

# DUQUESNE LAW REVIEW



## SHALL THESE BONES LIVE? RESURRECTING TRUTH IN AMERICAN LAW AND PUBLIC DISCOURSE

### FOREWORD

SHALL THESE BONES LIVE? RESURRECTING TRUTH IN  
AMERICAN LAW AND PUBLIC DISCOURSE

*Wilson Hubn*

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*Louise Antony*

THE RESURRECTION OF TRUST IN AMERICAN LAW AND PUBLIC DISCOURSE

*Bruce Ledewitz*

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*Justin Buckley Dyer*

LIES, DECEIT, AND BULLSHIT IN LAW

*Lawrence M. Solan*

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STATE ANTI-BDS LAWS COUNTERACTING THE BDS MOVEMENT...AND THE  
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*Sara J. Watkins*



# Duquesne Law Review

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## Shall These Bones Live? Resurrecting Truth in American Law and Public Disclosure

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# **Foreword**

## **Shall These Bones Live? Resurrecting Truth in American Law and Public Discourse**

*Wilson Huhn\**

Duquesne University School of Law hosted the symposium “Shall These Bones Live? Resurrecting Truth in American Law and Public Discourse” on November 16 and 17, 2017. The symposium was initially conceived by Professor Bruce Ledewitz and began to take shape with suggestions from Professor Jane Moriarty. Professor Heidi Feldman of Georgetown served with Professor Ledewitz as co-convenor of the symposium. The material and technical aspects of the program were conducted by the law school’s staff under the able direction of Jill Chadwick, Executive Assistant to the Dean, and Chris Driscoll, Director of Information Technology.

The law school hosted this conference on “Resurrecting Truth” at a moment of crisis in our society—a crisis of faith—a crisis of confidence in our ability to seek and know the truth. Politically, our country is divided, with different factions adhering to their own beliefs about foreign interference in our last national election and the role that the President played in those events. Economically, there is more inequality of wealth and income than at any other time in our history, with entrenched interests diametrically opposed on what to do about it. Racially, we face challenges on immigration and police violence that leave people bitterly at odds. And sexually, leading men from every branch of our society stand accused of sexual harassment and assault, leaving us each with the obligation to decide whom to believe.

“What is truth?”

Rather than wash their hands of the question, the co-conveners of this conference, Professors Ledewitz and Feldman, have assembled an impressive array of passionate seekers of truth to advise us on how we might seek the truth more effectively and see it more clearly. Each of the seven speakers addresses a different aspect of the problem. Their energy leapt from the lectern; each presentation was followed by vibrant discussions with the audience. This

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\* Visiting Professor, Duquesne University School of Law; Distinguished Professor Emeritus, University of Akron School of Law.

symposium issue of the *Duquesne Law Review* represents our best effort to capture their passion and commitment on the written page.

The keystone to the presentation of our keynote speaker, Professor Louise Antony, is “perspective.” Professor Antony brings her vast expertise on the relation between language and the mind, feminist epistemology, and the philosophy of religion to bear on how we understand the world around us in terms of our values. She emphasizes the importance of introspection—that before we investigate the facts and draw inferences from them, we must reflect upon, identify, and seek to set aside our own biases. We must strive to be objective—to be “fair and balanced” in ascertaining the truth. This is, of course, no easy task. People who care deeply about our country and the challenges we face do so because we perceive injustice and wish to redress it. From a humanistic framework, she reminds us to hate the sin, not the sinner. She brings all of her deep knowledge of human thought and experience together to encourage us to maintain perspective.

Professor Ledewitz focuses on “trust.” How can we restore trust to our society—trust in our institutions and trust in each other? To develop and sustain a consensus about what is true, the people of a community must have a common frame of reference, and they must share a commitment to the “common good.” Professor Ledewitz rejects both moral relativism and materialism and calls for a spiritual revival. He proposes that we find common ground in a philosophy of “hallowed secularism” whereby we embrace values consistent with the precept that the universe is on our side.

Professor Justin Dyer explains why materialism is so destructive of values—that if we are ruled by desires and appetites, then our values consist only of self-interest and gratification. Professor Dyer, a political scientist who has closely studied this nation’s history, would instead have us seek to be guided by reason, as were the founders of our country. He reminds us that we can find commonality of purpose by remembering the first principles upon which the United States of America was founded: the natural law principles of the Declaration of Independence. These are the principles in which our nation was conceived and to which it is dedicated. Professor Dyer finds hope in the founders’ view of human nature, specifically the anthropology of James Wilson, a signer of both the Declaration and the Constitution.

As a linguist and a lawyer, Professor Larry Solan brings a unique perspective to the question of “truth.” As a linguist, Professor Solan focuses on the relation between the individual and the truth, and as a lawyer, he describes the impact of mendacity on our system of

justice. Lawyers are not permitted to lie, nor may they suborn perjury, but the law does not require lawyers to be candid, and in some circumstances, lawyers are ethically obligated to deceive; the purpose of the adversary system is to uncover deception. Solan distinguishes between “lies,” “deceit,” and “bullshit” and examines the destructive effect of each on the law and our society.

Professor Alina Ng is currently exploring how neuroscientific data can shed light on our thought processes, and how this can lead to the development of innovative social policies and changes in the law. Professor Ng notes that medical and social science research reveals that people are “hardwired” to embrace truth—that we naturally seek the truth and that we are naturally drawn to the truth. Science and the scientific method are the material foundation of today’s society. She addresses whether we can extend the success of science beyond materialism to moral truth. Can devotion to empiricism and objective truth lead us to deeper and more true beliefs about human potential? Can we overcome Hume’s naturalistic fallacy? Can we derive “ought” from “is”?

Professor Feldman, trained in law and philosophy, has studied the relation between law and science, as well as that of virtue ethics and legal ethics. The scientific method requires scientists to make careful, objective observations of the world; the ethics of science require them to report their findings truthfully and without bias. So, too, does society, through law, demand truth. Professor Feldman points out that laws governing the marketplace require not only honesty but candor. Fraud and misrepresentation make contracts void or voidable; deceptive acts and practices are punishable; and false advertising is a crime. She describes how our social and political discourse should be modeled after the ethics of science and law.

Professor W. Bradley Wendel, whose scholarship has focused on the application of moral and political philosophy to legal ethics, offers an institutional perspective. Is it not remarkable that adversarial attorneys who are each bound to zealously champion the interests of their respective clients are indispensable components of a system of justice devoted to discovering the truth? Professor Wendel explains how competing versions of “legal truth” and the obligation of “role-differentiated morality” that is enjoined by the ethics of the legal profession contribute to both truth and justice.

Professors Elizabeth Agnew Cochran and Jennifer Ann Bates of Duquesne proficiently moderated the panel presentations, and I moderated the plenary session. What follows are my personal reflections on the theme of the conference.

We have created a great civilization. We have managed to do this only because and only to the extent that we are obedient to the truth.

Buildings do not withstand hurricanes or earthquakes unless they are constructed according to codes and specifications based upon mathematical and engineering principles designed after careful experimentation and observation, and unless they are built by contractors who follow those codes and who use the materials they are required to use. All parties to the erection and maintenance of those structures must be obedient to the truth. Only then can we trust that these edifices are sound—that they are built upon rock and not upon sand.

So it is with our system of criminal justice. Only when investigators are devoted to uncovering what really occurred; when prosecutors diligently seek to prosecute wrongdoers; when defense attorneys are obedient to their duty not to partake in the misprision of evidence or suborn perjury; when witnesses tell the truth, the whole truth, and nothing but the truth; when juries evaluate the trustworthiness of evidence in a fair and objective manner; when trial and appellate judges administer justice without respect to persons, and do equal right to the poor and to the rich, and faithfully and impartially discharge and perform all the duties incumbent upon them—only then can we have faith that our courts will punish the guilty and absolve the innocent.

So it is with our system of civil justice. The civil justice system replaces the police with the process of discovery. In a civil case, all relevant evidence—in fact, all information that might lead to the discovery of relevant evidence—must be disclosed to the other party. Each party has the power of subpoena, the power to force the other party and the other party's witnesses to testify under cross-examination. The process of discovery is a mighty engine for the discovery of truth. When civil disputes arise in our society, only through discovery can we have faith that the truth of the matter will come to light.

So it is with our legislative process. Consider, for example, legislation that seeks to govern the financing of healthcare, which constitutes one-sixth of the American economy. The regular legislative order would normally require such an important bill to pass through careful scrutiny by multiple committees of Congress; there would be wide-ranging testimony and voluminous studies from both interested parties and disinterested experts; we would hear from leading economists, healthcare organizations, employers, trade associations, and consumer advocates. We should expect the cost of

the measure and its likely consequences be examined by experts at the Congressional Budget Office, the Joint Committee on Taxation, and the Centers for Medicare and Medicaid. Only with the considered input of all these parties and institutions can we hope to produce laws that will work as intended. Only through the regular legislative process can we have faith that the law will truly reflect the will of the people.

And so it is with the democratic process—our experiment, now two centuries old, in self-government. When a hostile foreign government is free to spy on candidates or political parties; when it can infect our country with the kind of propaganda that is typical of totalitarian regimes; when it can seek favor with candidates in return for political assistance—then we no longer have a democracy, and we no longer rule ourselves. Even without foreign interference, to the extent that undemocratic devices such as malapportionment or gerrymandering or voter suppression are used to dilute the political power of citizens, then, to that extent, elections do not truly reflect the will of the people.

There is no doubt that we are making progress in our search for truth. Our social, legal and moral edifices are increasingly reliant on the empiricism of science and social science. The Brandeis Brief—a legal argument that attempts to base the law on expert scientific findings—has become a critical component of legal argumentation. In the future, we will no doubt continue to rely upon both economics and sociology in the enactment and interpretation of the law.

What of lies? They will dissipate in the light of truth. The gravest lie of our society—our original sin—is the myth of White Supremacy. Over the centuries, people have fought desperately to dispel that lie. The victory of the United States in the Civil War brought an end to slavery, and the Civil Rights Movement ended *de jure* discrimination and segregation. We are still fighting institutional racism and have not yet entirely cast off the myths that shackled our ancestors.

Truth is emerging. Women are coming forward now, increasingly, to tell the truth and to challenge male entitlement to ownership of women's bodies. The victims of child sexual abuse are coming forward now to challenge the silence and complicity of those who would prefer to ignore this atrocity. Other groups of citizens and non-citizens are coming forward into the light to assume their rightful place as equal persons under the law.

As Justice William Brennan wrote fifty years ago:

The mists which have obscured the light of freedom and equality for countless tens of millions are dissipating. For the unity of the human family is becoming more and more distinct on the horizon of human events. The gradual civilization of all people replacing the civilization of only the elite, the rise of mass education and mass media of communication, the formation of new thought structures due to scientific advances and social evolution—all these phenomena hasten that day.<sup>1</sup>

Our country can and will resurrect our search for truth. This symposium re-dedicates us to hastening that day.

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1. William J. Brennan, Jr., *How Goes the Supreme Court?*, 36 MERCER L. REV. 781, 786 (1985).



# Finding the Truth

*Louise Antony\**

“Is Truth Dead?” asked Time magazine on March 23, 2017.<sup>1</sup> No, it is not.

People *do* care about the truth, at least in mundane contexts. If the automaker says a particular car gets 45 mpg, and it doesn’t, we care. If the information board says that our flight is leaving from Gate 24, and it’s not, we care. If our children say that they have done their homework, but they haven’t, we care. Truth still matters. Why, then, do we elect people who don’t seem to care about the truth? I think that the answer to this question is partly political, and partly epistemological.

Let me start with the epistemological issues. The first thing I want to call attention to is the difficulty of *finding* the truth on many matters of current concern. I am a highly educated person with lots of control over my daily schedule, and yet even I find it extremely difficult to gain more than a passing understanding of many of the important issues of our time. I certainly cannot personally confirm or disconfirm many of the propositions I believe to be true, including some that form the bases of my political allegiances. These include:

- my belief in human-caused climate change
- my belief that public job programs will help the economy more than tax reductions for the wealthy
- my belief that the “free market” produces neither efficacy nor efficiency in the delivery of health care.

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\* Professor of Philosophy, University of Massachusetts Amherst. I wish to thank Joseph Levine, Heidi Feldman, and Bruce Ledewitz for comments and questions that helped me develop this paper. I would also like to thank Professor Feldman and Professor Ledewitz for their kind invitation to speak at the “Will These Bones Rise?” conference. Finally, I would like to thank my audience at Duquesne University School of Law for their stimulating questions and remarks.

1. *Is Truth Dead?*, TIME, Mar. 23, 2017.

Why do I believe these things? Because I trust the experts who research them, and the news agencies who report them. But this just pushes the question back – why do I trust *these* experts, *these* reporters? Why do I trust the people I trust?

Here it's tempting to say – as I have heard people in my milieu say – that we trust the particular experts we trust because they are “objective.” And in what does this “objectivity” consist? I think what people have in mind is that the trustworthy experts have the following characteristics:

- they consider *all* the facts; they are not selective
- they *base* their conclusions *on the facts*, and not on their own opinions or feelings
- they consider *both sides* of a controversy, and respond *rationaly* to objections or problems.

Taken together, these tenets constitute an epistemological ideal that I like to call “Dragnet Objectivity.” Older members of the audience will catch the reference here to a once-popular television police procedural featuring two LA cops. One of them, Sgt. Bill Friday, was a no-nonsense guy. He eschewed any premature theorizing. If any of his interviewees ventured to offer an *opinion* about the circumstances of the crime or the identity of the criminal, Friday would cut them off curtly with his signature phrase, “Just the Facts, Ma’am.” Only after all the evidence was in, and only after carefully considering it, would Friday reach a conclusion about the crime.

Now no sensible person would expect ordinary mortals to live up to the sterling example set by Sgt. Friday, but I do think that a great many sensible people (including me in weak moments) believe that we ought to *try*; that the more closely we can emulate Sgt. Friday's method, the better our researches will be. Dragnet Objectivity represents an epistemological ideal.

This view gives rise to the corollary belief that epistemological success is explained by adherence to the method of Sgt. Friday. Thus, for those of us who believe in “science” (the scare quotes here indicating only that it's problematic to think of science as a monolithic institution – a point I'll return to in a moment), it is because science has been so spectacularly successful – the eradication of smallpox, the lunar landing – pick your favorite example. And science, we think, has been successful precisely *because* its methods so closely match Sgt. Friday's. (We don't think of it in those terms, of

course!) Indeed, if you look at any grade school science textbook,<sup>2</sup> you'll find an explanation of the "scientific method" that is virtually identical to the Dragnet procedure I outlined above.

Similar thinking is in play when we choose our experts. The New York Times and National Public Radio, for those of us who rely on those sources for much of our news, appear to many of us to closely approximate the Dragnet ideal.

But Dragnet Objectivity, I contend, is *not* a suitable ideal for human inquiry. Firstly, it is nearly impossible for human beings to implement, successful scientists and incisive reporters notwithstanding. But more importantly, secondly, it would be a disaster for human inquiry if we *were* to implement it. According to this conception of objectivity, individuals charged with finding or promulgating the truth must divest themselves of background beliefs and stick to "just the facts." Since it is impossible for human knowers to follow this advice, the charge of "bias" can be credibly leveled at almost anyone, including the scientists and reporters who compose the set of experts on whom most of us are forced to rely. This is the route through which an organization like Fox News is able to represent itself as "fair and balanced."<sup>3</sup> It is also the route through which white power and other hate groups can claim to be *redressing* discrimination.

The central epistemological problem that human beings have to solve is the problem that Quine labeled "the underdetermination of theory by evidence."<sup>4</sup> The problem is that (a) we always have only a finite amount of evidence, and (b) for any finite amount of evidence, there are an infinite number of hypotheses logically consistent with that evidence. This means that (a) there is no such thing, even for individual issues, as "all the facts" and (b) the facts alone cannot determine any particular hypothesis to be better than any other. Some other factor must come into the picture, if only to cut down the set of alternatives to a manageable number. This other factor, surprisingly, is *bias*. The explanation for our human ability to know is that we come to every epistemic challenge equipped with concepts and background beliefs that condition every step of the process of inquiry – where we look for evidence, how we

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2. Or indeed, most any college study notes. See, e.g., Jose Wudka, *What Is the "Scientific Method"?*, U.C. RIVERSIDE: PHYSICS (Sept. 24, 1998), [http://physics.ucr.edu/~wudka/Physics7/Notes\\_www/node6.html](http://physics.ucr.edu/~wudka/Physics7/Notes_www/node6.html).

3. Fox News had once used this phrase as its motto "Fair and Balanced," but abandoned it in 2017. See *Fox News Drops 'Fair and Balanced' Motto*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/2017/06/14/business/media/fox-news-fair-and-balanced.html>.

4. WILLARD VAN ORMAN QUINE, *Epistemology Naturalized*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 69, 83 (Columbia Univ. Press 1969).

interpret evidence, which alternative hypotheses we consider, and how we respond to challenges.

The underdetermination problem is present both at the level of the individual knower, and at the level of societies of knowers, and bias is present at both levels. At the level of the individual, native biases enable us to learn important things that we would not otherwise be able to learn. The most dramatic example is language acquisition. Children typically manage, within three or four years, to acquire a very complicated system of symbolic communication, without explicit instruction or correction. (In contrast, highly intelligent non-human animals, like gorillas and chimpanzees, can master some vocabulary but virtually no syntax even after years of assiduous instruction.) Noam Chomsky famously offered the explanation that human beings are born with an innate cognitive structure that is primed to build a grammar based on minimal exposure to human speech.

More generally, it is clear that almost all animals operate with what Quine called “an innate similarity space,” native biases about what kinds of similarities among the objects in our experience are and are not important for understanding general features of our world.<sup>5</sup> Some animals, like birds and insects, have innate algorithms or procedures that guide them in noticing and using certain kinds of information.<sup>6</sup> For example, indigo buntings, who migrate up to 1,200 miles, are primed to attend to the fixed point in the rotating night sky – the North Star – and then to use that fixed point to guide their migration due south.<sup>7</sup> Similarly, human children are primed to attend to speech sounds – they show a preference for speech over other sorts of sounds at the earliest age at which contemporary methodology allows them to be tested.<sup>8</sup>

Bias, in these cases, plays a *constructive* role in the building of human knowledge. But there is a downside: the same cognitive biases that enable us to quickly sort other animals into groups, so that we can form useful generalizations about their characteristics and their behavior, can also work to enable pernicious social biases.

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5. See QUINE, *Natural Kinds*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS*, *supra* note 4, at 114, 123.

6. Stephen T. Emlen, *The Ontogenetic Development of Orientation Capabilities*, in *ANIMAL ORIENTATION AND NAVIGATION* 191, 191 (Sidney R. Galler, Klaus Schmidt-Koenig, George J. Jacobs & Richard E. Belleville eds., 1972), <https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19720017424.pdf>.

7. *Id.*

8. Janet F. Werker & Judit Gervain, *Speech Perception in Infancy: A Foundation for Language Acquisition*, in 1 *THE OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY* 909, 909 (Philip David Zelazo ed., 2013).

Sarah-Jane Leslie offers this sort of explanation for the development of certain kinds of social prejudice.<sup>9</sup> She argues, first, that we human beings are prone to making generalizations on the basis of just a few examples in cases where the salient property is “dangerous.”<sup>10</sup> So, she points out, we will agree that “ticks carry Lyme disease” even though it is only a tiny fraction of the tick population that actually carries the bacterium.<sup>11</sup> The utility of such a cognitive mechanism is obvious: it enables us, or at least enough of us, to avoid contracting Lyme Disease. But then, Leslie explains, if this cognitive mechanism is set into motion in environments shaped by social injustice, it can lead to such judgments as “black people are criminals” (by a white person) or “Muslims are terrorists” (by an American Christian).<sup>12</sup> The upshot, I want to argue, is that social prejudices are not necessarily the result of stupidity or sloppy reasoning. They may be the result of a normal, generally useful cognitive mechanism being deployed in a “bad” environment.

Another important fact: beliefs acquired through the operation of this cognitive generalization mechanism are resistant to counterexamples. Once I form the generic belief that ticks carry Lyme Disease, I will not give it up just because I have learned that there are some ticks that *are not* carriers. Confronted with a counterexample, I will say something like, “well, *in general*, ticks carry Lyme Disease.” Leslie explains this in terms of a folk theory of *essences*. If we have formed a generic belief about ticks, we have also adopted the view that there is some property that all and only ticks have, and that this property *disposes* ticks to carry the disease, even if they do not currently carry it. This hypothesis explains the persistence of certain racist and sexist beliefs even in the face of myriad counterexamples.

The kind of bias that I have been discussing operates *sub-consciously*. We do not realize that we are filtering evidence or failing to consider alternative hypotheses in the cases I have described above. But what happens when we *consciously* inquire? When we *explicitly* consider our evidence and weigh alternatives? To consider that question, let us switch to our main topic – how to responsibly form judgments about complicated matters.

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9. Sarah-Jane Leslie, *The Original Sin of Cognition: Fear, Prejudice, and Generalization*, 114 J. PHIL. 393, 394 (2017).

10. *Id.*

11. *Id.* at 397.

12. *Id.* at 399.

Start with science. Work beginning in the 1960's by Thomas Kuhn and other historians of science, as well as naturalistic philosophers like W. v. O. Quine and Hilary Putnam, showed that science as actually practiced failed to conform to the ideal of the "objective" scientific method.<sup>13</sup> Kuhn, in particular, challenged the idea that scientific hypotheses were subject to constant experimental testing, and that the hypotheses that failed were jettisoned. Rather, Kuhn argued, successful science depends on the existence of a form of social organization – what Kuhn called a "paradigm" – that is based on a set of broadly-shared background assumptions. These assumptions include a consensus about central tenets, an agreed-upon methodology and a common understanding as to what questions need investigating. The central tenets are, in practical terms, not revisable. There will be no experimental findings that challenge these tenets, because the tenets themselves structure the experiments – that is, the researcher's confidence that a certain experiment will yield useful information depends upon taking the background tenets to be true. If, however, enough "anomalous" observational results accumulate, and if some theorist comes up with an alternative theoretical framework – and that is a *crucial* "if" – there may be a "paradigm shift" – a wholesale migration of the scientific community from one organizing theoretical picture to another. The shift from Newtonian to relativistic physics is one example of a paradigm shift, and the shift from Linnaen to evolutionary biology was another. Sometimes the shift is, as it were, grown from below, with senior scientists clinging to the old paradigm while younger scientists bring in the new. (We see the same pattern in the introduction of new technologies, don't we?) The shifts are not *irrational* – they do occur largely because of empirical failures with the old paradigm, and so are responsive to evidence – but they also occur because they are *available*. Kuhn contends that the history of science demonstrates that old paradigms are not given up, despite accumulating experimental failures, unless and until a new paradigm is proposed.<sup>14</sup>

In short, science does *not* follow the "scientific method." In scientific domains, where a paradigm has emerged, scientists' commitment to background theory is a precondition for crafting useful ex-

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13. See Thomas Kuhn, *The Structure of Scientific Revolutions*, in INT'L ENCYCLOPEDIA OF UNIFIED SCIENCE (1962); W. V. Quine & J. S. Ullian, *The Web of Belief* (1978); Hilary Putnam, *Introduction, What Theories Are Not, and It Ain't Necessarily So*, in MATHEMATICS, MATTER AND METHOD: PHILOSOPHICAL PAPERS (1979).

14. See Kuhn, *supra* note 13.

perimental programs. Moreover – this is very important – *consideration of theories incompatible with the core tenets is ruled out*. Kuhn makes clear that, for example, progress in biology, dependent as it currently is on the evolutionary paradigm, would be seriously impeded if scientists had to stop and consider the hypotheses advanced by creationists. Contemporary biologists are justified, Kuhn argues, in dismissing such hypotheses *from the start*. It is precisely *because* biologists ignore such fundamental challenges that they have been able to make the progress they have.

The lessons Quine and Kuhn gave us about science, apply to ordinary knowledge-seeking as well. If we want to understand our complex world, we cannot behave like Sgt. Friday. We cannot garner *all* the pertinent facts – there are an unlimited number of those – and so we have to be selective. Not only that, however – we cannot even get *facts* in quite the sense Dragnet epistemology assumes. As I admitted earlier, I have only the vaguest clue what experimental evidence there is for human-caused climate change. I know what the experts I rely on *say* is the evidence, but I have not read the original papers by the original researchers, and if I tried to, I probably would not understand them. If a knowledgeable climate-change denier proffered counterevidence, I would not myself know how to refute it. In this matter, as in many other matters, I rely on *testimony*.

How does it work out for me – for us – this reliance on testimony? Here again, we have a generally useful cognitive habit – believing what people tell us – that works pretty well in a certain range of circumstances. Most of us, I expect, have asked directions of a total stranger, followed them, and arrived happily at our destination. Most of us believe, with a native credulity, much of what our parents tell us, at least initially. (It is hard to imagine a serious measure of this, but I venture to say that, if we take into account mundane information like “that stove is hot,” and “we call that a hippopotamus,” parental testimony is more often true than not.) But as we become more epistemically ambitious, we have to make explicit choices – who to talk to and what to listen to. What we will rely on as we make these choices is going to be guided, for better or for worse, by our background theories.

