# TRUTHFULNESS AND THE RULE OF LAW

W. BRADLEY WENDEL*

*"[I]t is the rational core of human institutions that is alone capable of keeping those institutions viable and sound, that can preserve them from deterioration, that can get them back on course after they have temporarily lost their bearings."*[1]

## I. INTRODUCTION

This paper is a defense of a principle of the public ethics of *truthfulness*, understood as a practice of reason-giving that contrasts with the raw exercise of arbitrary power.[2] Basic to the analysis here is the distinction between power, coercion, brute force, or domination, on the one hand, and justified, permissible action, on the other. Fundamental normative notions in moral and political philosophy such as rights, justification, legitimacy, and legality all attend in some way to this distinction.[3] On one influential conception of morality, an act is wrong if it would be disallowed by a set of principles that no one could reasonably reject.[4] In political philosophy, John Rawls argued that all citizens, which would certainly include public officials, have a moral duty of civility to explain how the policies they advocate for, and which involve the exercise of political power, are supported by reasons that all affected persons can be expected to endorse.[5] Common to these positions is the notion of reason-giving

* Edwin H. Woodruff Professor of Law, Cornell Law School. I gratefully acknowledge the research funding provided by the Judge Albert Conway Memorial Fund for Legal Research, established by the William C. and Joyce C. O'Neil Charitable Trust.

1. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 360 (1978).

2. BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 208 (2002) [hereinafter WILLIAMS, TRUTH].

3. *See, e.g.*, RAINER FORST, TOLERATION IN CONFLICT: PAST AND PRESENT (2013); STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 19–20 (2006); T. M. Scanlon, *Reasons: A Puzzling Duality?*, *in* REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 231, 238 (R. Jay Wallace et al. eds., 2004) (arguing that practical normativity presupposes that "we believe that some considerations are good reasons for a person to act in a certain way, and other considerations are not").

4. T. M. SCANLON, WHAT WE OWE TO EACH OTHER 153, 189 (1998).

5. JOHN RAWLS, POLITICAL LIBERALISM 217 (paperback ed. 1996) [hereinafter RAWLS, PL]. Rawls has in mind here the justification of the "big questions" – i.e., the constitutional essentials and matters of basic justice within a society. *See id.* at l–li. One goal of this paper is to suggest how the requirement of public reason can also serve as a component of the ethics of public officials insofar as they exercise political power in connection with more workaday matters.

and the acceptance (or rejection) of reasons by autonomous agents, each acting on their own judgment about the right, the good, and justice. Moral justification and political legitimacy acknowledge others as free and equal,[6] treat them with respect or as ends in themselves,[7] and establish a relationship of mutual accountability, by insisting that actions be based on reasons that are acceptable to those whose interests are affected.

Domination is the interference with the interests of another on an arbitrary basis.[8] Arbitrariness in this context means without reference to the interests of those who are affected—that is, without their opportunity to accept or reject the reasons underlying the action.[9] Conversely, a non-arbitrary action is one that is required to track the interests of persons affected by it. Giving reason in support of actions manifests respect for others as rational beings who can accept and act on these reasons.[10] A morally justified or politically legitimate action avoids domination to the extent it is supported by non-arbitrary reasons, i.e., those that respond in the right way to the interests of rational persons.[11] The ideal of the rule of law refers to a situation in which public (and, more controversially, private) power is constrained by the law and legal system so that arbitrary exercises of power are relatively unusual.[12] In both the moral and political case, imagine that someone whose interests are affected asks for a justification of the action. "Because I can" is not the right sort of reason.[13] It is arbitrary because it does not make any attempt to track the interests of affected persons, nor to offer something they could assess, and potentially endorse, from their own point

---

6. *See* David Dyzenhaus, *Liberty and Legal Form*, *in* PRIVATE LAW AND THE RULE OF LAW 94–95 (Lisa M. Austin & Dennis Klimchuk eds., 2014) (arguing that "the formal features of private law presuppose an immanent morality organized around the Kantian idea of the purposive agent whose freedom to enact his own purposes has to be made consistent with the same freedom of all other agents").

7. *See* Charles Larmore, *Public Reason*, *in* THE CAMBRIDGE COMPANION TO RAWLS 373–74 (Samuel Freeman ed., 2003) (observing Rawls holds that "[w]e respect others as ends in themselves . . . when in regard to their claims and interests we act on reasons that we are prepared to explain to them in the light of mutually acceptable principles").

8. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

9. *Id.* at 55.

10. DARWALL, *supra* note 3, at 79.

11. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 26–27 (2008).

12. *See* Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, *in* GETTING TO THE RULE OF LAW: NOMOS L (James E. Fleming ed., 2011).

13. I am being a bit glib here for rhetorical purposes, but "because I can" or "who's going to stop me?" is not much of an exaggeration of the attitude displayed by Trump and many officials in his Administration in response to objections grounded in generally applicable legal or moral norms. One of the other contributions to this Symposium leads off with a quote from long-serving political advisor Kellyanne Conway, who responded to an invocation of the Hatch Act (prohibiting partisan campaign activities by executive branch employees) by saying, "Let me know when the jail sentence starts." *See* Ann Ching, *Taking a Positive Approach to Government Ethics Training Using the West Point Model of Character Development*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 753 (2021). This contemptuous attitude toward normative authority stopping short of coercion is what I am summarizing here as "because I can."

of view. It is, therefore, an indication of domination, not a morally justified or politically legitimate action. A society in which powerful actors frequently did something and offered no attempt at justification other than to say, "because I can," would not be one in which the rule of law was respected.

The resort by public officials to lies,[14] propaganda,[15] Frankfurtian bullshit,[16] or "alternative facts"[17] is a means of exercising domination over the subjects of political authority. An asserted basis for an official action that is not supported by adequate and reliable evidence is not a reason addressed to others in virtue of their status as free, equal, and rational agents. Treating others with respect requires giving reasons that can be assessed for their empirical support as well as their normative attractiveness. Basing an exercise of official power on a factual claim that cannot be evaluated for its evidentiary sufficiency is just as much an act of domination as giving "because I can" as a reason for the action. The claim is not that reasons given must be *true*; rather, it is that truthfulness is a value that is central to the ethics of government officials. The Rawlsian strategy of focusing on shared public reasons that all affected individuals can accept is vulnerable to the objection that pluralism, disagreement, and political polarization undermine the liberal solution to the problem of establishing a stable and legitimate political order.[18] Not only that, but public-reason liberalism is vulnerable to hacking by actors who seek to undermine the shared basis for cooperative social and political life by spreading disinformation. Accordingly, the argument here aims at a process, rather than an outcome—truthfulness as a public ethic, rather than truth.[19]

---

14. *See, e.g.*, DAVID NYBERG, THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE (1993); SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978).

15. *See, e.g.*, JASON STANLEY, HOW PROPAGANDA WORKS (2015); RANDAL MARLIN, PROPAGANDA AND THE ETHICS OF PERSUASION 144–79 (2d ed. 2013).

16. Philosopher Harry Frankfurt distinguished lies and bullshit in a paper whose target was then-fashionable academic postmodernist theories of truth. *See* Harry G. Frankfurt, *On Bullshi*t, RARITAN Q. REV. 6, no. 2 (1986), *reprinted in* THE IMPORTANCE OF WHAT WE CARE ABOUT 117 (1998). The paper was subsequently reprinted as a stand-alone book. *See* HARRY G. FRANKFURT, ON BULLSHIT (2005). Lies, according to Frankfurt, are less threatening to truth because a liar must have the truth in view in order to deny it; bullshit is more corrosive because it is unconnected with any concern for truth, and thus severed from any constraint which might be provided by the accurate representation of reality. *Id.* at 30–32.

17. The term was first used by presidential advisor Kellyanne Conway in defense of then White House Press Secretary Sean Spicer's claim that the crowd at Trump's inauguration was the largest crowd ever, and certainly larger than Obama's. *See* Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Era of 'Alternative Facts*,*'* WASH. POST (Jan. 22, 2017, 11:44 AM), https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-ushered-in-the-era-of-alternative-facts/.

