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Conflicts of Integrity

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CONFLICTS OF INTEGRITY

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I am honored to be in the company of such marvelous speakers and thinkers and to be part of this truly special conference. I am especially honored and gratified to be paying tribute to John Feerick. John is a man of extraordinary generosity, warmth, and moral leadership. His friendship and mentorship have meant a great deal to me and to many at the law school. He is also a remarkably honest and open speaker, a man possessed of superb practical judgment, and an outstanding lawyer. My remarks today will explore integrity in each of these domains of excellence: integrity in communication, integrity in judgment, and integrity in the law. From time to time, I may make reference to John himself, but my point is not to focus on John. The essay is meant as a philosophical exploration of certain kinds of dilemmas in the world of law, particularly as manifested by the work of sitting judges.

I want to speak today about the concept of integrity as it applies to law, and particularly as it applies to adjudication. "Integrity" connotes wholeness, coherence, and univocality. With some recognition of irony, then, I shall identify and discuss the multiplicity of the nature of "judicial integrity."

I. INTEGRITY AS HONESTY AND CANDOR

Let us begin with the most straightforward sense of "integrity" as a virtue of adjudication; integrity as the opposite of corruption, duplicity, dishonesty, or manipulativeness. All of the following judges would certainly lack integrity in this sense: a judge who accepts bribes; a judge who lies; a judge who fails to disclose her lack of a substantial personal interest in a case; a judge who rules in what he considers the opposite of what the law demands because it increases his chances of being promoted to a higher court. There are, however, subtler cases that bring us even closer to everyday life in the courts: a judge who grants summary judgment where he believes it is not deserved because he wants to reduce his docket and he does not believe the plaintiff will appeal; a judge who delays indefinitely on ruling on a motion of vital importance to one party because she does not want the unfavorable press coverage that she believes she would get if she decided the case; a judge who denies a motion to suppress a

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confession she is certain was uncoerced, even though she believes the *Miranda* warning was defective.

Of course, as I become increasingly demanding in defining this facet of judicial integrity, I come closer to making moral judgments that are either sanctimonious or just plain wrong. Thus, for example, a judge who declines to grant an injunction because she believes it would take vast amounts of her time to enforce, even though she believes that monetary damages will not be wholly adequate and the merits are strong, is not necessarily replacing true evaluation of the merits with personal interest in a manner that lacks integrity. These interests of the court are entirely appropriate to consider, and doing so is practical and legally proper. It is true that there are practical and even self-interested reasons that take attention away from "justice" concerns, but that does not necessarily display a lack of integrity. Practicality is a virtue too.

Along this continuum, there are many cases where it is difficult to discern where practicality and worldliness cross over into the realm of dishonesty. A judge enters a particularly hazy area when the question is not affirmative misrepresentation, but rather a decision not to be fully forthcoming with all of the reasons for her decision, or her reasons for hesitation. This is sometimes referred to as the presence or absence of judicial candor. It would be wrong to say that judicial integrity requires complete openness as to all the reasons underlying a decision, and openness as to the weight of those reasons. But that is not to say that a judge can never do wrong by concealing or shielding from public scrutiny the true reasons for a decision. Certainly, deceit in judging or in justifying an opinion is unacceptable, and is quintessential of an absence of judicial integrity.

But I believe that integrity requires some level of judicial candor beyond a mere lack of deceit. At a minimum, a failure to mention powerful reasons for a decision, when reasons that in fact carried less weight have been articulated, borders on the deceitful. This is particularly true when the latter set of reasons would be considered acceptable, if sound, and the former would not. That is because, in large part, the public largely lacks the capacity to second-guess a judge's statements that she regards certain legal arguments as powerful. Hence, the public's capacity to evaluate the judge's claim to be applying the law can be compromised by the failure to be candid about the background reasons. Integrity, in this sense, is an important basis of public trust in the judiciary. Perhaps Justice Stevens was implicitly accusing his colleagues of lack of integrity in this sense in concluding his *Bush v. Gore* dissent:

> Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the

> loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[1]

On a closely related note, one aspect of integrity is that it is the opposite of bad faith. Robert Cover's wonderful book, *Justice Accused*,[2] offers a devastating criticism of antebellum judges not so much for their failure to protect fugitive slaves, but for their failure to take responsibility for what they were doing. Cover depicts the language of helplessness used by those judges as an understandable but deplorable effort to reduce cognitive dissonance between their conception of the appropriate institutional role for the courts, and their countervailing anti-slavery politics.[3] Integrity would have required these judges to admit that they were choosing this conception of institutional role over the freedom of slaves, and doing so as an all-considered judgment. At a minimum, integrity would have demanded a straightforward decision, without the façade of having no choice.