Facts alone cannot guide us. It is impossible to assess the significance of facts – that is, the significance of *truths per se* – without background theories. The reason is that empirical reasoning – reasoning that depends on propositions that are not self-evident, propositions for which we need evidence – such reasoning is *non-monotonic*. What that means is that adding a new truth to the truths

you already have can reverse the valence of your conclusion. Consider: Breitbart News reported that 402,000 crimes were committed by migrants in Germany in 2015.<sup>15</sup> This figure suggests that alt-right opponents of liberal immigration policies are right to think that such policies threaten domestic security. But now add the consideration that this figure includes the crime of “crossing the border as an asylum seeker.” Taking out those crimes leaves Germany’s crime rate roughly the same as in other years.<sup>16</sup>

Now when I first heard the Breitbart report, I had two reactions: the first was, “well, that is just Breitbart – they’re unreliable.” The second was, “I bet that’s a lie.” Both of these reactions were driven by my background theory, according to which (1) Breitbart has a political agenda and will lie if necessary in order to promote it, and (2) immigrants are generally law-abiding people who actually contribute positively to the economies and social wellbeing of the countries where they settle. The interesting surprise, then, for me, was hearing the Breitbart claim corroborated by Damien McGuinness, a BBC correspondent who has been reporting from Berlin for 14 years.<sup>17</sup> (The BBC is one of my trusted sources.) But then I was counter-surprised to hear that – as I tacitly hoped would be the case – there was context that changed the significance of the factoid. Breitbart had not reported *that*.

But a defender of Dragnet objectivity should not take comfort in this incident. My background distrust of Breitbart, and my near-reflexive trust of the BBC (and of *This American Life* from Public Radio International) are not based on my own careful comparison of the respective reliabilities of these news sources. (And how would I assess reliability, anyway? I would have to use the very sources I am evaluating to find out what the “facts” are.) My pattern of attitudes has much more to do with the coherence of the products of these sources than with my background theory of the world. And the project of justifying one’s background theory of the world to someone with a different background theory is huge. (“Spin” is bad, and something that one’s opponents do; “contextualize” is good, and is what is practiced by my fellow travelers.)

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15. Raheem Kassam & Chris Tomlinson, *Report: Migrants Committing Disproportionately High Crime in Germany While Media and Govt Focus on 'Far Right' Though Crimes*, BREITBART (May 23, 2016), <http://www.breitbart.com/london/2016/05/23/germany-registers-surge-crimes-right-wing-radicals/>.

16. *This American Life: Fear and Loathing in Homer and Rockville*, THIS AMERICAN LIFE (July 21, 2017), <https://www.thisamericanlife.org/radio-archives/episode/621/transcript> (quoting Damien McGuinness).

17. *Id.*



This is why I cringe when I hear friends bemoan the “stupidity” and “ignorance” of the masses. I do not believe that everyone who relies on Fox News is intellectually challenged. Nor do I believe that all of my fellow progressives are paradigms of epistemic responsibility. We cannot separate reliable news sources from unreliable ones on the basis of *formal* criteria. People who get their news from Fox do, it is true, operate within an “echo chamber.” But, it turns out, so do I. A multitude of studies indicate that people in general rely on news sources that reflect their own political perspective, a trend that has been exacerbated by the internet and the rise of social media.<sup>18</sup> (Which blogs do you read? I read *Truthout*, *Feminist Philosophers*, *Democracy Now!*, and *The Intercept*.)<sup>19</sup> Moreover, numerous studies in social psychology indicate that breaking out of one’s bubble is unlikely to make any difference. Mere exposure to disconfirming evidence has been shown, in several domains, to *increase* people’s confidence in their original opinions.<sup>20</sup>

What is to be done? To some extent, my advice here is negative. We must not exhort people to “check the facts”<sup>21</sup> to “be more critical,” to “find out what the other side has to say.”<sup>22</sup> Individualistic strategies like this are not going to work, at least not in a widespread or general way. As is true for scientists, a citizen aiming to be well-informed will do less well if he or she tries to follow this advice daily. (Even triangulating among a variety of left-wing news sources on just one issue takes my husband – who has a particular interest in Palestinian rights – a couple of hours each day.) What is needed, IMHO, is broad social support for institutions and social structures that enable concerned citizens to form *good* background theories.

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18. For a survey of the data, with special focus on the impact of social media, see Cass Sunstein, *#Republic: A Divided Democracy in the Age of Social Media* (2017); Eli Pariser, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think* (Penguin ed., 2014). For an analysis of coverage of the 2016 election by liberal media, see Nate Silver, *There Really Was a Liberal Media Bubble*, FIVETHIRTYEIGHT (Mar. 10, 2017), <https://fivethirtyeight.com/features/there-really-was-a-liberal-media-bubble/>.

19. TRUTHOUT (April 15, 2018), <http://www.truth-out.org/>; FEMINIST PHILOSOPHERS (April 15, 2018), <https://feministphilosophers.wordpress.com/>; DEMOCRACY NOW! (April 15, 2018), <https://www.democracynow.org/>; THE INTERCEPT (April 15, 2018), <https://theintercept.com/>.

20. Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979).

21. I check my facts at [www.politifact.com](http://www.politifact.com).

22. See, e.g., Thorin Klosowski, *How to Spot Truth in the Sea of Lies, Rumors, and Myths on the Internet*, LIFEHACKER (Oct. 11, 2012), <https://lifehacker.com/5950871/how-to-spot-truth-in-the-sea-of-lies-rumors-and-myths-on-the-internet>; Dan Rockmore, *A Crisis for Critical Thinking*, HUFFPOST (Nov. 30, 2016), [https://www.huffingtonpost.com/dan-rockmore/a-crisis-for-critical-thi\\_b\\_13329298.html](https://www.huffingtonpost.com/dan-rockmore/a-crisis-for-critical-thi_b_13329298.html).

That brings me to the political problem. Remember the epistemological problem? That finding the truth is *hard*? That is also the political problem. Finding the truth takes time, a lot of time. As I said earlier, I occupy a position of extreme privilege in this regard. As Joshua Cohen and Joel Rogers point out in their 1983 book *On Democracy*<sup>23</sup> (still timely), because of the time and effort demands of most jobs in the U.S., time for reading and thinking is in especially short supply for anyone outside the educated elite.<sup>24</sup> Moreover, educational opportunity – the kinds of experiences that give people the knowledge and cognitive skills to educate themselves about complex issues – is declining rapidly and alarmingly.

But then, too, we must factor in the consideration that becoming an informed citizen is less and less *valuable* to people at median incomes and below. Political discourse – especially at the national level – has become largely irrelevant to the real-life issues that face large numbers of people in our society. People are cynical about politicians, and with good reason. Senatorial and presidential campaigns have turned into reality-show competitions, with candidates who spout substance-free banalities, disciplined only by market research about which wording best “sells.”<sup>25</sup> The real platforms and promises are the ones candidates negotiate in camera, in consultation with their donors. Polling suggests that most people are aware of, and unhappy about the role that big money plays in our political system.<sup>26</sup> The resulting cynicism, I suggest, makes it all too easy for voters to make their decisions based on nebulous criteria like “leadership” or “strength.” The vapidness of most campaigns also helps explain the appeal of Donald Trump, who was perceived as

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23. Joel Rogers & Joshua Cohen, *Structure*, in *ON DEMOCRACY: TOWARD A TRANSFORMATION OF AMERICAN SOCIETY* 51-62 (Penguin ed. 1983).

24. “Leisure time” must be understood not simply as time not working, but as time not working that an individual can control and utilize. Hourly wage-earners and unemployed persons spend more time not working than salaried and professional workers, but have less money, security, and cultural capital to make use of it. See KENNETH ROBERTS, *LEISURE IN CONTEMPORARY SOCIETY* (2006); see, e.g., Brendan Saloner, *Leisure Inequality: What Do the Poor and the Non-Poor Do for Fun?*, *INEQUALITIESBLOG* (July 7, 2011), <https://inequalitiesblog.wordpress.com/2011/07/07/leisure-inequality-%E2%80%93-what-do-the-poor-and-non-poor-do-for-fun/> (last visited April 17, 2018).

25. See David Flasterstein, *Focus Groups: Manipulation and Representation*, *WASH. U. POL. REV.* (Jan. 17, 2016), <http://www.wupr.org/2016/01/17/focus-groups-manipulation-and-representation/>.

26. See Dylan Scott, *House Republican: My Donors Told Me to Pass the Tax Bill “Or Don’t Ever Call Me Again”*, *VOX* (Nov. 7, 2017), <https://www.vox.com/policy-and-politics/2017/11/7/16618038/house-republicans-tax-bill-donors-chris-collins> (demonstrating the role that not-so-behind-the-scene machinations played in powering the recent tax reform bill in Congress).

someone who spoke plainly and sincerely, making him look very different from mainstream candidates whose every word had been focus-group tested.<sup>27</sup>

My background theory explains the degradation of political discourse in terms of a conspiracy theory. I believe that the United States government currently serves the interests of an economic elite: the Republicans a very narrow one, and the Democrats a somewhat broader one. (I am a member of the second elite – an academic, someone who, in effect, traded-off a certain amount of income for autonomy and the pleasure of making a living doing something I love.) According to this background theory, Democrats and Republicans alike have an interest in obscuring the political goals they actually have. So, Republicans claim to be helping the little guy by “getting government off your back,” and Democrats promise to foster economic prosperity by increasing social justice. But in fact, Democrats, most of them, are beholden to big money to the same extent Republicans are – it is just different big money. Democrats answer to the pharmaceutical industry and the health insurance industry, and the financial sector, which is a big reason we have never seen a proposal for single-payer universal healthcare from a mainstream Democrat. (Bernie, of course, is not a mainstream Democrat. And I hold out hope for Elizabeth Warren!) Thus, I share background assumptions with many Trump voters – we both think that the government is out to get us, we just think that it’s for different reasons. I think the government has been hijacked by the ultra-wealthy. The Trump voters think it has been hijacked by people like me.

In any case, my main point is that it is difficult for any individual to make any material difference with respect to large issues that affect his or her life. Members of the 1% have the financial resources to hire managers and lobbyists – and some lawyers, too, I suppose – to watch over and work for their interests. Members of the – I guess it is about 5% – have the leisure, education, and connections, and may well have the energy to join and work with direct action groups – Citizens’ Climate Lobby, Jewish Voice for Peace, the American Civil Liberties Union are some of the organizations to which I contribute time and money. These organizations and others like them magnify the effects of individual effort, making large-scale change at least conceivable.

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27. See *Bernie Sanders on Abortion*, ON THE ISSUES (Oct. 30, 2017), [http://www.ontheissues.org/senate/bernie\\_sanders.htm](http://www.ontheissues.org/senate/bernie_sanders.htm) (noting Bernie Sanders presented the same appearance, although in Sanders’s case, there is plenty of evidence from his voting record that his campaign statements were sincere).

There are some opportunities for collective action for people in the 95%. Religious institutions are one example, and indeed, a great deal of social justice and anti-war work is accomplished through churches, synagogues, and mosques. But one important organ of collective action – labor unions – is in deep decline. Even the unions that have persisted in the face of economic reorganization and anti-labor laws – notably public-sector and service unions – are facing a mortal challenge in the form of a court case – *Janus v. AFSCME Council 31* – which will be soon be heard by a Republican-majority Supreme Court, which is almost certainly going to rule against the “agency fee” charged by unions to bargaining unit members who do not join the union, but benefit from its collective bargaining.<sup>28</sup>

Unions are one way to address the “high-cost/low-payoff” reality of knowledge-gathering in the U.S. today. In their role as custodians of their members’ interests, they can perform some of the informational watchdogging needed to track the likely effects of employer and government actions. They can also increase the likely payoff of being well-informed, because, as collectives, they have the resources to fight for real benefits for their members. I say all this recognizing that this is an idealized picture of union activity. But it is still the case that the period of greatest economic equality in the United States, as well as the period of greatest economic growth, was a time when about a third of American workers were unionized. Now, nationwide, it is less than 10%.<sup>29</sup> (Massachusetts has one of the highest rates of unionization among teachers in the U.S., and also the best schools as measured by standardized tests.<sup>30</sup>)

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28. Teachers are one of the largest groups of workers who are still highly unionized. There are now springing up many pseudo-unions hoping to drain genuine teachers’ unions of members once the agency fee is eliminated by the *Janus* decision. The umbrella organization for these is the Association of American Educators (<https://www.aeteachers.org/>) which offers “a modern approach to teacher representation...without a partisan agenda.” And also without bargaining power or job protection. See, e.g., *Who Are We*, ASS’N AM. EDUCATORS, <https://www.aeteachers.org/> (last visited May 12, 2018).

29. See *Union Members Summary*, ECON. NEWS RELEASE (Jan. 19, 2018), <https://www.bls.gov/news.release/union2.nr0.htm>.

30. See Richie Bernardo, *2017’s States with the Best & Worst School Systems*, WALLETHUB (Jul. 31, 2017), <https://wallethub.com/edu/states-with-the-best-schools/5335/#main-findings>; Amber M. Winkler, Janie Scull & Dara Zeehandelaar, *How Strong Are U.S. Teacher Unions?*, ED EXCELLENCE (Oct. 2012), <http://www.edexcellencemedia.net/publications/2012/20121029-How-Strong-Are-US-Teacher-Unions/20121029-Union-Strength-Full-Report.pdf>; Valerie Strauss, *Are Teachers Unions Really the Scourge of the Nation?*, WASH. POST (Aug. 15, 2014), [https://www.washingtonpost.com/news/answer-sheet/wp/2014/08/15/are-teachers-really-the-scourge-of-the-nation/?utm\\_term=.9562baca15de](https://www.washingtonpost.com/news/answer-sheet/wp/2014/08/15/are-teachers-really-the-scourge-of-the-nation/?utm_term=.9562baca15de).

The demise of unions (and the rise of the “gig economy”) has resulted in the atomization of knowledge for a large segment of the U.S. population.

In short – the problem of an uninformed citizenry does not, in my view, reflect either a disregard for truth, or a general decline in intelligence. It reflects the fact that too few of us in this country enjoy what philosopher John Rawls called the “fair value of liberty.”<sup>31</sup> Too few of us have the resources and time to learn what the truth is, and too few of us can make any material use of the information once we have it. To support the truth, I contend, we must support the public institutions that support intelligence and erudition, beginning with public education. State support for public higher-education has declined precipitously over the last few decades, forcing state universities to charge higher and higher tuition and to strike more and more deals with corporate America.<sup>32</sup> The movement for “school choice,” where it has not been beaten back by concerned citizens (many of whom are members of unions), is decimating public K-12 schools. If we cannot offer *all* citizens quality education, ideological “fake news” will rush in to fill the gap. Together with public education, though, we must ensure that all citizens have access to collective action, so that they may join their individual efforts with those of others, to make genuine improvements in their own lives.

Do you want the truth? Then we must have justice.

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31. See JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press rev. ed. 1999); Leif Wenar, *John Rawls*, STANFORD: PLATO, <https://plato.stanford.edu/entries/rawls/> (last updated Jan. 9, 2017).

32. See Michael Mitchell, Michael Leachman & Kathleen Masterson, *Funding Down, Tuition Up: State Cuts to Higher Education Threaten Quality and Affordability at Public Colleges*, CTR. ON BUDGET & POLY PRIORITIES, <https://www.cbpp.org/research/state-budget-and-tax/funding-down-tuition-up> (last updated Aug. 15, 2016).



# The Resurrection of Trust in American Law and Public Discourse

Bruce Ledewitz\*

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## I. INTRODUCTION

This symposium—*Shall These Bones Live? The Resurrection of Truth in American Law and Public Discourse*—is about truth. The reference to possible resurrection suggests that something has happened to truth in America. There has been a death.

The title of the symposium also refers to American law and public discourse, suggesting that what happens to truth has serious consequences for our lives together.

Perhaps most fundamentally, the title poses a question—*Shall These Bones Live?* This question implies that law and public discourse in America today are only a skeleton—no longer the living body they once were—but that they still retain a possible promise of a future return to full life.

Recognizing this death while still retaining hope for a healthy future is the origin and goal of this symposium. The question is how

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\* Professor of Law, Duquesne University School of Law. My thanks to my research assistants, Joshua Allenberg and Megan Malone for their assistance in the preparation of this paper. Duquesne is a place of open dialogue, so it is difficult to single out people here for thanks. But I do want to acknowledge Richard Gaffney and John Rago for their comments, Ron Ricci for a 35-year dialogue across the political aisle, and, especially, Jane Moriarty, who closely read, and made crucial suggestions on, each draft of this paper—some of which I accepted. Jane embodies all the qualities that you would want in a Dean of Scholarship. I also want to note the legacy of my friend and teacher Robert Taylor, whose habits of mind, even after his retirement, continue to mold Duquesne University School of Law.

to move forward in concrete ways that honor the seriousness of our crisis and yet address the future that may still be ours.

My contribution to the symposium responds to the task of going forward by asking four questions: what is the death of truth?; what are its origins?; what can be done?; and what will the resurrection of truth accomplish?

I will state my conclusions at the outset. The death of truth is not about truth as such at all. It is about trust—trust both in each other and in the universe. We lack truth in public life because we lack trust. Lying politicians did not cause this lack of trust. Such politicians are beneficiaries of it. So, to resurrect truth in American law and public discourse, we must restore trust. Restoring trust is ultimately a spiritual issue, which, given our society's secularization, will require a new understanding of the nature of religion and spiritual life, and a new willingness among secular people to be open to this realm. This spiritual path is the way to restore democratic life—to regain self-government.

## II. WHAT IS THE DEATH OF TRUTH?

When Time Magazine asked on its April 3, 2017 cover *Is Truth Dead?*,<sup>1</sup> it was asking a question on the minds of many of us. But, it turns out that the death of truth is not what it appears to be at first.

The story accompanying the cover assumed that the death of truth has to do with President Trump's ability to get away with telling lies.<sup>2</sup> So, for example, President Trump would say that his inauguration crowd was larger than that of President Obama or that he would have received a higher popular vote total than Hillary Clinton if only illegally registered voters had not been permitted to vote—obvious untruths—yet his supporters accept what Trump says as true.<sup>3</sup> In a way, Time Magazine agreed with President Trump's statement to the magazine that “[t]he country believes me.”<sup>4</sup>

The New York Times in a June 4, 2017 article illustrated this understanding of the death of truth as the inability to identify a lie, in a story about a high school teacher in Wellston, Ohio—Trump

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1. See D.W. Pine, *Is Truth Dead? Behind the Time Cover*, TIME (Mar. 23, 2017), <http://time.com/4709920/donald-trump-truth-time-cover>.

2. See Nancy Gibbs, *When a President Can't be Taken at His Word*, TIME (Mar. 23, 2017), <http://time.com/4710615/donald-trump-truth-falsehoods>.

3. *Id.*

4. *Read President Trump's Interview with Time on Truth and Falsehoods*, TIME (Mar. 23, 2017), <http://time.com/4710456/donald-trump-time-interview-truth-falsehood/>.



country—where, the headline proclaimed, students were stubbornly rejecting the facts of climate change.<sup>5</sup> In the story, general skepticism about climate change is exhibited by the students and a straight-A student bolts from class rather than watch a documentary that explained the science of global warming. Afterward, this student said, “It was just so biased toward saying that climate change is real...And that all these people that I pretty much am like are wrong and stupid.”

The New York Times story played up all the elements of the death-of-truth narrative that is the current conventional wisdom. The point of the story was that Trump supporters in red-state extraction industry areas reject obvious and accepted scientific findings. From this perspective, the death of truth would seem to be merely a problem of educating the ignorant—a sort of home-grown colonial project.

Except that the story did not actually exhibit that lesson. Eventually, most of the students in the class, seemingly including the student who had bolted,<sup>6</sup> could see perfectly well that humans were changing the planet’s climate and that something had to be done about it. So, ultimately, the early skepticism about global warming represented simple resistance to a narrative that would undermine the prospects for industries that support the local economy.

That should not be called the death of truth, but a lack of trust that climate change proponents will take the interests of this community into account. That is why the theme of disdain-shown-to-people-like-me is so important.

There is nothing here that could not be overcome by sharing the burden of fighting climate change rather than crowing about closing coal mines.<sup>7</sup> Those students knew who was going to pay the price of fighting global warming. It was not going to be people in New York City. It was going to be their communities that paid the price.

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5. Amy Harmon, *Climate Change Meets A Stubborn Obstacle: Students*, N.Y. TIMES (June 4, 2017), [https://www.nytimes.com/2017/06/04/us/education-climate-change-science-class-students.html?\\_r=0](https://www.nytimes.com/2017/06/04/us/education-climate-change-science-class-students.html?_r=0).

6. It is not clear whether the student who had bolted acknowledged that humans are to blame for global warming or whether she only acknowledged that others in her circle of friends so believed. See *id.* (stating, perhaps ambiguously, that the student responded, “I know,” when informed that her circle of friends, including her prom date, believed that humans are to blame for global warming).

7. Lauren Carroll, *In Context: Hillary Clinton’s Comments About Coal Jobs*, POLITIFACT (May 10, 2016, 12:01 PM), <http://www.politifact.com/truth-o-meter/article/2016/may/10/context-hillary-clintons-comments-about-coal-jobs/>. In context, Hilary Clinton’s statement about closing coal mines was not really callous. But it was politically disastrous: “So for example, I’m the only candidate which has a policy about how to bring economic opportunity using clean renewable energy as the key into coal country. Because we’re going to put a lot of coal miners and coal companies out of business, right?” *Id.*

Why should they not be hostile to such a message? Thus, what is called the death of truth is often actually a failure to earn people's trust. It may not be the case that the President is believed. Plenty of Trump supporters may know, for example, that most steel and coal jobs are gone for good.<sup>8</sup> But they trust Trump not to betray them—to do the best for them that he can. They don't necessarily believe his claims.

But isn't there a great deal of acceptance of untruth in American public life? There is, but it still represents a failure of trust. Trump supporters hang on to untruthful narratives because they don't trust his critics. A Trump supporter, Al Ameling, perfectly illustrated this distrust in another article in the *New York Times*, when he stated, referring to the media criticism of then President-elect Trump, "The way it is nowadays, unless I see positive proof, it's all a lie."<sup>9</sup> This insistence on irrefutable proof from those we don't trust can lead to the acceptance of false ideas, because no proof contrary to one's already established preference will ever be "positive" enough.

Distrust works this way on the political left as well. Consider the resistance to scientific reassurances about vaccines and genetically modified food.<sup>10</sup> Or, consider the insistence by her supporters that the Clinton Campaign join in election recounts when, before the election, all official sources had declared that hacking the vote was impossible.<sup>11</sup> Or the distrust of Fox News, as if Fox never could get anything right.<sup>12</sup> But in September, I read about a new batch of pay-to-play emails involving the Clinton State Department on the Fox News Website<sup>13</sup> that I don't remember seeing in the *New York Times*.

The unwillingness of the left to take charges against Secretary Clinton seriously looks to supporters of President Trump like the

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8. See Bruce Ledewitz, *The Role of Religiously Affiliated Law Schools in the Renewal of American Democracy*, 12 U. MASS. L. REV. 230, 243 (2017).

9. Trip Gabriel, *In Iowa, Trump Voters Are Unfazed by Controversies*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/us/donald-trump-iowa-conservatives.html> [https://perma.cc/FFG6-T38U].

10. See Bruce Ledewitz, *Is Religion a Non-Negotiable Aspect of Liberal Constitutionalism?*, 2017 MICH. ST. L. REV. 209, 231 n.120 (2017).

11. See generally Tal Kopan, *No, the Presidential Election Can't Be Hacked*, CNN (Oct. 19, 2016), <http://www.cnn.com/2016/10/19/politics/election-day-russia-hacking-explained/index.html>.

12. See, e.g., Sarah Jones, *How Trump is Creating a Propaganda State*, NEW REPUBLIC (Aug. 30, 2017), <https://newrepublic.com/article/144592/trump-creating-propaganda-state>.

13. See Brooke Singman, *'Pay to Play' at Clinton State Department Exposed in New Emails*, WATCHDOG SAYS, FOX NEWS (Sept. 14 2017), <http://www.foxnews.com/politics/2017/09/14/pay-to-play-at-clinton-state-department-exposed-in-new-emails-watchdog-says.html>.

very same kind of unreasonableness that the left attributes to supporters of President Trump. And in the case of Fox News, the reason for the unwillingness to take anything reported by Fox seriously is a distrust of Clinton's critics very similar to that expressed by Mr. Ameling. Unless there is positive proof from Fox—and no proof would ever be positive enough—it is considered all lies.<sup>14</sup>

Truth and trust are intimately related because without trust, truth is impossible to attain. As the Jesuit Philosopher Bernard Lonergan points out, the scientist does not recheck all prior results, but mostly relies on prior science to be true.<sup>15</sup> As Jurgen Habermas might say, dialogue requires a shared trust that my opponent is not simply manipulating the conversation.<sup>16</sup> If nothing that is not absolutely reliable is true, then nothing—not values, not assurances, not even facts—can be true.<sup>17</sup>

At its deepest level, the death of truth even reaches the question whether we can trust reality to yield truth. I have not yet said what truth is, exactly, because I do not have a definition as such.<sup>18</sup> I mean to indicate by the word, truth, the acceptance of binding authority from which all of us might come to shared meaning and common ground.<sup>19</sup> Truth is binding because it represents the whole of reality. Or, as C.S. Lewis explained in describing objective values, it is “the belief that certain attitudes are really true, and others really false, to the kind of thing the universe is and the kind of things we are.”<sup>20</sup>

That of course is not a definition of truth at all. All we can really say, a la Wittgenstein, is that truth is what is the case.<sup>21</sup>

14. See, e.g., Bob Cesca, *Benghazi Is a Fox News Farce: What the Witch Hunt Reveals About the Right's Most Cherished Lies*, SALON (Oct. 20, 2015), [https://www.salon.com/2015/10/20/benghazi\\_is\\_a\\_fox\\_news\\_farce\\_what\\_the\\_witch\\_hunt\\_reveals\\_about\\_the\\_rights\\_most\\_cherished\\_lies/](https://www.salon.com/2015/10/20/benghazi_is_a_fox_news_farce_what_the_witch_hunt_reveals_about_the_rights_most_cherished_lies/) (discussing the left's view of Fox News' coverage of the Benghazi issue).

