

## **The Loneliness of the Long Distance Judge: Integrity as an Imperative**

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*The Loneliness of the Long Distance Runner* is a 1959 short story which was in 1962 released as a movie in the United Kingdom. Smith, the young protagonist, is blessed with a capacity for great physical and mental endurance; these gifts enable him to excel in distance running. Despite his natural talents, however, Smith stumbles through life as an unreconstructed “rebel.” Regrettably, he squanders his good fortune. He is brought down by his view of life as little more than a battle of wits, in which he must confront and defeat the forces of the mainstream establishment. Specifically, Smith’s unvarying goal is to frustrate the efforts of authoritarian figures (such as the headmaster of the reform school where he is an inmate) to make him conform to accepted, legal norms in his everyday behavior. Thereby, Smith believes, he is able to express his *integrity*.

Smith's notion of *personal integrity* is a badly distorted one. It is grounded in the flawed view that integrity is defined as a deep-seated commitment to be honest with one’s self and to act in conformity with one’s world view at all

costs. Smith's pursuit of his concept of integrity diminishes him and robs him of an opportunity to live a virtuous life.

Judges, like the young long distance runner, often perform in an isolated and insular milieu as we seek to fashion legal judgments through the exercise of our mature intellect. Like Smith, we seek to employ physical and mental discipline as we go about our work resolving large numbers of private and public disputes. Also, as Smith was prodded by the reform school warden and police officers to obey the law, judges in an adversarial system are buffeted by the arguments of advocates urging that we conform our judgments to the advocates' conflicting views (often diametrically opposite views) of the facts and the law. Finally, like Smith, judges profess to live a life characterized by unstinting devotion to *integrity*. Unlike the erroneous approach of Smith, however, judges must not adopt the one dimensional, self-centered notion of integrity that doomed Smith to perpetual failure.

"Judicial integrity" is a much used term in legal discourse. But what is the core meaning of the term "judicial integrity?" How do we recognize it when it is present, and what clues are available to signal its absence? There is no single answer to these questions; acceptable answers could and do take several forms. Of value to judges, of course, is the guidance provided in enduring principles, such as

those prescribed in widely-accepted codes of conduct that serve as guideposts to help judges conform to an ideal of judicial integrity. First among these is the following general admonition that is regarded as the most important Canon of Judicial Ethics:

**A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.**

The commentary to this Canon counsels as follows, in part: “An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.”

Canon Two admonishes that:

**A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES:**

A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The commentary to this Canon elaborates as follows in part:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. The prohibition against

behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code.

Sober reflection on these canons reveals that judicial integrity is a two-part concept, and that the conscientious judge will always appreciate the importance of this fundamental duality in our notion of judicial integrity. The first and broadest of the two-part judicial integrity imperative is the imperative for institutional probity. As Professor Robert Bloom has noted, in its broadest manifestation, “The concept of judicial integrity may be described as the role of the judiciary in leading by example. A court can invalidate or rectify certain kinds of offensive official action on the grounds of judicial integrity. In this way, judges act as a beacon or a symbol to society for ensuring lawful acts by the forces of government. Thus, a court is wise to be cognizant of how its actions will affect the public perception of the judicial system. A court may not sanction or participate in illegal or unfair acts.”

In keeping with this broad, or macro, view of judicial integrity, Supreme Court Justice Louis Brandeis wrote some very profound words in his famous *Olmstead* dissent. In that case, a majority of the Supreme Court justices permitted the executive branch of the government to trench upon the legitimate

constitutional privacy rights of persons suspected of criminal activity through the government's use of wiretaps employed without prior judicial approval. In his dissent, Justice Brandeis reasoned as follows:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the Government may commit crimes in order to secure the conviction of a private criminal-- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Indisputably, the concept of judicial integrity as an institutional imperative is shared by judges around the world. The Speaker of the Ugandan parliament, Edward Ssekandi, made similar observations, for example. Ssekandi urged Ugandans to scorn corruption as a national cancer that deserves condemnation of the highest order. The Speaker was commenting on the Integrity Survey done in Uganda that implicated the judiciary as one of the most corrupt institutions in Uganda. Ssekandi who was opening the judicial integrity workshop at Nile Resort, Jinja, said it is painful and disappointing to hear of corruption in the judiciary, executive or the legislature because this threatens democracy and good

governance. He said culprits should be exposed and punished severely. The then chief justice, the Honorable Benjamin Odoki, said the objective of the workshop was to produce recommendations for reforms in order to strengthen judicial integrity and improve effectiveness and efficiency in the entire judicial system.