II. INTEGRITY AS SOLIDNESS

Let me move from integrity as the opposite of dishonesty or corruption to a second sense of "integrity"—the antithesis of which is promiscuity, unreliability, or flakiness. The person of integrity is faithful, reliable, and solid. She is grounded; she *is* someone. With the caveat of abstracting from the male gender, to have integrity is to be a *mensch*. John Feerick is loved, admired, and the honoree of many tributes not just because he has great integrity as an honest man who speaks his heart and mind. More deeply, it is because he is so solid, so real, so faithful, and so reliable.

I think it is fair to say that integrity as solidness is a great virtue, and certainly—along with integrity as honesty—is a paramount virtue of lawyers. Integrity in this sense is also a great virtue in judges, perhaps even more important. I remember coming home from college and having dinner with my best friend's family. His father greeted me by saying, "you are beginning to look like someone." And he meant it as flattery. What he meant was that a little bit of age had taken away some of the characterless quality of my face. I think a similar sensibility partly explains why the prototypical judge is not only an experienced adult but an older adult. We expect time to build not only wisdom and judgment, but character. And we expect character to make someone more solid.

This brings us to a fork in the road. Even within this general domain of integrity as "solidness," there are two paths. One of them

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1. Bush v. Gore, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).
2. Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (1975).
3. *See id.* at 119-23 (depicting the language of judicial "can't").

views a judge with integrity as a judge who is faithful to the system, and to her role within the legal system. In this view, a lack of integrity would be an overreaching, or a usurpation of another branch's domain of power. Integrity would be loyal adherence to the relatively well-understood and predictable institutional role prototypically expected of judges. A judge who restrains herself from exercising power to achieve what she believes to be a desirable result because she regards herself as bound by her office to defer to other branches would, of course, be exercising judicial restraint; this sort of restraint can be understood as a form of integrity. This form of integrity—an aspect of judicial self-control and restraint—is nicely displayed in a dissenting opinion by Justice Ginsburg in *BMW v. Gore*,[4] where she (along with Chief Justice Rehnquist) refused to declare punitive damages unconstitutional, despite her belief that there was a problem that needed to be addressed. Ginsburg and Rehnquist were, one might argue, solid enough to withstand the temptation to exercise their power to change a piece of tort law, since they believed that this was a matter for the states.[5]

If we go down another path, we see integrity as faithfulness to principle, not judicial role. If it is true, as I believe it is, that many heroic human beings have been people of great religious faith, then this may have something to do with integrity. Tremendous, resolute faith can create and sustain great strength and courage. I believe this is true with regard to some moral and political principles just as it is of some religious convictions. Sandy Levinson's wonderful book *Constitutional Faith*[6] suggests parallels between religious conviction and constitutional conviction, providing a nice perspective on judicial integrity of this sort. Justice Blackmun, in several of the bitter dissents of his last decade on the court, passionately declared his commitment to certain basic principles of dignity and mutual respect. Most notably, in *Bowers v. Hardwick*[7] Blackmun wrote—presaging recent events[8]:

> I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.[9]

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4. 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting).

5. *See id.* at 607 ("The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas.").

6. Sanford Levinson, Constitutional Faith (1988).

7. 478 U.S. 186 (1986).

8. *See* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

9. *Id.* at 214 (Blackmun, J., dissenting).

It is this kind of integrity that judges have in mind when they incredulously exclaim that their colleagues have missed the forest for the trees. The antithesis of integrity, in the sense of commitment to principle, is hypocrisy, or perhaps more gently, vacuousness or hollowness. Presumably, both kinds of solidness are kinds of judicial integrity; both the commitment to principle and the groundedness in judicial role.

