition, our findings showed that judges who deal with civil matters encounter inappropriate behavior related to the submission of written complaints and examination of witnesses, as well as "harsh exchanges between lawyers, including the use of abusive language, impertinence, or threats towards another lawyer," much more frequently than judges who deal with criminal matters or a mixture of issues.[118] There are a few possible explanations for the differences between criminal and civil judges. One possible explanation is that lawyers who appear before civil judges act in a more unseemly manner than lawyers in criminal cases. This difference might stem from an institutional ethos in the State Attorney office, which prevents prosecutors from engaging in inappropriate behavior or disrupting proceedings. This phenomenon might be caused by the conduct of defense attorneys who want to create an impression of respectability and preserve a level of decorum that distinguishes them from their clients. It is also conceivable that dealing with grave life-and-death issues induces the parties to exercise restraint. A second possible explanation is that criminal judges have developed more resilience than civil judges and therefore do not view unseemly behavior as problematic. A third explanation is that written complaints are relatively rare in criminal proceedings and criminal judges encounter problematic written complaints less often. Similarly, there is an understanding that more thorough—and possibly aggressive—questioning is necessary in criminal cases to uncover the truth, and it is therefore considered legitimate.

In response to our open question asking judges to explain problematic lawyer behavior in their own words, they presented the problem as circumscribed and limited in scope, focusing on factors outside their control. Some judges blamed the lawyers' lack of professionalism, identifying it as the source of problematic behavior. For instance, some respondents stated, "the lesser the knowledge, the greater the violence and impertinence" and "the fundamental lack of understanding regarding the pretrial process in civil proceedings . . . creates a negative atmosphere of contrariness and alleged discrimination."

[118] The statistical significance for various disruptions is as follows: offensive cross-examination ($p<0.05$); harassing a witness ($p<0.05$); scandalous written pleadings ($p<0.001$); filing a frivolous claim ($p<0.05$); filing a claim intended to delay or complicate proceedings or disrupt smooth proceedings ($p<0.005$); and harsh exchanges between lawyers, including the use of abusive language, impertinence, or threats towards another lawyer ($p<0.001$). For a discussion on the behavior of criminal law attorneys, see Wasby, *supra* note 8, at 75-84.

Other judges attributed the problem solely to certain lawyers who the system cannot successfully manage. Respondents stated, for instance, that "there are a few 'prominent' lawyers in this regard" and "the system has failed to handle them." According to the judges, a minority of lawyers used threats or reported judges to the Ombudsman to control the courtroom and prevent severe judicial responses. Some judges asserted that it was "very hard to control" them and, "in the more severe cases, the situation today does not provide judges with any effective tools for coping with improper conduct by lawyers."

A third explanation posited by judges suggests that unseemly behavior occurs more frequently in certain proceedings. This explanation was offered by judges in criminal law and family law. In their view, unseemly behavior was unique to their respective field and stemmed from the special characteristics of the field.

Statements by family court judges included the following: "the behavior of family law lawyers is the worst"; "especially in family court, where proceedings are sensitive and full of emotion"; "there is a serious problem in family court . . . both in the courtroom and in written complaints." An empirical assessment of this claim by family court judges indicates that it carries some truth. Our examination of the frequency of various disruptions as reported by family court judges reveals a high incidence of disorderly conduct of all kinds, as detailed in Table 5.

As noted, criminal judges also tend to blame the nature of proceedings for the problematic behavior of lawyers, but there was no empirical support for this assertion. In fact, our findings show that criminal judges cited fewer disruptions than civil judges.

Table 5: Comparison Between Family Court Judges and All Judges

Disruption	**Percentage of family court judges reporting at least one such incident weekly**	**Percentage of all judges reporting at least one such incident weekly**
Harsh exchange of words	80	31
Raising one's voice	80	39.9
Threats or expletives towards people in the court (other than the judge)	50	13.5
Violence[119]	0	0
Impertinence	10	5.4
Use of cellular phone	30	37.8
Scandalous pleadings	10	8.8
Frivolous claims	20	9
Overcomplicated written pleadings	60	18.2
Harassing a witness	30	25.9
Offensive questioning	10	7.6
Other	30	15.7
Arriving late to court	70	72.8

2. Findings from the Interviews[120]

Our first insight from the interviews was that retired judges were keen to stress that ethical problems and uncivil behavior are a rare occurrence. When asked to describe the methods they used to deal with unethical and uncivil behavior, they often noted first—even before addressing the question—that such behavior is very rare. Many judges added that instances of uncivil behavior (especially in criminal cases) often merely reflect their ardent advocacy for the client and their family, and do not reflect any actual disrespect towards the court. Some judges also emphasized that in rare heated hearings, apologies (from

119 Among family court judges, 20% reported some form of violence, compared with 6.8% of all respondents.

120 The statistical findings from these interviews are on file with the authors.

the lawyer or sometimes from the judge who lost their temper) were usually offered so that the judge and the lawyer could resume their mutual work without hard feelings.

