PROFESSOR MICAH SCHWARTZMAN: Thanks James, for inviting me in to the Managing Board of the Law Review, for having me. My topic today is whether judges have a duty to be sincere or candid in their legal decisions. And I hope you'll indulge a bit of philosophy about this topic. The paper that this talk is based on is fairly theoretical, and I just want to walk through the various parts of that paper and then discuss some of the principles. I've outlined those principles on this handout so that you can see the progression of the argument. I'll move pretty much in lockstep with your principles as they're laid out there.

So let me start with what I take as a fairly uncontroversial background observation, which is that there is a strong presumption in favor of truthfulness and against lying that applies to most of our interactions with other people. A similar presumption would seem to apply in the context of judicial decision making. So barring exceptional circumstances, judges should be truthful in their judicial decisions. They shouldn't knowingly make statements that they think are false or seriously misleading. That's a starting hypothesis.

I'd say that principle defines much of the conventional wisdom in this area. It seems very well entrenched, the idea that judges ought to be candid in their judicial decisions. 20 years ago, David Shapiro wrote an article in the Harvard Law Review defending the idea of judicial candor. And he asked, who after all would be a grinch-like enough to argue for a lack of candor. This seems pretty uncontroversial. And so part of my job is to tell you that there are some grinches out there, and then to give you an account of why I think they might be wrong. OK, so some grinches.

I think actually the literature is full of examples in which people argue that judges should be less than candid. And let me give you just a few examples to kick things off, and you can mull them over while I talk about all this overly fancy philosophical stuff. So the first example comes from Dean Jeffries biography of Justice Lewis Powell. After Justice Powell circulated his opinion in *Bakke*-- right, everyone is familiar with this decision. If you're in my Con Law class, we spent some time talking about *Bakke,* which is the Supreme Court's first pass at affirmative action in higher education. The decision was controversial even before it came forward. And Justice Blackmun spent a long time trying to figure out whether he was going to join the opinion many, many months.

In the meantime, Justice Blackmun authored an opinion in a tax case called *Frank Lyon Company against United States*. Justice Powell is reported to have said privately about the opinion, quote, if an associate at Hunton, Williams had done this for me, I'd have had him fired. That alone would not have been so surprising maybe coming from Justice Blackmun. You might or might not agree about the quality of his opinions. I mean, my Con Law class, we'll read *Roe* next week and you can make up your own minds about that. But Powell joined Justice Blackmun's decision anyway, saying to one of his clerks, we don't want to upset Harry in *Bakke*. So he goes ahead and joins the opinion regardless.

Powell, it's clear from Dean Jeffries biography, agreed with the outcome in *Frank Lyon Company.* And so I think there are a few ways to interpret his decision to join Blackmun's opinion. So first, he might have just disliked the style or the construction of the opinion, even though he agreed with the reasoning for it. Right, that might mark out one possibility for why he joined the opinion. A second option is that he disagreed with the reasoning, but he signed on anyway because he wanted Blackmun's support in *Bakke.* And a third option is that he thought that Blackmun's reasoning in the case was sufficient, but that if he'd written it himself, he might have articulated the reasons for the opinions based on some other rationale.

I think on the second and third of those interpretations, we can ask whether Justice Powell's decision conformed with the principle of sincerity or candor. And after working through some of those principles, I want to try to come back to the example and do just that. Let me give you two more examples. One involves *Bakke* itself. So one of the more famous commentaries on that case is by Guido Calabresi, who is a judge on the Second Circuit. He describes the case as a tragic choice, a choice between two competing moral values. One is equality of opportunity, and the other is correcting for past racial injustices.

Calabresi says that instead of choosing between those values, the Court in *Bakke* created what he called a legal subterfuge. The Court averted its eyes. It fudged. It shaded honesty in order to avoid having to face the public with this tragic choice between two values. I think that example raises the question of whether sincerity or candor should ever be traded off in cases of moral conflict so that as Calabresi says, we can preserve our commitment to both of the competing values. The idea being if we don't have to face the choice, then we can continue to publicly affirm our commitment to the various conflicting values. We can, as it were, have our cake and eat it too.

The third example is not related to *Bakke.* This one comes from *Bush vs Gore.* In a book that came forward after *Bush v Gore,* Judge Posner on the 7th Circuit who you may know from your readings in Law in Economics, but who has written quite widely, Judge Posner says the Justices Rehnquist, Scalia, and Thomas joined the majority's equal protection analysis for pragmatic reasons. Had they not, there would have been a majority to stop the recount but no majority on the rationale setting up some cycling arguments that would have weakened the legitimacy of that decision.