III. DWORKINIAN INTEGRITY

Finally, I want to turn to an entirely different aspect of integrity that is related to adjudication, a form of integrity given central stage by Ronald Dworkin in his great book, *Law's Empire*.[10] Dworkin's integrity is not a virtue of judges, but a virtue of states that have certain kinds of legal systems.[11] Integrity is thus a political virtue, much like equality, justice, or freedom. It exists where the legal system is constituted not only by rules but by principles and institutions that operate openly and evenhandedly, in a Fullerian manner.[12] It exists by virtue of a commitment of actors within the system to create and apply the law in a manner that embodies moral principles, while being constrained by an evenhanded application of actual, extant legal materials. These commitments sustain a practical, institutionalized and social embodiment of a justice, so that rights and interests of persons within the state are governed, ultimately, by a jointly realized set of aspirations to justice. Just as late twentieth century philosophers such as Hilary Putnam offered a metaphysics based on truth as a regulative ideal of our communal search for knowledge,[13] so Dworkin arguably analyzed law as the regulative ideal of a system aspiring, in institutionalized form within an actual political system of legislation, adjudication, and regulation, to embody justice. This is what I, in an admittedly somewhat tendentious and slightly idealized form, think Dworkin has in mind when he writes of law as integrity.[14]

Dworkin has both an interpretive and a prescriptive theory of adjudication, and law as integrity requires that judges decide cases in the manner prescribed.[15] That manner involves two steps. The first is the generation of a domain of options for legal interpretation that would fit the relevant materials.[16] The second step is the selection, among those options, of the legal interpretation that is best justified,

10. Ronald Dworkin, Law's Empire (1986).
11. *Id.* at 188.
12. *Id.* at 404-07.
13. Hilary Putnam, Reason, Truth and History 155 (1981).
14. Dworkin, *supra* note 10, at 406.
15. *Id.* at 176.
16. *Id.* at 230.

or puts the legal system in its best light.[17] A system of law that is operated by judges using this sort of adjudication is a system that aims toward simultaneously generating and maintaining coherence while deciding rights in an evenhanded manner that reflects considerations of principle. That is why the state enjoys the virtue of integrity.[18]

Integrity in the Dworkinian sense is the opposite of arbitrariness or ad hocness. It shares the sense of "solidness" in three respects: first, it is coherent; second, it stands for something; and third, it is designed to allocate rights and dispositions in a systematic manner.

IV. CONFLICTS OF INTEGRITY

At a minimum, it is clear that there are many prima facie conflicts among forms of integrity in adjudication. Perhaps the most celebrated example is a conflict between two versions of judicial "solidness." The integrity of standing for principle may conflict with the integrity of keeping to one's own judicial role. Thus, for example, a judge who believes that the death penalty simply cannot be squared with the conception of the state as bound always to respect individuals as equals, and bound to view itself as merely a creature of all the people, may be in principle opposed to the death penalty. On the other hand, her judicial role may demand of her that she defer unless the Constitution requires her to do otherwise. Which displays integrity? Do both? What should the judge do?

I say this is a prima facie conflict because there are ways to define either the judicial role or the status of principle that finesse the conflict. Thus, if the principle is one that underlies the constitutional order, then part of applying the Constitution is applying the principle. Or if the judicial role includes vigilance as to abuses by government of its awesome power, then perhaps the judicial role also permits, or even requires, striking down the death penalty. Conversely, one's commitment to principle is not at any cost, but within the judicial role. Thus, the opponent of the death penalty in principle need not ignore her judicial role, just as, for example, an opponent in principle of progressive taxation need not ignore his obligation to pay his taxes.

Similar philosophical maneuvers can be performed to suggest the reconcilability of integrity in the Dworkinian sense with integrity in the sense of solidness. This is famously the case with regard to versions of judicial solidness that take the judicial role seriously. It runs to the core of Dworkin's view that the judicial role includes an attitude of best-answer seeking that looks for general principles.[19] Similarly, it runs to the core of his view that the judges staffing our judicial system aim to stand behind these principles themselves, and

17. *Id.* at 231.
18. *Id.* at 186-90.
19. *Id.* at 225-28.

be committed to them.[20] Hence, it would seem that whatever sort of integrity judges *qua* persons aim to demonstrate (or we would wish demonstrated), is entirely consistent with integrity as a political virtue of the state. Finally, one might add that the most common error leading judges to diminish their forthrightness or candor is the misguided view that judges should separate themselves from positions of moral or political principle. Once we are fully Dworkinized in our conception of the nature of law and the nature of judicial role, there is no reason for hesitating to be candid about judicial reasons for various decisions. If this line of thinking were accepted, then even if the unity of virtues were not obtained, at least the fragmentation of one virtue in one context—integrity in the law as it relates to adjudication—would be forestalled.