Many judges credited themselves with developing methods that prevented improper behavior. However, the judges' explanations offered different successful methods. Some claimed that being authoritative and assertive created a "balance of terror" that effectively deterred lawyers. For instance, respondents stated that "lawyers identify who is an authoritative and assertive judge" and "lawyers identify a judge against whom they can have an outburst." On the other hand, some judges claimed that creating a free and open-minded atmosphere and being informal and humorous is crucial. Respondents stated, "I am opposed to a strict courtroom atmosphere"; "I mainly used humor"; "I tried to create a pleasant atmosphere, without tension"; or "I tried to be as informal as possible, and this turned out to be successful." Still others mentioned self-control as the key to success, stating that responding quietly or ignoring outbursts was helpful in dealing with unruly lawyers "not to be dragged into unnecessary arguments" or "not to raise one's voice," and "a good judge does not need to know how to control lawyers but how to control oneself." These differences probably stem from differences in temperament and the individual experiences of the judges, and are unrelated to the neo-institutional model.

Although most judges said that instances of improper behavior were rare, some complained that the state of attorney conduct is changing and that, in recent years, unethical and uncivil behavior has become more common. Moreover, some stated that, in certain cases, improper behavior by lawyers resulted from a premeditated calculation aimed at achieving the best result for the client at any cost. For example, one judge stated that "lawyers exploit judicial proceedings and the court's heavy workload to recuse judges, delay proceedings, [and] reach the desired outcome." The judges did not hesitate to label lawyers and cases involving unethical and uncivil behavior with terms that recall U.S. literature on the "two hemispheres" of the legal profession.[121] Judges claimed that university graduates are less inclined towards such behavior than graduates of *mihlalot* (Israeli higher

[121] *See* JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 6-7 (2005); *see also* Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863 (2007).

education institutions offering undergraduate and graduate programs, usually in a small number of areas, and usually considered inferior to universities); that lawyers from large firms are less likely to be involved in such behavior than other lawyers; and that young lawyers tend towards such behavior more than experienced lawyers.

The judges also noted that the proceeding subject matter and court location affect the likelihood of unethical behavior. In their opinions, criminal and family matters invoke heated and emotional arguments, which in turn provoke disrespectful and uncivil behavior. Such behavior is also more frequent, in their opinion, in the Tel Aviv district (which is the largest in Israel) than in the Jerusalem district. They also opined that, in general, lawyers' behavior is better in peripheral and small courts than in large courts. Naturally, lawyer misbehavior occurs less frequently in the Supreme Court than in other courts and is more frequent when a single judge presides over a case than a panel of three judges.

Finally, all judges stated that lawyers' misbehavior had no influence on the outcome of a case. The judges stressed that lawyers might want to influence the dynamics of a case, but that such efforts were futile.

3. Comparing the Results of the Two Studies

We identified stark discrepancies between the findings of the survey, which indicated that disruptions occurred frequently, and the findings of the interviews, which indicated that unruly behavior was relatively rare. There are several possible explanations for these discrepancies. First, the interviews were conducted among retired judges, some of whom had left the bench many years earlier, and it is possible that they opted to recall the positive aspects of their judgeship and think of themselves as judges who did not encounter disruptions, rather than recall disruptions and negative aspects of their service. Second, it is possible that the situation has changed and disruptions have indeed increased, as some of the judges indicated. Third, our methodologies differed for each study, and we did not ask retired judges about the frequency of specific disruptions, possibly leading them to focus solely on extreme misbehavior, which the survey also indicated was rare. A fourth possible explanation, which is also consistent with the findings of the survey, is that long-serving judges tend to identify fewer disruptions than young judges. Retired judges might recall the

events of their later years in service more clearly than the events of their early years.[122]

In contrast to this discrepancy, in other respects the interviews and judges' comments in the survey yielded comparable results. Judges in both studies noted that the extent of misbehavior varied in different jurisdictional districts and different subject matters. At the same time, the quantitative findings of the survey did not actually indicate any differences in attorney misbehavior among jurisdictional districts and the statistical differences among subject matters did not necessarily accord with the judges' verbal or written descriptions. The judges' descriptions and the statistical findings both indicated a serious problem in family court proceedings, but while retired judges and sitting judges described a serious problem in criminal proceedings, numerical findings did not support this claim.