The Danish ambassador Flemming Pedersen echoed these views when he said the integrity of the judiciary is fundamental because it was one of the pillars of a democratic society.

In addition to this broader notion of judicial integrity, there is also a narrower, more focused, concept of judicial integrity. At this micro level, the imperative of judicial integrity is concerned with the day-to-day behavior of the individual judge and his or her obligation to comport himself and herself, both on and off the bench, in a manner that directly and indirectly enhances the public reputation of the judiciary.

So viewed, it is clear that the need to guard against practices and behaviors which are corrosive of judicial integrity is not limited to instances of corruption based on financial considerations inimical to the existence of a neutral and impartial judiciary. In the more narrow, micro sense of judicial integrity, the absence of judicial integrity can be glaring in other contexts, as well.

A rather notorious case from the United states illustrates my point.

The then newly-elected Chief Justice of the state of Alabama in the southern region of the United States, Justice Roy Moore, provoked an unseemly federal-state judicial confrontation by secretly installing-- at night after the building closed-- a 5,280-pound monument featuring a granite tablet on which the Ten Commandments are etched. He placed it in the center of the state courthouse lobby, cordoned off by velvet ropes, where it is impossible to miss. Justice Moore asserted boldly that he would never remove it.

In a case brought to challenge Justice Moore's actions, federal district judge Myron Thompson of the United States District Court in Montgomery, Alabama, ordered Justice Moore to remove the monument on the ground that its presence in the courthouse violates the constitutional principle of separation of church and state, a bedrock principle of our constitutional scheme of government. Judge Thompson wrote that the monument is "nothing less than an obtrusive, year-round religious display intended to proselytize on behalf of a particular religion, the chief justice's religion."

According to some observers, Justice Moore's motives seemed to be political as well as religious. In Alabama, state supreme court judges are elected. The monument stunt made Moore a popular figure with evangelical Christians, who are a powerful force in the state. Moore had earlier become an instant

Alabama celebrity in 1992, when as a lower court judge, he placed a plaque of the Ten Commandments in his courtroom. The American Civil Liberties Union sued, and another judge ordered Moore to take it down. Moore refused and campaigned for the state supreme court calling himself the "Ten Commandments Judge."

Acknowledging that the Ten Commandments can serve a historical and educational purpose as a model code for good citizenship, Judge Thompson ruled that Moore went "far, far beyond" that. Judge Thompson noted that Moore had installed the huge monument in the most prominent place in a government building with the specific purpose of establishing recognition of the "sovereignty of God, the Judeo-Christian God, over all citizens" regardless of their personal beliefs or lack thereof."

This case dramatizes the crucial role in American life that judicial integrity plays in our system, and how a judge determined to pursue a one dimensional idea of "judicial integrity" can, like young Smith, the long distance runner, pervert the concept of integrity into an empty vessel lacking meaningful content. Ask yourself whether a judge who does what was done here has acted "in a manner that promotes public confidence in the integrity and impartiality of the judiciary" as required by canons of judicial ethics.

The Alabama case described above reflects how the exalted status of

First Amendment liberties in the United States, including free speech rights and rights of religious freedom, has given rise to a potential crisis in the protection and maintenance of judicial integrity. The potential crisis arises in respect to the election of judges, a common feature of American judiciaries in the state court systems. Some years ago, the Supreme Court struck down an attempt by the state of Minnesota to regulate the political speech of candidates for judicial election. The state sought to justify its speech restriction as one that it thought necessary to maintain the integrity of its judiciary. Justice Kennedy, while voting with a narrow majority of the Court to strike down the regulation, went to great pains to explain that the Court's respect for the First Amendment in no way signaled a disregard for the imperative of judicial integrity. He stated:

Nothing in the Court's opinion should be read to cast doubt on the vital importance of [the state's interest in fostering and maintaining judicial integrity]. Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order. Articulated standards of judicial conduct may advance this interest . . . . To comprehend, then to codify, the essence of judicial integrity is a hard task, however. The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth . . . . Much the same can be said of explicit standards to

ensure judicial integrity. To strive for judicial integrity is the work of a lifetime. That should not dissuade the profession. The difficulty of the undertaking does not mean we should refrain from the attempt. Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The legislative bodies, judicial committees, and professional associations that promulgate those standards perform a vital public service . . . .

As Justice Kennedy and the other justices candidly observed, and as recently retired Justice Sandra Day O'Connor has emphasized, the 38 state court systems in which judges are elected (and must periodically mount campaigns to get reelected to remain on the bench) pose challenges to the maintenance of judicial integrity. While the election of judges may arguably bring an element of public accountability into the judge's work, it is also a source of unrelenting pressure having a natural tendency to undermine the counter-majoritarian independence of judges. By counter-majoritarian independence, I mean the protection of minorities from majority will, or in other words, the willingness on the part of judges to issue unpopular decisions when that is what the law or justice require. Any genuine concept of judicial integrity must include a judge's willingness to issue such judgments when the law and justice so require. Electoral campaigns pose a potential threat to the willingness of judges to do so.

In this regard, as the first canon quoted above sets forth, there simply

is no doubt that, at both the institutional level as well as the individual level, and as Judge Pauline Newman of the federal appeals court in Washington has stated: “Judicial independence and judicial integrity are inseparable.”

The intimate relationship between judicial integrity and judicial independence is evident in the structure of the United States federal judiciary. Federal judicial integrity and independence is grounded in Art. III, Section 1 of our federal Constitution, which states in part, “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” These are often referred to as the twin protections of life tenure and salary. Unlike a state court judge, a federal judge cannot be removed from office absent impeachment proceedings for bad behavior (i.e., commission of a “high crime or misdemeanor”), and a federal judge’s salary cannot be reduced during his or her tenure. In other words, a judge cannot be removed or punished financially for issuing decisions that someone powerful does not like. In this way, Alexander Hamilton explained in Federalist Paper 78, the drafters of Article III sought to insulate the federal judiciary from potential pressures, from either the representative branches of the federal government, or the citizenry; pressures that might skew the decision making process or compromise

the integrity or legitimacy of federal court decisions.

But the Framers did not put the federal judicial power beyond the reach of the people's representatives. As always in this system of checks and balances, there are many subtleties in play when one inquires further. The beginning of Article III, Section 1 states, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Pursuant to this power Congress did, in the Judiciary Act of 1789, establish inferior Courts-- the federal district courts and later the courts of appeals. But scholars agree that since Congress has the power to establish inferior courts, it likely also has the power to abolish them, as long as the salaries of sitting judges are not diminished. So Congress could abolish the federal district and circuit courts and continue to pay sitting judges until we all die off. All that would remain would be the state courts and the United States Supreme Court. Now there might be a due process argument requiring the existence of trial level courts to adjudicate federal claims, but Art. III, the provision of the Constitution granting the judiciary power, would not stand against abolition. My point here is not that this is likely to happen. My point is that judicial independence, as a correlative of judicial integrity, within an effective system of checks and balances, can be a complicated affair.

Ultimately, to achieve and maintain legitimacy, whatever may be the structural details of the judicial branch of a government founded on democratic principles, a community of judges must keep faith with the individual and institutional values embedded in the complementary concepts of judicial integrity and judicial independence. Popular and widespread respect for the judiciary, and thus for the Rule of Law, will only be accomplished if this is regularly-- indeed, unflinchingly, achieved. Absent judges impartially evaluating evidence, secure in their independence in the proper application of principles of law and justice, the Rule of Law would be, like *The Loneliness of the Long Distance Runner*, a fiction. Society would quickly slide back to a regime of the powerful exercising their power according to who it affects-- the rule of men, not the Rule of Law, and cherished democratic principles would be lost.

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