Unfortunately, I am not entirely persuaded by these maneuvers. Indeed, while some of the prima facie conflicts of integrity are merely apparent conflicts, many of them are real. The problem is most acute as to the type of personal integrity involving fidelity to principles. In law, particularly in constitutional law, the most difficult legal dilemmas are ones in which a group of the public has decided to enact a law or behave in a manner that another party or group believes inconsistent with some basic principle, or perhaps they themselves are acting upon what they take to be a vitally important moral or political principle in a manner that they deem permissible. Those favoring the law do not blithely stomp upon plainly controlling constitutional principles. Rather, they take the view that the relevant legal norms, properly applied, permit them to act or make law as they have. Sometimes, as in the case of, for example, hate speech law, the advocates of the law believe they are acting on principle. Other times, as in challenges to criminal enforcement tactics opposed by civil libertarians, it is the attackers of government action who believe they are acting on principle. In the case of affirmative action, both sides believe they are on the side of principle.

Integrity in such decisions is not adequately exemplified by mere adherence to principle. If Dworkin's normative theory of adjudication is accepted, integrity is a matter of aiming to articulate and adopt an interpretation of the law that reaches back toward what law and decisions have been, while reaching forward in a manner that coheres with that law and advances the realization of the principles underlying it. To the extent that this process is capable of looking like law and like adjudication—rather than looking like a game of post hoc rationalization—it will be an open question whether the actual product of the adjudication sits well or poorly with the judge's own values and principles. This means, for example, that a judge who is fundamentally committed to the eradication of bigotry and the

20. *Id.*

cultivation of equality might find herself striking down a hate speech statute as applied to a defendant burning a cross on the lawn of an African-American family in a predominantly white suburb. The judge who is part of a legal system in a state that enjoys the Dworkinian virtue of integrity must take the chance that she will end up with such a result.

V. CONCLUSION

Where, then, do I come out? What, if anything, can be learned from these observations? I would like to conclude by suggesting three or four points, with an overall aim of mitigating the anxiety-provoking implications of my comments thus far.

First, I hope I have said at least something about why integrity is a virtue both in judges and in our legal system, and something about what the forms of integrity I have enumerated have in common. I have used what I am afraid may be a somewhat clunky term—"solidness." But the many forms of integrity I have enumerated are all forms of solidness.

Integrity as honesty is a kind of solidness; it is the absence of a façade, a consistency through and through. Integrity as role is a matter of knowing where someone stands. Integrity in principle is a solidness in who and what one is. Integrity in the state is all of these, transposed to the group level—standing for something as a community, and as a state. All of these forms of integrity, under the names I have used or others, are cousins of the sort of integrity we seek in a person from a moral point of view, and also of the sort of continuity and stability and rootedness we value in a legal system.

As Dworkin makes surprisingly clear in *Law's Empire*,[21] and as John Feerick would be the first to admit, one cannot always know that one is doing the just or the right thing. But one can always try. And one can try to be someone or something or some community. Just as we value integrity in others, in part because it allows us to know what we are contending with, so do we value integrity in the law, in part because our freedom and our sense of equal worth are enhanced if we can count on the rules and the system actually being solid and coherent. Both in other people, and in the legal system, integrity is important because it is important to be something at all. In this sense, too, integrity is important in oneself.

And now for the practical question: what if integrity points in different ways? This question should not trouble us, at least not in that form. For it is a mistake to think that the concept of integrity should really be a guide in adjudication. Duties of honesty, conceptions of role, commitments of principle, and methodologies of synthesis should

21. *See* Dworkin, *supra* note 10.

guide judges; each may contribute to or constitute a form of integrity, but that is not to say that integrity is itself the guiding light. If conflicts of integrity are troubling, and perhaps they are, then there are two sources of trouble, one practical and one philosophical. The philosophical problem is that it would be nice to be able to tell a story according to which all forms of integrity could be simultaneously realized. I have not actually argued against this; I have only argued that there is no reason to believe this will always be true, and plenty of reason to believe that it will sometimes not be true. It would be nice if it could always be true, but it is not really surprising that it might not be—it is just philosophically disappointing.

The practical problem, if there is one, is that of deciding what to do in adjudication; how much weight to give principle, role, candor, systematic concerns, etc. My reflections suggest that there is no reason to believe that there will ever be a framework that will order all of these considerations. But none of you believed there would be, anyway. As Dworkin's metaphor of Hercules suggests, this requires the hard work of judging.[22] And, of course, it requires judgment.

22. *Cf.* Abner Greene, *The Work of Knowledge*, 72 Notre Dame L. Rev. 1479 (1997) (asserting that detailed work of adjudication, rather than overarching interpretive theory, is necessary for excellence in statutory interpretation).