B. Dealing with Improper Behavior

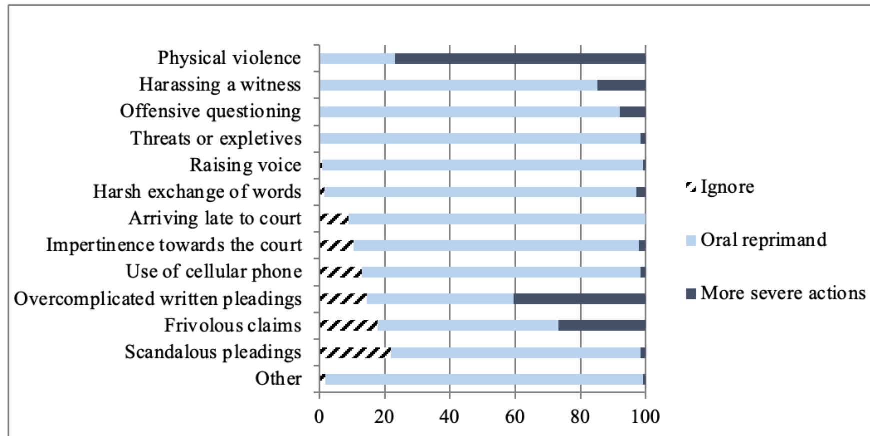
1. The Survey's Findings

After mapping the various types of misbehavior that judges encounter, we turned our attention to the main question—namely, how judges respond to misbehavior and the variables that influence their response. We presented judges with a list of thirteen types of misbehavior (see Graph 2), and for each example (the example of threats or expletives relates to threats that were **not** aimed at the judge) we asked the question, "What is your typical response when such an incident takes place?" In each case we offered several possible responses, including "ignore," "oral reprimand to the lawyer," and more severe measures, both formal and informal.[123]

122 *See generally* Daniel Kahneman, *Experienced Utility and Objective Happiness*: *A Moment-Based Approach*, *in* CHOICES, VALUES AND FRAMES 673 (Daniel Kahneman & Amos Tvesky eds., 2000).

123 For a discussion of the differences between formal and informal sanctions, see McMorrow et al., *supra* note 5, at 1453, 1465-66.

Graph 2: Distribution of Judges' Responses to Misbehavior by Lawyers



The most interesting finding that emerges from these responses is their consistency. The most common response to all types of misbehavior, except for physical violence, was "oral reprimand to the lawyer." Oral reprimands are indeed the most prevalent means by which judges handle misbehavior; in response to how judges address "other types of disrespectful behavior by a lawyer," 97.3% said they issue an "oral reprimand" to the lawyer. That is, when responding to an unspecified form of misbehavior, nearly all judges assumed that their response would be to issue an oral reprimand, even though the question did not describe the type or severity of lawyer misbehavior.

These findings are unrelated to the judges' area of expertise or their previous career. The judge's gender also had almost no bearing on the response, with one exception: a higher percentage of female judges (19.5%) summoned lawyers to their chambers than male judges (7.4%).[124] On the other hand, there are differences among judges from different districts,[125] both in terms of summoning lawyers to chambers

124 (<0.05).

125 The court system comprises six districts. Given the sample size, however, it was not possible to assess responses from the smaller districts separately. Under the circumstances, we decided to classify jurisdictional districts according to three groups: southern (Southern and Jerusalem Districts), central (Tel Aviv and Central Districts), and northern (Haifa and Northern Districts). The premise underpinning this classification was that judges from adjacent geographical districts tend to be better acquainted and are more likely to behave similarly than judges from geographically distant districts. *Compare* Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts 1870-1970*, 19 L. & SOC'Y

and in terms of submitting complaints to the Court Administration. To illustrate, 40% of judges from the Jerusalem District and the Southern District submitted complaints and 31.4% summoned lawyers to chambers; 24.2% of judges from the Haifa District and the Northern District submitted complaints and 15.2% summoned lawyers to chambers; and only 16.9% of judges from the Tel Aviv District and Central District submitted complaints while a mere 4.2% summoned lawyers to chambers. The judges' length of service had a bearing only on their summoning of lawyers to chambers: a small percentage (5.6%) of new judges (with up to nine years on the bench) summoned lawyers to chambers, whereas 23% of the judges having more than nine years on the bench used this option.

It appears that the preference for issuing a reprimand to lawyers stems from several policy considerations that correspond with both the neo-institutional and public choice models. According to the public choice model, judges have an interest in conducting proceedings as efficiently as possible at the lowest possible personal cost.[126] Issuing a reprimand to lawyers typically takes little time and does not delay the proceedings, in contrast to measures such as conducting private conversations in chambers and suspending proceedings. Moreover, issuing a reprimand does not require further follow-up or formal proceedings that necessitate support from the court system (unlike the submission of a complaint to the Bar Association) and it does not raise serious concerns about future lawyer retaliation, given that they too regard oral reprimand as a relatively insubstantial disciplinary measure. According to the public choice model, therefore, the preferred option among judges will be to warn a lawyer, and our findings correlate with this hypothesis.

The neo-institutional model also supports the finding that judges prefer reprimands over other measures. The abovementioned efficiency of a verbal reprimand means it is well suited to the efficiency constraints inherent in the judicial institution. A reprimand does not

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REV. 449, 455-58, 476-79 (1985), *and* Russell Smyth & Vinod Mishra, *The Transmission of Legal Precedent Across the Australian State Supreme Courts Over the Twentieth Century*, 45 L. & SOC'Y REV. 139, 140 (2011), *with* Boaz Shnoor & Naomi Bacon-Shnoor, Cases, Judges, States, or Politics – What Is It that Changes the Law? A Study of States' Supreme Courts Decisions to Accept or Reject the Loss of Chance Doctrine (July 9, 2011), http://ssrn.com/abstract=1881652 [https://perma.cc/3ZY8-MKZA] (last revised Feb. 24, 2012) (unpublished manuscript).