18. *See, e.g.*, Gerald F. Gaus, *Public Reason Liberalism*, *in* THE CAMBRIDGE COMPANION TO LIBERALISM 112, 122 (Steven Wall ed., 2015); DAVID MCCABE, MODUS VIVENDI LIBERALISM: THEORY AND PRACTICE (2010).

19. I have explored this theme previously, in connection with both legal and political ethics. *See* W. Bradley Wendel, *Truthfulness as an Ethical Form of Life*, 56 DUQ. L. REV. 141 (2018); W.

A subtext to the theoretical arguments in this paper may be a bit ambitious, but I will say it openly anyway: Thank goodness for lawyers and litigation! Yes, the United States is a litigious society, but it is a good thing, because litigation has structural features that make it resistant to lies and bullshit. In more theoretical terms, ideals in political ethics such as public reason and the rule of law are promoted by the peculiar, frequently noted, and just as frequently demonized American practice of resorting to lawsuits to resolve issues of public significance.[20] The practice of adjudication,[21] with its familiar features of constraints on admissible evidence, burdens of proof and evidentiary sufficiency requirements, threshold tests of good faith in pleading, and adversarial testing of factual and legal contentions, is highly appealing from the point of view of public ethics, because of the way it manifests respect for the moral agency of citizens.

In the circumstances in which this paper is being written—namely, the ongoing assertion by Donald Trump of claims that the 2020 presidential election was "rigged" or affected by widespread voting fraud, and the riot at the U.S. Capitol provoked by Trump's continued insistence on this falsehood—it is difficult to avoid the gravitational pull of the Trump Administration's history of untruthfulness. However, the aspiration of the paper is to provide something less ephemeral than another *cri de coeur* about the threat to our democratic experiment posed by Trump. The aim is instead to praise the often-maligned institutional practice of adversarial adjudication as one that has proven its value as a means of resisting authoritarianism.[22] The seemingly simple expedient of requiring government officials to give reasons, and that those reasons be the actual ones upon which an action was based, and that they have adequate evidentiary support, was frequently the sole check on efforts by Trump Administration officials to exercise arbitrary power.[23] American lawyers and

---

Bradley Wendel, *Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J.L. & HUMAN. 105 (2016). Reason-giving more generally is integral to my recent jurisprudential scholarship. *See* W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. Rev. 107 (2019).

20. A bit of a cliché, but a necessary reference at this point is Tocqueville's observation that "[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257 (Harvey C. Mansfield & Delba Winthrop trans., 2000).

21. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

22. As has been the case throughout my career, Bob Gordon beat me to the insight, and all that is left is to fill in a philosophical defense. *See* Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQ. L. 441, 449–50 (2010). In this instance, however, Gordon is more critical of lawyers and adversarial litigation than I will be here.

23. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551 (2019) (rejecting the attempt of the Secretary of Commerce to add a citizenship question to the 2020 Census because the reasons given for doing so were pretextual); Sierra Club v. Trump, 977 F.3d 853 (9th Cir. 2020) (affirming injunctive relief prohibiting Trump from diverting funds appropriated for military construction projects to border wall construction); Doe v. Trump, 957 F.3d 1050 (9th Cir. 2020) (denying motion to stay injunction against presidential proclamation prohibiting entry of certain immigrants not

legal scholars are accustomed to criticism of the mode of governance known as "adversarial legalism," in which party-controlled lawsuits are seen mostly as a social deadweight loss.[24] Yes, decentralized policymaking by means of litigation adds to the cost and complexity of governance, but it has the frequently unacknowledged virtue of channeling government power in a way that is responsive to the ethical values of accountability and reason-giving, and the requirement of giving the right sorts of reasons. To the extent this paper is motivated by the experience of living through the last four years, it can be seen as a bit of cheerleading for something many Americans love to hate—the legal profession and adversarial litigation.[25]

The paper proceeds as follows: Section II will provide, all too briefly, the normative pillars of the argument—morality as a system of reason-giving in response to demands for accountability, public reason as a solution to the problem of legitimacy in political philosophy, and the rule of law. One thing these normative practices share is the requirement of giving the right sorts of reasons as a justification of one's actions. Commitment by lawyers and government officials to the ideal of the rule of law, far from being a component of authoritarianism,[26] is one of the best defenses against the abuse of state power. Section III will then defend a principle of ethics for public officials that reflects the practices of adversary adjudication as a means of ensuring truthfulness as one of the foundational values in public ethics. The principle is as follows: In all public statements, and all considerations of the reasons in support of a government action, act as though the truth or falsity of matters in question will be subjected to the procedures of adversary adjudication including

---

showing health insurance coverage); Richardson v. Trump, Civ. Action No. 20-2262 (EGS), 2020 WL 5969270 (D.D.C. Oct. 8, 2020) (granting preliminary injunction against policy changes allegedly motivated by desire to slow down delivery of mail-in ballots); Washington v. Trump, No. 1:20-CV-03127-SAB, 2020 WL 5568557 (E.D. Wash. Sept. 17, 2020) (granting nationwide injunction against President and Postmaster General prohibiting them from no longer treating election mail as first-class mail); New York v. Wolf, Nos. 20-CV-1127 (JMF), 20-CV-1142 (JMF), 2020 WL 6047817 (S.D.N.Y. Oct. 13, 2020) (granting plaintiffs' motion for summary judgment on APA claims in action against acting Department of Homeland Security head after Department ended ability of New York residents to apply for Trusted Traveler programs).

24. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001). Fairness requires noting that Kagan has published an updated edition considering adversarial legalism in a more positive light, given its capacity to resist the arbitrary exercise of government power. Conservative historian Niall Ferguson criticized the transformation of the ideal of the rule of law into the dysfunctional rule of lawyers. *See Niall Ferguson: The Landscape of the Law*, BBC: THE REITH LECTURES (July 3, 2012), https://www.bbc.co.uk/programmes/articles/2wGL4ypn7C8N54r9flsvX3x/niall-ferguson-the-landscape-of-the-law.

25. For a similar argument in an op-ed format, see Bruce A. Green & Rebecca Roiphe, *Trump's Lawsuits Are Good for American Democracy*, HILL (Nov. 9, 2020), https://thehill.com/opinion/white-house/525008-trumps-lawsuits-are-good-for-american-democracy.

26. *See* William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709 (2012) (reviewing W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010)).

(1) rules of evidence and procedure, (2) threshold standards of adequacy and good faith, (3) prohibitions on making false statements of fact or failing to correct statements you subsequently learn to be false, (4) input from the other side, subject to similar constraints, (5) a neutral adjudicator who will assess the weight and sufficiency of supporting evidence.

To be clear, this is defense of a principle of ethics, not a proposal to require a full-dress adjudicative proceeding before taking any action. As the opening quotation from Lon Fuller suggests,[27] the idea is that the "rational core" of adjudicative practices can get the ethics of governmental officials back on track after it has temporarily lost its bearings.

## II. FOUNDATIONS

Morality, politics, and law are distinct normative domains, but they all share the feature of being concerned with reasons that arise out of our relationship with others. Reasons of the right sort, which can function as a justification for action in each of these normative domains, must be given from the standpoint of individuals who are affected by an action. Reciprocity is fundamental to justification. This is most clearly the case in ordinary personal morality, but also holds in political ethics, where I will contend that the Rawlsian requirement of a publicly shareable justification can be applied not only to constitutional essentials but also to discrete, retail-level actions by government officials.[28] It also informs the understanding of the venerable ideal of the rule of law, which in ethical terms reflects a manifestation by government officials of respect for the agency and dignity of subjects of political authority. The rule of law, and practices of legal argumentation and adjudication, also reveal the centrality of truthfulness as an ethical ideal, through the pervasive reliance upon standards of evidentiary sufficiency, reliability, and relevancy. To lawyers this sounds stunningly obvious. We take for granted that the law requires some rational connection between facts about the world and the exercise of coercive state power. But familiarity should not obscure the importance of the connection between the value of freedom from the arbitrary exercise of authority and the underlying values of agency and dignity. Legal procedures can exemplify the importance of truthfulness as an ethical ideal for official actors.