15. BERNARD J.F. LONGERMAN, *METHOD IN THEOLOGY* 42 (2013).

16. See generally 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 286-95 (Thomas McCarthy trans., 1984).

17. As Hilary Putnam argues, if all values are subjective, so are all facts because establishing facts depends on values such as reasonableness, consistency and simplicity. See Mario De Caro & David Macarthur, *Hilary Putnam: Artisanal Polymath of Philosophy*, in *PHILOSOPHY IN AN AGE OF SCIENCE: PHYSICS, MATHEMATICS, AND SKEPTICISM* 15 (Marion De Caro & David Macarthur eds., 2012).

18. Putnam thought a theory of truth might not be possible. HILARY PUTNAM, *WORDS & LIFE* 152 (James Conant ed., 1994) (1981).

19. See HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* 88 (2002) (comparing reasons why truth is binding).

20. C.S. LEWIS, *THE ABOLITION OF MAN* 18 (Harper Collins 2001) (1944).

21. See *PHILOSOPHY IN AN AGE OF SCIENCE: PHYSICS, MATHEMATICS, AND SKEPTICISM*, *supra* note 17, at 340. The actual Wittgenstein quotation, given by Putnam, is “the world is all that is the case.” But since the project of realism is to bring truth and the world into consonance, this seems an acceptable alteration. *Id.*

But what if we now doubt that there is that kind of truth about reality or that we could know it if there were? What if there is no necessary connection between our language and reality?<sup>22</sup>

What happens to public discourse if there is a widespread feeling that there is no truth in this ultimate sense? When a person sees truth as possible, it can lead to the healthy political attitude “that objective reality exists, that people of good will can perceive it and that other people will change their views when presented with the facts of the matter.”<sup>23</sup> But, when that understanding of truth, and of truth’s power of persuasion, is absent, there is no point in trying to convince my opponent of anything. Thus, the death of truth is also the death of rational politics.

In other words, if nothing is binding in the sense that it represents what is real, and everything depends solely on my preference, then my opponent and I have nothing in common. If all points of view are arbitrary, we can assume that my preferences represent whatever is a benefit to me. From this perspective, politics can be nothing more than hostile camps opposing each other on grounds of tribal self-interest and identity.<sup>24</sup> That is a fair description of where we are today.

Is it any wonder that, under these conditions, there is such a widespread attitude of hopelessness and fatalism in our culture? Is it any wonder that democracy has deteriorated into contests of turn-out of the base, as opposed to attempted persuasion? Is it any wonder that we now see rage and political violence?<sup>25</sup>

The willingness to resort to violence arises out of the absence of trust in the power of truth and the corresponding emphasis upon winning at all costs. Whereas Gamaliel says in the New Testament that if the new Christian movement is not from God, it will not succeed and if it is, it should not be opposed,<sup>26</sup> few people today are willing to trust reality that way—allowing reality to judge one’s own

22. PUTNAM, *supra* note 19, at 100 (criticizing Richard Rorty for disputing “the ordinary idea that our thoughts and beliefs refer to things in the world”).

23. Richard Aldous, *Critical Thinkers: The Ties that Bind Orwell and Churchill*, N.Y. TIMES (May 23, 2017), [https://www.nytimes.com/2017/05/23/books/review/churchill-and-orwell-thomas-e-ricks.html?\\_r=0](https://www.nytimes.com/2017/05/23/books/review/churchill-and-orwell-thomas-e-ricks.html?_r=0) (quoting THOMAS E. RICKS, CHURCHILL AND ORWELL: THE FIGHT FOR FREEDOM (2017)).

24. For a description and critique of identity politics on the left, see MARK LILLA, THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS (2017). It is unfortunately beyond my scope here to show that it was New Atheists like Lilla who helped destroy the very notion of a common good to be pursued by political action that led us to the point he now decries and takes no responsibility for bringing about. See Bruce Ledewitz, *Toward a Meaning-Full Establishment Clause Neutrality*, 87 CHI.-KENT L. REV. 725, 742 (2012).

25. See, for example, the shootings of Representative Steve Scalise and four others on June 14, 2017 and the car attack that led to one death in Charlottesville on August 12, 2017.

26. *Acts* 5:34-39.

commitments. Whereas Karl Barth said that in Christ is “the end of the whole friend-foe relationship, for when we love our enemy he ceases to be our enemy,”<sup>27</sup> today we have nothing but enemies. Whereas Shakespeare wrote that “truth will out,”<sup>28</sup> we no longer believe that our fellow citizens are sufficiently capable of self-government that they will eventually realize the truth and act on it.

Democracy requires reasoning about fundamental matters in public life. If such reasoning is impossible because our ends are incommensurate and there can only be winning as an exercise of power, then there can be majority rule, but there cannot be democracy. As Hilary Putnam explained, “We may come to think of history and politics as nothing but power struggle, with truth as the reward that goes to the victor’s view. But then our culture—everything in our culture that is of value—will be at an end.”<sup>29</sup>

These trends of the loss of trust in dialogue also manifest in law. In law, where we do still purport to give reasons for decisions, increasingly, two hostile ideological blocs on the Supreme Court face each other across an unbridgeable divide that is no longer rationally addressed.<sup>30</sup> The effort is still made to appeal to objective factors—precedent or original public meaning or whatever—but no one expects persuasion or common ground to emerge.

It is not surprising that confirmation hearings for Supreme Court Justices have become a tissue of lies. Justice Thomas falsely denied he was a natural law thinker.<sup>31</sup> Justice Kagan falsely claimed to be

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27. 4 KARL BARTH, *CHURCH DOGMATICS* pt. 2, at 549-50 (2004).

28. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 2, sc. 2, l. 75 (Kenneth Myrick ed., Signet 1965) (1596).

29. HILLARY PUTNAM, *THE MANY FACES OF REALISM* 71 (1987).

30. See generally Bruce Ledewitz, *Has Nihilism Politicized the Supreme Court Nomination Process?*, 32 *BYU J. PUB. L.* 1 (2017); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 *SUP. CT. REV.* 301 (2016).

31. Charles H. Cosgrove, *The Declaration of Independence in Constitutional History: A Selective History and Analysis*, 32 *U. RICH. L. REV.* 107, 160 n.328 (1998) (“During the confirmation hearings on his appointment to the Supreme Court, however, Thomas virtually denied that he was committed to a natural law approach to constitutional decision-making.”).

an originalist.<sup>32</sup> Justice Gorsuch stated that his values do not matter in deciding cases<sup>33</sup> and then, in his first big case—*Trinity Lutheran Church*<sup>34</sup>—he voted to protect religious believers in a thoroughly non-originalist way.<sup>35</sup> His values mattered a lot. And we supporters of these nominees just accept these false and misleading statements and say nothing about them because if “we” were honest and candid, “they” would just take advantage. Our candidate would get “Borked.”

Similarly, in law schools, the trends of political partisanship and the breakdown of dialogue are increasingly present. The notion of law as a set of eternal principles that could be searched for, reasoned about and discovered, is absent.<sup>36</sup> It is not even clear any longer what knowledge in law school would consist of.<sup>37</sup> Instead of a resource that might assist society in resolving its current divides, law school increasingly just represents the same divides in a different setting.

So, the absence of trust leading to the death of truth is a catastrophe on many levels. How did the loss of trust come about? That is the subject of the next section.

### III. HOW DID THE ABSENCE OF TRUST THAT LEADS TO THE DEATH OF TRUTH COME ABOUT?

If truth died because of a loss of trust, then we have to ask how that loss of trust happened.

32. Josh Blackman, *Originalism at the Right Time?*, 90 TEX. L. REV. 269, 271 n.8 (2012) (“During her confirmation hearing, then-Solicitor General Elena Kagan remarked that ‘we are all originalists.’”).

33. PBS NewsHour, *WATCH LIVE: Senate Confirmation Hearings for Judge Neil Gorsuch* – Day 3, YOUTUBE (Mar. 22, 2017), <https://www.youtube.com/watch?v=kWVvrrRsh4U&feature=youtu.be&t=16013>. On the third day of hearings, Senator Amy Klobuchar asked whether a judge’s “own moral convictions” do not inevitably play a part in a judge’s decisions. Justice Gorsuch answers, “Senator, I can just say that’s not been my experience.” *Id.*

34. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 2012 (2017).

35. See Bruce Ledewitz, *Trinity Case Marks the End of Originalism*, INQUIRER (July 7, 2017), [http://www.philly.com/philly/opinion/commentary/20170707\\_Trinity\\_case\\_marks\\_end\\_of\\_originalism.html](http://www.philly.com/philly/opinion/commentary/20170707_Trinity_case_marks_end_of_originalism.html).

36. Harold Berman saw this coming a while ago. See Harold J. Berman, *The Crisis of Legal Education in America*, 26 B.C. L. REV. 347, 349 (1985) (“Rarely does one hear it said that law is a reflection of an objective justice or the ultimate meaning or purpose of life. Usually it is thought to reflect at best the community sense of what is expedient; and more commonly it is thought to express the more or less arbitrary will of the lawmaker.”).

37. Compare the anguished comment of Judge Wilkinson: “It may no longer be possible to judge a Supreme Court ruling by anything other than result.” J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 257 (2009).

Some people might say that trust disappeared because we were in fact lied to. Didn't Secretary of State Hillary Clinton lie about her email account? And the reader may remember that during a 2009 Address to a joint session of Congress, Republican South Carolina Rep. Joe Wilson yelled out "You lie!" when President Obama said Obamacare would not mandate coverage for undocumented immigrants.<sup>38</sup> And what about President Bill Clinton, claiming he did not have sex with that woman?

Or was it President Bush and weapons of mass destruction in Iraq? Or President Nixon and Watergate? Or, as George Will claims,<sup>39</sup> was it the lies by the government during the Vietnam War that taught us distrust?

But why did this lying not lead to the public insisting on truth? Why did it lead Mr. Ameling to believe that it is all lies? Why did it lead us to abandon dialogue rather than improve it?

It has been suggested that America has been all about untruth, exaggeration and unreality from the beginning of our history.<sup>40</sup> From the Pilgrims to Buffalo Bill to Hollywood, it is said, America has never been in touch with the real. President Trump's outrageousness is just the latest iteration.

I understand this claim, but I cannot accept it. It is a kind of fatalism. No. Someone like President Trump could never have been elected before. That is a fundamental change.

Something prepared the ground for our current, all-encompassing skepticism. Perhaps it was technology generally, because under the reign of technology, from Photoshop to special effects to virtual reality, nothing is what it seems. Technology taught distrust as early as the *War of the Worlds* radio broadcast in 1938.<sup>41</sup>

But distrust has an even deeper foundation than that. The deep, encompassing trust that we lack, but need, requires that one feel at home—with oneself, one's fellow citizens and, ultimately, in the universe. To trust, we must have an idea of who we are and why we are here. That is what is now lacking.

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38. For the video, see *Rep. Joe Wilson Yells Out "You Lie!" During Obama Health Care Speech (VIDEO)*, HUFFINGTON POST (Dec. 06, 2017), [http://www.huffingtonpost.com/2009/09/09/gop-rep-wilson-yells-out\\_n\\_281480.html](http://www.huffingtonpost.com/2009/09/09/gop-rep-wilson-yells-out_n_281480.html).

39. George Will, *Distrust in Government Rooted in Vietnam Bungles*, RECORD (Aug. 2, 2017), <http://www.troyrecord.com/article/TR/20170802/NEWS/170809973>.

40. See KURT ANDERSEN, FANTASYLAND, HOW AMERICA WENT HAYWIRE: A 500-YEAR HISTORY (2017).

41. See A. BRAD SCHWARTZ, BROADCAST HYSTERIA: ORSON WELLES'S WAR OF THE WORLDS AND THE ART OF FAKE NEWS (2015).

Distrust on this level has been present in the West from the beginning of modernity.<sup>42</sup> In the 17<sup>th</sup> century, Rene Descartes employed radical doubt as a methodological starting point in his search for certainty.

There was room in Descartes for trust only at one, crucial point. Descartes felt he could prove his own existence through the very act of questioning it—the famous *cogito ergo sum*. But what about the world around us? What about the existence of other people?

Descartes hypothesized that an evil demon might be fooling us into believing that there is an outside world.<sup>43</sup> For Descartes, only God, whom he could trust, could guarantee the reality of the outside world.

But then, that God died. Not for those religious believers who live in perfect trust even today. Such persons are not the consciousness of this culture.

God died in the sense that the culture, as a whole, including many so-called religious believers, could no longer relax in the unselfconscious certainty that love and goodness lie at the heart of reality. The universe was no longer beneficent and caring. There was no satisfying answer to the question, what is the point of all this?

Art reflects our fundamental unease. In Daniel Quinn's 1992 philosophical science fiction masterpiece *Ishmael*, a student expresses his deepest feeling that somehow, in everything modern civilization professes, he is being lied to.<sup>44</sup> And in the 1999 science fiction movie, *The Matrix*, the audience actually watches Descartes' brain-in-a-vat scenario, come to life on the big screen.<sup>45</sup>

With the Death of God, the West set about attempting to regain a reliable foundation for reality in nature: nature around us or human nature. Two great traditions—science and what would come to be known as the various forms of humanist existentialism—began the quest for a reliable foundation for reality—a replacement for Descartes's guarantee from God.

In the sciences, distrust spurred a search for a completely reliable foundation for reality in materialism. In this understanding, the universe is composed of forces—blind, indifferent and cold, but real. Tables and chairs are really empty space. Algorithms using big data can predict human behavior. Brain science can account for

42. Distrust of reality could be placed much earlier. After all, even the resurrection of Jesus Christ does not quite undo the expulsion from the Garden of Eden.

43. See discussion in HILARY PUTNAM, *NATURALISM, REALISM AND NORMATIVITY* 218 (Mario De Caro ed., 2016).

44. See DANIEL QUINN, *ISHMAEL: AN ADVENTURE OF THE MIND AND SPIRIT* 27-28 (1995).

45. For a discussion by Putnam of the scenario and its relation to the movie and Descartes, see PUTNAM, *supra* note 43.



consciousness. Evolution accounts for love. Our mania for facts resides here. We imagine facts to be reliable.

What becomes unreal in this scientific account is what Husserl called the lifeworld—our human scaled world with its meaning and consequence.<sup>46</sup> From the perspective of a certain kind of science, that human world is illusion. As Richard Dawkins starkly explained in 1995, “The universe we observe has precisely the properties we should expect if there is, at bottom, no design, no purpose, no evil and no good, nothing but blind, pitiless indifference.”<sup>47</sup>

In the non-scientific account of reality, distrust spurred the same search for a reliable foundation, but the “foundation” that eventually emerged was human will in various forms of subjectivity.<sup>48</sup>

In this view, there is nothing fixed in human nature.<sup>49</sup> There is no objective morality or meaning to existence.<sup>50</sup> Everything is interpretation and text. And our interpretations are incommensurate.<sup>51</sup> We are courageous, existential travelers making up our world. Under this view, humans are free and unconstrained. This is the humanist/existentialist tradition. Capitalism roots here, as does our mania for choice.

In this tradition, as in science above, the communal lifeworld is unreal. Only the individual’s will is real.

The emphasis on the individual leads to incommensurate lifeworlds. It is not only that each person makes her own meaning, but that you make your meaning and I make mine.

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46. See Daniel R. Williams, *After the God Rush—Part II: Hamdi, The Jury Trial, and Our Degraded Public Sphere*, 113 PENN ST. L. REV. 55, 95 (2008) (describing the lifeworld sphere as “those domains in life that we experience with our family and friends, our cultural life, our political life outside of organized politics (especially party politics), and our voluntary associations”).

47. RICHARD DAWKINS, RIVER OUT OF EDEN: A DARWINIAN VIEW OF LIFE 133 (1995).

48. In this short essay, I am leaving out any reference to Kant’s insistence that we are bound by a law we give ourselves through reason. See MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 109 (2009). I do that not because I denigrate Kant’s great achievement, but because faith in reason to ground even values no longer reflects a cultural consensus. Even in John Rawls, Kantian reason has deteriorated into the principles that we choose in an original position. See JOHN RAWLS, A THEORY OF JUSTICE 18 (1971).

49. See Sartre’s famous formulation, “Man is nothing else but that which he makes of himself.” JEAN-PAUL SARTRE, EXISTENTIALISM AND HUMANISM, IN JEAN-PAUL SARTRE: BASIC WRITINGS 28 (Stephen Priest ed., Philip Mairet trans., 2001) (1948).

50. See generally Michael Moore, *Moral Reality*, 1982 WISC. L. REV. 1061 (1982) for a description of value skepticism.

51. See Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2510 (1992) (“Both in commonsense, everyday understanding and in Western philosophy, including traditional jurisprudence, the bedrock assumption has been that we are capable of representing reality more or less precisely and that some knowledge transcends particular perspectives and contexts. This is exactly what postmodern thought rejects.”).

This understanding of the ontological primacy of the individual achieves its perfect expression in the famous Gestalt Prayer of Fritz Perls:

I do my thing and you do your thing. I am not in this world to live up to your expectations, And you are not in this world to live up to mine. You are you, and I am I, and if by chance we find each other, it's beautiful. If not, it can't be helped.<sup>52</sup>

The fact/value dichotomy rests in both these forms of scientific and non-scientific positivism.<sup>53</sup> Under materialism, values are unreal. Facts are real. Under subjectivism, values are also unreal. They are posited by the individual as expressions of opinion or will and ultimately of power. In both the scientific and non-scientific accounts, values are not something one could have knowledge about. Under these forms of positivism, morality cannot be objective and cannot be binding. The image of human beings reasoning toward moral truth is regarded as an illusion.

One way that the binding power of morality is undermined is the linkage of human beings to the brutally animalistic—although actual animals are not particularly brutal. Humans are said to be ‘*Exceptionally Rapacious Primates*’ in the title of a recent review by David Bromwich of John Gray’s book, *The Soul of the Marionette: A Short Inquiry into Human Freedom*.<sup>54</sup> The quote in the title of the review is from the book and is said to illustrate the false human aspiration to rise above animal nature.

A similar point about humans was made more dramatically a year before in a review essay by Daniel Smith of Elizabeth Kolbert’s book, *The Sixth Extinction: An Unnatural History*,<sup>55</sup> in Harper’s Magazine. The title of that review was *Consume, Screw, Kill: The origins of today’s mass extinction*.<sup>56</sup> This is how Smith describes the book’s core teaching about humans: “And there you have it, on page two: consume, screw, kill. The *Homo sapiens* way.”<sup>57</sup>

Books like these combat what is considered to be an ingrained human illusion. Since humans are animals, and thus not unique,

52. FREDERICK S. PERLS, GESTALT THERAPY VERBATIM 24 (1969).

53. By positivism, I am referring broadly to the tradition associated with Auguste Comte that “demanded verifiable facts and dismissed all idealism, including moral philosophy.” George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 13 (1999).

54. David Bromwich, *Are We Exceptionally Rapacious Primates?*, 62 N.Y. REV. BOOKS 17 (Nov. 5, 2015) (reviewing JOHN GRAY, *THE SOUL OF THE MARIONETTE: A SHORT INQUIRY INTO HUMAN FREEDOM* (2015)).

55. ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* (2014).

56. Daniel Smith, *Consume, Screw, Kill*, 328 HARPER’S MAG. 84, 84 (May 2014).

57. *Id.* at 85.

the sense of ourselves as unique, which we retain, should be jettisoned. Bromwich refers to “Gray’s image of man as a fantasy-haunted being that hungers after illusion.” That illusion is “the uniqueness of human life.”<sup>58</sup>

The illusion of human significance could also be described as the illusion of meaningfulness—not just of our meaningfulness, but of the idea of meaningfulness itself. The universe is said, as in Dawkins above, to have no intrinsic meaning.

Often, the criticism of this human illusion is voiced by critics of traditional religion. Here is one famed culturally iconic source, Neil deGrasse Tyson, in the 2014 *Cosmos* series, explaining this erroneous human tendency:

We hunger for significance. For signs that our personal existence is of special meaning to the universe. To that end, we are all too eager to deceive ourselves and others. To discern a sacred image in a grilled cheese sandwich.<sup>59</sup>

One of the most beautiful scientific invocations of the insignificance of humanity—attempting to counter the illusion of human significance—is the pale blue dot episode from the original *Cosmos* series by Carl Sagan, which Tyson recalled in the 2014 version. I won’t repeat my description of the episode here<sup>60</sup>—nor the somewhat different sense in which Nietzsche invoked the same image along the lines of Gray above: humans are nothing special and will soon die out. Sagan and Tyson were trying to show that we must care for the Earth because we are alone and the universe is indifferent. No God will save us. They meant well.

But the effect of such a message is the opposite of what they intended. The effect is to instill hopelessness in the culture.<sup>61</sup> There is nothing in the universe to trust.

Law’s experience with the lack of trust and the death of truth can stand as an illustration of what has happened to discourse in public life generally. In the mid-twentieth century, there was confident judicial rhetoric of right and wrong. The *Brown* desegregation de-

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58. Bromwich, *supra* note 54, at 55.

59. See BRUCE LEDEWITZ, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 125 (2016).

60. See *id.*

61. See RICHARD WINTER, STILL BORED IN A CULTURE OF ENTERTAINMENT: REDISCOVERING PASSION AND WONDER 88 (2002).

cision, for example, was not grounded in history, although it purported to be grounded in empirical findings.<sup>62</sup> That *Brown's* real ground is right and wrong is made clear by the companion case of *Bolling v. Sharpe*, which held, with no other justification, that it would “unthinkable” if the federal government could engage in racial discrimination when the States could not.<sup>63</sup> That was a purely moral judgment. Or, think of *Skinner v. Oklahoma*, with Justice Douglas’ unselfconscious invocation of the basic civil rights of human beings.<sup>64</sup> Truth was not dead then.

Skepticism really arrived<sup>65</sup> in American law through the post-modernism of the Critical Legal Studies Movement, which built on the insights of Legal Realism. As Dennis Arrow observed in 1999, post-modernism in law mostly consisted of “linguistic, ontological, and epistemological agnosticism.”<sup>66</sup> That agnosticism was on display in the debates in the 1980’s over objectivity in interpretation.<sup>67</sup>

This value skepticism eventually became entrenched in American Law in the view, accepted by all of the Justices on the Supreme Court in a celebrated five-day period in 1992, which I have called *The Five Days in June When Values Died in American Law*,<sup>68</sup> that values are merely subjective human constructs. This view led the vaunted icon of traditional values, the late Antonin Scalia, to argue grotesquely that because some cultures exposed unwanted infants, or disposed of the incompetent elderly, no judgment could be made about the humanity of an unborn child.<sup>69</sup>

62. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The Court stated that the history of the Fourteenth Amendment was “inconclusive,” *id.* at 489, and that “modern authority” in “psychological knowledge” shows that segregation has “a detrimental effect.” *Id.* at 691-92.

63. 347 U.S. 497, 500 (1954).

64. 316 U.S. 535, 541 (1942) (“We are dealing here with legislation which involves one of the basic civil rights of man.”).

65. Previously, there have been scattered suggestions by Supreme Court Justices that value judgments are subjective, but not to the extent of today’s unanimous presumption. Perhaps Justice James Iredell expressed the sentiment in its earliest form in *Calder v. Bull*, 3 U.S. 386, 399 (1798): “The ideas of natural justice are regulated by no fixed standard . . .” Iredell’s view was picked up again by Justice Hugo Black in dissent in *Adamson v. California*, 332 U.S. 46, 92 (1947), in which he added that Justices invoking natural law principles, “roam at will in the limitless area of their own beliefs.” Beyond my scope here is the question of the Constitution itself and whether it does not embody the very distrust we are now experiencing.

66. Dennis W. Arrow, “Rich,” “Textured,” and “Nuanced”: Constitutional “Scholarship” and Constitutional Messianism at the Millennium, 78 TEX. L. REV. 149, 155-56 (1999).

67. See, e.g., Stanley Rish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984).

68. LEDEWITZ, *supra* note 59.

69. See discussion in Ledewitz, *supra* note 30.

On the left, John Hart Ely anticipated Justice Scalia by twelve years, in his classic book featuring its skepticism in its title, *Democracy and Distrust*.<sup>70</sup> Later, as Robin West has described, in the twenty-first century, “[a]ny theory based on an account of human nature, even loosely understood, appears suspect.”<sup>71</sup>

Quite a lot of the structure and dogmas of constitutional law, including the foundations of originalism and textualism, can be viewed as reactions to the certainty that values are inevitably arbitrary and that reliance on values will lead to the imposition on the country of merely personal preferences by five Justices on the Supreme Court.

