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THE POWELLIAN VIRTUES IN A POLARIZED AGE

J. HARVIE WILKINSON III*

The American legal culture is profoundly polarized today. This polarization extends to the very nature of law. The traditional view of how the legal system does and should function has broken down. Ours is an age which is skeptical of all authority, and that includes the authority of the law. The sense of estrangement from social institutions does not exempt the courts. Indeed, there are those who view the application of law as nothing more than an act of human preference and will—in other words, merely as a form of politics. Unavailable and incomprehensible to the dispossessed, the law symbolizes, to the indeterminists, nothing more than the subjective preferences of those in positions of power. In their view, the legal culture perpetuates the oppressive divisions inherent in American society—divisions primarily along the lines of race, class, gender, ethnicity, and the like.

This perception is vigorously opposed by those who insist that the rule of law embodies an objective component, that relativism seems little more than a pathway to confusion, and that indeterminacy portends the demise of the social contract. The dominant view in our legal culture remains that some answers and some reasoning are objectively “better,” in a legal sense, than other answers and reasoning. Lawyers might disagree, sometimes quite vociferously, about which is better, but the majority of lawyers rejects the belief that equally plausible legal arguments can always be made for any position.

Not only is the nature of law the subject of strenuous debate. The polarization and politicization of our legal culture is reflected in several other ways. Perhaps the best example is the increasing hostility of confirmation hearings on the president’s nominees to the Supreme Court. Deep differences in society over such issues as affirmative action and abortion have led to fights characterized by nothing so much as an absence of restraint. During the nomination battles over Robert Bork and Clarence Thomas, the instrumentalities of modern mass political action and communication were used by opponents and supporters alike—tools such as thirty-second television ads, bumper stickers and buttons, and detailed personal exposés involving everything from which church the nominee attends to the life history of the nominee’s spouse and even to what movies the nominee rents from his local video store. Such trivialization of the judicial confirmation process ironically reflects the frantic perception of high stakes—stakes that have inevitably risen with the transfer of more and more political business into the courts.

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Polarization of the legal culture can also be seen at the nation's law schools. Tenure decisions—the academic analogue of confirmation hearings—are alleged to turn at some schools on a professor's perceived allegiance to one school of thought rather than another. Polarization has unfortunately filtered down to some student bodies as well. The absence of consensus on fundamental assumptions of the legal culture—or even on the need for consensus itself—has in turn endangered the basic elements of civility. Discussions both inside and outside of classrooms may resemble shouting matches with little meaningful intellectual exchange or thoughtful re-examination of assumptions.

Finally, I do not exempt lawyers or judges from this general polarizing trend. Trust within the legal profession is not what it once was. The maxim that the worthiest of adversaries in court are the warmest of friends outside of court may not be so true anymore. The debate between judges is conducted at a high decibel level also, and the need to depersonalize all judicial disagreements must be kept continually in mind.

I mention all these things because they may help us to recognize what a treasure we have in Justice Lewis Powell. I can think of no one who has worked harder to ease rather than exacerbate tensions in our society. His demeanor suggests open-mindedness and compromise. His has not been the harsh voice of a harangue, but the soft voice of persuasion. He has listened to litigants, not lectured them. He has been considerate to colleagues. He has treated both people and their points of view with consummate respect. He has not washed his hands of the difficult disputes, but he has viewed the ultimate role of the judiciary in our society as that of mediator and facilitator, not as dictator. Under Justice Powell's approach, in sum, judges play an important role—albeit, in the final analysis, a limited one—in contributing to consensus both within our body politic and our legal culture.

I ask you to contemplate how Justice Powell's personal characteristics manifested themselves in his jurisprudence. First, the tool that perhaps most clearly distinguishes Powellian jurisprudence from that of the Left and the Right is balancing: the Justice disfavored bright-line rules and instead preferred constitutional dispositions that weighed very carefully the private and governmental interests at stake. Second, Justice Powell often sought to frame rulings narrowly and to base a decision only upon those principles that were essential to the decision. Third, and closely related to the second, he wanted the facts. As a former practitioner and litigator, he was conscious of the importance of facts; he relished the facts; he placed stock in them. The rule of decision was strictly based on the facts of the case then before the Court, with the results of cases with differing facts left for the future. All of these rules functioned to maintain the essentially incremental nature of adjudication, which allowed continuous calibration and re-evaluation of existing doctrine by a Court functioning in a traditional common-law fashion.

A fourth characteristic of Powellian jurisprudence is Solomonian results. He has been a judge who made litigants feel they should have settled the case. He often eschewed decisions that wholly rejected or wholly accepted

the philosophical positions advanced by the parties. Instead, he sought to craft decisions that gave something to both sides, that recognized candidly the closeness of the case, that honored the legitimacy of two opposing positions and that sought to ensure that the adjudicatory losers did not leave court feeling disenfranchised and abandoned by the legal system.

Fifth, and finally, Powellian jurisprudence treated legal principles not as hard and fast rules but, rather, as presumptions that could be rebutted in an appropriate case. In this way, judicially crafted rules functioned to guide judges but not to blind them.

Now, any significant figure will be subject to criticism, and Justice Powell has had his share. Many wished Justice Powell would become an unabashed partisan—mind you, for their own point of view. Many recognized his stature and sought, unsuccessfully, to turn it to their purposes. The Powell approach was also criticized for providing insufficient guidance to the lower courts, and for a lack of predictability which bred litigiousness in a society already too prone to resort to litigation.

What has been overlooked in recent years, however, are the advantages of the Powellian approach. It is sometimes claimed on behalf of bright-line rules that they reduce the impulse inherent in judges to decide cases based on their own personal policy preferences by committing the judge to an indisputable principle of law. Yet bright-line rules, valuable though they may be, do not hold all the answers. Trial courts are naturally uneasy with hard-and-fast rules that are dictated by appellate courts and that seem to tolerate grave injustice in individual cases, even if such cases are a minority. And the injustice created in particular cases by a bright-line rule is likely to mark it as a target for judicial erosion or overruling when, over time, the judicial philosophy of the Court evolves. Over the long haul, greater stability may be engendered by presumptive standards over which competing viewpoints can struggle for emphasis, rather than by hard-and-fast principles which admit of no exception.

Perhaps the most distinctive feature of the Powellian approach, however, is its emphasis on the judicial role in facilitating the development of consensus over potentially divisive social issues. Our history is, unfortunately, replete with judicial attempts to preempt social conflict through constitutional decree—attempts that have all too often aggravated such conflict rather than ameliorated it. The Powell approach sought to ensure that the most volatile issues in our society did not quickly achieve definitive outcomes in the courts. He wished both to leave open the channels of judicial debate and to ensure that the “losers” in court (if they so recognized themselves) took not to the streets but rather to the voting booths and to the legislatures.

It has been customary to speak of our “social fabric” and “our sense of community”—in fact, such expressions have become almost a cliché. But a fabric is made of interwoven strands, and our legal culture today is in danger of unravelling. There has never been a time when the legal profession was in greater need of Lewis Powells. There is a temptation now to think of hostility as the norm and of civility as a bygone thing. Justice

Powell's career will always call upon lawyers to seek common ground. So what shall we make of his distinguished example? Will we view it as the inspiration for a stronger legal order, or treat it merely as an occasion for nostalgia? I do not think of Justice Powell as the last great conciliator, but as a prophet of mutual respect and understanding. His is a healing example, if we can but heed it.