---

27. *See supra* note 1 and accompanying text.

28. In the introduction to the paperback edition of *Political Liberalism*, Rawls states that public reason does not settle specific questions of law or policy. It does, however, "specif[y] the public reasons in terms of which such questions are to be politically decided." RAWLS, PL, *supra* note 5, at li; *see also* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 767, 771 (1997) [hereinafter Rawls, *Public Reason*]. The argument given here therefore should be understood as an extension of the ideal of public reason as understood by Rawls, as a matter of the ethics of public officials. It is faithful to Rawls's understanding of the ideal, however, insofar as Rawls acknowledges that public reason bears on the creation of a process by which retail-level political decisions can be justified.

### *A. Morality*

Reason-giving is basic to morality in the following way. Morality regulates a community of people who regard themselves, and others, as free, equal, rational, and mutually accountable. The equal dignity of persons entails a way of relating to others, in which we each recognize the authority of others to demand respect for our interests. Relations among free and equal persons create a structure of accountability, in which we are entitled to demand that others respect our interests, or give reasons in justification for actions that interfere with our interests. Reasons arise out of our relations with others. When we acknowledge others as equal to ourselves, as free and rational, and as bearers of dignity, we are committed to a relationship of mutual recognition, respect, and accountability. The way to vindicate this structure of reciprocal accountability is to give reasons that are acceptable to others as free and rational agents, either in one-on-one interactions or as members of a moral community, from a standpoint we share.[29] Doing so takes the interests of others into account when acting by, in effect, putting the question to the affected person whether to approve or disapprove of the action. A justified action differs from an instance of coercion, deception, or domination by being based on reasons that are acceptable to affected persons as free and rational agents.[30] It is not that an affected person *creates* reasons for others, in the way that would occur through a promise or a request.[31] The reasons are there all along, and exist because people stand in a relationship of mutual responsibility and accountability to one another by virtue of being, to use Rawls's phrase, "self-originating sources of valid claims . . . ."[32]

Scanlon's contractarianism understands wrongful acts as those that would be disallowed by any set of principles for the regulation of behavior that no one could reasonably reject.[33] This seems to argue in a circle with the notion of reason, since an act would not be wrong if supported by a sufficient reason given in justification for it, which would be one that someone affected by the action could not reasonably reject. Scanlon grants that "whether certain objections to possible moral principles would be reasonable" is a substantive judgment, but denies that his theory begs the question by building moral elements into his conception of reasonableness.[34] He does not rely on some notion, such as well-being, which can be imported from some non-moral context such as what it is rational for an individual to prefer. There is no way to avoid substantive moral

29. DARWALL, *supra* note 3, at 33.

30. *Id.* at 22.

31. *See* David Enoch, *Reason-Giving and the Law*, *in* OXFORD STUDIES IN PHILOSOPHY OF LAW: VOLUME 1 (Leslie Green & Brian Leiter eds., 2011).

32. DARWALL, *supra* note 3, at 121 (quoting John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 546 (1980)).

33. *See* SCANLON, *supra* note 4, at 153, 189. Scanlon observes the now-familiar distinction between the rational and the reasonable, and clarifies that his contractarianism relies on a wider conception of reasonability than simply acting to satisfy one's preferences. *Id.* at 190–93.

34. *Id.* at 194.

choices in the process of reflection that goes into determining whether a principle offered in justification for an act can be reasonably rejected.[35] This process of reflection proceeds from what we know about human interests and values generally. These include not only gains and losses in well-being, but also reasons such as fairness and proportionality in the distribution of burdens and benefits of a proposed principle, what alternatives are available, the foreseeable behavioral consequences of applying the principle generally, the capacities people have to engage in self-protective actions, the motives people have for acting (was a harm the result of an accident or an intentional act?), the impact on special concerns such as our family, friends, and life projects, and so on. Importantly, right and wrong depend on justifiability to individuals affected by actions, not on some aggregation of some value which is to be maximized.[36] In order to be the "right sort of reason" to sustain a moral justification, a consideration offered in justification of an action must be one that an affected individual would actually have.[37]

Lies, deception, trickery, and other efforts to manipulate others into doing something the liar wants, fail the test of justifiability based on reasons that affected persons cannot reasonably reject.[38] Looking at the issue through a contractarian lens, the question is whether the provider and recipient of information have reasons to reject the following principle:

"One may not, in the absence of special justification, act with the intention of leading someone to form a false belief about some matter, or with the aim of confirming a false belief he or she already holds."[39]

The reasons for prohibiting deception seems clear enough. People want to be able to make up their own minds about how to act, and to direct efforts and resources toward their chosen aims without interference by others.[40] This is related to Kant's argument against the permissibility of lying, in which he contends that lying involves a practical contradiction because it would lose its efficacy as a means of obtaining what the liar wants.[41] The wrongfulness of deception depends on the value of autonomy and rational agency. People

35. *Id.* at 217–18.

36. *Id.* at 230. Darwall makes a similar point when he argues that the social desirability of the consequences of an action "is a reason of the wrong kind to warrant the attitudes and actions in which holding someone responsible consists in their own terms." DARWALL, *supra* note 3, at 66.

37. SCANLON, *supra* note 4, at 241.

38. *See* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 7 (2014) (locating the wrongfulness of lying in having "wrongfully treat[ed] oneself as more important than one's interlocutor").

39. SCANLON, *supra* note 4, at 318.

40. *Id.* at 298; *see also* Sarah Buss, *Valuing Autonomy and Respecting Persons: Manipulation, Seduction, and the Basis of Moral Constraints*, 115 ETHICS 195 (2005) (doubting that autonomy, understood as self-direction, can do all of the work that philosophers often assume).

41. *See* Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, *in* CREATING THE KINGDOM OF ENDS 133, 136 (1996). Citations are to the book version, although the paper was originally published in 15 PHIL. & PUB. AFF. 325 (1986).

cannot assent to an act amounting to deception because they have no opportunity to make up their mind about what to do. Without knowledge of what is going on and some possibility of making a contrary choice, a person cannot be said to have autonomously agreed to be treated in a particular way.[42]

In either its Kantian or more modern contractarian form, the wrongfulness of lying and other practices of deception is related to the non-universalizability of any principle purporting to allow it. This point can also be brought out by considering the role of truthfulness in cooperative or social activity. Truthful, accurate communication is a means toward the cooperative action that is often necessary for any individual to achieve his or her own objectives. Lying and deception interferes with a channel of communication that people use to align their actions with others or pursue projects that require coordinated action, because communications (outside of contexts like fiction and jokes) presuppose that speakers are being truthful.[43] The only ethical means of coordinating one's own actions with the actions of others is to appeal to others' faculty of reason. As Christine Korsgaard observes, Kant's sometimes elusive concept of the Kingdom of Ends can be seen as a democratic ideal, in which we treat others as equally entitled to the prerogative of determining what should happen.[44]

The idea developed here, of a "reason of the right sort," is fundamental to Kant's understanding of the value of humanity. Lying, deceiving, coercing, trying to get something over on someone, or exercising raw power are all implied assertions that your reasons matter more than the reasons of others. However, the justifying force of a reason stems from its being exactly the same as anyone's reason. The power of rational choice is a condition of the value of humanity, and therefore your needs and desires have the status of justifying *reasons* only if they can be shared by others.[45] What distinguishes brute force from justified action is the grounding in considerations that cannot be reasonably rejected by others.

### *B. Politics*

Reason-giving is basic to political philosophy and the ethics of public officials in the following way: A member of a political community, a subject of political authority, demands to know why some exercise of government power is legitimate. Suppose the governor of a state has ordered that people wear masks in public, the federal government has required that people pay taxes to support some foreign misadventure, or a court has held that bakers must bake cakes to celebrate the weddings of same-sex couples. These requirements may engender a demand to know why these things are required. The response to what Bernard Williams calls the Basic Legitimation Demand,[46] cannot be

42. *Id.* at 138–39.

43. *See* SHIFFRIN, *supra* note 38, at 16–23.