126 *Cf.* Posner, *supra* note 64, at 31 (claiming that judges' behavior is influenced by their desire for leisure).

substantially constrain a lawyer's freedom of action, and it does not require judges to pursue matters they regard as beyond the scope of their judicial duty.

It is possible that the differences among districts—in terms of summoning lawyers to chambers and submitting complaints to the Bar Association—stem from an institutional ethos in the Jerusalem and Southern districts, and, to a lesser extent, the Haifa and Northern districts, according to which it is part of a judge's duty to educate lawyers and shape them into more civil lawyers through personal conversations and Bar complaints. The ethos is evidently much weaker in the Tel Aviv and Central districts. This explanation reinforces the neo-institutional model.

In contrast, the correlation between length of service and increased likelihood of issuing summons to chambers may be attributable to public choice model considerations. New judges might be reluctant to engage in confrontation with lawyers and therefore regard a summons to chambers as entailing a high personal cost. Conversely, long-serving judges no longer fear such confrontations and therefore employ this means more often. It is also possible that male judges view such individual conversations as causing distress more than female judges, which would explain the fact that men use this measure far less than their female counterparts.

In an effort to shed further light on the considerations that influence judges in practice, and to determine which of the theoretical models better explains judicial behavior, we divided the judges into two categories: the first includes judges who use a wide range of means to respond to misbehavior by lawyers, and the second includes judges who prefer a narrow range of responses. We decided to classify judges who use three or fewer measures (that is, up to half of the measures we listed) as judges with a limited range of responses. Judges who, even infrequently, use at least half of the measures noted in the questionnaire (that is, four or more) were classified as judges with a wide range of responses. An oral reprimand is considered less harsh than all the other disciplinary measures, and all judges use it. A judge who uses only three measures or less is probably a judge who uses oral reprimand more than a judge who uses a wider variety of measures, and therefore it is likely that on average their responses are mild.

Only about one-third of the judges have a varied range of responses, while two-thirds rely on a limited range of up to three possible responses. Our assumption is that if the neo-institutional model applies, then we will find a correlation between institutional variables

and the likelihood of a judge having a wide range of responses that include severe measures, whereas if the public choice model applies, there will be a correlation between personal variables and the likelihood of severe measure usage.

As it turns out, there is no correlation whatsoever between institutional characteristics (such as area of work, district, or court level) and a judge employing a wide range of responses to lawyer misbehavior (which we characterize as "strict judges"). Nor do most of the personal characteristics (such as gender, length of service, previous career, or area of work) correlate with the breadth of a judge's responses.

However, we identified two characteristics that closely correlate with the likelihood of a judge employing a wide range of severe responses: the submission of a complaint against a judge to the IJA Ombudsman during the previous three years and the submission of a request for recusal during the same period. Judges against whom such a complaint or request for recusal had been submitted in the preceding three years showed a significant tendency[127] to use varied and severe disciplinary measures. In other words, there is a significant correlation between a judge using strict or severe measures and lawyers in kind taking measures against that judge.

Since the data is correlational, these findings do not provide an answer to the "chicken and egg" question, namely: Does a judge's use of disciplinary measures result in the submission of complaints and requests for recusal against that judge? This scenario might trigger a race to the bottom, with judges refraining from the use of disciplinary measures to prevent retaliation by lawyers. Or does the submission of such complaints and requests against a judge result in that judge employing varied disciplinary measures to retain a sense of control over the courtroom?

The correlation between the submission of complaints and requests for recusal against a judge on the one hand, and that judge's use of varied and severe disciplinary measures on the other, supports the public choice model to a degree. It appears that a judge against whom a complaint or request for recusal has been submitted perceives the judicial role, lawyer-judge relations, and the backing of the court system differently from a judge who has not had such an experience. This difference in perspective may be because the experience changed that judge, or because judges against whom complaints and requests for recusal have been submitted had a different judicial temperament from

127 ($P<0.05$).

the outset. This difference is consistent with the public choice model because it considers personal factors. At the same time, the correlation may also be explained by the neo-institutional model: Judges against whom a complaint or request for recusal has been submitted tend to perceive the judicial institution differently from those who have not had such an experience.

An examination of the judges' responses to our open-ended questions reveals that judges are influenced by considerations of the neo-institutional model and the public choice model. Some judges viewed undesirable lawyer behavior by lawyers as spontaneous rather than premeditated or tactical. The same judges believe that to maintain proceedings in the best possible manner—that is, for their own personal benefit (public choice model) or the benefit of efficient proceedings and courtroom decorum (neo-institutional model)—it is best to address such occurrences through calm discussion, humor, moderate reprimands, and restraint. To the extent possible, judges who view lawyer misbehavior as spontaneous rather than planned try to refrain from imposing sanctions.