So in his book, *Law, Pragmatism, and Democracy,* Judge Posner says that it was possible the three conservative justices joined an opinion they didn't really believe. Here's what Posner says about that scenario. He says quote, if the only things that matter to a decision are its consequences, the dishonesty which might seem the right word for subscribing to a judicial opinion that one thinks all

wrong, while no doubt regrettable, becomes just another factor in the decision calculus. Posner concludes, a judge will often join an opinion with which she doesn't actually agree.

The example of *Bush v Gore* you might think is exceptional, maybe even *Bakke* looks like that too. But pragmatists have argued that candor can be sacrificed for any number of reasons. Let me give you a few more of those. So for example, it can be sacrificed to secure preferred outcomes through strategic action on multi member courts, for preserving collegiality or civility, for continuity coherence and clarity of legal doctrine, to prevent let's say the unnecessary proliferation of judicial opinions, and also perhaps most importantly, to maintain the perceived legitimacy of the court. Judges have the impression that if there is dissent on a court, that weakens their decisions. And so by forming larger majorities, they strengthen the legitimacy of their decisions. If sacrificing candor is necessary to achieve that end, then so be it.

The job of the paper that this is based on is to rescue an idea of judicial sincerity against the various pragmatic criticisms that have been raised against it. And I try to do that by articulating what I think are some intrinsic values in the process of adjudication, and show how those values can be worked up into an account of a principle of sincerity that applies in the context of judicial decision making. My argument has two basic parts, and it tracks the handout that you have. So the first part of the argument is to separate out the ideas of sincerity and candor. And then the second part of the argument is to give some justification for a principle of judicial sincerity, to show how it's related to some important values in adjudication.

I'll say this, my argument has on the one hand, a deonta component. By that, I mean a component that deals with the rights of litigants and the rights of people who are affected by the decision. And it has a consequentialist component, a component about how best to satisfy those rights. It should follow from my argument that judicial candor is desirable, but one of the interesting points of following through the logic of this argument is that although candor is a value on this view, it's not necessary for legitimate adjudication. So I want to distinguish between what I'm calling judicial sincerity and judicial candor. I think judicial sincerity is a narrower concept. And I want to say that's all that judges need to have in order to attain legitimacy in their judicial decision making.

OK, so that's the broad structure of the argument. Let me walk through some of these principles then. But I want to start with definitions of sincerity and candor. You might think at the end of all this that I've been sort of picky about the definitions, or overly precise, or aiming at too much precision. I think in defense of that, I think it helps us clarify some intuitions we might have about judicial opinions. You've all read already a lot of them, and you may have some views about what judges ought to say

or don't need to say in those opinions. And I want to try to work through those intuitions to achieve something of a more systematic view.

OK, so first, the definition of sincerity. By that I just mean judges are sincere when they say what they mean. I think the idea of sincerity captures the view that people ought to say what they believe. There is some connection to truth-telling here because when you say what you believe, you tend to say what you believe is true. So I have a fairly simple definition of sincerity. If you're philosophically minded, you might think there are more sophisticated views about this. This is a pretty stripped down version of the concept. We can talk about that if you think that there are better definitions. But for now, this is all I mean by that idea.

I think by contrast, candor is a more complicated concept. I think our intuitions about candor tend to divide between two ideas. And I've tried to separate them out on the handout. So one is an idea of candor as honesty. This just says judges are candid when they don't knowingly mislead others about a legal decision. That's one of you. When people talk about judicial candor, I think they frequently mean this. But they sometimes mean something else, right? They sometimes mean what I'm calling candor as transparency. Judges are candid when they disclose all the information they believe is relevant to a legal decision. Sometimes people mean that when they talk about judicial candor in the literature.

I'm not sure that our ordinary intuitions about ideas of candor really help us distinguish between those arguments. And so instead of trying to fight over whether judges ought to be candid or not candid, my strategy is to do something a little different. I want to say look, what we really care about is should judges disclose certain types of information about decisions. And once we figure out what they need to disclose, do they have to be sincere about what they've disclosed. In other words, do they have to mean whatever assertions or propositions they've disclosed about a decision. I think we can talk about things in terms of sincerity and disclosure, and set aside for the time being, the idea of candor. Once we've got those distinctions worked out, I think the problem of choosing intuitions over ideas of candor becomes a lot less pressing.

So with that distinction in place then, I sort of in the paper pick up an argument at that point to develop the principle, what I'm calling a principle, of judicial sincerity. Let me say this by way of background before starting the argument. To get an argument off the ground like this, you have to say something about the role of judges in a legal system. You have to say something about judicial function or the judicial role. And you might think you need a fully worked out theory of what judges should be doing in order to have an account of judicial ethics, and underneath an account of judicial

ethics, some conception of judicial candor or judicial sincerity. You might need the whole shebang philosophically in order to get out particular arguments in specific cases about whether judges ought to be sincere.