44. Korsgaard, *supra* note 41, at 142.

45. *Id.* at 143.

46. *See* BERNARD WILLIAMS, IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT 4–6 (Geoffrey Hawthorn ed., 2005) [hereinafter WILLIAMS, BEGINNING].

"because we can," or "who's going to stop us?" The Basic Legitimation Demand calls for a justification—a demonstration that the exercise of power was rightful. Just as morality can be understood in terms of a relationship between mutually accountable agents in which each must be prepared to offer reasons that the other can accept, political ethics can be understood as a relationship between the governors and the (self-governing) governed, in which reasoned justifications must be given to those who are affected by an action.

The public-reason tradition, which is now associated with Rawls but which has roots in the political philosophy of Hobbes, Locke, Rousseau, and Kant,[47] seeks to justify the basic structure of the political institutions of a society—what Rawls terms its constitutional essentials[48]—on terms that are acceptable to all affected citizens. Without claiming to be offering an interpretation of Rawls, the proposal here is that an ethical responsibility of public officials is to be prepared to justify *all* actions involving the exercise of coercive state power on the basis of reasons that can be accepted by all who are thereby affected.[49] As described in the previous section, moral obligations arise *relationally*. Stephen Darwall calls this the second-person point of view, and also refers to the perspective of the moral community as first-person plural.[50] In other words, morality involves taking up the perspective of others, and seeing oneself as a member of a community of people who regard each other as free, equal, and rational.

The trouble is, in modern pluralistic communities, there is extensive and seemingly intractable disagreement over what we owe to each other. To take a currently depressingly familiar example, should I regard myself as under an obligation to wear a mask when shopping indoors? The resolution of that question depends not only on scientific considerations, such as the efficacy of masks in preventing transmission of the coronavirus by asymptomatic individuals, but also on contested questions of value, such as the desirability of relying on coercive measures rather than an appeal to altruism or personal responsibility. The process of resolving these contested questions is burdened by empirical uncertainty, a diversity of reasonable conceptions of the good, and indeterminacy in the application of normative concepts.[51] This is not merely a conflict of interests, but uncertainty about what we owe to each other.[52] While some strands of the social contract tradition rely on a prudential, and hence *rational* agreement by self-interested utility-maximizing agents, the Rawlsian strategy is instead to rely on *reasonable* agreement among people who are

47. Gaus, *supra* note 18, at 112.

48. RAWLS, PL, *supra* note 5, at l–li, 217, 227.

49. *See* Larmore, *supra* note 7, at 381 (questioning why "the domain of public reason [should] be limited to these fundamentals instead of extending to all the political decisions which a community must make").

50. DARWALL, *supra* note 3, at 9 (citing Gerald Postema, *Morality in the First Person Plural*, 14 L. & PHIL. 35 (1995)). I believe I picked up this usage from Rawls's "Reply to Habermas." *See* John Rawls, *Reply to Habermas*, *in* POLITICAL LIBERALISM 372, 378 (1993).

51. *See* RAWLS, PL, *supra* note 5, at 54–57.

52. Gaus, *supra* note 18, at 119–20.

prepared to propose principles for a fair system of cooperation.[53] Political legitimacy in a society characterized by reasonable disagreement must therefore depend on a set of values that are shared by all, but not reducible to self-interest.[54]

One approach to the problem of political legitimacy is to rely not on moral truth, which is something about which people reasonably disagree, but on "reasonable grounds for reaching agreement rooted in our conception of ourselves and our relation to society."[55] This approach is not meant to supplant morality, including religion, but rather to provide a stable basis for cooperation that recognizes the freedom and equality of other members of the political community. It relies on a conception of political morality, in which we show respect for those with whom we disagree, recognizing that we may never reach agreement. There is a subtle difference between respecting others as moral agents and respecting them as citizens of a political community. In both personal morality and political ethics we recognize others as free, equal, and rational. From this point of view, we owe a justification of actions that affect the interests of others. This justification must consist of considerations that others cannot reasonably reject.[56]

One question that can be raised here is, rejected in light of what? Among other things, in light of information about what people in general have a reason to want.[57] The approach of the early Rawls was to rely on a so-called thin theory of the good as the basis for justifying constitutional principles agreed upon by the parties to a hypothetical agreement, behind a veil of ignorance that blocked access to information about their social standing, capabilities, conceptions of the good, or anything other than the objective good of choosing a plan of life

---

53. RAWLS, PL, *supra* note 5, at 48–54. The leading proponent of reliance on the merely rational, rooted in the moral psychology of Hobbes but having considerable common ground with modern rational-choice theory, is Gauthier. *See* DAVID GAUTHIER, MORALS BY AGREEMENT (1986).

54. RAWLS, PL, *supra* note 5, at 225–26, 243.

55. Gaus, *supra* note 18, at 121 (citing John Rawls, *Kantian Constructivism in Moral Theory*, *in* JOHN RAWLS: COLLECTED PAPERS (Samuel Freeman ed., 1999)).

56. Reason-giving and public reason are generally deployed in political philosophy in connection with the claims about moral truth and their ground—in citizens' comprehensive doctrines or within an overlapping consensus, in the later Rawls, for example. It is important not to lose sight of the importance of *factual* truth. As Williams observes, there is an anti-tyranny argument for institutions and practices that sustain truthfulness as a virtue:

> [P]recisely because of their peculiar powers and opportunities, governments are disposed to commit illegitimate actions which they will wish to conceal, as they also want to conceal incompetent actions. It is in citizens' interests that these be checked. They cannot be checked without true information . . . . Political, particularly governmental, truthfulness is valuable against tyranny, but you will get it only as associated with other values and expressed in a set of institutions and practices that as a whole stand against tyranny.

WILLIAMS, TRUTH, *supra* note 2, at 207–08.

57. SCANLON, *supra* note 4, at 204–05.

under ideal deliberative conditions.[58] (Notice how this is thinner than Scanlon's description of the standpoint from which reasons are offered in moral reason-giving.[59]) Later, however, Rawls shifted the focus from a thin theory of the good to a political conception of citizenship from which citizens can agree on the basic structure of the society.[60] The alteration here is subtle, because Rawls means to preserve the distinction between the rational (arguably that which underlies the thin theory of the good) and the reasonable. Reasonable citizens are not merely self-interested, but are prepared to acknowledge others as free and equal.[61] No further appeal to ideals of the good are permitted in political justification.[62] Rawls holds that his conception of legitimacy is not a mere *modus vivendi*[63]—nothing more than a provisional compromise among interests in lieu of deeper agreement—but must be justifiable to all based on reasons they can accept from within their own comprehensive doctrines.[64]

Public reason is meant to be an intermediate position between a Hobbesian war of all against all and agreement at the level of comprehensive doctrines. Rawls sought to separate out the matters upon which there is broad agreement in a pluralistic society from those about which reasonable disagreement is possible.[65] Arguments based on public reason can be directed to any member of the political community, no matter what fully worked-out conception of the good they subscribe to. A pro-choice atheist and a Roman Catholic bishop should be able to find some common ground on which to debate, and ultimately justify, the principles of justice that bear on issues such as contraception and abortion.[66] At least that is the hope, for Rawls believes that the exercise of political power is legitimate only if "it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[67] It became clear, however, that Rawls's strategy of separating comprehensive doctrines from public reason still runs smack into the problem of reasonable pluralism. Rawls himself admitted as much in the introduction to the paperback edition of *Political Liberalism* when he conceded that "[r]easonable political conceptions of justice do not always lead to the same conclusion; nor do citizens holding the same conception always agree on

58. JOHN RAWLS, A THEORY OF JUSTICE 64 (1971).
59. *See supra* note 33, and accompanying text.
60. *See* RAWLS, PL, *supra* note 5, at 178–82.
61. *Id.* at 198.
62. *See* MCCABE, *supra* note 18, at 82–85.
63. RAWLS, PL, *supra* note 5, at xxxix, 145.
64. *Id.* at 386.
65. Gaus, *supra* note 18, at 128.
66. Larmore, *supra* note 7, at 382.
67. RAWLS, PL, *supra* note 5, at 217.

particular issues."[68] Issues such as abortion and school prayer may not be resolvable on terms that all affected citizens can be expected to endorse.