Many judges (ten of the fifty-six judges who responded to the open-ended question) attribute their method for dealing with lawyers' inappropriate behavior to considerations associated with defensive judicial approach within the public choice model. These judges are reluctant to directly address misbehavior by lawyers for fear of the lawyers' reaction, and, in particular, the submission of a complaint to the IJA Ombudsman. Some judges stated that misbehavior is typical of only a relatively small number of lawyers who are not afraid to intimidate the court and make open or veiled threats, and who tend to submit complaints to the IJA Ombudsman as a preemptive measure.[128] These judges feel genuine distress because—according to the public choice model—conceding to unruly lawyers will undermine their ability to work efficiently and will negatively impact their work environment. Taking harsh measures against these lawyers could also result in the lawyers filing complaints against them or the Bar Association

128 Regarding problems related to filing complaints with the IJA Ombudsman, see DiscA (TA) 102/10 The Tel-Aviv Region Ethics Comm. v. Maimon, Pador-Ethics (Jan. 8, 2012) (Isr.). *See also* DiscA (TA) 63/10 The Nat'l Council of the Isr. Bar Ass'n v. Hecht, Pador-Ethics (June 13, 2013) (Isr.) (An acquittal in a complaint filed by the IJA against a lawyer who had filed a complaint with the IJA Ombudsman regarding an alleged romantic relationship between a judge and a lawyer. After the lawyer failed to provide evidence, the IJA filed a complaint with the Bar Association with respect to the statements contained in the complaint filed by the lawyer with the Ombudsman.).

opposing their promotion, which could harm their career and future prospects. Indeed, one judge overtly stated that the Bar's participation in the judicial selection process is a factor that causes judges to avoid disputes with lawyers.

Under the neo-institutional model, judges are thus torn between two conflicting messages regarding the institution for which they work. On one hand, judges receive a clear, unequivocal message that the judicial institution requires efficiency and dignity, which, if warranted, necessitates severe measures against misbehavior by lawyers. On the other hand, the respondents' answers showed that their institution discourages severe measures against lawyers and is prepared to overlook inappropriate behavior. One of the judges noted, for example, that other judges informally advise him to refrain from issuing complaints against lawyers and to try to solve problems through other means. This message is conveyed to judges in two ways. First, the Ombudsman's tendency, as judges see it, is to accept complaints against judges without sufficiently considering the lawyers' behavior that led to the complaint. Second, judges feel that the court system does not press the Bar to earnestly consider judges' complaints against lawyers[129] and that the Court Administration itself very rarely submits complaints against lawyers to the Bar and occasionally even prevents individual judges from doing so. Indeed, many judges referred to a "lack of support" from the Court Administration (which screens complaints against lawyers) and the Ombudsman.

2. Findings from the Interviews

There was widespread consensus among the interview respondents that judges rely almost exclusively on oral reprimands when dealing with unruly lawyers, and that only in very rare and extreme cases do they use any other means. This finding affirms the survey findings. Some judges stated that the reason for their resort to oral reprimands is that judges lack more effective methods for dealing with unruly lawyers. They noted that they wished the law and the IJA would provide

129 Judges' dissatisfaction with the Bar's approach to judicial complaints against lawyers is reflected in the responses to two questions presented to the judges, which yielded remarkably similar answers. We asked judges whether they agree that the Bar Association's handling of judges' complaints about lawyers serves as an effective deterrent, and whether they agree that the Bar Association takes these complaints as seriously as it should. For both questions, only 20% of the judges agreed with the statements, while 40% disagreed with the statements.

more effective means of dealing with such lawyers. Given that other formal means for addressing lawyers' misbehavior exist, this impression suggests either that these other means seem ineffective to the judges or they think the costs related to using them are too high.

Many respondents stressed that judges only attempt to prohibit misbehavior by lawyers when such behavior interferes with the smooth running of a hearing (such as shouting or oral abuse of witnesses), and they tend to ignore suspicions of other unethical behavior by lawyers (whether in the lawyer-client context or in the context of relations between the lawyer and the other party). In situations in which attorneys interfere with the smooth running of the hearing, the judge at most will call the lawyer into their chambers and advise the lawyer of their concerns. The reason cited by respondents for their propensity for inaction, is that judges do not perceive themselves as educators of lawyers and do not think they are entrusted with the enforcement of ethical rules. Many judges emphasized the distinction between the role of a judge, on the one hand, and the role of a schoolteacher or police officer on the other.

Judges were unwilling to use public means of reprimand, such as written reprimand within rulings or filing complaints with the Israeli Bar. Respondents also explained this unwillingness with the abovementioned distinction between the judge qua adjudicator and the judge qua educator.

In the past, judges who wished to report a lawyer's behavior would file individual complaints with the Israeli Bar. However, judges felt that the Bar was not taking their complaints seriously, and the Bar felt that judges sometimes filed unjustified complaints.[130] Therefore, a few years ago, the Bar and the IJA decided that all complaints would be transferred to the IJA Administrator, who, on behalf of the judicial authority, would file the complaints with the Bar that they deemed justified. Our data show that this change has failed to achieve all of its objectives. Most of the judges we interviewed stated that they did not transfer complaints to the IJA Administrator. A majority of judges made claims such as, "the Bar Association does not take this very seriously," or "when I saw that nothing came out of this, I stopped."