Ultimately, in the 2003 *Lawrence* case,<sup>72</sup> the logical conclusion of this legal skepticism was reached: the Court held that morality is not adequate to justify the passage of legislation.<sup>73</sup> In *Lawrence*, the popular moral judgment in question was that homosexual sexual relations are immoral and should be criminalized. The statute at issue was held to fail what is called the rational basis test.

Why is a moral judgment insufficient to uphold a law? At the end of the majority opinion, Justice Kennedy seemed to suggest that the problem was that this particular moral judgment was wrong—that homosexual conduct is not immoral. He wrote that the framers of the Fourteenth Amendment “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”<sup>74</sup> One could then infer that the “truth” is that homosexual relations are, or at least can be, morally proper.

Unfortunately, Justice Scalia’s dissent is surely correct that, taken as a whole, the majority opinion actually decides that *no* moral judgment can be sufficient to justify a law.<sup>75</sup> That is why Justice Kennedy reached back to the *Casey* abortion case for the proposition that the role of the Court is to define the liberty of all, rather than “to mandate our own moral code.”<sup>76</sup> The implication was that *any* moral judgment is subjective—that is, merely one’s “own”—and thus not objectively justifiable.

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70. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

71. ROBIN WEST, *NORMATIVE JURISPRUDENCE* (2011).

72. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

73. *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Stevens, J., dissenting)) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”).

74. *Id.* at 579.

75. *Id.* at 599 (Scalia, J., dissenting) (“This effectively decrees the end of all morals legislation.”).

76. *Id.* at 571.

Nor is this just the case with abortion. The question of cultural relativism also arises, for example, in something like the practice of female genital mutilation. Can we really say *nothing* about the immorality of this practice just because some societies have engaged in it? That is the moral dead end that Austin Dacey saw coming in 2008 because of the moral relativism of the secular left in America, which he tried to contest by the reinvigoration of *The Secular Conscience*.<sup>77</sup> This tendency truncates political discourse by robbing it of its revolutionary possibility, which is a criticism denominated in *The Tolerance Trap* by Suzanna Walters.<sup>78</sup> As Justice Thomas once pointed out, quoting Frederick Douglass, genuine liberation, including genuine equality, depends on substantive justice.<sup>79</sup> To be liberating, the notion of substantive justice must be full and not merely formal.

In 2004, in *Law's Quandary*,<sup>80</sup> Steven Smith argued that moral judgment in law might survive even in a materialistic culture. He pointed to the gap between truth and our materialist ontology of forces. Smith described law's traditional notion of the rule of law as having to do with right answers to legal questions. His point was that any notion of a legal right answer is inconsistent with our current understanding of reality and thus is a form of nonsense.

But Smith noted that, schizophrenically, lawyers retain both forms of discourse. We still talk about "law" and right answers even though there should only be interests and outcomes given our ontology.

Smith thought that lawyers could just go on despite the gap between what we think we believe about the universe and what we say about law. Given the intensifying ideological split on the Supreme Court, I am not sure that Smith was right about lawyers. It may be that such cognitive dissonance eventually leads to aggression and bad faith.

But, even if Smith was right about the limited craft values of law, his suggestion that we might just soldier on without confronting the harmful ontology that we have accepted plainly does not work with regard to society as a whole. We now see how sick society is. We will not regain political health until we confront the depth of what

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77. AUSTIN DACEY, *THE SECULAR CONSCIENCE: WHY BELIEF BELONGS IN PUBLIC LIFE* (2008).

78. SUZANNA DANUTA WALTERS, *THE TOLERANCE TRAP: HOW GOD, GENES, AND GOOD INTENTIONS ARE SABOTAGING GAY EQUALITY* 179 (2014).

79. *Grutter v. Bollinger*, 539 U.S. 306, 349-50 (2003) (Thomas, J., dissenting in part).

80. STEVEN D. SMITH, *LAW'S QUANDARY* (2004). See discussion in LEDEWITZ, *supra* note 59, at 154-55.

is wrong. Somehow, we must restore trust in ourselves and in the universe.

The reader may ask whether this is not all an exaggeration? Is the loss of trust in the universe really that important? It is, because the absence of trust undermines our capacity to respond fruitfully to all problems. When, under the influence of the lack of trust in the universe, we conclude that the moral arc of the universe does not bend toward justice,<sup>81</sup> it affects how we approach everything.

To see this, consider a column by Ross Douthat, the New York Times columnist, advising both political parties to abandon debating healthcare in favor of more fundamental matters. Douthat asked, what is the greatest threat today to the American Dream? He answered:

First, an economic stagnation that we are only just now, eight years into an economic recovery, beginning to escape — a stagnation that has left median incomes roughly flat for almost a generation, encouraged populism on the left and right, and made every kind of polarization that much worse.

Second, a social crisis that the opioid epidemic has thrown into horrifying relief, but that was apparent in other indicators for a while—in the decline of marriage, rising suicide rates, an upward lurch in mortality for poorer whites, a historically low birthrate, a large-scale male abandonment of the work force, a dissolving trend in religious and civic life, a crisis of patriotism, belonging, trust.<sup>82</sup>

The decline of trust is Douthat's last word. Lack of trust is the American crisis that must be faced. The question is, what can be done to restore trust in reality?

#### IV. WHAT CAN BE DONE ABOUT THE LOSS OF TRUST THAT LEADS TO THE DEATH OF TRUTH?

In that same column, Douthat had suggestions for each political party going forward. They consisted of the usual bromides—cutting regulations to spur growth, increasing the child tax credit to aid

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81. See Rich Cohen, *Why Generation X Might Be Our Last, Best Hope*, VANITY FAIR (Aug. 11 2017), <https://www.vanityfair.com/style/2017/08/why-generation-x-might-be-our-last-best-hope> (stating that “the long arc of history does not in fact bend toward justice”).

82. Ross Douthat, *The Healthcare Cul-de-Sac*, N.Y. TIMES (Sept. 23, 2017), [https://www.nytimes.com/2017/09/23/opinion/sunday/health-care-congress.html?\\_r=0](https://www.nytimes.com/2017/09/23/opinion/sunday/health-care-congress.html?_r=0).

families, job and income guarantees to promote stability in our communities.<sup>83</sup>

It does not denigrate Douthat to point out that none of this speaks directly to trust. A spiritual absence cannot be repaired by a materialist response. A spiritual response is needed.

Every culture lives from a story.<sup>84</sup> For America, it was originally the biblical story of God's intervention in Creation to bring salvation. Then for a long time, it was the echo of the biblical story, with democracy and constitutional self-government substituting for the City of God. Those were stories that evinced trust. But they are no longer this culture's story.

Our default story today is of an accidental universe of uncaring forces that led to humans driven by forces. That story cannot sustain a civilization. It cannot promote trust.

If there is to be a resurrection of truth, it will have to begin with a resurrection of trust in reality. A new story. And it will have to begin with each of us.

The Canadian Jesuit Bernard Lonergan put the question that each of us has to answer very simply:

Is the universe on our side, or are we just gamblers and, if we are gamblers, are we not perhaps fools, individually struggling for authenticity and collectively endeavoring to snatch progress from the ever-mounting welter of decline? ...Does there or does there not necessarily exist a transcendent, intelligent ground of the universe?<sup>85</sup>

Most of us today answer either that the universe is not on our side or that we cannot know or that the question makes no sense because, under the assumptions of materialism, the universe is not the kind of thing that could be on somebody's side. Very few of us can wholeheartedly answer, yes, the universe is on our side.

Restoring trust, and thus truth, requires a second look at Lonergan's question. Certainly, it is a theist's question. But there is plenty of evidence *in nature* that the universe is on our side. The big bang shows us there is a tendency toward being. The early galaxies show us there is a tendency toward order. Life shows us there is a tendency in matter toward self-organization. Consciousness shows us there is a tendency toward intellect. Evolution shows us

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83. *Id.*

84. If it is a destructive story, then the people in that culture will be held captive by it. See ISHMAEL, *supra* note 44, at 35.

85. BERNARD LONERGAN, *METHOD IN THEOLOGY* 102-03 (1972).



that, with higher intellect, there is a tendency toward tenderness, generosity and care. And history shows that Martin Luther King, Jr., was right—that the arc of the moral universe really does bend toward justice and that yes, it actually has happened that black and white children play together in peace. Of course, we make many mistakes, we lose ground very easily, and racism with all its attendant evils has not been banished. But you would have to be blind not to see moral progress among humanity.

The birth of the Black Lives Matter movement demonstrates our progress. Police shootings now provoke a national response that was never present before. And, when President Trump invited a harsher police response in a July, 2017 speech, police forces across the country said, no thank you.<sup>86</sup> Those days are over.

So, what accounts for the lack of trust? It is mostly the old Enlightenment brief against religion as superstition. That brief seems to require hopelessness as a badge of intellectual rigor.<sup>87</sup> But I have said nothing here about the supernatural. This is no brief for traditional religion. There are secular, even scientific, sources that can lead us back to trust.

One such source is the late philosopher Hilary Putnam, who spent his whole life charting a middle course between the God's eye view of traditional theism, on the one hand, and the forces of despair—nihilism, materialism and relativism—on the other. Putnam argued that although we could not know everything, but we could know some things. There could not be one true account of reality, but there could be accounts that are in parts truer than others. Yes, there are different perspectives, but they are not all equal. In other words, we have to actively inquire toward truth and that activity is coherent.

Putnam thought that a relativist like Richard Rorty was really a disappointed believer in metaphysical realism<sup>88</sup>—that is, in a kind of traditional religion. If Rorty could not have the certainty of traditional theism, then he would have nothing. If Putnam is right, then our lack of trust is in part a fear of commitment to a pursuit of meaning, because we fear it is not true.

I grant the reasonableness of such a fear. There is no guarantee of truth or significance, or of any of the traditional values anymore.

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86. See Cleve R. Wootson Jr. & Mark Berman, *Police Chiefs Across the U.S. Blast Trump for Endorsing Police Brutality*, CHI. TRIB. (July 30, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-police-chiefs-trump-brutality-20170730-story.html>.

87. The pathos of this position can be seen in PHILIP KITCHER, *LIVING WITH DARWIN: EVOLUTION, DESIGN AND THE FUTURE OF FAITH* (2007).

88. PUTNAM, *supra* note 19, at 101.

Yet, when we dare to genuinely inquire, despite the risk of failure, we find deep reasons for trust. E.L. Doctorow, through a character in his novel *City of God*—Rabbi Sarah Blumenthal—writes that the essence of humanity is the sense that what we do matters: we all pursue a teleology that “has given us only the one substantive indication of itself—that we, as human beings, live in moral consequence.”<sup>89</sup>

Doctorow’s claim that human beings experience a destiny is startling. It sounds like an unprovable tenet of organized religion.<sup>90</sup>

But Doctorow’s claim is not aspirational. It is actual, universal and foundational. Not just Gandhi, but Hitler, Stalin, Pol Pot also lived in moral consequence. All human beings live in moral consequence.

An atheist like Christopher Hitchens, who denies ultimate meaning, shouts out his atheism so that his fellow human beings are not taken in by the lie of God. A postmodernist like Stanley Fish, who says there is no text here, proclaims that with exactitude, expecting to be understood. Both try to live in the truth though they think they deny truth.

Even the scientist like Tyson, who dismisses the sacred as misplaced pattern recognition and an illusionary search for human significance, must ultimately declare that human beings engage in scientific discovery “because it matters what’s true.”<sup>91</sup> Not just matters to us. But actually matters.

In other words, there is no way for a human being to live a life of meaninglessness. The assertion that we do is really just a bad habit.

But what does human moral consequence suggest about the universe? Since this very universe gave birth to beings like us, for whom truth is so important, we may conclude that this universe deserves our trust. The British paleontologist Simon Conway Morris in *Life’s Solution*<sup>92</sup> is willing to look at evolution itself as evidence of a beneficent universe:

89. E.L. DOCTOROW, *CITY OF GOD* 256 (2000).

90. ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 351 (corrected ed. 1978).

We find here the final application of the doctrine of objective immortality. Throughout the perishing occasions in the life of each temporal creature, the inward source of distaste or of refreshment, the judge arising out of the very nature of things, redeemer or goddess of mischief, is the transformation of Itself, everlasting in the Being of God. In this way, the insistent craving is justified—the insistent craving that zest for existence be refreshed by the ever-present, unfading importance of our immediate actions, which perish and yet live for evermore.

91. See SANDEL, *supra* note 48.

92. SIMON CONWAY MORRIS, *LIFE’S SOLUTION: INEVITABLE HUMANS IN A LONELY UNIVERSE* (2003).

“[G]iven that evolution has produced sentient species with a sense of purpose, it is reasonable to take the claims of theology seriously. In recent years there has been a resurgence of interest in the connections that might serve to reunify the scientific world-view with the religious instinct.”<sup>93</sup>

For many people, this resurgence will not lead back to a personal God. But, if the physicist Werner Heisenberg could speak of the “consciousness” of the universe,<sup>94</sup> then it is not incoherent to assert that the universe wants our truth. As Carl Sagan once put it, humans are “a way for the cosmos to know itself.”<sup>95</sup>

However, if all this is so, why are we in the mess we are in? How could truth have died? And what should we do about it?

The answer is that truth did not die, we just lost our way. But it will be hell to find our way back. We now need the social imagination to rebuild institutions of trust.

Loneragan called what we need, *Cosmopolis*, “a redemptive community that would motivate people on a *cultural* level instead of attempting through economics or politics to impose new social structures.”<sup>96</sup> *Cosmopolis* is not a place or even one institution. It is a loose formation of persons of good will who understand the source of our decline as bad habits of mind and try to embody social health in community.<sup>97</sup> *Cosmopolis* would expose distrust and irony as, usually, just bad habits. In building *Cosmopolis*, we defeat distrust through working toward communities of trust.

Where should we begin? We have to start where we are, in the communities and institutions in which we are already situated. Duquesne Law School has helped me begin by hosting this very symposium. And I think, in general, law schools, because of their intense involvement with social problems and their mix of action and thought, are very good candidates, though not exclusive, for a kind of proto-*Cosmopolis* site.<sup>98</sup> After all, in a constitutional democracy, where else should the people look for hope but to their schools of law?

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93. *Id.* at 328.

94. Quoted in BRUCE LEDEWITZ, *CHURCH, STATE AND THE CRISIS IN AMERICAN SECULARISM* 225 (2011).

95. Jonathan Cott, *The Cosmos: An Interview with Carl Sagan*, *ROLLING STONE* (Dec. 25, 1980), <http://www.rollingstone.com/culture/features/the-cosmos-19801225> [<https://perma.cc/67BM-T5T2>].

96. MARK T. MILLER, *THE QUEST FOR GOD & THE GOOD LIFE: LONERAGAN'S THEOLOGICAL ANTHROPOLOGY* 177-78 (2013).

97. LONERAGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 238-42 (1958).

98. For more on the role of religious law schools, see Ledewitz, *supra* note 8.

There is no rulebook for how we should proceed. But there are some guidelines for building Cosmopolis.

First, Lonergan is clear that Cosmopolis does not promote a practical, political/economic/social program.<sup>99</sup> Policy prescriptions are not how decline is arrested. For law professors this is particularly difficult because we pride ourselves on taking positions on important issues and cases. But partisanship is so prevalent today that all such activity is suspect. Every analysis looks like an argument. Every paper looks like a brief. I rarely trust what law professors write, including my own biases. In this era of distrust, we have to prove that we are not lying in our public positions, just to support our “side.”<sup>100</sup>

Second, Cosmopolis is a place for the kind of open inquiry championed by John Dewey. There cannot be shibboleths, taboos, preconceptions of any kind.<sup>101</sup> That goes against the grain today. In some universities, there are topics that can hardly be discussed. Similarly, there are red States in which words like climate change are practically banned from public discourse. The only way to ensure the needed transparency in Cosmopolis is through genuine diversity, not only of race and gender, but of party and viewpoint. There must be conservatives, liberals, capitalists, anarchists, communists—and even religious believers. There must be people in Cosmopolis who can come to the table with the trust of each of our disparate communities.

Third, though not emphasized by Lonergan, there must be more care for language in Cosmopolis than we usually exhibit. Heidegger, echoing Hoderlin: says “poetically man dwells.”<sup>102</sup> It is hard to imagine a poetic law school, but that is the point. A poem expresses truth not only in its ideas but in its form. Our very language must express our reverence for each other and for the universe. There is a practice in some religious law schools of opening each class with a prayer. I think, instead, we have to imagine each class, each encounter, *as* a prayer. Every occasion a kind of religious holy day.

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99. LONERGAN, *supra* note 97, at 239.

100. My proposal that law professors cease arguing for immediate case outcomes in favor of a longer-term effort to develop a science of human flourishing toward which law could orient itself, *see infra*, corresponds roughly to the distinction drawn by Robin West between genuine normative jurisprudence and faux-normative jurisprudence that actually argues toward what the law is said already to be. *See* West, *supra* note 71, at 181-83.

101. LONERGAN, *supra* note 97, at 240 (“[I]t must be purged of . . . rationalizations and myths . . .”).

102. *See* Paul Douglas Callister, *Law's Box: Law, Jurisprudence and the Information Eco-sphere*, 74 UMKC L. REV. 263, 331 (2005).

We in law school have to be a community that lives the resurrection of truth. Living the truth is the only way that truth can be resurrected.

But we cannot rest with trust, or even with truth. Finally, we have to ask, what is our ultimate goal? We want to restore trust and truth, but to what end?

## V. REGAINING SELF-GOVERNMENT

Self-government is at risk in America today. There is very little realistic, responsible discussion of issues in public life. What passes today for political debate is like a fantasy world.

The effect of the breakdown is perhaps most clearly apparent in the fiscal realm. On the right, huge tax cuts are proposed at a time of already mounting deficits, with the false claim that such cuts, whatever their effect on the economy, will not increase the federal deficit. This is not even defended rationally. Tennessee Senator Bob Corker sounded absurd when the Republican plan was announced: “I’m going to want to believe in my heart that we’re going to be lessening deficits, not increasing.”<sup>103</sup>

Among Democrats, the fiscal irresponsibility is just as great. There are discussions of single payer healthcare without even a mention of the cost and difficulty. There is not any suggestion that entitlement spending might have to be limited. The fact that a Democrat, President Bill Clinton, last balanced the federal budget is not embraced anywhere in the Democratic Party as a model.

Just consider hurricane relief in 2017. Billions of dollars were authorized to be spent and not one second was spent by anyone considering where the money would come from. I don’t mean the money should not have been spent.<sup>104</sup> But, spending without paying is a fantasy, no matter how just the cause.

Deficits are just one example of the political fantasy world in which we live. We cannot have healthy debate about any of the challenges facing us. The capacity for self-government was once America’s gift to the world. Who today would look to America as a model for self-government?

Worse than just our current incapacity, is our skepticism about the very possibility, or even desirability, of self-government. The

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103. Alan Rapperport & Thomas Kaplan, *Senate Republicans Embrace Plan for \$1.5 Trillion Tax Cut*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/us/politics/senate-republicans-tax-cut.html>.

104. See *Filing Season Statistics for Week Ending Dec. 30, 2016*, IRS, <https://www.irs.gov/newsroom/filing-season-statistics-for-the-week-ending-december-30-2016> (last visited Apr. 2, 2018) (152,544,000 tax returns were filed in 2016).

sorry tale of the Republican Party in this regard is well known, but the negative attitude of the Democrats, because it is not so obvious, may be even more damaging.

For the Republicans, the notion of convincing a majority of the American people has given way to efforts to frustrate majority will. These efforts take the form of occasional outright voter suppression,<sup>105</sup> but usually are composed of the legal, but dubious, policies of gerrymandering and voter ID laws.<sup>106</sup> I have actually heard ostensibly mainstream Republicans opine that the second-place finish of President Trump in the 2016 Presidential election is not a problem because much of Secretary Clinton's 2,868,691 national vote lead<sup>107</sup> was brought about by winning California by over 4 million votes—as if California voters were not part of the American electorate.

We have to be clear about this. Democracy requires majority rule over the long-term. All those anti-democratic provisions in the Constitution are meant to function as a limit on majority power, not to substitute permanent minority rule. If one of our major political Parties now is willing to live with permanent minority rule—or even to enshrine it by manipulating the already anti-democratic Electoral College—the American experiment in self-government is over. Eventually, the military will take power.

What about the Democratic Party? On this side of the aisle, people can afford to laude majority rule because they expect to take power demographically. So, the strategy is just to get Democratic Party voters to show up at the polls.<sup>108</sup>

Yet, this is to miss the point of democracy, which is self-rule. Self-rule requires policy-discussion and conscious choice by the people, not turnout success. Turning democracy into a function of election technology not only loses elections—as it lost the 2016 election—but leads to empty election campaigns. I am still waiting to hear just what policies the Democrats were offering if elected in 2016. I know that a major issue that I was voting for in casting a ballot for

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105. A few examples, like the misleading robocalls that led to the conviction for election fraud of Paul Schurick, Campaign Manager for Maryland Republican Governor Robert Ehrlich are given by Pamela Edwards, *One Step Forward, Two Steps Backward: How the Supreme Court's Decision in Shelby County v. Holder Eviscerated the Voting Rights Act and What Civil Rights Advocates Should Do About It*, 17 BERKELEY J. AFR.-AM. L. & POL'Y 174, 181 (2015).

106. See discussion at LEDEWITZ, *supra* note 59, at 168-71.

107. *2016 Election Results*, CNN, <https://edition.cnn.com/election/2016/results> (last visited Apr. 2, 2018).

108. See discussion at LEDEWITZ, *supra* note 59, at 167-68.

Hillary Clinton—efforts to limit climate change—was hardly mentioned on the national stage.

Law school as Cosmopolis is a path to change all this—a path that leads back to self-government. It does not rest at accomplishing the resurrection of truth for itself. Cosmopolis changes the society around it.

The deepest description I know of what a law school can be is from Roberto Unger, who was not using the term, Cosmopolis, but who saw lawyers as the agents who could return productive political debate to the greater society. He wrote this famous opening paragraph in his 1996 book, *What Should Legal Analysis Become?*:

The conflict over the basic terms of social life, having fled from the ancient arenas of politics and philosophy, lives under disguise and under constraint in the narrower and more arcane debates of the specialized professions. “There we must find this conflict, and bring it back, transformed, to the larger life of society.”<sup>109</sup>

We can do Unger one better. Law School as Cosmopolis can be the place where a new form of politics is actually practiced—a politics of trust that aims at discovering and implementing a science of human flourishing in a benevolent universe through the use of reverent language. We law professors and our students become that polis. Then that model will be seen and emulated throughout society.<sup>110</sup>

Law schools thus have an inside and an outside responsibility. Within, there must be intense, strictly nonpartisan debate held to the highest standards of intellectual rigor and scientific evidence. But debate must be conducted with care and respect for every member of the community and with genuine faith in the future. There must be total openness and thorough rejection of all the forms of reductionism—starting with relativism, nihilism and materialism. Debate must be open to wonder and not wither under cynical gazes.

With regard to the outside, the greater society, law school as Cosmopolis must enforce clarity and candor in political debate, particularly among political allies. We must not be rubber stamps for our side, but harsh critics of our side. Eventually, the practice of no sides will triumph in renewed human solidarity.

Beyond that, Cosmopolis does not bring about change directly. Cosmopolis practices the wisdom attributed, not quite accurately,

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109. ROBERTO MAGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 1 (1996).

110. LONERGAN, *supra* note 97, at 239 (Cosmopolis “provide[s] that witness . . .”).

to Gandhi—be the change you want to see.<sup>111</sup> In our context, the people will only be convinced by seeing law school as something in political life that works.

I know I will be asked what any of this has to do with the primary function of law schools: to train lawyers. The answer is, everything. Lawyers trained in these ways are the only lawyers America needs today. Until now, our best thinking about law school's potential to serve the common good has been to meet legal needs that are currently unserved.<sup>112</sup> That is a worthy goal. But it is far short of what America must have from its law schools today. Today, law school must be the place where the very possibility of a common good is shown to be real.

I don't know whether all this can actually happen, but there is a kind of historical precedent. It is said that the reason the early church spread within the Roman Empire was because pagans looked on the early church communities and were amazed at how humane and loving they were. Nothing like these churches existed. They were irresistible to a worn out, cynical age.<sup>113</sup>

Our age is similarly worn out and cynical. Law school as a living experiment in a new politics is the only way I know that we can change that.

## VI. CONCLUSION

The Immanent Frame, a well-known collaboration of the Social Science Research Council,<sup>114</sup> publishes “interdisciplinary perspectives on religion, secularism, and the public sphere.”<sup>115</sup> This is the site of the best thinking that tries to bring naturalism and religion, or the spiritual, or the sacred, into some kind of harmony. For its tenth anniversary, the Immanent Frame invited noted thinkers to answer the question, “Is This All There Is?” on any terms the writer chose.<sup>116</sup>

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111. Gandhi's actual words were “If we could change ourselves, the tendencies in the world would also change. As a man changes his own nature, so does the attitude of the world change towards him. . . . We need not wait to see what others do.” Brian Morton, *Falser Words Were Never Spoken*, N.Y. TIMES (Aug. 29, 2011), <http://www.nytimes.com/2011/08/30/opinion/falser-words-were-never-spoken.html>.