I don't opt for that strategy. I don't think we need to lay out a full theory of adjudication to get up and running a theory of judicial ethics, let alone a theory of whether judges ought to be sincere. I think we can do a lot with much less than a full theory of adjudication. If that seems really abstract, let me try to make it a little bit clearer by talking about what I'm calling the principle of legal justification, which is number three on your hand. This principle says adjudication is legitimate only if judges have sufficient reasons to justify a legal decision. Let me point out two things about this principle. The first is that it leaves open what it means to have a legal reason. I don't tell you anything about what counts as a good legal reason. Whether you're a textualist, or a purposivist, or a pragmatist, or whatever your theory of adjudication is that it tells you what a good reason is, I don't have anything to say about that. Right I just want to be open with respect to a whole range of theories of adjudication.

My only claim is that this principle is necessary to a theory of adjudication. It serves as a necessary condition. So you don't need a full theory, but I think you do at least need this much, that adjudication is only legitimate if judges have sufficient reasons to justify their decisions. Let me point out then something else about this principle, and that is that judges have to have sufficient reasons for their decisions, but I don't think yet we should build into the principle that judges have to give their reasons, or that they have to make their reasons public. I said before, I'm going to try to be very careful about the way the argument proceeds. And part of being careful is to see that there is an extra step from saying that judges have to have a reason, and comparing that principle to the claim that judges have to give their reasons. I think we ought to take that extra step, but I want to make sure that we've argued for it before we do.

So here's my argument for the principle of legal justification. There are a couple arguments that I give in the paper, but the basic argument is I think that judges have to have reasons in order to respect the rational capacities of citizens and of litigants, the people who are affected by the decisions and who are expected to follow the reasons given to them. That is, reason giving respects the ability of citizens to follow reasons. It may even mark out, if you can go past that, you may even mark out their ability to act as rational beings. That may sound like a deep claim. I'm happy to talk more about it. But just so that you know, what I think is doing the work of justifying this first principle.

Let me say something then in supporting the principle of what I'm calling public legal justification, all

right, taking the extra step. Not just the judges should have reasons, but they should give them. Why might that principle be justified? I think, again, there are couple reasons. So the first is just like the principle before, I think it respects the ability of citizens and of litigants, those affected by the decisions to follow reasons. But I also think, and here is a second consideration, that satisfying the principle creates conditions for improving the quality of legal decisions. I call this an epistemic argument. It's an argument about improving the decision making process, improving the reasons that are given, ensuring that they do in fact justify the decisions that judges give.

I think that the argument from respect, and the argument from the quality of legal decisions are interrelated. They're connected. And they're connected in the following way. The first requires that judges treat citizens with respect by articulating justifications for the use of the state's power. But it's important to see that judges can make mistakes. Right? Judges, in Hart's famous phrase, may be final that they're not infallible. To the extent that judges can make mistakes, it's important for them to say something about their reasoning process so that those mistakes can be corrected. So that the reasons given to citizens and to litigants, and so forth are actually justificatory. In other words, that they do indeed support the way that the state has chosen to exercise its coercive power.

At this point, you might think, well, we've just stumbled on to a principle of sincerity. We've defined this principle of public legal justification. Principle four, it says, adjudication is legitimate only if judges have sufficient reason to justify a legal decision and make that reason publicly available to those governed by it. Why isn't that principle just a principle of sincerity? If you satisfy principle number four, this is a bit of a philosophical puzzle for you. But if you satisfy this principle, why aren't you automatically sincere? Why haven't we just kind of stumbled onto the principle that I said I was looking for?

In the paper, I give a kind of complicated response to this concern, but let me try to summarize it for you here. The summary goes like this. It says judges can offer what they think are sufficient reasons without actually believing those reasons. And that seems like a puzzling thought. There is a scholar in the literature who's articulated this argument better than I think I could. So let me just quote his objection for you. His name is Martin Golding. And he writes, it would be unfortunate if the judge did not sincerely hold the reasons he explicitly gives. But in an important respect, this fact, whenever it is a fact, is irrelevant to the justifiability of the decisions. The justifiability of the decision depends on how well the decision is reasoned. And the argument here is as long as judges give what are actually sufficient justifications, who cares whether they're sincere about them. That's the objection. It just says sincerity is irrelevant, a big red herring, right? It doesn't really matter whether judges believe

what they say in their decision as long as the decisions justify their outcomes.