In response to the problem he observed, Rawls offered a striking concession: It may be sufficient for citizens to seek an outcome that is "for the moment reasonable."[69] That position is not too far from a *modus vivendi*, but one might see this as a good thing. Given the vehemence and intractability of conflict over just about every imaginable normative issue, it would actually be quite a significant achievement to reach agreement on a method of establishing a framework for peaceful coexistence and cooperation toward mutually beneficial ends.[70] This agreement may be only temporary or provisional, but it may nevertheless be legitimate. I believe it is a mistake to see the process of reaching and sustaining agreement as *mere modus vivendi*, with emphasis on the "mere," as if it is nothing but a second-best outcome. Instead, a process that is open to competing views and seeks resolution on reasonable grounds has considerable moral significance as a means of acknowledging others as free, equal, and reasonable agents alongside whom one is required to live.[71] For example, one might understand an exercise of official power as justified if and to the extent it gives sufficient consideration to the interests and values of citizens who are affected by the actions.

A *modus vivendi* constitution would therefore be a structure in which institutions are designed to handle a "recurrent negotiation of interests and values."[72] At the risk of a bit of disciplinary parochialism, I will suggest that the practice of adversarial adjudication is well designed to deal with the kind of recurrent contestation of normative issues that can be expected in light of reasonable disagreement about goods, values, and ideals. To pick up on Rawls's intriguing phrase, the legal system trades in resolutions that are "for the moment reasonable." Focusing on the term *reasonable*, the ideal of legality, or rule of law, can be understood as sharing with morality and political legitimacy the concern for reciprocity and justification in terms that affected persons can accept.

---

68. *Id.* at 479 (footnote omitted). Rawls states that conflicts arising from the burdens of judgment "always . . . [remain] and limit the extent of possible agreement." *Id.* at 487. Among the burdens of judgment are the different normative considerations bearing on the resolution of an issue and the Berlinian insight that human lives and political institutions necessarily involve a limitation or selection from the full range of objective goods and ideals that may be realized. *Id.* at 56–57.

69. *Id.* at liv.

70. MCCABE, *supra* note 18, at 133–34; *see also* RAWLS, PL, *supra* note 5, at 191 (considering, but rejecting, a conception of liberal neutrality that requires agreement only on "values that regulate fair procedures for adjudicating, or arbitrating, between parties whose claims are in conflict").

71. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 102 (1999) (referring to a "felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be" as the "*circumstances of politics*").

72. MCCABE, *supra* note 18, at 148 (quoting JOHN GRAY, TWO FACES OF LIBERALISM 108 (2000)).

### C. Legality and Adversarial Adjudication

It is a commonplace that the concept of the rule of law has most often been defined with reference to a laundry list of features of a well-functioning legal system.[73] A Japanese philosopher friend of mine has suggested, however, that all of these lists can be boiled down to a very simple, practical working concept: The rule of law is what makes it possible for the little guy to say to the big guy, "You can't do that to me."[74] In other words, the normative significance of the rule of law is related to the "legal reduction of the possibility of *arbitrary* exercise of power by those in a position to wield significant power."[75] The little guy's complaint is that the big guy is acting arbitrarily; if the big guy had a justifying reason for the action, the little guy would have no complaint. Once again, the normative issue comes down to the sufficiency of the reason given in justification of an action. And, once again, the sufficiency of the reason can be understood as what the affected person could accept, or not reasonably reject. As a further refinement, the vice of arbitrariness can be understood as running roughshod over the interests of the little guy. An arbitrary action is one that is "chosen or rejected without reference to the interests, or the opinions, of those affected. The choice is not forced to track what the interests of those others require according to their own judgments."[76]

Recent scholarship on the rule of law has emphasized the relationship between non-arbitrary (that is, reasoned) exercise of coercive force and respect for the agency and dignity of the subjects of legal authority. Governance through law is "sharply distinct from a system of rule that works primarily by manipulating, terrorizing, or galvanizing behavior."[77] Martin Krygier's

---

73. *See* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, *in* GETTING TO THE RULE OF LAW: NOMOS L 3, 5–7 (James E. Fleming ed., 2011). Lon Fuller's famous list comprises eight criteria: (1) generality, (2) promulgation, (3) prospectivity, (4) clarity, (5) consistency, (6) feasibility, (7) stability, and (8) congruence between law and official action. LON L. FULLER, THE MORALITY OF LAW 46–90 (rev. ed. 1964). Others add or subtract from this list; for example, the former Lord Chief Justice of England and Wales argued for a thicker definition including the protection of fundamental human rights. *See* TOM BINGHAM, THE RULE OF LAW 49–50 (2010).

74. I owe this formula to many conversations over the years with Yasotomo Morigiwa. I keep urging him to publish it. In the meantime, I will backstop it with a citation to Bernard Williams, saying much the same thing in a typically arresting way, when he notes that the domain of politics is not simply "one lot of people terrorizing another lot of people"; rather, the solution to the political question lies in explaining to the less empowered the difference between the solution and the problem. *See* WILLIAMS, BEGINNING, *supra* note 46, at 5.

75. Krygier, *supra* note 12, at 75.

76. *Id.* at 76 (quoting PETTIT, *supra* note 8, at 55).

77. Waldron, *supra* note 11, at 27. Note that the concept being analyzed here is legality, or the rule of law, not law itself. One of the themes of Waldron's article is that philosophers have it backwards when they treat the concept of law as analytically prior to the value of legality. *See id.* at 10–12. This approach suggests a response to Fred Schauer's recent contention that jurisprudence, in its preoccupation with Hart's "puzzled man," the internal point of view, and the practical

explanation of the ethical value of legality and the disvalue of arbitrariness is worth quoting at length:

> A closely associated harm that flows from arbitrariness is the *indignity* of finding oneself the mere *object* of power, where one has to guess how one might be treated by those in power and/or there is no way of asserting, defending, and claiming attention to one's own point of view in the face of its exercise—all that flattery, bowing, and scraping, those forelocks to tug, caps to tip, favors to curry . . . . Law that avoids and curbs arbitrariness allows that citizens have their own points of view that must be attended to and treats them as active, self-directing *subjects*, not mere objects of sovereign will.[78]

Jeremy Waldron, making the same point, observes that "the law pays respect to those who live under it, conceiving them now as bearers of individual reason and intelligence."[79] Finally, David Luban's illuminating reinterpretation of Lon Fuller's *Morality of Law* sees the choice to govern through law as "a morally freighted choice"—a manifestation of respect for the governed.[80]

In concrete, operational terms, how does law and the legal system manifest respect for the dignity and agency of citizens? Again we can gain some insight from Lon Fuller, although not principally from his consideration of the relationship between law and morality. In a paper unpublished at the time of his death, entitled *The Forms and Limits of Adjudication*, Fuller distinguished adjudication from other methods of resolving social conflict, including the exercise of managerial or executive power.[81] Adjudication is a form of social ordering in which the affected party participates in the decision that is ultimately reached, through the presentation of evidence and reasoned arguments.[82] "As such it assumes a burden of rationality not borne by any other form of social ordering."[83]

Return for a moment to Rawls's intriguing idea that treating our fellow citizens with respect, as free and equal agents, in circumstances of reasonable pluralism, may occur through a process aimed at results that are "for the moment reasonable." Linking the notion of for-the-moment reasonableness with Fuller's defense of adjudication suggests an ethical ideal for political officials:

---

normativity of law, has overlooked the centrality of coercion to the concept of law. *See* FREDERICK SCHAUER, THE FORCE OF LAW (2015).

78. Krygier, *supra* note 12, at 80.

79. Waldron, *supra* note 11, at 36.

80. David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, *in* LEGAL ETHICS AND HUMAN DIGNITY 99, 110–12 (2007).

81. Fuller, *supra* note 21, at 354–55.

82. *Id.* at 363–65; *see also* Waldron, *supra* note 11, at 59 ("I do not think that a conception of law or a conception of the Rule of Law that sidelines the importance of argumentation can really do justice to the value we place on governments to treat ordinary citizens with respect as active centers of intelligence.").