130 Anat Ro'eh, *Why Does the Court Administrator Interfere with Judges' Complaints Against Lawyers?*, CALCALIST (May 25, 2010, 12:44 PM), https://www.calcalist.co.il/local/articles/0,7340,L-3405650,00.html [https://perma.cc/8PPM-D84S]; Yuval Yo'ez, *The Bar Ethics Committees: Many of the Complaints Filed by Judges Are Unjustified*, GLOBES (Nov. 8, 2010), https://www.globes.co.il/news/article.aspx?did=1000599309 [https://perma.cc/CLS7-JHQY].

Moreover, some judges claimed, "it seems the Bar is more powerful against weak lawyers than against strong ones." Many judges mentioned the same names of lawyers against whom the IJA has repeatedly filed complaints, and who, sometimes proudly, have a reputation for being disruptive and unruly. The judges claimed that because it took the Bar many years to initiate complaints against these lawyers, despite the IJA's requests for a speedy hearing, they formed the impression that the Bar does not care about judges' complaints or lawyers' uncivil and disruptive behavior. Another reason for judges deciding not to file complaints is that they felt that such complaints disrupted the positive courtroom atmosphere.

Those judges who filed complaints said they did so when the lawyers' unethical behavior was directed at their own clients, thus undermining the clients' rights. According to judges' responses, it appears that in these instances, because the complaint was not focused on the lawyer's courtroom behavior, the Bar took it more seriously, and it did not negatively impact the court atmosphere.

C. Lawyers' Complaints Against Judges

Almost all respondents in both studies stated that they personally knew a judge against whom a complaint had been filed with the Israeli Judiciary Ombudsman's Office. Most judges perceived such complaints as attempts by lawyers and parties to deter judges from acting lawfully or in retaliation against judges for unfavorable rulings. Judges claimed that the practice of filing such complaints is especially common in family court, where lawyers appear repeatedly before the same judges and court discussion often becomes emotional. The judges we interviewed also stated that the Ombudsman's Office, although headed by a retired Supreme Court justice, does not understand the dynamics and pressures involved in judicial hearings.

D. The Judges' Responses: Between the Real and the Ideal

An interesting finding emerged from our question about how the judges thought a judge *should* respond to misbehavior by a lawyer, as opposed to the question about how they actually respond. We presented the judges with six statements regarding the need to take measures against unruly behavior. For each statement they were asked to indicate the extent to which they agree on a scale of 1 (completely

disagree) to 5 (completely agree). The responses are summarized in Table 6.

Table 6: Judges' Positions on the Appropriate Hypothetical Response

	Average	Median
It is appropriate to reprimand lawyers for arriving late to proceedings.	4.5	5
It is appropriate to reprimand lawyers when their cell phones ring in the courtroom.	4.2	5
It is appropriate to issue personal fines/costs against lawyers for disciplinary problems in the courtroom.	3.6	4
It is appropriate to issue procedural sanctions against lawyers for misbehavior.	3.5	4
It is appropriate to file a complaint with the Bar when a judge encounters disciplinary violations by a lawyer in the courtroom.	3.5	3
Judges should refrain from strictly and meticulously enforcing disciplinary rules.	2.3	2

The results from this question revealed that, first, judges believe that the disciplinary rules should be strictly enforced. Of the respondents, 58.8% noted that they are opposed or strongly opposed to the statement that judges should refrain from strictly and meticulously enforcing disciplinary rules, and only 8.8% indicated that they agree or strongly agree with this statement.

Second, although only a small minority of the judges indicated that it is not appropriate to strictly and meticulously enforce disciplinary rules, only about half the judges believe that it is appropriate to use severe disciplinary measures in response to lawyer misbehavior. Only 56.2% of the judges indicated that they agree or strongly agree that procedural sanctions should be issued against lawyers for misbehavior; only 53.4% indicated that they agree or strongly agree that personal fines/costs should be issued against lawyers; and only 49.6% indicated that they agree or strongly agree that a complaint should be

submitted to the Bar for disciplinary violations by lawyers. Notably, these figures are significantly higher than the percentage of judges who actually employ these disciplinary measures.

In other words, the findings reveal three separate issues: Judges' ideal view of a judge's conduct; judges' willingness to work towards the ideal in principle; and judges' conduct in practice. Almost 60% of the judges believe that there should be strict and meticulous enforcement, but only about half think that severe disciplinary measures should be used. An even lower proportion of judges actually use such measures. This variance might stem from the judges' belief that a judge is not the appropriate entity for disciplinary enforcement and that the system does not encourage judicial enforcement. It is possible that judges think that severe measures entail a personal cost, which they are unwilling to pay even if they believe, as a matter of principle, that the lawyer should be severely reprimanded.[131]

These findings appear to reflect conflicting institutional considerations, which establish an ideal of strict enforcement while simultaneously conveying a lack of support for severe disciplinary measures. Judges are also guided by personal considerations that lead them to conclude that, on an individual level, they should avoid the costs of strict enforcement, given the lack of institutional support for disciplinary measures.

In order to better understand the gap between the real and the ideal, we tried to characterize various models of judges according to two variables. The first variable is the extent to which the judge thinks that judges should severely enforce lawyer behavioral norms (ideal law). The second variable is the extent to which a specific judge in fact severely addresses lawyer misbehavior (actual law).[132] We attempted to examine whether the judges' positions correlated with their experiences as judges, or with various other individual and institutional characteristics.