I take that as a pretty serious objection to the position that I'm trying to defend. So I think we've got to go past number four, this principle of public legal justification, to what I'm calling a principle of judicial sincerity. And that principle says this. It says, adjudication is legitimate only if judges sincerely believe a reason is sufficient to justify a legal decision, and makes that reason publicly available to those governed by it. What I want to know is why is that principle justified? If you think it's justified and if so, why?

So here's my argument for why I think it's justified. I think it's justified because I think it's the best way for judges to satisfy the first principle I articulated. That's number three here, which is the principle of legal justification. My argument is that judges are more likely to give sufficient reasons when they think their reasons are sufficient. I'll try to say that again because it's a little bit complicated. My claim is that judges are more likely to give sufficient reasons when they believe the reasons they give are sufficient. Otherwise, they're going to be giving you reasons they don't believe are any good. And I think it's kind of puzzling why we would expect judicial decision making to produce overall more justified outcomes if that's the case, if judges don't adhere to some principle of judicial sincerity.

In the paper, I say the duty imposed by this principle of judicial sincerity functions like what I call a subjective correlative to the principle of legal justification. That is, as a subjective matter, when judges try to accomplish giving sufficient reasons, they're going to do a better job of that when they actually think their reasons again, as a subjective matter, are sufficient. There are, I think, some things for me to say to guard against misunderstandings about the way that argument works. But because we've got some time for Q&A, maybe I can try to clarify it a bit later if it's not clear now.

Let me at this point come back to the idea of judicial candor, and try to connect some of these concepts. So you might be wondering at this point, we've spent all this time talking about judicial sincerity. Why does that bear, or how does it bear on the idea of judicial candor? Let me bring us back to the Justice Powell example to show how it would work. My claim is that the principle of judicial sincerity is narrower than what's usually thought to be a requirement of candor. So in the Powell example, I delineated two possibilities that are relevant here. One, Powell might have joined Blackmun's opinion even though he didn't agree with his reasoning. If he did that, then I think that Justice Powell violated what I'm calling the principle of judicial sincerity. He joined an opinion, but didn't agree with the reasoning for it.

On the second option, he might have believed that Powell's decision gave sufficient reasons for the

outcome of the case, even though he would have decided the case on alternative grounds. If that was Powell's logic in joining Blackmun's opinion, then I think he satisfies the principle of judicial sincerity, but I don't think he's candid. He joins an opinion whose reasoning he thinks is sufficient, even though he thinks that there are probably other reasons that would have satisfied or made sufficient the outcome, maybe even better reasons, other grounds on which the decision might have been made.

My argument is that if that was the case, still no one would have a reason to complain. d Powell would still have given a reason in joining that decision that he believed was sufficient to dispose of the outcome. And I don't think any litigant at that point would have grounds to complain about Powell's actions. So I think that captures the distinction as I want to draw it between candor and sincerity. And I want to defend for now the narrower version. Now how do I want to defend it? I want to say sincerity is necessary for legitimacy. I mean, a judge has to give a reason that he thinks is sufficient. And he has to believe sincerely that that reason is sufficient. If a judge doesn't do that, then the decision is illegitimate.

I think it would be a good thing if judges went beyond that, and were candid about the reasons for their decisions. But I'm not sure that that's required for the legitimacy of a decision. I can imagine cases in which judges would have lots of reasons and would agree only on some of them with their fellow judges on an appellate court. And it would be enough for them to give their reasons in which they overlap, and just not saying anything more about the rest of them. I think there is some space for that here.

In the paper, I talk about some limits to the concept of judicial candor and judicial sincerity, some cases usually involving moral conflicts, where maybe the principle runs out and it should be sacrificed. I'm going to leave aside those limits for now. I've already put on the table I think a lot of philosophical principles, maybe one too many. But if you've got questions about the limits, I'm happy to talk about those.

The big picture point though is, I think that pragmatists and prudentialists, or whatever you want to call them have in many ways over the last 20 years, obscured the reasons why it's important for judges to give their reasons. They use lots of institutional kinds of arguments to explain why those reasons should be given. But of course, the institutional arguments can be easily counterbalanced. I think something somewhat deeper is going on, something that has to do with the nature of adjudication and how the values that are embodied in adjudication are best achieved. And I think that this principle of judicial sincerity does a better job than the pragmatists have indicated so far. It does a better job of capturing those values.

The point of the paper is not to defeat all of the possible pragmatists objections. It's just to put on a solid footing an argument for sincerity, and perhaps even candor, and then allow a debate about that principle to go forward. So thanks for listening.