83. Fuller, *supra* note 21, at 366.

Legitimate, non-arbitrary exercise of power is that which responds appropriately to the interests of those affected. One way to do this, taking Fuller literally, is to require a full-dress adversarial proceeding, complete with an impartial adjudicator, a right to counsel, the presentation of evidence, direct and cross-examination of witnesses, briefing, oral argument, a written decision by the judge, a right to appeal, adherence to rules of procedure and evidence, and so on. The line of cases, beginning with *Goldberg v. Kelly*[84] and continuing through *Mathews v. Eldridge*[85] and subsequent decisions,[86] on the requirements of due process when a government action deprives an individual of some property or benefit, sets sensible limits on the government's obligation to provide an actual hearing or any particular form of procedures. As an ethical ideal, however, we can look to Fuller's core insight that the process of adjudication is one of the most fundamental procedures of a democratic society.[87] Why is this? Because a decision informed by "intelligent and vigorous advocacy on both sides" is far more likely to represent a reasonable resolution of the issue at hand.[88] A decision can be evaluated for reasonableness even if it was not the product of a full-dress adversarial proceeding.

For example, the so-called "hard look" doctrine is well established in administrative law.[89] Under Section 706(2)(A) of the Administrative Procedure Act,[90] as interpreted by the *State Farm* case[91] reviewing courts subject agency decisions to a standard of review that requires their actions to be more than merely rational. "Hard look" review is intended to ensure that an agency action is not arbitrary. In the *State Farm* case itself, the National Highway Traffic Safety Administration rescinded a rule issued during the Carter Administration that would have required cars to be equipped with either automatic seat belts or airbags. Why would it have done that? Certainly one possible motivation would have been the election of Ronald Reagan, who ran on, among other

84. Goldberg v. Kelly, 397 U.S. 254 (1970).

85. Mathews v. Eldridge, 424 U.S. 319 (1976).

86. *See, e.g.*, Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309 (2012).

87. Fuller, *supra* note 21, at 384.

88. *Id.*

89. *See, e.g.*, Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761–62 (2008); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 528–29 (2003); Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599 (2002); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 419–22 (1987); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 525 (1985); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 210 (1983).

90. 5 U.S.C. § 706(2)(A) (2012).

91. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co. (State Farm), 463 U.S. 29 (1983).

things, a platform of deregulation of business.[92] The Court did not accept this reason as adequate, however, holding that an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[93] Rational support would be lacking for the agency's decision—i.e., it would be arbitrary—if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[94]

Review for rationality is based on the reasons articulated by the agency; conclusory statements will not suffice.[95] Moreover, an agency's decision must not only *be* rational, but it must be *shown to be* rational; the explanation must be one that reasonable people would understand as reflecting the considerations pro and con.[96] There must also be a rational connection between the facts presented to the agency and the policy choice it made.[97]

A recent high-profile case seems to add the requirement that an agency's decision not only be objectively reasonable, but that the reasons it gives for an action are the *actual* reasons for it.[98] The Secretary of Commerce in the Trump Administration, Wilbur Ross, announced that the Census Bureau, an agency within the Department of Commerce, would add a question to the 2020 Census form asking about respondents' citizenship status. Ross claimed to be acting at the request of the Department of Justice, which was seeking data to help it enforce the Voting Rights Act (VRA).[99] The trouble is, that rationale was simply untrue:

> Ross and his team had been trying to figure out a justification for adding the question for some time, long before they'd shown any interests in the VRA. It was, in fact, the Commerce Department that

92. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2382 (2001).

93. *State Farm*, 463 U.S. at 43.

94. *Id.* This conception of arbitrariness is echoed by Fuller, who argues that an official decision may be arbitrary if there is an insufficient alignment between the reasons presented by the affected parties and the decision: "[I]f this congruence is utterly absent—if the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant—then the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning." Fuller, *supra* note 21, at 388.

95. Cherokee Nation of Okla. v. Norton, 389 F.3d 1074, 1078 (10th Cir. 2004); Adams Telcom, Inc. v. FCC, 38 F.3d 576, 582 (D.C. Cir. 1994); Am. Mining Cong. v. EPA, 907 F.2d 1179, 1189 (D.C. Cir. 1990); ARCO Oil and Gas Co. v. FERC, 932 F.2d 1501, 1504 (D.C. Cir. 1991).

96. Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992).

97. Humana of Aurora, Inc. v. Heckler, 753 F.2d 1579, 1582 (10th Cir. 1985); Ctr. for Auto Safety v. Fed. Highway Admin., 956 F.2d 309, 313 (D.C. Cir. 1992).

98. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

99. *Id.* at 2562.

> urged Justice to make that VRA request, rather than the other way around. (The Justice Department seemed to have little interest in the matter beyond doing Ross a favor.)[100]

There is not necessarily anything wrong with executive-branch agencies having a political motivation. Then Harvard Law School Dean, now Supreme Court Justice Elena Kagan famously argued that considerations of democratic accountability justify agencies in relying on presidential policy preferences.[101] We would expect a Republican administration to pursue a deregulatory agenda, for example, and a Democratic administration to pursue more extensive regulations in areas like environmental protection, consumer rights, and public safety. Reviewing under the Administrative Procedure Act's arbitrary and capricious standard, Chief Justice Roberts concluded based on the administrative record that Secretary Ross made a reasonable choice among alternative policy options and articulated a satisfactory explanation for his decision.[102] He also acknowledged Kagan's point, writing that "a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities."[103] Nevertheless, he held that the Department's decision was arbitrary and capricious because "the evidence tells a story that does not match the explanation the Secretary gave for his decision."[104] The justification put forward by the agency was not genuine, and therefore could not be reviewed for its reasonableness.[105]

---

100. Andrew Prokop, *Trump's Census Citizenship Question Fiasco, Explained*, VOX (July 11, 2019), https://www.vox.com/2019/7/11/20689015/census-citizenship-question-trump-executive-order. These criticisms were acknowledged in Chief Justice Roberts's opinion. *See* 139 S. Ct. at 2564, 2574.

101. Kagan, *supra* note 92. Kathryn Watts has traced the evolution of hard-look doctrine following *State Farm*, as courts grapple with the extent to which not only technical expertise but also political preferences can justify agency actions. *See* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

102. *See Dep't of Com.*, 139 S. Ct. at 2570–71.

103. *Id.* at 2573.

104. *Id.* at 2575.

105. *Id.* at 2575–76. The result reached by Chief Justice Roberts is particularly noteworthy in light of his authorship of the majority opinion in the litigation over Trump's ban on travel from several majority-Muslim countries. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018). He relied on a record of an extensive factfinding process supporting the President's claim that the ban was enacted on national security grounds, not to fulfill a campaign promise to enact a "Muslim ban." *Id.* at 2408, 2421. Justice Sotomayor, dissenting, accused the Chief Justice of a "blinkered" review of the stated rationale. *See id.* at 2438 n.3 (Sotomayor, J., dissenting); *see also id.* at 2448 ("By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another."). In fairness to the Chief Justice, the standards of review in these cases are different—"arbitrary and capricious" review under the APA in the Census case, as opposed to the traditional deference accorded to the Executive Branch in both immigration and national security

The core ethical ideal animating the rule of law is non-arbitrariness, understood as justification on the basis of reasons that are acceptable to affected individuals. Offering a consideration that is not the actual reason for an action is really no different from government officials saying "we're doing this because we can"—it is the assertion of raw power, not the effort to engage with the rational agency of citizens. To emphasize, Chief Justice Roberts's decision was not based on the impermissibility of political or policy considerations as justifications for the agency's decision. It would have been okay, for example, for Secretary Ross to determine that adding the citizenship question was justified even if it resulted in a potentially lower response rate.[106] In a separate concurring and dissenting opinion, Justice Thomas referred to other episodes in which presidential pressure or the influence of lobbying and special interest groups caused an agency to alter its policies.[107] Unless Justice Thomas is correct, and the Court majority has completely blown up existing norms of "arbitrary and capricious" review,[108] there must be something distinctive about this agency action. Reading the decision in context, it is difficult to escape the conclusion that what is different is the background of the Trump Administration's pattern of playing fast and loose with the truth.