112. See, e.g., George Critchlow, *Beyond Elitism: Legal Education for the Public Good*, 46 U. TOL. L. REV. 311, 317 (2015).

113. See, e.g., Helmut Koester, *The Great Appeal*, FRONTLINE (Apr. 1998), <http://www.pbs.org/wgbh/pages/frontline/shows/religion/why/appeal.html>.

114. *About*, IMMANENT FRAME, <https://tif.ssrc.org/about/> (last visited Apr. 2, 2018).

115. *Id.*

116. *Is This All There Is*, IMMANENT FRAME, <https://tif.ssrc.org/category/is-this-all-there-is/> (last visited Apr. 2, 2018).



The Immanent Frame is asking the same question Lonergan asked above, but with more poignancy. Lonergan, the committed Christian, did not really doubt that there is more than this—that the universe is on our side. By asking the question, he was trying to help the rest of us see that.

The contributors at The Immanent Frame, our contemporaries, are much more uncertain. They are committed to science, to natural explanations for everything, and yet a number of them are beset with longing for something more—what Charles Taylor calls “fullness.”<sup>117</sup>

We know from history that robust faith can build a civilization. We are learning that doubt and uncertainty cannot sustain one. That is why we are in the crisis we are in.

Years ago, in the book *Hallowed Secularism*, I observed that the statement “‘This world is all there is’ does not represent closure against a religious view of life.”<sup>118</sup> Even if we are just matter, it turns out that matter comes into existence, self-organizes, develops into life and, ultimately, lives in moral consequence, in us. That is all we can know, but it is also all that we need to know. It is sufficient to restore the trust that we need to go on.<sup>119</sup>

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117. CHARLES TAYLOR, *A SECULAR AGE* 768 (2007).

118. BRUCE LEDEWITZ, *HALLOWED SECULARISM: THEORY, PRACTICE, BELIEF* 75 (2009).

119. I had hoped here to engage the observation by the Dean of University of St. Thomas School of Law, Robert Vischer, who is a thoughtful and careful practitioner of Christian legal training, and who kindly read an earlier version of the paper that I gave at this symposium, that the early church communities shared a robust conception of life together based on the life of Christ that Cosmopolis cannot have. This very fair critique echoes the fact that Lonergan never put all of his eggs in the Cosmopolis basket but retained a crucial role for the church. See MILLER, *supra* note 96, at 182-83. I would answer Dean Vischer if I could. But, he is really asking the question I struggled with in the book *Hallowed Secularism*—how does a genuinely secular civilization survive? We don't yet know that such a civilization can survive. There has never really been one before. All I can say here is that the starting point for the survival of secular civilization is a rediscovery of trust in the universe and therefore of truth. The rest is a path for the future to forge.



# James Wilson, Necessary Truths, and the Foundations of Law

*Justin Buckley Dyer\**

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## I. INTRODUCTION

When James Wilson composed his lectures on law in the early 1790s, Americans were not yet living in Charles Taylor’s secular age, a time in which citizens in the Atlantic world could “engage fully in politics without ever encountering God, that is, coming to a point where the crucial importance of the God of Abraham for this whole enterprise is brought home forcefully and unmistakably.”<sup>1</sup> Wilson was writing nearly a century before Friedrich Nietzsche first declared, through the mouth of a madman, that God is dead. Even then, the madman’s announcement turned out to be premature, for as he realized, “[t]his tremendous event is still on its way, wandering; it has not yet reached the ears of men.”<sup>2</sup> The event still on its way was not so much the death of God as the death of the theological tradition that underpinned core liberal concepts we often take for granted, such as basic human dignity, natural rights,

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\* Professor of political science and director of the Kinder Institute on Constitutional Democracy, University of Missouri. The author thanks Paul R. DeHart, J. Budziszewski, Nathan Tiemeyer, Carli Conklin, Vanya Kriekhaus, Adam Seagrave, Joseph Postell and Adam J. MacLeod for conversations and comments on previous drafts of this essay.

1. CHARLES TAYLOR, *A SECULAR AGE* 1 (2007).

2. FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 120 (Bernard Williams ed., Josefine Nauckhoff trans., Cambridge Univ. Press 2001).

and moral agency grounded in free will. The classicist Kyle Harper noted in a 2015 talk on these themes that the full realization of this tremendous event “would unravel in future time, and its consequences would be unsettling.”<sup>3</sup>

Wilson, an Associate Justice on the first United States Supreme Court and one of only six men to sign both the Declaration of Independence and the U.S. Constitution, seemed to understand the implications this event would have, should it ever reach men’s ears, and he endeavored in his lectures at the College of Philadelphia to shore up the theoretical foundations of American law. Though not an original thinker, Wilson did labor to consolidate and preserve the tradition of Anglo-American jurisprudence, and adapt that tradition to the new circumstances in the post-revolutionary United States. He wanted, his biographers have noted, to be the American Blackstone, and, like Blackstone, he located the basic concepts of the law within a broader theological framework.<sup>4</sup> In this essay, I revisit the moral anthropology of Wilson’s *Lectures on Law*, which offers a window into the theoretical foundations of one major strand of American jurisprudence associated with the perennial natural-law tradition. That strand of jurisprudence provided an account of law that took very seriously the claims of both truth and reason.<sup>5</sup> Before we consider—as we are in this symposium—whether “these bones shall live,” it is worth first recalling how they came to the valley of dry bones and what they looked like when they were alive.<sup>6</sup>

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3. Kyle Harper, “Human Rights and Human Dignity: The Long View,” Lecture at the Kinder Institute on Constitutional Democracy, University of Missouri (Feb. 19, 2015); see also Kyle Harper, *Christianity and the Roots of Human Dignity in Late Antiquity*, in 1 CHRISTIANITY AND FREEDOM 123-48 (Timothy Samuel Shah & Allen D. Hertzke eds., 2016).

4. See generally 1 JAMES WILSON, THE COLLECTED WORKS OF JAMES WILSON, at xiv, xxiv (Mark David Hall & Kermit L. Hall eds., 2007). In his preface to the volume, Kermit Hall notes Wilson’s lectures on law were “intended to make him the American equivalent of Sir Edward Blackstone, the great English legal commentator” and that his “ambition was entirely in keeping with his goal of becoming the American Blackstone.” Wilson was, however, quite critical of Blackstone precisely where he thought Blackstone’s philosophy and theology might inadvertently imply the modern view that sovereignty is merely about power divorced from considerations of transcendent goodness – something discussed later in this essay.

5. See generally James R. Stoner, *Common Law and the Law of Reason*, in FOUNDATIONS OF LAW 284-88 (Adam J. MacLeod & Robert L. McFarland eds., 2017) (explaining common law, natural law, and natural theology are separate but related concepts).

6. The title of the symposium – “Resurrecting Truth in American Law and Public Discourse: Shall These Bones Live?” – is an allusion to Ezekiel 37:5, where the Hebrew prophet Ezekiel has a vision of standing in a valley of dry bones. Yahweh then asks Ezekiel whether these bones can live. The prophet’s uncertain answer is, “O Lord GOD, you know.”

## II. LOSING SIGHT OF THE PRIMARY THINGS

Hadley Arkes, an emeritus professor of jurisprudence who now directs the James Wilson Institute for Natural Rights and the American Founding, once observed that it “has taken generations of lawyers to make obscure and to forget the most obvious things around us – or within us.”<sup>7</sup> From a different angle, however, we might say the framing assumptions of our public culture no longer give an adequate account of the primary things we see around us and within us, leaving us uncertain and anxious about what to do with this tension. The primary things I have in mind are basic and foundational: the value of individuals, the human capacity for choice, the reliability of reason, and the reality of goodness. This is not an exhaustive list, but these are the kinds of taken-for-granted concepts that the reductive materialistic assumptions of our secular age routinely call into question.

One example of the discrepancy between the framing assumptions of our age and a concept we take for granted was provided by a recent story in *The Atlantic* entitled, “There’s No Such Thing as Free Will.”<sup>8</sup> Philosophers and theologians, of course, have debated the question of free will for millennia. What was new was the confidence with which the article pronounced that neuroscience had settled the debate. Chemistry and physics, according to the author, can explain every thought, every hope, and every dream (and this would of course include our thoughts about determinism, or free will, or anything else). This is an old assertion, purportedly supported by new evidence from neuroscience, and the implications are indeed unsettling, for it would make freedom and moral responsibility illusory. As a character in C.S. Lewis’ *That Hideous Strength* contends, after thinking this through, such a state of affairs would mean that “[s]ocial relations are chemical relations.”<sup>9</sup> On this view, politics and law are, and can only be, applied chemistry. One implication is that the analytic distinction between freedom and tyranny, consent and coercion, persuasion and propaganda, and ultimately sanity and insanity, begins to break down.

These dire implications do not necessarily make the view false; Nietzsche might have been right when he asserted that free will is

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7. HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS 78 (2010).

8. Stephen Cave, *There’s No Such Thing as Free Will*, ATLANTIC (June 2016), <https://www.theatlantic.com/magazine/archive/2016/06/theres-no-such-thing-as-free-will/480750/>.

9. C.S. LEWIS, THAT HIDEOUS STRENGTH 252 (HarperOne ed. 2003).

the “foulest of all theologians’ artifices.”<sup>10</sup> Indeed, it could be the case that the foundational beliefs of civilization are all illusory – that the truth is a poison pill that eventually will lead to our ruin. Perhaps, to borrow that famous line from the movie *A Few Good Men*, we simply cannot handle the truth. The really interesting part of the *Atlantic* article pronouncing that free will does not exist, then, was its subtitle: “But we’re better off believing in it anyway.”<sup>11</sup> Within a discussion of philosopher Saul Smilansky’s contention that we should embrace the illusion, the article explains (perhaps with a sense of irony), “if the *choice* is between the true and the good, then for the sake of society, the true must go.”<sup>12</sup>

According to Smilansky, the truth is that there is an unbroken chain of physical cause and effect from which we cannot escape and which determines all that is or will be; but belief in this truth of the human condition is contrary to our good. The truth, as Smilansky sees it, is contrary to our good, because it empties the world of purpose and meaning, which provide the crucial motivation for individuals to carry on the project of civilization. The cold reality, on this view, is that the same physical laws that determine the course of our lives, actions, and thoughts will lead eventually to our physical entropy and decay. As that other philosopher, Jim Carrey, said recently on the red carpet at an awards ceremony, “[w]e’re going nowhere. It is a big pageant of nothing, rising out of nothing, and happening for no one.”<sup>13</sup> From this vantage point, moral nihilism seems to be a reasonable conclusion as we look into the abyss of death, but the author of the *Atlantic* article highlights the worry that the nihilistic outgrowth of materialism will undermine the good of society.

Setting aside whether the concept of good is meaningful in this context, let us note that the problem was acknowledged in Western theology and jurisprudence before neuroscientists began studying the brain. Biblical commentators, for example, have long interpreted one of the consequences of the fall of man to be humanity’s tendency to elevate material reality as the ultimate or highest source of meaning. As R.R. Reno writes in his recent commentary on Genesis, synthesizing the insights of classical Jewish, Catholic,

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10. FRIEDRICH NIETZSCHE, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 499 (Walter Kaufmann ed., 1977).

11. Cave, *supra* note 8.

12. *Id.* (emphasis added).

13. Rai, *Venezia 74 – Il Red Carpet di Jim Carrey*, YOUTUBE (Sept. 6, 2017), <https://www.youtube.com/watch?v=Cx6F6IRSuDCA>.

and Protestant interpreters, “When the eye of the soul becomes carnal, taking the physical and finite as the measure of all things, the testimony of creation awakens a sense of shame. We know ourselves pursuing a futile life-project—even as we commit ourselves to its futility.”<sup>14</sup> Smilansky and others, of course, might see this tradition as useful nonsense. Tabling that question, we can say that people have long been aware of the disheartening implications of a worldview that makes the physical and finite the measure of all things, and it arguably is our deep longing for the infinite and immortal that leads us to be disheartened.<sup>15</sup>

### III. RETHINKING THE CONSTITUTION’S HIGHER-LAW BACKGROUND

Alongside the conversation about free will, there has been a related debate going on for some years in the United States about whether what Edward Corwin called the “higher law” background of American constitutionalism is actually backed up by a higher law, or whether natural law is just the foulest of all political theorists’ artifices.<sup>16</sup> Writing around the same time Corwin was teaching at Princeton and leading the American Political Science Association, Columbia University psychologist Edward Thorndike drew out the full logic of the modern materialistic outlook, which poses a unique challenge to the natural-law tradition. “The life of a dog or a cat or a chicken . . . consists largely of and is determined by appetites, cravings, desires and their gratification . . . So also does the life of man, though the appetites and desires are more numerous, subtle, and complicated.”<sup>17</sup> If Thorndike was right – if our lives are determined entirely by our appetites, cravings, and desires – then there seems no way for us to speak intelligibly about making choices, or about being morally responsible for our actions in any meaningful sense. Our lives and identities could then be reduced to our biochemical composition, as we have already seen, and we would at any moment be the obedient servants of our passions and appetites, since it could not be otherwise. Reason, accordingly, would not be the rightful ruler of our desires but would, as Hobbes

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14. R.R. RENO, *GENESIS* 92 (Brazos Press 2010).

15. See, e.g., Sarah Beth V. Kitch, *The Immovable Foundations of the Infinite and Immortal: Tocqueville’s Philosophical Anthropology*, 60 *AM. J. POL. SCI.* 947-57 (2016) (making a similar argument as an interpretation of Tocqueville).

16. See EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (Liberty Fund 2008).

17. MICHAEL SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 47 (2010) (citing EDWARD THORNDIKE, *HUMAN NATURE AND THE SOCIAL ORDER* 43 (1940)).

maintained, simply serve as “[s]couts and [s]pies” to “find the way to the things [d]esired.”<sup>18</sup> This grim modern outlook makes its own claim to truth, but the truth is human beings are not so special, and human reason can never know or discern what are good or choice-worthy or rightful ways of living.

Public discourse is impoverished by such an outlook, since the purpose of debate about public affairs and the law could not be to reason together about how we ought to live, but rather strategically to negotiate the terms of our common life in a way that allows us to satisfy our desires. This is the view Oliver Wendell Holmes seemed to take in his famous 1918 *Harvard Law Review* article on natural law, where he insisted that “[d]eep-seated preferences cannot be argued about” since reason does not disclose “what we should want to want.”<sup>19</sup> *Want* is the foundation of human behavior, Holmes suggested, and our wants do not take their orders from reason. When we, like Holmes, dispense with the rational *ought*, however, the a-rational will is all that remains. And if it is true that practical reason can ever only be a foot soldier taking marching orders from appetites and passions, then at the bottom of every argument is simply a deep but rationally inscrutable preference. About this outlook, we can say, at least, that it rejects root and branch the foundational anthropology of American jurisprudence and undermines the cogency of many basic legal concepts still scattered throughout the law.

James Wilson’s account of the law, grounded ultimately in theology, exemplifies this foundational anthropology of American jurisprudence. The very first line in his first substantive lecture begins with the observation that “[o]rder, proportion, and fitness pervade the universe. Around us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or should not, or will not be made.”<sup>20</sup> This rule that we admire applies to everything in existence, including the “great and incomprehensible Author, and Preserver, and Ruler of all things” – the God who “himself works not without an eternal decree.”<sup>21</sup> With this beginning lecture, Wilson dives right into a complex philosophical and theological dispute about the relationship between goodness and power that ultimately traces back to Plato’s *Euthyphro*. Wilson’s answer to that question

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18. THOMAS HOBBS, *LEVIATHAN* 45 (A. R. Waller ed., Cambridge Univ. Press 1904) (internal punctuation omitted).

19. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40-44 (1918).

20. WILSON, *supra* note 4, at 464.

21. *Id.*



– that “from almighty power infinite goodness can never be disjoined”<sup>22</sup> – is a direct critique of Blackstone’s definition of law as a “rule of action, which is prescribed by some superiour, and which the inferiour is bound to obey.”<sup>23</sup> Wilson’s insistence on the unity of goodness and divine power provides a crucial underpinning for his later accounts of natural law, the defining characteristics of sovereign power, and the legitimacy of rooting political obligation in the consent of the governed. I will eventually return to these weighty topics, but let me pause to note that Wilson’s lectures begin by highlighting several important strands of thought from the perennial natural-law tradition, which he understands to be woven into the new constitutional and legal fabric of the young United States. Knowing something about the broad contours of the natural-law tradition, then, is an essential prerequisite to evaluating the significance of Wilson’s lectures.

#### IV. THE PERENNIAL NATURAL-LAW TRADITION

At a basic level, the law of human nature is a standard of right and wrong behavior that we know and that we can expect other people to know as well. It is “law” because it imposes itself on us as obligation, and it is “natural” because it belongs to that part of our nature that is distinctively human, our reason. At times our moral duties under the natural law will require us to suppress or redirect our passions and appetites. To put it another way, the rational part of our nature is the rightful ruler of those parts of our nature we share with other organisms. As Aristotle noted, animals make noises to communicate pleasure and pain, but human beings reason with each other about what is just or unjust.<sup>24</sup> As rational animals, it is uniquely in the nature of human beings to reason about justice, but in order to do so there must be something – some transcendent standard or grounding of right – for us to reason about.

My own introduction to some of these ideas, like so many others in the twentieth-century, came from reading C.S. Lewis’ *Mere Christianity*, the published version of a series of broadcast talks he delivered for the BBC during World War II. Lewis, then teaching English literature at Oxford’s Magdalen College, had become a recognized public intellectual, and the BBC asked him to deliver a se-

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22. *Id.* at 503.

23. *Id.* at 471.

24. ARISTOTLE, *POLITICS* 5 (Benjamin Jowett trans., Batoche Books 1999).

ries of talks reintroducing Britons to the basic tenets of Christianity.<sup>25</sup> Rather than beginning with Christianity's core doctrines as outlined in the ancient creeds of the church, however, Lewis began his first talk by describing what he called the law of human nature. Starting with our lived moral experiences, Lewis then pushed his audience to consider the consequences of abandoning the idea that such a transcendent standard does in fact exist. If there is no natural law, he insisted, "then all the things we said about the war were nonsense. What was the sense in saying the enemy were in the wrong unless Right is a real thing which the Nazis at bottom knew as well as we did and ought to have practiced it?"<sup>26</sup> Pivoting from the reality of evil – as it was laid bare by Nazism's political project – Lewis insisted that *we* also do not behave as we ought. "None of us are really keeping the Law of Nature," Lewis concluded, and these two facts—there is a law of nature and we do not keep it—are, Lewis asserted, "the foundation of all clear thinking about ourselves and the universe we live in."<sup>27</sup>

These seemed to me at the time – and still seem – to be some pretty big claims with profound implications for political life. The claims are also consistent with the way many people experience the world. As Paul reflected on his own moral experience in his epistle to the Romans, "I do not do the good I want to do, but the evil I do not want to do – this I keep on doing." Later, he wrote, "Although I want to do the good, evil is right there with me."<sup>28</sup> One does not have to be a Christian to understand the experience Paul described here. Lincoln once quipped in a debate that we would have discovered that men are desperately selfish even without the Bible, and I think we also would have discovered that we do not always do the things we know we ought to do.<sup>29</sup> This is a fact of the world as we experience it. We long for righteousness and justice, but our world is corrupt, because we are corrupt. Our experience of the world as somehow less than what it ought to be is a fact of our existence, and natural-law theory tries to make sense of the fact.

As a natural-law theorist, Lewis was, as Ayn Rand contended, "a pick-pocket of concepts."<sup>30</sup> His strength was not in originality but

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25. See generally GEORGE M. MARSDEN, C.S. LEWIS'S "MERE CHRISTIANITY": A BIOGRAPHY (Princeton Univ. Press 2016).

26. C.S. LEWIS, MERE CHRISTIANITY 5 (HarperOne 2001).

27. *Id.* at 7-8.

28. Romans 7:15.

29. 3 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 310 (Roy P. Basler ed., 1953).

30. AYN RAND, AYN RAND'S MARGINALIA: HER CRITICAL COMMENTS ON THE WRITINGS OF OVER 20 AUTHORS 92 (Robert Mayhew ed., 1995).

rather in synthesizing and communicating a corpus of knowledge. Lewis was well-versed in the classical theory of natural law, as it had been developed by the ancient Greeks and Romans, and the early Christians. The citations in his famous book *The Abolition of Man*—listed as the seventh best book of the twentieth century by *National Review* magazine<sup>31</sup>—include Plato, Aristotle, Jesus, Paul, Augustine, Aquinas, and the 17<sup>th</sup> Century Anglican theologian Richard Hooker. As ecumenical as Lewis tried to be, he was in fact aligning himself with a distinct tradition of thought. In his academic magnum opus, *English Literature in the Sixteenth Century*, Lewis described the twists and turns of modern political philosophy and theology, and wrote that with Hooker “the medieval conception of Natural Law” had “reached its fullest and most beautiful expression.”<sup>32</sup> Hooker, in turn, is a connecting link from the classical natural-law tradition to many of the American founders such as James Wilson, who read Hooker and cited him approvingly.

Beginning with Aristotle, that tradition taught there is a purposeful order to the world. Nature is imbued with purposes, and to act in accordance with our nature means to act consistently with the way we are designed to function. It is proper to human nature to act according to reason, that is, for reason to guide our passions and appetites to appropriate ends and objects. When reason rules, it does so by identifying what is good according to our nature (i.e., the kind of thing we are and are designed to be) and pursuing it. These, then, are the foundational questions of ethics: What kinds of things are good? How do we attain these goods through our actions? That some things are good, and that we ought to pursue what is good in our day-to-day lives, is axiomatic. It is foundational to practical reason in the way that axioms are foundational to mathematics. This is what we mean by “self-evident.” If you know what it means to be parallel, then you will agree that parallel lines do not touch. If you don’t see it, however, I will not be able to prove it to you. In the same way, ethics will rest on some very basic axioms that are indemonstrable and underived. From those axioms we reason about how to live well, but in order to see the axioms—to understand what is noble and just, as Aristotle says—we must first be

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31. *The Non-Fiction 100*, NAT’L REV. (Mar. 3, 1999), <http://www.nationalreview.com/articles/21571/non-fiction-100>.

32. C.S. LEWIS, *ENGLISH LITERATURE IN THE SIXTEENTH CENTURY, EXCLUDING DRAMA* 50 (1954).

brought up in good habits, since vice mars our moral vision.<sup>33</sup> Happiness is the term Aristotle used to describe a life well lived, but we cannot achieve happiness on our own. This is why Aristotle famously said that man is by nature a political animal – not because we spontaneously engage in politics, but because living well as human beings requires that we live in political communities. A man who can flourish on his own, Aristotle thought, would be either a beast or a god.<sup>34</sup>

With Aristotle, we are not yet at the natural-law tradition, but we are close. Other theorists soon identified the principles that lead to human happiness with law. As the Roman statesman and philosopher Cicero wrote, in the voice of Laelius, “[t]here is a true law, a right reason, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil.”<sup>35</sup> There is nothing distinctly Christian about what the ancient tradition taught, but many Christians have thought it was for the most part correct: our universe *is* imbued with purposes; human beings *should* act according to reason; we *are* by nature political animals; these principles *do* impose themselves on us as law. Christians, however, have qualified or at least emphasized a few things about the ancient tradition. First, the natural law has a law giver. It is the product of the mind of God, part of the divine reason, or what Aquinas, Hooker, and James Wilson each called the eternal law. Second, law is an ordinance of reason made for the common good by someone with authority, and it is made known to those who are morally obligated to obey.<sup>36</sup> Natural law fits this description. It is an ordinance of reason made by God for the care of the human community and promulgated through the deep structure of the human psyche. Human law, to be truly law (and not simply an act of violence or coercion), must also fit this description; it must be reasonable, made for the common good by someone with authority to make law, and made known. If it is not, then it is defective as law to the degree that it deviates from the archetype.

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33. See ARISTOTLE, NICOMACHEAN ETHICS 6 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000).

34. ARISTOTLE, *supra* note 24, at 6.

35. MARCUS TULLIUS CICERO, *The Treatise on the Republic*, in 1 THE POLITICAL WORKS OF MARCUS TULLIUS CICERO bk. 3, para. 36 (Francis Barnam trans., Edmund Spettigue 1841-42), <http://oll.libertyfund.org/titles/cicero-treatise-on-the-commonwealth--5>.

36. See, e.g., 2 THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, question 90, art. 4 (Fathers of the English Dominican Province trans., Daniel J. Sullivan rev., Encyclopedia Britannica, Inc. 1952).

## V. NATURAL LAW AND THE AMERICAN FOUNDING

These broad claims informed the Anglo-American legal tradition and influenced the way the American founders thought about law. To take just one example, consider the often-cited excerpt from nineteen-year-old Alexander Hamilton's defense of the American revolution against criticism from the royalist Episcopalian Bishop Samuel Seabury. Drawing his argument largely from Blackstone's *Commentaries*, the young Hamilton asserted:

Good and wise men, in all ages, have . . . supposed that the deity, from the relations we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensably, obligatory upon all mankind, prior to any human institution whatever.