131 THE COMMITTEE FOR FURTHERING THE CIVILIZED BEHAVIOR IN COURTS, ISR. BAR ASS'N 12 (2011) (Hebrew) (on file with author). The report stated that the main reason judges refrain from enforcing discipline is their perception of themselves as not duty-bound to play a policing or educational role in their courtrooms: "The [judge's] role is to oversee legal deliberations, rather than to engage in thwarting a culture of dysfunctional discourse during deliberations." *Id.* If judges do not view themselves as having this responsibility, lawyers will react accordingly.

132 This variable is measured according to the judge's self-reports regarding their own response to previous incidents.

Table 7: Models of Judges

	Believes in being severe	**Does not believe in being severe**
Severe in practice	Strict by choice (23%)[133]	Strict by constraint (18.2%)
Flexible in practice	Compromiser by constraint (33.1%)	Compromiser by choice (25.7%)

As the preceding discussion indicated, there is a gap between the position that, in theory, favors severe enforcement of disciplinary measures and the willingness to do so in practice. About one-third of the respondent judges believe in being severe but are not severe in reality. We named these judges "compromisers by constraint," since it seems that they are not severe in reality because they do not dare, do not succeed, cannot apply severe measures, or simple reprimand is sufficient because in practice they do not encounter lawyer misbehavior. On the other hand, about 18% of respondents do not think it is necessary to be severe, yet, in practice, they do apply severe disciplinary measures. We named these judges "severe by constraint," since it seems that they think that their usage of severe measures is being forced upon them by the lawyers' misbehavior and the lack of other options.

In addition, about 23% of the judges think that severe measures should be used against misbehavior in court, and act accordingly (we named them "severe by choice"), and about a quarter of all judges think that there is no need for the usage of severe measures and act accordingly (we named them "compromisers by choice").

There is a strong correlation between a judge's regulation of severe attorney misbehavior in practice (as measured by their usage of means other than oral reprimand) and the severity the judge believes should be employed in theory,[134] and, separately, with the number of disruptions the judge reports.[135] Yet there is no correlation between the number of disruptions the judge reports and the degree of severity the judge believes should be employed in theory. Put differently, there

133 Percentages in parentheses represent the percent of judges who fit the description.

134 ($P<0.05$).

135 ($P<0.001$).

is no correlation between the theoretical position of judges and the conduct of attorneys in their courtroom.

Despite the many studies pointing to the different judicial approaches of male and female judges,[136] male and female judges do not have different opinions about addressing lawyers' disciplinary transgressions, and they do not treat such transgressions differently in practice. Similarly, a judge's employment background (private market or public service) does not make a difference.

On the other hand, there is a correlation between the length of time judges have served and their views. More senior judges believe they encounter inappropriate behavior less often,[137] and they are less inclined to think that strict enforcement of lawyers' disciplinary rules is required.[138] There is a similar difference (albeit not a significant one) with respect to strictness in practice. Here too, the senior judges are less strict than newer judges.

Judges' experiences across different court districts[139] are nearly identical. There is a significant difference, however, between their actual strictness towards attorney misconduct[140] and the amount they believe is appropriate.[141] Judges in the Jerusalem and Southern Districts are more inclined to believe that strictness is necessary than judges in the Tel Aviv, Central, Haifa, and Northern Districts (among which there were no substantial differences), and the former are also stricter than the latter in practice. Judges in the Jerusalem District are more often "strict by choice" or "compromiser by constraint." Judges in the Tel Aviv District are much more often "compromiser by choice" and

136 *See, e.g.*, Bryna Bogoch & Rachel Don-Yechiya, *Different Research, Different Concept: A Response to Prof. Rahav's Article*, 2 SHA'AREI MISHPAT 412 (2001); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 165 (1993); Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 421-23 (1981); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 324-25 (2004); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 402 (2010); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1790 (2005).

137 ($P<0.05$).

138 ($P<0.05$).

139 As noted, given the sample size and our expectation of similarities for adjacent districts, we combined districts to form three geographic regions in which judges operate: Jerusalem and the south, Tel Aviv and the center, and Haifa and the north.

140 ($P<0.05$).

141 ($P<0.005$).

somewhat more often "strict by constraint." Judges in the Haifa and Northern Districts are somewhat more often "strict by constraint" and "compromiser by choice."

The data show that there are some significant correlations between judges' areas of work and the variables examined. Civil judges are stricter than judges who work in a combination of areas, and the judges who work in a combination of areas are stricter than criminal judges. However, judges who work in a combination of areas believe it is necessary to be very strict, civil judges are inclined to believe that less severity is required, and criminal judges tend to believe that a middle level of severity is required. Consequently, civil judges are "severe by constraint" or "compromiser by choice," criminal judges are "compromiser by constraint," and judges who work in a combination of areas are "strict by choice" or "compromiser by constraint."

According to the neo-institutional model, the institutional climate differs across various districts in all matters related to lawyers' conduct and judges' attitude towards this conduct. Moreover, judges in various areas of expertise are exposed to different institutional atmospheres and therefore respond to attorney misconduct differently. The extent to which judges identify with the institutional ethos might also vary between new and long-serving judges, where the latter tend to regard the court as a dignified institution in which misbehavior is rare.