## III. TRUTHFULNESS AND ADVERSARIAL LITIGATION—AN ETHICAL ANALOGY

The argument developed in this paper has been that the normative domains of morality, politics, and law have in common a "rational core" of giving reasons that can be accepted by those who are affected by our actions. Reason-giving manifests respect for the dignity and agency of others. Turning the point around, if a government official's response to a request for an explanation for an action is nothing more than "because I can," or "who's going to stop me?," this response communicates an attitude that the official considers the questioner to be a loser, a nobody, a sucker, a dog, or a target of a scam. For a reason to be one of the right sort, that is, appropriate in response to a request for justification or a demand for accountability, it must be truthful. Again following Bernard Williams's account of the virtue of truthfulness, a truthful action is characterized by sincerity[109] (the speaker says what they mean, which sustains social trust) and accuracy[110] (the speaker aims to get it right, which allows members of a community to pool reliable information about the world). The argument given here extends Williams's position in two ways. First, I contend that the requirement of offering public reasons extends beyond the defense of constitutional essentials and includes the justification of more

matters. It is also possible, however, that the Chief Justice may have felt hoodwinked by Trump and, by the time the Census case came to the Court, refused to play a part in a transparent political action.

106. *Dep't of Com.*, 139 S. Ct. at 2571.

107. *See id.* at 2583 (Thomas, J., concurring in part and dissenting in part).

108. *Id.* at 2576.

109. WILLIAMS, TRUTH, *supra* note 2, at 11, 87, 96.

110. *See id.* at 11, 123–26.

particular or retail-level decisions by public officials. Second, given the remarks above in connection with *modus vivendi* liberalism, the requirement of giving public reasons may be satisfied by establishing procedures that are adapted to handle recurrent contestation of normative issues in a pluralist community.

The principle for the ethics of government officials proposed here is as follows: In all public statements, and all considerations of the reasons in support of a government action, act as though the truth or falsity of matters in question will be subjected to the procedures of adversary adjudication, including (1) rules of evidence and procedure, (2) threshold standards of adequacy and good faith, (3) prohibitions on making false statements of fact or failing to correct statements you subsequently learn to be false, (4) input from the other side, subject to similar constraints, (5) a neutral adjudicator who will assess the weight and sufficiency of supporting evidence.

It cannot be overemphasized that the position I am defending here is a principle of critical morality for public officials, not a proposal to require an actual hearing or other adversarial procedure before an action may be taken. If you like, it is analogous to the "newspaper heuristic" one often encounters in business ethics—that is, in deciding what to do, imagine that your actions will be reported on the front page of the *Wall Street Journal*, the *New York Times*, or some similar news outlet.[111] Many, if not most, actions taken by government officials will not be accompanied by any sort of procedure at all, let alone one characterized by rules of procedure and presentation of evidence. However, as a thought experiment a government official could certainly imagine the experience of defending a decision in court, in a deposition, or at a Congressional hearing.

This principle of political ethics is directed toward not only lawyers, but politically appointed and career agency officials considering some action, along with its purported justification. Imagine, for example, the situation of a relative senior official in the Department of Defense (DoD), knowing that the President is unhappy that Congress had appropriated only $1.375 billion of the $5.7 billion he had sought to construct a wall along the U.S.-Mexico border.[112] The President hits upon the idea of declaring that there is a national emergency, justifying the reallocation of funds under the National Emergencies Act (NEA)[113] and a statute authorizing military construction projects in the event of

111. *See, e.g.*, Chris Matthews, *Business Ethics and the "New York Times" Rule*, BUS. ETHICS BLOG (Dec. 8, 2010), https://businessethicsblog.com/2010/12/08/business-ethics-and-the-new-york-times-rule/; Tom Popomaronis, *Billionaire Warren Buffett Has a 'Simple' Test for Making Tough Decisions—Here's How it Works*, CNBC (May 11, 2019), https://www.cnbc.com/2019/05/10/billionaire-warren-buffett-use-this-simple-test-when-making-tough-decisions.html (ascribing this principle of integrity and ethics to Warren Buffet). The newspaper heuristic is arguably just a way of making the device of Adam Smith's impartial spectator more concrete. *See* James Otteson, *Adam Smith*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF ETHICS 421, 429–31 (Roger Crisp ed., 2013).

112. *See* Sierra Club v. Trump, 977 F.3d 853, 862 (9th Cir. 2020).

113. 50 U.S.C. § 1601, *et seq.*

a national emergency.[114] The NEA is intended to be used "only in time of genuine emergency"[115] and the military construction statute specifies that applicable construction projects must be those that "support such use of the armed forces."[116] Mid-level officials at another federal agency, the Department of Homeland Security (DHS), have argued that new border wall construction will

> [r]educe vulnerabilities in key border areas and the time it takes Border Patrol agents to apprehend illegal migrants, . . . effectively reduce the enforcement footprint and compress [Border Patrol] operations to the immediate border area, . . . serve to channel illegal immigrants towards locations that are operationally advantageous to DHS, . . . [and] give a distinct and enduring advantage to [Border Patrol] as a force multiplier.[117]

The Defense Department official strongly believes that, despite the military jargon in the request from DHS, the border wall has nothing to do with supporting the armed forces, and that there is no national security emergency at the southern border. The question is, what does political *ethics*, not law, have to say about the duties of our hypothetical senior DoD official?

The principle defended here is intended to elaborate on what a government official owes to those who are potentially affected by an action, by way of explanation and justification. It is a requirement of truthfulness and reason-giving, reflecting (1) the moral agency and accountability of all persons, including those acting in institutional roles, (2) the distinctive requirements of public reason that flow from the Basic Legitimation Demand,[118] *i.e.*, demonstrating that the exercise of official power is rightful, and (3) the value of legality, as a manifestation of the respect owed to citizens as bearers of human dignity. The principle as stated requires government officials to think about the reasons given in support of an action as if they would have to defend the action at a hearing or deposition. It is a thought experiment, not a requirement for actual legal procedures, but it nevertheless reflects Fuller's insight that adversarial adjudication assumes a burden of rational justification that is not assumed by other forms of social ordering.[119] Rules of evidence and threshold requirements of adequate evidence, for example, ensure that an action must be grounded in reality. As Harry Frankfurt understands the concept, one who traffics in bullshit "offers a description of a certain state of affairs without genuinely submitting to the constraints which the endeavor to provide an accurate representation of reality imposes."[120] But bullshit will not do in

---

114. 10 U.S.C. § 2808.

115. *Sierra Club*, 977 F.3d at 864–65 (quoting The National Emergencies Act (Public Law 94-412), Source Book: Legislative History, Text, and Other Documents 50, 292 (1976)).

116. 10 U.S.C. § 2808.

117. *See Sierra Club*, 977 F.3d at 880 (alteration in original).

118. *See* WILLIAMS, BEGINNING, *supra* note 46, at 6.

119. *See* Fuller, *supra* note 21, at 366.

120. FRANKFURT, *supra* note 16, at 32.

adjudicative proceedings, as demonstrated by the record of litigation by some of the fabulists representing Trump in challenges to state election procedures.[121] In order to function as a reason in support of an action, a consideration must be an attempt to provide an accurate representation of reality. I do not know whether anyone seriously doubts that proposition or whether it is completely banal. However, the ethical principle proposed here seeks to make anti-bullshit norms more concrete by testing official actions against a hypothetical inquiry in which they must be supported by sufficient reasons.