This is what is called the law of nature, 'which, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are valid, derive all their authority, mediately, or immediately, from this original.' BLACKSTONE.<sup>37</sup>

This was as true for the future Republicans as it was for the future Federalists. It was Thomas Jefferson, after all, who in the first draft of the Declaration of Independence appealed to the "laws of nature & of nature's god" and affirmed the "sacred & undeniable" truth that "all men are created equal" and "from that equal creation they derive rights inherent & inalienable among which are the preservation of life, & liberty, & the pursuit of happiness."<sup>38</sup>

Although he was not personally fond of Blackstone, whom he later called a "honied" Tory,<sup>39</sup> the first two paragraphs of the Declaration of Independence echoed some of the major theoretical themes in Blackstone's *Commentaries*. As Carli Conklin notes, "Blackstone's discussion of the pursuit of happiness was both preceded by, and informed by, his discussion of the laws of nature and

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37. 1 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 62-63 (Henry Cabot Lodge ed., G. P. Putnam's Sons const. ed. 1904).

38. Thomas Jefferson, *Rough Draft of the Declaration of Independence* (1776), in AMERICAN SOUL: THE CONTESTED LEGACY OF THE DECLARATION OF INDEPENDENCE 7 (Justin Buckley Dyer ed., 2012).

39. Letter from Jefferson to Madison (Feb. 17, 1826), <https://founders.archives.gov/documents/Jefferson/98-01-02-5912>. For discussion and sources, see Carli Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 201 n.21 (2015).

of nature's God."<sup>40</sup> The various strands of the natural-law tradition come together in Blackstone's pithy account of God's one paternal precept: "that man should pursue his own true and substantial happiness."<sup>41</sup> James Wilson, following Blackstone, also insisted that God's "will is graciously comprised in this one paternal precept – Let man pursue his happiness and perfection."<sup>42</sup> This comment makes sense within the larger theological and philosophical framework of Wilson's lectures. As noted above, Wilson began his first lecture by observing the pervasive order, proportion, and fitness of the universe. Everything, including God, is governed by law, Wilson insisted. The study of law, then, as a discipline, is the study of an enduring and fundamental feature of the universe we live in.

For human beings, law presupposes freedom and the possibility of choice governed by reason. In practical affairs, we "propose an end," that is, a purpose, for our actions in light of some good we want to attain. The "brute creation," by contrast, "act not from design."<sup>43</sup> Animals are still governed by law, but the law that governs them is sub-rational. Human beings, still subject to sub-rational appetites and passions, also exhibit the rational capacities that make it possible to choose against appetite and passion for the sake of a good discerned by reason. This is why natural-law thinkers have so closely connected reason and law. The typology of law that James Wilson develops makes the first classification of law either divine or human. Under the heading of divine law, Wilson includes the revealed law (i.e., Scripture); eternal law (i.e., law internal to and governing God's character); laws of nature (i.e., laws governing irrational and inanimate creation); law celestial (i.e., laws of angels and spirits made just); and the natural law (i.e., the moral law known to human beings by reason and the moral sense). The last category of natural law is further subdivided into the law of nature (when addressed to human beings as such) and the law of nations (when addressed to societies of human beings as such). Human law is what other natural-law theorists call positive law, or the law posited in a particular community, and it is further divided into the

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40. Conklin, *supra* note 39, at 201 n.22; *cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 28-43 (George Sharswood ed., 1893), <http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1>. Conklin notes that Blackstone uses the phrase "the law of nature and the law of revelation" and later "the law of nature, and the law of God."

41. BLACKSTONE, *supra* note 40, at 41.

42. WILSON, *supra* note 4, at 523.

43. *Id.* at 468.

municipal law (i.e., positive law within a single commonwealth) and the voluntary law of nations (i.e., international positive law).<sup>44</sup>

Natural law, in Wilson's schema, is truly law. It has an authoritative source, and it is known to us by reason and the moral sense. The first principles of natural law are themselves "engraven by God on the hearts of men" and "in this manner, [God] is the promulgator as well as the author of the natural law."<sup>45</sup> Yet it is important to recognize that the authority of the natural law does not come from God's superior physical strength. Power, by itself, is neither necessary nor sufficient to establish legitimate authority; it must also be connected with goodness. This is why Wilson begins his lecture on natural law with an attack on theological voluntarism, or the theory that God's authority derives from his superior strength. This is crucial for Wilson, because there is an analogy between God's rule and our own. Power, wisdom, and goodness, are united and inseparable in the "incomprehensible Archetype."<sup>46</sup> Both God's authority and our obligation flow from this fact. God is powerful, yes. But He is also wise and good, and the rules He promulgates are for our own good. His one paternal precept can be reduced to the command that we pursue our own happiness, because his commands are *all* designed to direct us to our proper end, which is our happiness or flourishing.

## VI. AXIOMS AND THE MORAL SENSE

Within this broader discussion, asking whether we have good reasons to obey God is akin to asking whether we are obliged to obey God's one paternal command; must we pursue our own happiness? Wilson offers an answer that shows his indebtedness to the school of Scottish moral sense philosophy: "I can only say, I *feel* that such is my duty. Here investigation must stop; reasoning can go no farther."<sup>47</sup> The term "feel" is equivocal here. Wilson's Scottish contemporaries such as David Hume, Adam Smith, and Thomas Reid debated whether moral obligations are known through the intellect or through sentiment.<sup>48</sup> Mark David Hall notes that Wilson rejected the school associated with Hume and Smith and followed the school associated with Reid, which maintained the broader natural-law tradition's tenet that human reason apprehends the moral law.

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44. *Id.* at 497-98.

45. *Id.* at 470.

46. *Id.* at 503.

47. *Id.* at 508.

48. MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON* 68-72 (1997).

Reid, in particular, “contended that the first principles of morality are known through common sense, which is a degree of reason.”<sup>49</sup> Interestingly, the Oxford English Dictionary includes as an entry for the word “feel” a chiefly Scottish and now obsolete meaning that indicates “mental perception or apprehension; understanding, comprehension; knowledge.”<sup>50</sup> This is foreign to how we often talk about sense perception today, but “sense” and “feel” are equivocal terms in their eighteenth-century usage that may indicate knowledge held by the intellect rather than an emotion or sentiment. In context, what Reid and Wilson have in mind when they talk about the moral sense is something very similar to what classical natural lawyers call the first principles of practical reason, that is, the indemonstrable and underived axioms that are at the foundation of every body of knowledge, including morality and law. “The science of morals, as well as other sciences,” Wilson insists, “is founded on truths, that cannot be discovered or proved by reasoning.”<sup>51</sup> These truths provide the foundation for our reasoning, but they are known intuitively. There can be no further demonstration or proof, for on them demonstrations and proofs depend.

The point is that moral reasoning begins with an intuitive grasp of basic moral categories. Those first principles might indeed be very basic. Aquinas boiled down the first principle of practical reason to the proposition that “good is to be done and pursued, and evil is to be avoided.”<sup>52</sup> Blackstone and Wilson reduce the first precept to pursuing our own happiness and perfection. Philosophers might find subtle distinctions between these different ways of thinking about the foundational axiom of practical reason, but both of these formulas develop from the same tradition, and they both operate at a high level of generality. Neither tells us what is good, or evil, or what contributes to our happiness. Yet neither does the principle of non-contradiction tell us the answer to any particular math problem. It is a principle that exists at a level of abstraction, but it is one that is foundational to the entire enterprise that comes after. If a person did not feel or intuit the basic moral categories, “it would not be in the power of arguments, to give him any conception of right and wrong. These terms would be to him equally unintelligible, as the term colour to one who was born and continued blind.”<sup>53</sup>

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49. *Id.* at 71.

50. *Feel*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

51. WILSON, *supra* note 4, at 508.

52. AQUINAS, *supra* note 36, at question 94, art. 2.

53. WILSON, *supra* note 4, at 509.



Moral ignorance might be theoretically possible, but it is empirically rare, according to Wilson. Languages, “not invented by philosophers,” testify to the universality of the moral sense, since every language has words to denote right and wrong, praiseworthy, detestable, etc.<sup>54</sup> This does not mean that every culture is equally advanced in the science of morality, however. Appealing to Aristotle explicitly, Wilson insists that to “ascertain moral principles, we appeal not to the common sense of savages, but of men in their most perfect state.”<sup>55</sup> According to Wilson, human beings gain, and develop, human knowledge in three principal ways. First, they encounter and gain knowledge of moral reality through conscience and the moral sense.<sup>56</sup> Next, reason interrogates and corrects the moral sense about the goodness of certain ends and the most prudent means of achieving those ends in practice. Reason, he insists, “contributes to ascertain the exactness, as to discover and correct the mistakes, of the moral sense.”<sup>57</sup> The third, and final, source of moral knowledge, according to Wilson, is Holy Writ, which refines and exalts the moral knowledge known already through conscience and reason. The writers of the Bible, as he notes, “generally presuppose a knowledge of the principles of morality” and the Scriptures are “addressed to rational and moral agents, capable of previously knowing the rights of man, and the tendencies of actions; of approving what is good, and disapproving what is evil.”<sup>58</sup>

## VII. RETURNING TO THE PRIMARY THINGS

After this discussion, what then can we say about the law of nature? According to Wilson, we can say that it is immutable, universal, and progressive. It is immutable because “it has its foundation in the nature, constitution, and mutual relations of men and things.”<sup>59</sup> It is universal because “having its foundation in the constitution and the state of man, [it] has an essential fitness for all mankind and binds them without distinction.”<sup>60</sup> Finally, it is progressive in that “morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are.”<sup>61</sup> Even beyond its theological underpinnings, however,

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54. *Id.* at 511.

55. *Id.* at 516.

56. *Id.* at 513-14.

57. *Id.* at 515.

58. *Id.* at 522.

59. *Id.* at 523.

60. *Id.*

61. *Id.* at 525.

Wilson's natural-law theory presumes basic things about reality that are contested and frequently denied. The first basic claim about reality is that there is such a thing as the self. (Odd as it sounds, some philosophers such as David Hume, and, more recently, James Giles, do deny that the individual self exists, insisting instead that personal identity is a fiction.)<sup>62</sup> Second, these individuals have a rational nature. They are not simply a mass of tissue or a lump of cells, and this matters. In John Quincy Adams' 1841 *Amistad* argument, for example, he distinguished between merchandise and enslaved human beings, including "infant females, with flesh, and blood, and nerves and sinews."<sup>63</sup> He emphasized their embodied nature to underscore their humanity, and he underscored their humanity to insist they were rational creatures who were qualitatively different than merchandise – not that they were merely, or only, or reducibly, flesh and blood, nerves and sinews. Finally, practical reason discloses what is good for human beings, or what kind of life is choice-worthy. Living well, or achieving this good, requires all sorts of personal and communal virtues, and the preeminent political virtue is justice.

Natural rights are an aspect of natural justice, but the founders' natural rights theory is only a slice of a larger moral vision that includes duties and virtues as well as rights. James Wilson's lectures on law bring together these strands from the broader natural-law tradition, and the lectures modify and apply that tradition to the peculiar circumstances in the United States. Among the things he retains from the classical tradition is a certain understanding of human nature as somewhere between the nature of beasts and gods. What makes human beings unique is that they can give and understand reasons for action, and the language of practical reason employs normative terms such as right and wrong, just and unjust. Justice, in its classical definition, is the constant and perpetual will to render to each his own right. All justice, in an important sense, is social justice. The way we do acts of justice is by rendering to others what is owed to them, what is their own right. Justice, then, entails a relationship between individual duties and individual rights. The objective duty and the subjective right are therefore two sides of the same coin, and the same word can be used to describe both; it is right for me to render to another what is his right. Wilson

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62. JAMES GILES, *NO SELF TO BE FOUND: THE SEARCH FOR PERSONAL IDENTITY 1* (Univ. Press of America 1997).

63. Transcript of Oral Argument at 40, *United States v. Libellants of the Schooner Amistad*, 40 U.S. 518 (1841), [http://avalon.law.yale.edu/19th\\_century/amistad\\_002.asp](http://avalon.law.yale.edu/19th_century/amistad_002.asp) (argument by John Quincy Adams on Feb. 24, 1841).

thus does not take the modern path, cut by Hobbes and others, that begins with individual rights unbounded by morality, leads quickly to a war of all against all, and then prompts men to construct minimal duties designed to maintain peace.<sup>64</sup>

One implication of this otherwise academic discussion is that natural rights and duties are in harmony, and deciding what justice requires in any particular case demands individual judgment. Because justice is rationally scrutable, our judgment about what justice requires is a rational judgment, even if it is informed, at the root, by an axiom known to the morally mature individual by intuition. Another implication is that there is a qualitative difference between human beings and what James Madison in *Federalist* no. 54 calls the “irrational creation.”<sup>65</sup> In contrast to domesticated animals, whom we rule rightfully for their own good without asking their permission, it is an injustice to govern a rational being without his consent. This is because human beings are naturally equal in the very limited sense that no one has a right by nature to rule another. Parents, of course, do rule children without their consent, but the goal of that relationship is the maturation of the child into an independent rational adult. There *is* a natural inequality between parent and child, but as James Stoner has explained, “Precisely what [the American revolutionaries] objected to in Tory political theory was *political* patriarchalism, the effort to form the state on analogy to the family. Natural equality meant that the king was not to act as father in relation to his people—not that fathers were not kings in their own homes.”<sup>66</sup>

The family has, of course, largely been reconceived along liberal lines, but even now we do recognize a difference between the authority of a parent over a child, on the one hand, and the authority of one rational adult over another. Take the television show *Lost* as an example. Airing first in 2004, the hit ABC drama began in its pilot episode with a commercial jet liner crashing on an apparently deserted island in the South Pacific Ocean. The survivors quickly had to confront, through practical action, some of the core questions of political theory: who should rule, on what basis, and for what ends? The answer is intuitively different for parents and children, on the one hand, and free and equal adults, on the other. The answer James Wilson and most of the founders would have given to

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64. Justin Dyer, *Natural Justice and the Amistad*, STARTING POINTS J. (Aug. 28, 2017), <http://startingpointjournal.com/natural-justice-amistad/>.

65. THE FEDERALIST NO. 54 (James Madison) (Clinton Rossiter ed., 2003).

66. James R. Stoner, *Is There a Political Philosophy in the Declaration of Independence?*, 40 INTERCOLLEGIATE REV. 7 (2005).

this question as it applies to free and equal adults is: we do, together, by mutual consent for the common good. But consent is bounded by moral limits; we must not consent to irrational or morally vicious things, and legitimate consent presumes some rational understanding of our own good.

Our own good is comprised of a right ordering of multiple goods, each of which is self-evidently good and intrinsically choice-worthy to the morally mature individual. Wilson does not attempt an exhaustive list, but these basic good things include life, knowledge, religion, and friendship. The aim of rationally ordering our lives around these goods is to flourish as human beings, that is, to be happy. Happiness is not whatever we happen to desire or will, however. We can be mistaken about what will make us happy, and we often are led astray by those worse angels of our nature. Natural rights therefore take their bearings from what leads to our flourishing by nature. It is thus intelligible both to think about individuals having natural rights, and to include among these rights the right to pursue happiness. The things we have a right to are things that are good for ourselves and others. As Lincoln would later say, there is no “right to do wrong.”<sup>67</sup> This, of course, does not mean that every wrong must be criminalized or brought within the purview of the state, but it does mean that the entire theory of natural rights rests on a thick moral framework. When we come together to create and consent to a government, we do so for the ultimate purpose of living well. Justice is simply one prerequisite for our flourishing, but not the whole of it.

### VIII. THE FOUNDATIONS OF AMERICAN LAW

This theory of natural law and natural rights—seen as mutually compatible and working toward our individual and common good—gives a coherent foundation to our system of law and governance. As Paul DeHart has persuasively argued, the Constitution’s provisions and institutional arrangements (whatever the subjective intentions of its drafters) seem to presuppose a classical theory of sovereignty, the common good, and natural law and natural rights.<sup>68</sup> At the bottom of all of this are certain axiomatic propositions, what Alexander Hamilton described in the *Federalist* as “primary truths, or first principles, upon which all subsequent reasonings must depend.”<sup>69</sup> Consider Hamilton’s further elaboration of this concept:

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67. LINCOLN, *supra* note 29, at 226.

68. PAUL R. DEHART, UNCOVERING THE CONSTITUTION’S MORAL DESIGN (2007).

69. THE FEDERALIST NO. 31 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some defect or disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice. Of this nature are the maxims in geometry, that “the whole is greater than its part; things equal to the same are equal to one another; two straight lines cannot enclose a space; and all right angles are equal to each other.” Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation. And there are other truths in the two latter sciences which, if they cannot pretend to rank in the class of axioms, are yet such direct inferences from them, and so obvious in themselves, and so agreeable to the natural and unsophisticated dictates of common-sense, that they challenge the assent of a sound and unbiased mind, with a degree of force and conviction almost equally irresistible.<sup>70</sup>

The problem that Hamilton identified, however, and that still bedevils us today, is the tendency for self-interested passions and malformed moral character to lead our practical reasoning astray. This is what the political philosopher J. Budziszewski refers to as the problem of moral self-deception.<sup>71</sup> Our personal interests or passions may not often lead us to deny the abstract axioms of geometry, although they might give us a personal incentive to deny the wrongness of an activity we want to engage in or deny the implications of empirical findings that cut against our preferred policy objectives. In the realm of practical reason, our own vices and base passions often pose obstacles that they do not pose for theoretical reason.

At a very foundational level, we might add the existence of truth to the list of primary truths Hamilton identifies. There is no way to deny that truth exists without falling into contradiction since the statement *there is no truth* is a claim that it is true that there is no truth. That, of course, is absurd, but seeing its absurdity relies on

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70. *Id.*

71. J. BUDZISZEWSKI, *THE LINE THROUGH THE HEART: NATURAL LAW AS FACT, THEORY, AND SIGN OF CONTRADICTION* (2011).

other primary truths: of being (things exist), identity (things maintain identity through time), and non-contradiction (that things cannot be and not be at the same time and in the same respect). In the world of politics and ethics, there are other propositions with similarly axiomatic qualities that all build upon these other primary truths and introduce new ones. It is wrong to punish the innocent, for example – an axiom that presumes we are moral agents who choose courses of action for which we are morally responsible. The category of innocence implies that individuals are not blameworthy for things that they were powerless to effect. This is why deliberately driving a car into a crowd to murder innocent bystanders is qualitatively different than having a heart attack at the wheel and accidentally driving into a group of people, even if the consequences (in terms of damage to life and property) are the same. We hold someone morally responsible for the first action, but not the second, on the premise that human beings make choices, and these choices are morally meaningful. As Arkes observes, “we cast judgments only on those acts that take place in the domain of freedom, where people are free to choose one course of action over another.”<sup>72</sup>

This whole body of primary truths and moral axioms cannot be proven or demonstrated. It simply has to be seen or apprehended or (to use James Wilson’s language) *felt*, which is another way of saying we know the truth of these things prior to applied moral reasoning, and these truths in fact provide the foundation of our moral reasoning. This is why the classic teachers of jurisprudence in our tradition used the terms law of nature and law of reason interchangeably. Locke in the *Second Treatise* says simply, “reason, which is that law . . .”<sup>73</sup> This understanding both provides the moral foundation of law and guides our interpretation of law. Written law does not free us from the law of reason; the written law itself rests on a mountain of moral assumptions, and at the base of that mountain are the axioms of practical reason. In interpreting and applying written law, we will be forced to make interpretive choices that depend at every turn on some conception of what is good or choice-worthy or authoritative, and in our legal and moral disquisitions, just like “disquisitions of every kind,” as Hamilton reminds us,

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72. HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 52 (2010).

73. JOHN LOCKE, THE TWO TREATISES OF CIVIL GOVERNMENT ch. 2, § 6 (Thomas Hollis ed., London: A. Millar et al. 1764), <http://oll.libertyfund.org/titles/locke-the-two-treatises-of-civil-government-hollis-ed>.

there will be “certain primary truths, or first principles, upon which all subsequent reasonings must depend.”<sup>74</sup>

## IX. RESURRECTING TRUTH

Returning now to the question that began our symposium: Shall these bones live? Can we resurrect truth in American law and public discourse? The practical question is what it would take for the people who control the key institutions in our society to embrace the old idea that the axioms of practical reason are objective rational truths, and not merely the subjective byproducts of our bio-chemistry. In our modern world, there seem to be three main hurdles that we must get over, as a society, before returning to the idea that statements about what *ought* to be can be as true or false as what *is*. The first is physical determinism. So long as our choices are entirely determined by physical causes, freedom is an illusion. If freedom is an illusion, then nothing is right or wrong, since unavoidable necessity is not a moral category. Second, and relatedly, is the general philosophy of materialistic evolutionism, which reduces all of reality to its material components and depicts life as emerging from the blind and purposeless process of natural selection. (Note this philosophy is different than the biological theory of evolution by natural selection, which is reconcilable with the larger theological and jurisprudential natural-law tradition if it does not already begin with the philosophical premise of reductive materialism.) Arguably, such a philosophy does not provide an adequate account of why reason is reliable in the first place<sup>75</sup> or even how there can exist such things as minds, consciousness, values, and intentions.<sup>76</sup> Finally, theological voluntarism – which understands moral norms to be derived from the arbitrary will and power of God rather than the reason and goodness of God – denies the existence of rationally-discernible moral truths just as much as determinism or materialistic evolutionism.<sup>77</sup>

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74. THE FEDERALIST NO. 31 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

75. See ALVIN PLANTINGA, WHERE THE CONFLICT REALLY LIES: SCIENCE, RELIGION, AND NATURALISM (2011).

76. These are controversial assertions, of course, but see THE WANING OF MATERIALISM (Robert C. Koons & George Bealer eds., 2010) and THOMAS NAGEL, MIND AND COSMOS (2012).

77. This was the basic thesis of Pope Benedict's controversial 2006 address at the University of Regensburg titled "Faith, Reason, and the University – Memories and Reflections." See Benedict XVI, Address at the University of Regensburg (Sept. 12, 2006), [https://w2.vatican.va/content/benedict-xvi/en/speeches/2006/september/documents/hf\\_ben-xvi\\_spe\\_20060912\\_university-regensburg.html](https://w2.vatican.va/content/benedict-xvi/en/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg.html).

The stakes for how we answer these questions are high. In one of his best and most reflective essays on this topic, C.S. Lewis observed that:

[t]he very idea of freedom presupposes some objective moral law which overarches rulers and ruled alike. Subjectivism about values is eternally incompatible with democracy. We and our rulers are of one kind only so long as we are subject to one law. But if there is no Law of Nature, the ethos of any society is the creation of its rulers, educators and conditioners; and every creator stands above and outside his own creation.<sup>78</sup>

Lewis' observation does not mean the natural law exists (although he of course thought it did). His narrower point is that the idea of natural law is essential to the idea of freedom, because, as he wrote elsewhere, it provides the foundation of "a rule which is not tyranny or an obedience which is not slavery."<sup>79</sup> In the modern world, some have been tempted to dispense with the metaphysical baggage of the natural-law tradition, but without metaphysics we are left simply with physics, and physics is about power, leverage, and force. If power is all there is, then everything is about power, including the arguments we engage in as academics.

The alternative to reason is strength: it has always been the alternative. In the reigning worldview of many intellectuals, material nature in an endless chain of cause-and-effect necessitates all human action. The strong rule, as must be the case, but strong can also mean clever if cleverness helps one gain power. For this reason, many academics see law and public discourse as little more than linguistic power struggles, necessitated in advance by the course of matter. It is a grim worldview that cannot give a coherent account of many of the fundamental concepts at the base of our law and politics, and cannot account for our actual lived experiences in the world. "Everyone knows," as the late Peter Lawler wrote, "that physics can't explain the physicist."<sup>80</sup> Physics, by itself, simply explains *away* the physicist – and much else. The older theological and metaphysical view gave us two basic things that so far we have not been able to recover: a confidence in practical reason and a be-

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78. C.S. LEWIS, *The Poison of Subjectivism*, in *THE SEEING EYE* 111 (Walter Hooper ed., 1967).

79. C.S. LEWIS, *THE ABOLITION OF MAN* 74 (1943).

80. PETER AUGUSTINE LAWLER, *Defending the Personal Logos Today*, in *REASON, REVELATION, AND THE CIVIC ORDER: POLITICAL PHILOSOPHY AND THE CLAIMS OF FAITH* 104 (Paul R. DeHart & Carson Holloway eds., 2014).



lief in freedom. Both grew out of a deeper philosophical anthropology that understood human beings as rational animals unique in their capacity to deliberate about the standards of justice rooted in human nature. We must recover that understanding, and a broader worldview that makes it possible, if the bones of truth are to live on in our politics and our law.



# Lies, Deceit, and Bullshit in Law

Lawrence M. Solan\*

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## I. INTRODUCTION

Gerald Shargel, a prominent criminal attorney in New York, has written, “A trial may be a search for the truth, but I – as a defense attorney – am not part of the search party.”<sup>1</sup> This essay asks who is a member of the search party, and by what tactics parties and lawyers impede a successful search for the truth, both in the courtroom and in the interactions among people that set the stage for judicial intervention. In this effort, the essay distinguishes among three kinds of dishonesty: lies, deceit, and bullshit.