VI. Study Limitations

As noted, our survey was conducted by sending an e-mail to judges and requesting them to answer an online questionnaire on courtroom lawyer conduct. This method might lead to two forms of bias, the presence of which we cannot ascertain. First, it is possible that judges who regard lawyers' behavior as typically problematic, or who encountered extremely problematic behavior in the past, were more likely to answer the questionnaire than other judges. It should be noted, however, judges who never encountered problematic behavior answered the questionnaire. Second, it is possible that judges who feel comfortable working with computers were more likely to answer the questionnaire than judges who do not use computers. Moreover, given that only 21% of the judges completed the questionnaire, the sample may not be representative.

Another limitation of the study relates to the wording in the fifth section of the questionnaire. Some of the descriptions of lawyers'

conduct are open to interpretation. For example, the term "frivolous claim" may be interpreted in several ways, and the words "harassing a witness" might trigger different associations for different judges. It is possible, therefore, that the responses we received reflect judges' different understandings of the questionnaire.

A major limitation of the interviews is that we asked judges to describe their behavior retrospectively. Temporal distance from events raises concerns about biased descriptions and the possibility of retrospective self-aggrandizement. Indeed, some judges noted that "I did not have any problems, but other judges . . . ." Such responses lead us to suspect a self-serving bias.

Another limitation stems from the varying lengths of time that transpired between the participating judges' retirement and our interviews. Some judges had served and retired at a time when relations between the Bar Association and the courts were positive, while others retired after relations between the institutions had deteriorated and after the Ombudsman's Office of the Israeli Judiciary was established in 2003.

This Article occasionally compares judges who work on criminal cases with judges who work on civil issues or a mix of issues. This rough classification might obscure internal differences within the groups, as the findings regarding family court indicate, for example. However, given the relatively small number of respondents in each subgroup, it was not possible to refine the classification, although it may be desirable to do so in further studies.

VII. General Discussion and Conclusions

There are major differences between the findings of the two studies, even though in many respects they are similar. For instance, judges tended to report much less misbehavior in the interviews than in the survey. However, in both studies judges attributed the misbehavior to external factors, such as the quality of all lawyers, the presence of a small number of unruly lawyers, or misbehavior in particular practice areas. In both studies, judges considered themselves better at managing misbehavior than other judges.

Oral reprimand is the main sanction judges use in response to lawyers' misbehavior. Other formal and informal sanctions are used more rarely for various reasons that correspond with both the public choice and the neo-institutional models. For example, judges believe that dealing with lawyers' misbehavior wastes time, that using firmer

sanctions might result in personal cost, that the judicial system does not support judges who challenge unruly lawyers, and that their peers will not appreciate such sanctions. Thus, from both their personal and professional perspectives, judges feel that dealing harshly with disruptive behavior is undesirable. Moreover, judges tend not to report lawyers to the Bar because, in addition to the abovementioned considerations, they do not view reporting as an effective action.

We classified four different types of judges differentiating in their theoretical approach towards misbehavior on one hand, and their real actions on the other. The amount of misbehavior in judges' court, their time on the bench, the district to which they belong, and their area of expertise, are all correlated to this typology.

Lawyers' behavior influences the work environment of judges. Inappropriate behavior hinders judges' completion of their work and makes their work unpleasant. Consequently, and considering the power dynamics between judges and lawyers where the latter are advantaged, we would expect judges to employ all the means at their disposal to address misbehavior by lawyers.

Our research findings, however, indicate that judges do not use all means at their disposal. Even though judges encounter many disruptions, they tend not to address them through sanctions or complaints to the Bar Association. Rather, they mainly direct oral reprimands at the lawyers, even if they think it is appropriate to act more severely. This finding is consistent with the expectations of both the neo-institutional model and the public choice model, and it appears that factors predicted by both models correspond with judges' modes of operation. Harsher measures appear to conflict with the judicial ethos that the system transmits to judges and that judges transmit to one another. Using such harsher measures also requires time, and might cause the judge to conflict with individual lawyers and the Bar as a whole.

The judicial system and its judges perceive the court as a forum for settling disputes peacefully. In other words, the court provides a social service for the parties, but does not believe that it can educate the lawyers. Judges' reliance solely on the non-educational aspects of their role may produce undesirable lawyer behavior. It is both possible and appropriate to change the institutional perspective of courts in such a way that judges establish their role as one that incorporates an educational element for the benefit of the parties and their lawyers. If the system seeks to change the conduct of lawyers, then it must change

the ethos it transmits to judges and the corresponding incentives that apply to them.

Courts already have an educational role vis-à-vis the public at large, given that judicial decisions convey normative principles and values that are binding on the public. We propose that an effort be made to try to change the self-perception of judges and the institutional norm of courts so that they encourage judges to convey important normative principles and values to the parties and their counsel. Lawyers can act either as agents of moderation or agents of escalation, and it is only fitting that courts educate lawyers to choose moderation.