I make no claim that the ethical principle defended here is an interpretation of Rawls's own views. In his "Reply to Habermas," Rawls insists that "*any* liberal view must be substantive" because the justice of a procedure "*always* depends . . . on the justice of its likely outcome, or on substantive justice."[122]

---

121. *See, e.g.*, Bowyer v. Ducey, No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020). The district court described the evidence submitted and its deficiencies:

> Advancing several different theories, Plaintiffs allege that Arizona's Secretary of State and Governor conspired with various domestic and international actors to manipulate Arizona's 2020 General Election results allowing Joseph Biden to defeat Donald Trump in the presidential race . . . . Plaintiffs append over three hundred pages of attachments, which are only impressive for their volume. The various affidavits and expert reports are largely based on anonymous witnesses, hearsay, and irrelevant analysis of unrelated elections . . . . Plaintiffs next argue that they have expert witnesses who can attest to widespread voter fraud in Arizona. As an initial matter, none of Plaintiffs' witnesses identify Defendants as committing the alleged fraud, or state what their participation in the alleged fraudulent scheme was. Instead, they allege that, absentee ballots "could have been filled out by anyone and then submitted in the name of another voter," "could be filled in by third parties to shift the election to Joe Biden," or that ballots were destroyed or replaced "with blank ballots filled out by election workers, Dominion or other third parties." . . . These innuendoes fail to meet Rule 9(b) standards. But perhaps more concerning to the Court is that the "expert reports" reach implausible conclusions, often because they are derived from wholly unreliable sources.

*Id.* at *13–14 (emphasis omitted). A district court in Michigan found that there was no rationally supported claim that any conduct by the defendants resulted in votes being changed from Trump to Biden:

> Plaintiffs' equal protection claim is not supported by any allegation that Defendants' alleged schemes caused votes for President Trump to be changed to votes for Vice President Biden. For example, the closest Plaintiffs get to alleging that physical ballots were altered in such a way is the following statement in an election challenger's sworn affidavit: "I believe some of these workers were changing votes that had been cast for Donald Trump and other Republican candidates." . . . But of course, "[a] belief is not evidence" and falls far short of what is required to obtain any relief, much less the extraordinary relief Plaintiffs request. The closest Plaintiffs get to alleging that election machines and software changed votes for President Trump to Vice President Biden in Wayne County is an amalgamation of theories, conjecture, and speculation that such alterations were possible.

King v. Whitmer, No. 20-13134, 2020 WL 7134198, at *12 (E.D. Mich. Dec. 10, 2020) (emphasis omitted).

122. John Rawls, *Reply to Habermas*, *in* RAWLS, PL, *supra* note 5, at 421 (emphasis added). *See also* Rawls, *Public Reason*, *supra* note 28, at 774.

However, I believe the principle here expresses a broadly Rawlsian conception of reasonableness. In that, I draw inspiration from a passage in Burton Dreben's unfinished commentary *On Rawls and Political Liberalism*:

> [T]o truly understand what Rawls is teaching, you have to understand the way the best appellate judges work. Public reason, as he says explicitly, is binding in the first instance on appellate justices and Supreme Court justices, particularly in our kind of system . . . . To be a serious political philosopher, one should understand the development of the common law and what a great judge does; that is the heart of the subject. And that is what is behind Rawls.[123]

This passage refers to appellate judges, but to understand the development of the common law one must also appreciate the role of trial judges as factfinders, and of counsel in facilitating the development of a truthful record. Further supporting this analogy, Fuller appreciated the importance of partisan advocates for the development of the factual record of an adjudicated proceeding. The presentation of evidence by competing parties enhances the reliability of the outcomes by preventing decisionmakers from jumping to hastily considered decisions. But he warned that the process could be undermined by advocates who "muddy the headwaters of decision" by obscuring or distorting the truth.[124] The ethical principle in this paper seeks to incorporate Fuller's insight into the literature on public reason. Reasonableness requires a good faith effort to accurately represent reality.

What reasonableness does not require, however, is substantive justice. In his later work, Rawls grounded the requirement of public reason in reciprocity, distinguishing a political community committed to reasonableness from one in which politics is understood in zero-sum terms, with only winners and losers.[125] He advocates for something more than a mere *modus vivendi* as the basis for the constitution of a political community, in which the constitution is honored only as a pact to maintain civil peace.[126] In a case analogous to Sixteenth and Seventeenth Century states in which Protestants and Catholics would convert or kill members of the other faith if they ever got the upper hand, political issues may be discussed in ways that do not inflame sectarian hostility, but the society would not be "stabl[e] for the right reasons."[127] A different way of looking at such a society, however, would be that it may be possible for citizens who disagree about foundational matters to reach agreement on particular results and

123. Burton Dreben, *On Rawls and Political Liberalism*, *in* THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 7, at 339–40.

124. Fuller, *supra* note 21, at 384. This portion of Fuller's paper was originally published many years earlier as a joint conference report of the ABA and the AALS. *See* David Luban, *The Adversary System Excuse*, *in* LEGAL ETHICS AND HUM. DIGNITY 19, 37–40 (2007) (discussing Fuller's views in the joint conference report).

125. Rawls, *Public Reason*, *supra* note 28, at 766–67.

126. *Id.* at 781.

127. *Id.*

relatively narrow explanations for them.[128] Alternatively, it may be possible to reach agreement on procedures for resolving disagreements about many different matters, implicating everything from workaday disputes to matters of basic justice. The scope of necessary agreement among citizens would be to a system of procedures and norms for handling disputes. This is, admittedly, a very thin basis for social stability, but in the immediate aftermath of an attempt at a violent repudiation of a democratic election, it is at least something. Long before the 2020 presidential election, however, I argued that reasonable pluralism runs very deep, and involves matters of basic justice, and that legitimacy in a society characterized by persistent disagreement may be largely a matter of establishing and maintaining a system of lawmaking and law-application that is generally regarded as fair, even by those who lose in connection with particular matters.[129]

This is a plausible way to understand, in ethical terms, Fuller's idea of the rational core of adjudication. A generally shared endorsement of the rationality of the legal process may be sufficient to stabilize an otherwise sharply divided society. Notice that this is an ethical principle emphasizing *truthfulness*, not truth. Truthfulness is a virtue of a process that aims at sincerity and accuracy,[130] not a property of utterances or propositions. "The 2020 presidential election was marked by widespread fraud and was probably stolen by Biden" is a false statement. It is almost certainly fruitless to argue about its truth or falsity with a committed believer in what has come to be known as the Big Lie.[131] The post-election litigation showed, however, that it is possible to put proponents of this falsehood to their proof, and demand evidence that would satisfy standards of admissibility, relevance, reliability, and consistency. The value of truthfulness does not seek to preempt anyone's effort to establish what is true; it does, however, insist that establishing truth involves more than simply repeating a statement many times in a loud voice. As applied to public officials, the ideal implies a commitment to accepting that one must rely on facts that could be established in a rational adjudicative process, and that one's conduct may be subject to scrutiny.

---

128. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995).

129. *See* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010).

130. *See* WILLIAMS, TRUTH, *supra* note 2, at 11.

131. *See* Aaron Blake, *Trump's "Big Lie" Was Bigger Than Just a Stolen Election*, WASH. POST (Feb. 12, 2021). The term originates with Adolf Hitler in *Mein Kampf*, so caution is warranted in applying it to contemporary politics, but the general idea is a falsehood repeated so strongly and emphatically that it cannot be disbelieved. House impeachment managers used the term in describing Trump's strategy, with the *New York Times* report acknowledging the Nazi origin of the term. *See* Glenn Thrush, *Prosecutors Describe Trump's "Big Lie" of a Stolen Election*, N.Y. TIMES (Feb. 10, 2020), https://www.nytimes.com/live/2021/02/10/us/impeachment-trial/prosecutors-describe-trumps-big-lie-of-a-stolen-election.

## CONCLUSION

Morality, political ethics, and the rule of law are all committed, in their distinctive ways, to distinguishing raw power from justified action. Each one of these normative domains can be characterized by efforts to identify the right sorts of reasons that can serve to justify actions. The rightness of these reasons is ultimately grounded in the value of human dignity and the importance of manifesting respect for other rational agents. The ethical principle defended here borrows from each of these normative domains. It seeks to express Lon Fuller's appreciation for the rational core of adjudication as way of testing the sufficiency of reasons for the actions of public officials. The experience of the post-election litigation—indeed, of much of the judiciary's response to the Trump administration's indifference to truth—suggests that there is a robust ethical ideal underlying adjudication.