The federal perjury statute criminalizes an assertion of a material fact that the speaker believes to be false but which is asserted

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\* Don Forchelli Professor of Law and Director, Center for the Study of Law, Language and Cognition, Brooklyn Law School. The author expresses his gratitude to Laurence Horn and Jason Stanley for valuable insights into these issues, and to the participants in the Dugesne symposium, of which this article is a part.

1. Gerald L. Shargel, *Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 FORDHAM L. REV. 1263 (2007).

as true.<sup>2</sup> Once one has taken an oath to tell the truth, it is a crime for that person to “willfully and contrary to such oath state[ ] or subscribe[ ] any material matter *which he does not believe to be true.*”<sup>3</sup> The law purports to disapprove of lying. By and large it does, but not always. For example, the legal system gives law enforcement officers license to lie both during the interrogation of witnesses and during sting operations and subsequently permits prosecutors to take advantage of these lies.<sup>4</sup> The prosecutors themselves may not lie, however. Moreover, there is well-studied tolerance by judges of police officers lying about the circumstances under which they seized evidence or interrogated a suspect.<sup>5</sup>

Apart from such selective tolerance, conceptual questions about lies arise from time to time. May a witness who intended to lie be saved from a perjury conviction if the testimony turns out to be true by some kind of fluke? For example, what if the witness was mistaken about the facts and what he intended as a lie was really true? Another issue is whether the witness must intend that the false statement be believed. In the film *Casablanca*, Humphrey Bogart’s character, Rick, is asked his nationality and answers, “I’m a drunkard.”<sup>6</sup> Whether that was a lie or not depends upon whether an intention to deceive is part of the definition of lying. In civil litigation, a plaintiff who claims to have been damaged by having relied on a false statement must demonstrate that the reliance was reasonable. Whether perjury requires that the speaker could reasonably expect to be believed is not well-established in the case law, suggesting that there are few, if any, prosecutions that raise the issue.

While lying is about both false testimony and the state of mind of the speaker, deceit is more about the state of mind of the information’s recipient. A speaker has deceived another when the speaker has led the hearer to come to believe something to be true that the speaker believes to be false. It makes no difference whether the speaker did this by means of making false assertions of fact or by uttering half-truths or by other means of persuasion. Speech act theorists refer to a hearer-oriented element of an act of speech as the *perlocutionary effect* of the utterance—the effect it has on the state of mind of the hearer, rather than the communicative

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2. 18 U.S.C. § 1621 (2016).

3. *Id.* (emphasis added).

4. For discussion, see Stuart Green, *Lying in Law*, in OXFORD HANDBOOK OF LYING (Jörg Meubauer, ed.) (forthcoming) (manuscript at 11-12).

5. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

6. Mjcgonzales, *Are My Eyes Really Brown?*, YOUTUBE (June 5, 2009), <https://www.youtube.com/watch?v=ZkM6HegRk3A>.

intent of the speaker.<sup>7</sup> Verbs vary as to their focus in this regard. “Persuade,” for example, holds when the perlocutionary effect of an assertion is to convince the hearer of a proposition.

As for “bullshit,” I intend that word to be understood as described by Harry Frankfurt, in his 2005 book *On Bullshit*.<sup>8</sup> Frankfurt paints the bullshitter as an amoral person, not concerned about whether what he says is true or false. Thus, the bullshitter is not a liar because the liar must say something he believes is false, and the bullshitter does not bother himself with such concerns. Whether the bullshitter engages in deceit is a different matter. The bullshitter may be concerned with the perlocutionary effect of his or her statements but not with whether the statement is intended to convince the hearer of something true or false. As Frankfurt puts it:

The fact about himself that the bullshitter hides . . . is that the truth-values of his statements are of no central interest to him; what we are not to understand is that his intention is neither to report the truth nor to conceal it. . . .

It is impossible for someone to lie unless he thinks he knows the truth. Producing bullshit requires no such conviction.<sup>9</sup>

In a number of circumstances, the law declares bullshit as unacceptable, recognizing that it would not be covered by the ordinary definitions of deceit or lying. Illustrations include Rule 11 of the Federal Rules of Civil Procedure, which requires that an attorney (or party) make adequate investigation of the facts underlying a submission to a federal court or be subject to monetary or other sanctions.<sup>10</sup> Of course, lawyers do sometimes intentionally include false allegations in a legal pleading. More often, however, a lawyer may simply intend to fill in the gaps in a narrative in which a number of the assertions required for the lawyer to succeed can be proven, but not all such assertions. When a lawyer takes liberties with these remaining facts, the lawyer is engaged in bullshitting. The same holds true for fraud under a number of common law and statutory definitions. Asserting something as true without finding out whether it is true or not is considered fraudulent behavior.

The remainder of this essay explores the themes raised in this introduction with examples from legal proceedings, from business

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7. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 101 (1962).

8. HARRY G. FRANKFURT, ON BULLSHIT (2005).

9. FRANKFURT, *supra* note 8, at 55.

10. FED. R. CIV. P. 11.

transactions (real and hypothetical) that may become the subject of such proceedings, and from political discourse.

## II. LYING

Lying is outlawed in one context after another. Lying under oath is perjury.<sup>11</sup> Lying to a government official is a federal crime.<sup>12</sup> Lying in a business transaction is a species of fraud if the party lied to reasonably relies on the lie to his or her detriment.<sup>13</sup> Lawyers may not lie in the course of representing a client.<sup>14</sup> Nor may they arrange to have a non-lawyer employee lie as their agent.<sup>15</sup>

### A. *What is a Lie?*

Linguist/philosopher Laurence Horn sets forth four criteria that have been proposed in defining what constitutes a lie:

- (C1) S says/asserts that p
- (C2) S believes that p is false
- (C3) p is false
- (C4) S intends to deceive H<sup>16</sup>

There is general agreement that a lie must be an assertion of some kind. An opinion, a question, a promise and other such speech acts do not have truth value and therefore cannot be false.<sup>17</sup> Philosopher Don Fallis elaborates: “I think that you *assert* something when (a) you say something and (b) you believe that you are in a situation where you should not say things that you believe to be

11. 18 U.S.C. § 1621 (2016).

12. 18 U.S.C. § 1001 (2016).

13. A classic example is Rule 10b-5 of the Securities and Exchange Commission, which defines securities fraud. 17 C.F.R. § 240.10b-5 (2018). It is fraudulent conduct “[t]o make any untrue statement of a material fact” in a securities transaction. While lying is sufficient to constitute fraud, it is not a necessary condition, in that the rule also outlaws other types of deceptive practice. See *infra* note 80 for further discussion of this rule.

14. See, e.g., N.Y. RULES OF PROF'L CONDUCT r. 4.1 (2017) (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.”).

15. See, e.g., N.Y. RULES OF PROF'L CONDUCT, r. 5.3(b)(1) (2017) (“A lawyer shall be responsible for the conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if: (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it[.]”).

16. Laurence Horn, *Telling it Slant: Toward a Taxonomy of Deception*, in *THE PRAGMATIC TURN IN LAW* 23, 24-25 (Janet Giltrow & Dieter Stein eds., 2017).

17. Well, almost. One can lie about what one's opinion is, although as an opinion, its substance lacks truth value.

false.”<sup>18</sup> Fallis, in turn, takes this condition on assertions to follow from Paul Grice’s maxim of quality that we expect of our partners in conversation: “Do not say what you believe to be false.”<sup>19</sup>

There is also wide agreement that one does not lie if one says what one believes to be true but is wrong. Such cases are matters of mistake. It is the last two criteria that create disagreement and some confusion. Does a statement have to be false for it to constitute a lie? Most say “no,” following the writings of St. Augustine in late antiquity.<sup>20</sup> If one intends to make a false statement, he is not rescued by the truth if he happens to have spoken truthfully because he mistook the facts. If I attempt to protect my friend by saying he was in Cleveland when a crime was committed although I am quite certain that he was in Pittsburgh committing the crime, I have lied even if it turns out that I was wrong and he really was in Cleveland. As we shall see, the law of perjury follows this tradition.

Finally, there is a question of whether a lie must be part of an effort to deceive. Those who argue that this is not required (although it is characteristic of most lies) cite examples such as the student who lies to the school authorities as not having cheated, knowing that they will not believe him, but maintaining the position so that there will not be adequate proof to justify severe punishment. No doubt the student lied. Likewise, a witness afraid of repercussions may testify falsely to protect himself, knowing full well that he will fool no one, having already told authorities the true story before the trial began. Roy Sorensen refers to such assertions as bald-faced lies.<sup>21</sup> In keeping with positions taken by Jennifer Saul, Don Fallis,<sup>22</sup> and other philosophers, this essay proceeds on the claim that an attempt to deceive is a feature of the prototypical lie but not a necessary condition for an assertion to be deemed a lie.<sup>23</sup>

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18. Don Fallis, *What is Lying?*, 106 J. PHIL. 29, 33 (2009).

19. *Id.* (quoting PAUL GRICE, *Logic and Conversation*, in *STUDIES IN THE WAY OF WORDS* 22, 27 (1989). Grice also includes a maxim to the effect that one should avoid bullshit in conversation: “Do not say that for which you lack adequate evidence.” *Id.*

20. See generally Saint Augustine, *To Consentius, Against Lying*, NEW ADVENT, <http://www.newadvent.org/fathers/1313.htm> (last visited May 10, 2018).

21. Roy Sorensen, *Bald-Faced Lies! Lying Without the Intent to Deceive*, 88 PAC. PHIL. Q. 251 (2007).

22. See Fallis, *supra* note 18.

23. See Horn, *supra* note 16 at 26-27; JENNIFER MATHER SAUL, LYING, MISLEADING, AND WHAT IS SAID 8-12 (2012); see generally Sorensen, *supra* note 21.

### B. Perjury

As for perjury, the leading case is a 1973 unanimous Supreme Court decision *Bronston v. United States*.<sup>24</sup> Bronston was a film producer who had filed for bankruptcy. Required to answer questions under oath from the creditors from whom he sought relief, the following colloquy took place:

'Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

'A. No sir.

'Q. Have you ever?

'A. The company had an account there for about six months, in Zurich.<sup>25</sup>

It turned out that not only did the company have an account in Zurich in the past, but so did Bronston himself. As a result, he was prosecuted for perjury and convicted. The perjury statute states in relevant part:

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; . . . is guilty of perjury[.]<sup>26</sup>

But the Supreme Court reversed the conviction, relying on a distinction between a false statement on the one hand and a true statement leading to a false inference on the other:

The words of the statute confine the offense to the witness who 'willfully . . . states . . . any material matter which he does not believe to be true.' Beyond question, petitioner's answer to the crucial question was not responsive if we assume, as we do, that the first question was directed at personal bank accounts.

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24. 409 U.S. 352 (1973).

25. *Id.* at 354.

26. 18 U.S.C. § 1621 (2016).



There is, indeed, an implication in the answer to the second question that there was never a personal bank account; in casual conversation this interpretation might reasonably be drawn. But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true.<sup>27</sup>

This has come to be known as the “literal truth defense” to perjury.<sup>28</sup> The Court noted that Bronston’s answer was unresponsive, not false, and that an alert lawyer would be on sufficient notice to ask a follow-up question, such as, “Mr. Bronston, I didn’t ask about your company; I asked about you.” As Peter Tiersma and I have noted, this holding, at least if taken at face value, sets a very low moral floor for witnesses who swear to tell the truth in an enterprise whose goal is to seek out and discover the truth.<sup>29</sup>

Yet the questions and answers in a courtroom or a deposition are not ordinary conversational exchanges. The philosopher Paul Grice famously wrote that conversation is a cooperative enterprise. When speaking with others, we typically abide by his cooperative principle, “Make your contribution such as it is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.”<sup>30</sup> In litigation contexts, however, witnesses are instructed by their lawyers to answer the questions asked and not to volunteer more information for the sake of being helpful. This instruction does not entirely flout the cooperative principle because witnesses must give answers that are both relevant and truthful. Grice lists four maxims as components of cooperation in conversation. Two are the maxim of relation (be relevant) and the maxim of quality (be truthful).<sup>31</sup> Others have elevated relevance to the principal component of conversational responsibility.<sup>32</sup>

As for Bronston, the Court held, in essence, that by giving an answer that was literally both truthful and irrelevant, he had flouted

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27. 409 U.S. at 357-58.

28. See, e.g., RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON 49 (1999).

29. LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME (2005). I also explore this issue in Lawrence M. Solan, *Lawyers as Insincere (But Truthful) Actors*, 36 J. LEGAL PROF. 487 (2012).

30. H. P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975).

31. *Id.* at 46.

32. See DAN SPERBER & DEIRDRE WILSON, RELEVANCE: COMMUNICATION AND COGNITION (2d ed. 1995).

the maxim of relation but not the maxim of quality. But that, of course, is not all that Bronston did. In ordinary discourse, if a person says that his company had a Swiss Bank Account in response to a question about whether the witness himself had one, the normal inference is that the witness intends to convey, "No. I never had one, but. . ." Bronston thus succeeded in misleading the questioner into concluding that Bronston himself did not have one. If the questioner thought otherwise, he would indeed have asked the follow-up question necessary to button down the facts about what Bronston himself owned.

Without question, Bronston engaged in dishonest conduct. Some commentators believe that the case was wrongly decided for that reason.<sup>33</sup> But if perjury is about lying, and the Court decided to articulate a bright line rule, then at first glance, it seemed to have accomplished its goal. The Court itself took a second glance, however, recognizing that whether an answer to a question is truthful requires not only analysis of the answer, but also analysis of the question. Because Bronston's response was so blatantly unresponsive, the Court reasoned, it was the questioner who should be held responsible for the truth not coming out. The Court thus distinguished Bronston's conduct from the conduct in a hypothetical case that the trial court had presented. It concerns the third of Grice's maxims: the maxim of quantity (say whatever is necessary to make one's point but not more).<sup>34</sup> The district court, which the Supreme Court quoted, had noted:

(I) If it is material to ascertain how many times a person has entered a store on a given day and that person responds to such a question by saying five times when in fact he knows that he entered the store 50 times that day, that person may be guilty of perjury even though it is technically true that he entered the store five times.<sup>35</sup>

The Supreme Court argued that the situation was unlike that in *Bronston* because "the answer 'five times' is responsive to the hypothetical question, and contains nothing to alert the questioner that he may be side-tracked."<sup>36</sup> The Court continued:

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33. See, e.g., Philip Gaines, *Toward a Communicative Approach to Law- and Rule-Making*, in *SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA* 235 (Lawrence M. Solan, Janet Ainsworth & Roger Shuy, eds. 2015).

34. Grice, *supra* note 30, at 46-47.

35. *Bronston v. United States*, 409 U.S. 352, 355 n.3 (1973).

36. *Id.*

Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect, because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question—unless there is to be speculation as to what the unresponsive answer ‘implies.’<sup>37</sup>

The Court was correct in declaring that unresponsive answers may generate false inferences but are not false answers to the questions in their own right. But the situation is a bit more complex. Ambiguous questions pose a similar problem. If a question is subject to more than one interpretation, a witness’s answer may be truthful if the question is understood one way yet false if it is understood another way. Generally, as the Court assumes, if we ask someone how many times he or she has been to a particular place, we mean to ask for the sum total of times. But this is not always true of quantitative inquiries. Consider this hypothetical: Two friends are taking a long walk, and one sees a beverage machine at a gas station that they pass. It requires inserting a \$1 bill and some coins. He has the coins but not the \$1 bill. He asks his friend, “How much cash do you have?” The friend, understanding the situation, responds, “I have a dollar.” In fact, he has \$32. Did he lie? No. He was merely trying to advance the conversation by giving a relevant response. What he meant was that he had at least the dollar required for the beverage, and he would be understood that way. By the same token, if a store has a special promotion for patrons who had been there at least five times in the past month, a person who had been there fifty times could enter the store and say forthrightly that he had been there five times when asked how many times he had been there.

If what I have said thus far is right, it presents a problem for the Court’s analysis. The Court was correct in its assertion that construing an unresponsive answer as misleading requires it to speculate as to the inferences that a reasonable hearer would draw. However, it is also true that determining whether a seemingly responsive answer is true or false requires a court to speculate as to the inferences that the witness drew in understanding the question, at least in the examples that the Supreme Court used. Of course, some questions are sufficiently clear that this is not a problem. But many are not, and we routinely resolve ambiguity as we attempt to understand the discourse.

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37. *Id.*

If the truth of an answer can be judged only with respect to the question that was asked, can a witness be saved from a perjury conviction if the questioner misstated the question but both questioner and witness understood the question to mean what the questioner intended to ask? This inquiry may sound bizarre, but it is exactly what happened in *United States v. DeZarn*<sup>38</sup>—and the answer the Sixth Circuit gave was “no”: If you are under oath, and you answer a question in a manner that you believe to be false, then you have committed the crime of perjury even if your answer is literally true.

In 1990, Robert DeZarn, a retired officer in the Kentucky National Guard, attended and participated in a fundraising party for a political candidate running for governor of Kentucky. The party was held at the home of an officer in the Kentucky National Guard, General Wellman. The party was referred to as a “Preakness party” because it was held on the day of the annual Preakness horse race. It is illegal for officers to solicit such funds from military personnel. In 1991, that same officer held another, smaller party, this time on the day of the Kentucky Derby race. DeZarn attended that party as well. No fundraising took place at the 1991 event.

Because of the illegality of the fundraising by military personnel, an investigation ensued once authorities heard about the incident. DeZarn was questioned by an officer, in relevant part, as follows:

Q: Okay, sir. My question is going to deal with General Wellman, though. Was it traditional for General Wellman to hold parties at his home and invite Guardsman to attend?

A [by DeZarn]: Well, I suppose you could say that for a number of years that going back to the late 50s he has done this on occasion.

Q: Okay. In 1991, and I recognize this is in the period that you were retired, he [i.e., General Wellman, the host] held the Preakness Party at his home. Were you aware of that?

A: Yes.

Q: Did you attend?

A: Yes.

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38. 157 F.3d 1042 (6th Cir. 1998).

Q: Okay. Sir, was that a political fundraising activity?

A: Absolutely not.

Q: Okay. Did then Lieutenant Governor Jones, was he in attendance at the party?

A: I knew he was invited. I don't remember if he made an appearance or not.

Q: All right, sir. You said it was not a political fundraising activity. Were there any contributions to Governor Jones' campaign made at that activity?

A: I don't know.

Q: Okay. You did not see any, though?

A: *No*.

Q: And you were not aware of any?

A: *No*.<sup>39</sup>

DeZarn was convicted of perjury for having given these answers. He appealed on the ground that the questioner placed the party in 1991, and in that year, there was no political fundraising. The jury, though, believed that DeZarn and the questioner both understood at the time that they were talking about the 1990 fundraising Preakness party that had occurred the year before and that he had therefore testified falsely.

Had the questioner asked DeZarn about a 1991 Kentucky Derby party, there would have been little justification for the conviction. The testimony as it did occur, however, presents a thorny doctrinal question. Why is it that Bronston's answer *is not* perjurious because it requires the hearer to draw an inference that Bronston himself did not have a Swiss Bank Account, but DeZarn's testimony *is* perjurious, even though his answer requires the hearer to draw an inference that the questioner had mistakenly placed the Preakness party in the wrong year? Interestingly, in *Bronston*, the Court put the blame on the lawyer for not following up after receiving an unresponsive answer:

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39. *Id.* at 1044-45.

It is the responsibility of the lawyer to probe; testimonial interrogation, and cross examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.<sup>40</sup>

In *DeZarn*, in contrast, the questioner, rather than failing to follow up with the witness, simply asked the wrong question in the first place, leaving a degree of ambiguity that the witness attempted to leverage to create a misleading record. The court reasoned:

At trial, DeZarn testified that Colonel Tripp, by mistakenly setting the questions in his interview about the Preakness Party in 1991, rather than 1990, led him to answer the questions with reference to the 1991 dinner party, which was not a fundraiser and at which he did not collect any contributions.

Evidence was presented at trial, however, to establish that DeZarn was not misled by the 1991 date but had answered the investigators' questions as he had with intent to deceive them. Specifically, all of the individuals questioned by the investigators described the same party, even though some were questioned about a "Preakness Party", some were questioned about a "1990 Preakness Party", and some, like DeZarn, were questioned about a "1991 Preakness Party".<sup>41</sup>

Let us assume that the court was accurate in its description of DeZarn's motives. The question then becomes what difference should DeZarn's motives make if he arguably did not answer falsely in light of the questioner's mistake in wording the question? After all, Bronston had bad motives, too.

The perjury statute, read literally, does not have a literal truth defense.<sup>42</sup> Bronston did not violate the law if we read the law as written. He did not say something that he did not believe to be true. What about DeZarn? If DeZarn believed that the question was asking about the 1990 Preakness party, then he did violate the law. But what if he was just being cagey? What if DeZarn saw an opening in the question that permitted him to answer as he did without actually lying? If so, he did this not because he was trying to be

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40. 409 U.S. at 358-59.

41. 157 F.3d at 1046.

42. 18 U.S.C. § 1621 (2016).

helpful and forthright, but rather because he wanted to take advantage of the lawyer's mistake and avoid having to say what really took place without perjuring himself. If that is what happened, it is difficult to distinguish the two cases on their relevant facts.

The Supreme Court was certainly correct in concluding that one cannot assess the truthfulness of an answer without knowing what the question was. Yet it is not a simple matter to reconcile *Bronston* and *DeZarn*. There was only one Preakness party, and it was an illegal fundraising event. If DeZarn understood the question as referring to that party, then he committed perjury. By the same token, there was only one relevant party in 1991, and it was not a fundraising party. If DeZarn understood the question as referring to that party, then he did not commit perjury. The more difficult question is what should happen if DeZarn recognized the error, and for the sake of obfuscating the facts, chose the 1991 date over the name of the horse race to accomplish this goal. Perhaps it was right to leave that decision to the jury. The rule of lenity tells us that ambiguities in law are to be resolved in favor of the defendant. But this, at least arguably, is not an ambiguity of law. Rather, it is a murkiness in the facts regarding the defendant's state of mind.

Regardless, taken together, the cases describe a rather simple story: If a person makes a statement under oath that she believes to be false at the time she makes it, then that person has committed perjury. *Bronston* tells us that a false statement must be literally false—not a true statement that leads the hearer to infer something false. *DeZarn* tells us that the “literal truth” defense is a misnomer. More important than literal truth is the speaker's belief in the falsity of her statement, which is exactly how the perjury statute is worded.

Experimental work in the psychology of language suggests that native speakers' intuitions about what constitutes a lie match the holding of the *DeZarn* court. Most notably, linguists Linda Coleman and Paul Kay set out to determine how people understand the concept of lying.<sup>43</sup> Participants in a study were presented with vignettes that ended with a person making some kind of statement. The participants were then asked to rate the statement on a 1-7 scale, where 1 indicated “very sure” it is not a lie, 2 and 3 were “fairly sure” and “not too sure” it is not a lie, 4 was “can't say,” and 5-7 went from “not too sure” it is a lie to “very sure” it is a lie.<sup>44</sup>

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43. Linda Coleman & Paul Kay, *Prototype Semantics: The English Word Lie*, 57 LANGUAGE 26 (1981).

44. *Id.* at 30.

The statements in the vignettes were varied systematically along three axes. First, the statement was either true or false. Second, the speaker either believed the statement to be true or believed it to be false. Third, the speaker either intended to deceive the hearer or not. These axes are the very features that Horn attributes to the various definitions of lying, in addition to the requirement that a lie be an assertion.<sup>45</sup>

Coleman and Kay hypothesized that these three factors each contributed to the meaning of the verb “to lie,” but that none is a necessary condition; some combination may be sufficient. They further hypothesized that participants would rate the statements with either all three or no elements to be the strongest, i.e., prototypical examples of lying, with various combined features being less clear. And that is just what happened.

First, consider the all-or-nothing vignettes. Vignette (I) has all of the features of a prototypical lie, vignette (II) none of them:

(I) Moe has eaten the cake Juliette was intending to serve to company. Juliette asks Moe, ‘Did you eat the cake?’ Moe says, ‘No.’ Did Moe lie?<sup>46</sup>

(II) Dick, John, and H.R. are playing golf. H.R. steps on Dick’s ball. When Dick arrives and sees his ball mashed into the turf, he says, ‘John, did you step on my ball?’ John replies, ‘No, H.R. did it.’ Did John lie?<sup>47</sup>

Both answers are self-serving, but only one is true and intended to convey the truth. Sure enough, Coleman and Kay’s subjects almost universally thought confidently that (I) contains a lie (6.96 average) and that (II) does not contain a lie (1.06 average).<sup>48</sup>

The more interesting cases are ones in which some, but not all, of the three elements of lying are present. What do people think when a person makes a truthful statement, knowing it to be true, but with the intention of attempting to get the hearer to draw a false inference? This is the typical scenario of fraud without lying, discussed earlier. Below is the scenario that contains these conditions:

(VI) John and Mary have recently started going together. Valentino is Mary’s ex-boyfriend. One evening John asks Mary,

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45. See Horn, *supra* note 16, at 25.

46. Coleman & Kay, *supra* note 43, at 31.

47. *Id.*

48. *Id.* at 33.



‘Have you seen Valentino this week?’ Mary answers, ‘Valentino’s been sick with mononucleosis for the past two weeks.’ Valentino has in fact been sick with mononucleosis for the past two weeks, but it is also the case that Mary had a date with Valentino the night before. Did Mary lie?<sup>49</sup>

The mean score on this question was 3.48,<sup>50</sup> close to the midpoint of 4.00. This suggests that, on the average, people did not consider this to be a lie, but it approaches being a lie. I have presented this scenario to law students who, when probed, typically agree with the statement: “I don’t think Mary lied, but what she did was dishonest, and I’m uncomfortable saying it’s not a lie because that answer doesn’t reflect my disapproval of her behavior.”

In essence, this scenario is *Bronston*. Mary evaded answering the question directly so that she would not have to tell the whole story or take responsibility for having lied, neither of which was palatable under the circumstances. It also resembles President Bill Clinton’s efforts to evade the truth without lying.<sup>51</sup> Clinton had been sued by Paula Jones, an employee of the state of Arkansas, for sexual harassment while Clinton was Governor of that state. Later, Kenneth Starr, a special prosecutor appointed to investigate whether the President or those close to him had committed any crimes in connection with a real estate investment called Whitewater, convened a grand jury to determine whether Clinton had perjured himself or obstructed justice when he testified in a deposition in the *Jones* litigation. Much of the questioning in the deposition was about his sexual relationship with Monica Lewinsky, which apparently caught him off guard. Before the grand jury, he testified in true Bronstonian fashion:

Q [W]as it your responsibility . . . to answer those questions truthfully, Mr. President?

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49. *Id.* at 31.

50. *Id.* at 33.

51. For a fair account of the relevant facts, see generally RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (2000). Both Peter Tiersma and I wrote about linguistic issues concerning the Clinton impeachment and the events leading up to it. See SOLAN & TIERSMA, *supra* note 29, at 221-31; Lawrence M. Solan, *The Clinton Scandal: Some Legal Lessons from Linguistics*, in LANGUAGE IN THE LEGAL PROCESS 180-95 (Janet Cotterill ed., 2002); Peter Tiersma, *Did Clinton Lie? Defining Sexual Relations*, 79 CHI-KENT L. REV. 927 (2004).

A It was. . . . But it was not my responsibility, in the face of their repeated illegal leaking, it was not my responsibility to volunteer a lot of information.<sup>52</sup>

The House of Representatives voted to bring Articles of Impeachment against Clinton for lying to the grand jury but not for lying in the *Jones* deposition. Both before the grand jury and at his deposition, Clinton refused to characterize his conduct with Lewinsky as “having sexual relations” because in his dialect of English, the term is only applicable if the relationship includes sexual intercourse. In fact, it was not until his grand jury appearance that he admitted having a physical relationship with Lewinsky at all. Testifying about an affidavit that Lewinsky had sworn, Clinton said to the grand jury: “I believe at the time that [Lewinsky] filled out this affidavit, if she believed that the definition of sexual relationship was two people having intercourse, then this is accurate. And I believe that is the definition that most ordinary Americans would give it.”<sup>53</sup>

To Clinton, intercourse is a necessary element of the concept “sexual relations.” Along these same lines, Clinton had famously told the press: “I did not have sexual relations with that woman, Ms. Lewinsky.”<sup>54</sup> Whether he would agree that his own conduct may be within that term but not its prototype for some people is something we cannot know.

If the Mary vignette and Clinton’s statements resemble *Bronston’s* approach to the truth, what do they say about *DeZarn*? The following Coleman and Kay vignette describes a person who thought he was lying but later found out that he had spoken truthfully:

Superfan has got tickets for the championship game and is very proud of them. He shows them to his boss, who says, ‘Listen, Superfan, any day you don’t come to work, you better have a better excuse than that.’ Superfan says, ‘I will.’ On the day of the game, Superfan calls in and says, ‘I can’t come to work today, Boss, because I’m sick.’ Ironically, Superfan doesn’t get to

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52. THE STARR REPORT: THE EVIDENCE 361 (Phil Kuntz ed., 1998).

53. H.R. DOC. NO. 105-311, at 473 (1998) (deposition of William Jefferson Clinton in *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998)).

54. See, e.g., jw00534, *Bill Clinton--“I did not have sexual relations with that woman”*, YOUTUBE (Apr. 18, 2012), [https://www.youtube.com/watch?v=VBe\\_guezGGc](https://www.youtube.com/watch?v=VBe_guezGGc).

go to the game because the slight stomach ache he felt on arising turns out to be ptomaine poisoning. So Superfan was really sick when he said he was. Did Superfan lie?<sup>55</sup>

Most people said he did. The mean score was 4.61,<sup>56</sup> again fairly close to the midpoint of 4 but nonetheless on the “lying” side of the line.

Other findings were interesting as well. When a person makes a false statement as a result of having mistaken the fact of the matter, participants did not call it a lie. But they did call it a lie when the speaker made a true statement as a result of having mistaken the facts in an effort to tell a lie. They also considered a polite statement from a guest to a host after a dismal party to be a lie. These results reinforce the intuitive appeal of the perjury law, which focuses on the belief of the speaker, rather than on the speaker’s factual accuracy. It also gives some credence to both *Bronston* and *DeZarn* as consistent with people’s judgments about what constitutes a lie and what does not.

Coleman and Kay’s results indeed suggest that we are more comfortable calling some statements lies than others and that falsity is not the determining factor—at least, not by itself. Rather, in keeping with the earlier work of Eleanor Rosch,<sup>57</sup> we are more comfortable categorizing prototypical cases as members of a category than we are categorizing fringe cases as members of a category. Work by British psychologist James Hampton and his colleagues confirms that consensus about category membership dissipates as we stray from the prototype.<sup>58</sup> This explains why the scores get closer to the midpoint when some, but not all, of the features of a prototypical lie are present. Steven Winter develops the case for this approach impressively in his book *A Clearing in the Forest*.<sup>59</sup> However, it should be kept in mind that the means reported by Coleman and Kay are only partly informative. If half the participants are certain that a statement is a lie, the other half certain that it is not, the mean on a 1-to-7 scale would be exactly 4—the midpoint—even though there is no uncertainty about category membership, only sharp disagreement.

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55. Coleman & Kay, *supra* note 43, at 31-32.

56. *Id.* at 33.

57. Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104 J. EXPERIMENTAL PSYCHOL.: GEN. 192, 197-99, 229-33 tbl.A1 (1975).

58. James A. Hampton, Zachary Estes & Sabrina Simmons, *Metamorphosis: Essence, Appearance, and Behavior in the Categorization of Natural Kinds*, 35 MEMORY & COGNITION 1785, 1797-98 (2007).

59. See generally STEVEN L. WINTER, *A CLEARING IN THE FOREST: LIFE, LAW, AND MIND* (2001).

Also to be kept in mind are the findings of Lila Gleitman and her colleagues. A study by Sharon Armstrong, Lila Gleitman, and Henry Gleitman found that while words indeed have prototypes, people use them more to sort out good and bad examples of a concept than they do in deciding category membership in the first place.<sup>60</sup> For example, people agree that a robin is a better example of a bird than a penguin. However, when asked, they also say that a penguin is no less a bird than a robin. Regardless, with the law's concern about "ordinary meaning" in legal interpretation, it seems clear that prototype analysis has a place in legal argumentation.

### *C. Section 1001: Lying to a Government Official*

Perjury is not the only crime that requires proof of a lie. It is also a crime to lie to a government official in the context of an official interaction even when not under oath. Section 1001 of the U.S. Criminal Code reads in relevant part:

#### § 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years[.]<sup>61</sup>

The law does not apply to false statements made by parties or their lawyers in judicial proceedings.<sup>62</sup> Those are covered by the

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60. Sharon Lee Armstrong, Lila R. Gleitman & Henry Gleitman, *What Some Concepts Might Not Be*, 13 COGNITION 263, 267 (1983) (describing view of categories that considers "[m]embership in the class [as] categorical, for all who partake of the right properties are in virtue of that equally birds; and all who do not, are not").

61. 18 U.S.C. § 1001(a) (2016).

62. 18 U.S.C. § 1001(b) (2016).

perjury and obstruction of justice laws and by procedural rules that sanction parties who act dishonestly.

As this essay is being written, Section 1001 has come into play in American culture. Two members of President Trump's inner circle have pleaded guilty to violating this statute. On December 1, 2017, former National Security Advisor Michael Flynn pleaded guilty to lying to the FBI about contacts he had with a former Russian ambassador to the United States, Sergey Kislyak, in violation of Section 1001.<sup>63</sup> The charges to which he pleaded guilty alleged that he falsely told the FBI that he did not ask the Russian Ambassador "to refrain from escalating the situation in response to sanctions that the United States had imposed against Russia"; that he did not remember being told that Russia agreed to moderate its response as a result of Flynn's request; that Flynn did not ask the Russian Ambassador to act with respect to a then pending UN Security Council resolution; and that the Russian Ambassador never conveyed to Flynn Russia's response to this request.<sup>64</sup> He has not yet been sentenced as of this writing. The agreement requires Flynn's cooperating with Special Counsel Robert Mueller in the investigation into Russian meddling in the 2016 presidential election.<sup>65</sup>

About six weeks earlier, George Papadopoulos, who served as a foreign policy advisor to Donald Trump during his campaign, also pleaded guilty to violating Section 1001 by lying to the FBI about his interactions with individuals connected to the Russian government. He told the FBI that his contacts with these individuals were superficial and occurred before he joined the campaign; in fact, the contacts were serious efforts to work with the Russian individuals and occurred during his tenure with the Trump campaign.<sup>66</sup>

This law has been the source of another interesting interpretive issue: The "exculpatory no" defense. As noted, Section 1001 does not apply to statements made in judicial proceedings. This, of course, includes pleading "not guilty" to a crime that the defendant actually committed. What, if instead, a suspect tells a federal law

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63. The documents are available at Matthew Kahn, *Michael Flynn Plea Agreement Documents*, LAWFARE (Dec. 1, 2017, 9:44 AM), <https://www.lawfareblog.com/michael-flynn-plea-agreement-documents>.

64. Statement of the Offense at 2-4, *United States v. Michael T. Flynn*, available at <https://www.lawfareblog.com/michael-flynn-plea-agreement-documents>.

65. Letter from Special Counsel's Office to Michael Flynn and his counsel dated November 30, 2017 at 5-6, available at <https://www.lawfareblog.com/michael-flynn-plea-agreement-documents>.

66. Statement of the Offense at 2-3, *United States v. George Papadopoulos*, available at Vanessa Sauter, *George Papadopoulos Stipulation and Plea Agreement*, LAWFARE (Oct. 30, 2017, 10:25 AM), <https://www.lawfareblog.com/george-papadopoulos-stipulation-and-plea-agreement>.

enforcement officer that he did not engage in conduct that is criminal in nature? Is such a denial a federal crime? Until 1998, many circuit courts accepted the “exculpatory no” defense, saying that a simple denial of an accusation of criminal activity comes within a suspect’s constitutional rights.<sup>67</sup> But that year, the Supreme Court put this practice to an end in *Brogan v. United States*.<sup>68</sup>

James Brogan was a union leader who had illegally taken money on five occasions from a business that employed union members. The statute of limitations had run on four of the five.<sup>69</sup> One night, federal agents knocked on Brogan’s door and asked him whether he had accepted such funds. He answered “no” and was subsequently prosecuted for the false statement. Such a denial comes very close to simply saying, “I plead not guilty.” Had Brogan said that, instead of “no,” Justice Ginsburg observed in her concurring opinion,<sup>70</sup> he would not have been prosecuted. Secondly, in cases like Brogan’s, applying the statute to a situation in which the government already knows the truth, including situations in which the statute of limitations has already run, applying Section 1001 is an open invitation to law enforcement agents to create crimes when none that could be prosecuted has been committed.<sup>71</sup>

Yet the language of Section 1001 makes no exception for exculpatory “no” cases, and the majority, in an opinion written by Justice Scalia, decided to follow the text as written. This drew sharp criticism from Justice Stevens’s dissenting opinion, for courts routinely contextualize statutes to avoid having them apply to situations that were not intended to be covered.<sup>72</sup>

In some respects, Brogan’s denial and the denials of members of the Trump campaign share a common narrative. All of these individuals, when approached by law enforcement officers, could have asserted their rights under the Fifth Amendment and not answered the questions. The biggest difference is that Brogan was caught by surprise in the night, whereas the Trump affiliates met with agents voluntarily and lied to them, perhaps assuming wrongly that there would be no independent record of what really happened. It is also

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67. *Moser v. United States*, 18 F.3d 469, 473-474 (7th Cir. 1994); *United States v. Taylor*, 907 F.2d 801, 805 (8th Cir. 1990); *United States v. Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988); *United States v. Tabor*, 788 F.2d 714, 717-719 (11th Cir. 1986); *United States v. Fitzgibbon*, 619 F.2d 874, 880-881 (10th Cir. 1980); *United States v. Chevoor*, 526 F.2d 178, 183-184 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

68. 522 U.S. 398 (1998).

69. *Id.* at 411 (Ginsburg, J., concurring).

70. *Id.*

71. *Id.* at 412 (Ginsburg, J., concurring).

72. *Id.* at 419-20 (Stevens, J., dissenting).

possible that President Trump's affiliates did not commit a crime by meeting with the Russian representatives, and lied merely to protect the false story coming from the White House that there were no such contacts—criminal or not. Whatever their motives, it is hard to believe that people involved in a heavily-reported investigation of that sort were unaware that there may be consequences if they are caught lying to the FBI. This puts Brogan in a somewhat more sympathetic light; he may well have simply been pleading not guilty in his own way but failed to use the acceptable language to do so.

We are thus left with four observations when it comes to how the law treats lies: First, making a truthful statement that is intended to lead the recipient to believing something false is not a lie, at least as far as the perjury statute is concerned (*Bronston*). Second, making an assertion one believes to be false is a lie, even if the assertion turns out to be true (*DeZarn*). Third, bald-face lies are still lies, even if they do not fool anyone and were not intended to fool anyone (Sorensen and examples of students lying to escape serious punishment). Fourth, pleading “not guilty” in court is not a lie, but saying “I didn’t do it” to the police is a lie (*Brogan*). Philosophers are not in complete accord in drawing boundaries around the concept of lying.<sup>73</sup> Yet the illustrations in the literature suggest that the legal definition is in accord with the conclusions of many scholars who have taken positions on the definition of lying.

### III. DECEIT

#### A. *Lying Versus Deception: Which is Worse?*

Samuel Bronston was not a perjurer, but that does not make him a paragon of virtue. His goal was to trick his creditors into thinking that he did not have assets that he actually did have to prevent those assets being distributed among them by the Bankruptcy Court. Bronston engaged in an act of deception that apparently was thwarted as a result of the assets in question having been discovered independently.

People generally consider lying to be morally worse than deceiving by misdirection. Philosopher Jennifer Mather Saul presents the following experiment to demonstrate the point:

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73. For example, Jörg Meibauer, takes the position that the deceit in cases like *Bronston* should be seen as falling within an extended definition of lying. See Jörg Meibauer, *Lying and Falsely Implicating*, 37 J. PRAGMATICS 1373, 1382 (2005).

An elderly woman is dying. She asks if her son is well. You saw him yesterday (at which point he was happy and healthy), but you know that shortly after your meeting he was hit by a truck and killed. [Is it better] to utter (1) than (2)—because (1) is merely misleading while (2) is a lie[?]

(1) I saw him yesterday and he was happy and healthy.

(2) He's happy and healthy.<sup>74</sup>

Many people choose (1) over (2) because telling the truth is morally better than lying, even if the truth is intentionally misleading. But Saul argues that it should make “no defensible moral preference” for deception through misdirection over lying.<sup>75</sup> The result is the same. To Saul, the difficult issue is why so many of us feel better about ourselves uttering (1) rather than (2) if there is no moral basis for preferring one over the other.

Others take the view that uttering a false statement is itself a moral wrong, which should be taken seriously in its own right. Seana Valentine Shiffrin presents strong argumentation in this direction,<sup>76</sup> using Kant’s “murderer at the door” as a vehicle for analysis.<sup>77</sup>

### *B. What the Law Says About Deceit*

At this point, one may wonder why the legal system would create a safe harbor for fraudulent conduct in the courtroom whereas it is outlawed in everyday life. If anything, one might expect judicial proceedings to be a sanctuary for honesty and fair play. Stuart Green explains the disparity this way:

Why exactly should culpable deceit be easier to prove in cases of fraud than of perjury? The distinct contexts in which the two crimes are committed suggest a possible answer: As noted above, perjury involves statements made under oath, often in a formal, adversarial setting where the truth of the witness’ statement can be tested through probing cross-examination. Fraud, by contrast, typically occurs in a commercial or regulatory setting, where the deceiver and deceived are engaged in

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74. SAUL, *supra* note 23, at 70.

75. *Id.* at 86.

76. SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 5-46 (2014).

77. Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives* (1799), <https://www.unc.edu/courses/2009spring/pley/240/001/Kant.pdf>.



an arm's length, often one-shot transaction. In such circumstances, there is no opportunity for careful fact-finding or cross-examination. Likely for this reason, the courts have tended to define deception more broadly in the fraud context than in that of perjury.<sup>78</sup>

Green's explanation is consistent with that of the *Bronston* Court, which blamed the creditors' lawyer for not following up and asking the question that would have pinned Bronston down ("What about you personally?").<sup>79</sup> Indeed, the adversarial system does present the opportunity to probe further. But that does not really get to the heart of the matter. For one thing, in the world of business, at least in many transactional environments, both parties have ample opportunity to ask additional questions to undo the inferences drawn from misleading statements. While we may not wish to require those in the business world to be as distrustful as those in the world of adversarial litigation, the distinction between the two settings may not be adequate to justify such a sharp distinction in moral responsibility.

Deception, like lying, is generally disallowed in the business world, especially when a victim relies on a deceptive statement to his or her detriment. That is the classic definition of fraud. There are nuances, however. When it comes to misrepresentations for which there are monetary or criminal sanctions, the conveyor's state of mind comes more into play. Consider Rule 10b-5 of the Securities and Exchange Commission:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

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78. Green, *supra* note 4, at 7-8.

79. 409 U.S. at 358.

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.<sup>80</sup>

Note that the rule specifically includes truthful statements that are designed to lead the reader or hearer to draw a false inference. This is exactly what Bronston did. It is not perjury, but it is an act of fraud. By the same token, the definition of fraud itself explains why puffery is accepted in commercial transactions. An individual is defrauded only after he reasonably relies to his detriment on a false or misleading statement. Statements on which it is not reasonable to rely because they are simply normal boasts that the recipient should know to discount as such are not fraudulent under that standard.

In our book *Speaking of Crime*,<sup>81</sup> Peter Tiersma and I agree with the holdings in both *Bronston* and *DeZarn* but find the justification not in the lawyer's responsibility to follow up as a matter of professional competence, but, rather, in the role morality of lawyers. Lawyers are permitted to deceive in circumscribed ways, which are defining features of the relationship between lawyer and adverse witness. To take two examples, lawyers are permitted, some say required, to produce false defenses. By "false defense" I mean a defense based on legitimate evidence that is likely to lead a trier of fact to an inference that the lawyer knows to be false. This license applies particularly to criminal defense lawyers. A lawyer who decides not to challenge the time of death in an autopsy report that contains errors in calculation would be remiss even if the lawyer knew from his own client that the estimated time of death is fairly accurate. Likewise, as Monroe Freedman has pointed out, a lawyer who fails to cross-examine a visually-impaired eyewitness on what she actually saw because he knows her account to have been accurate would be committing malpractice.<sup>82</sup>

Moreover, in the routine cross-examination of witnesses, it is the lawyer's job to persuade witnesses to agree to characterizations of uncontested events in ways that will help the lawyer's client. Witnesses need not agree to inaccurate characterizations, of course, but even such choices as "smash" versus "hit" in a car accident case can

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80. 17 C.F.R. § 240.10b-5 (2018) (emphasis added).

81. SOLAN & TIERSAMA, *supra* note 29, at 234-35.

82. MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 48 (1975).

have a profound effect on how a juror conceptualizes the event.<sup>83</sup> The moral issue arises when the lawyer knows that the characterization is sufficiently accurate so that the witness has an obligation to accept it, but that is not a fair characterization. That is, if the lawyer was speaking in casual conversation with a person she trusts, she would have used different language.

As Bradley Wendel points out in his essay in this volume,<sup>84</sup> it is not enough to justify deceptive practices by lawyers as within the role of the lawyer in society unless we can justify the rules of the role itself on independent moral grounds. He writes:

We tolerate lawyers engaging in these practices not because we are indifferent to lying, but because we recognize that bluffing in negotiations and arguing for false inferences are means to broader institutional ends such as protecting liberty and enabling citizens to have access to the rights allocated to them by law. The assessment of public actors as truthful or untruthful requires situating their conduct in context, including the expectations and beliefs of others who participate in the relevant social practices and institutions. This contextual, community-grounded evaluation also suggests that we may do better at realizing the value of truthfulness by instituting and reinforcing certain methodologies and practices that are adapted to the obstacles one is likely to encounter to the maintenance of truth.<sup>85</sup>

Returning to *Bronston*, a witness does not answer questions in a vacuum. A witness answers questions that are often designed to elicit answers that will create a misimpression, at least from the witness's point of view. At the very least, the questions are intended to elicit answers that will serve the interest of the party the lawyer represents, even if neither the lawyer nor the witness would regard the exchange as producing a fair characterization from the perspective of a neutral observer.

This license for lawyers to produce a record that may go beyond the lopsided, even to the point of being deceptive, helps explain why *Bronston* should not go to prison for playing on the same field. Grice's Cooperative Principle tells us that in ordinary conversation, we assume the other participant to be moving the discussion along

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83. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAVIOR 585 (1974).

84. W. Bradley Wendel, *Truthfulness as an Ethical Form of Life*, 56 DUQ. L. REV. 141 (2018).

85. *Id.* at 154-55.

in a cooperative manner, and we give the other individual the impression that we are doing the same.<sup>86</sup>

In cross-examination, some of this cooperation holds. For example, Grice's maxim of relation (be relevant) is required of witnesses, although Bronston himself trickily flouted that maxim. Yet trial practice manuals encourage lawyers to be conversational in their cross-examination not to cooperate with the witness, but to lull the witness into being less guarded and more cooperative—increasing the likelihood of getting helpful responses.<sup>87</sup>

#### IV. BULLSHIT

As noted at the beginning of this article, bullshit may be either true or false: The bullshitter does not care which.<sup>88</sup> But the bullshitter does care about something. What the bullshitter cares about is winning an argument, by whatever rhetorical means is necessary. As the philosopher Jason Stanley describes, the same holds true for the propagandist.<sup>89</sup> Propaganda, according to Stanley, need not be false, but rather must be a statement, whether true or false, made in the service of promoting a flawed ideology.<sup>90</sup> Thus, while not all bullshit is propaganda in that it is not made in the service of a flawed political ideology, it is plausible to claim that all propaganda is bullshit, in that the truth of the matter is subordinate to accomplishing an illegitimate (at least in a liberal democracy) goal. Let us look first at the use of bullshit in current political discourse, and then turn to how the law deals with bullshit.

##### A. *A Brief Note on President Trump*

On December 30, 2017, the Washington Post published an article titled, "In a 30-minute interview, President Trump made 24 false or misleading claims."<sup>91</sup> President Trump had been interviewed by the New York Times at one of his golf resorts and was apparently not entirely truthful in his remarks. I will not summarize the details of the interview here because this essay is focused on the legal

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86. Grice, *supra* note 30, at 45.

87. See STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 87 (3d ed. 2013); THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 207 (9th ed. 2013).

88. FRANKFURT, *supra* note 8, at 55.

89. See generally JASON STANLEY, HOW PROPAGANDA WORKS (2015).

90. *Id.* at 46.

91. Glenn Kessler, *In a 30-Minute Interview, President Trump Made 24 False or Misleading Claims*, WASH. POST (Dec. 29, 2017), <https://www.msn.com/en-us/news/factcheck/in-a-30-minute-interview-president-trump-made-24-false-or-misleading-claims/ar-BBHuIgy?li=BBmkt5R&ocid=spartandhp>.

system's handling of the various species of dishonesty. However, whether it is Bill Clinton talking about his sex life, George W. Bush talking about Iraq's efforts to acquire nuclear weapons, or Tony Blair's similar efforts, politicians are known to present information in a manner that is more concerned with the narrative they wish to create than with the truth of the matter. President Trump holds a special place in this succession. In the summer of 2017, the New York Times published a full-page list of what it called "Trump's Lies," updated later to include dates through November 11.<sup>92</sup> Below are two examples:

FEB. 18: "You look at what's happening in Germany, you look at what's happening last night in Sweden. Sweden, who would believe this?" (*Trump implied there was a terror attack in Sweden, but there was no such attack.*)<sup>93</sup>

...

MARCH 17: "I was in Tennessee — I was just telling the folks — and half of the state has no insurance company, and the other half is going to lose the insurance company." (*There's at least one insurer in every Tennessee county.*)<sup>94</sup>

In response to claims that Trump was no different from President Obama, the Times further reported a comparative analysis showing that Trump had produced more false statements in ten months than Obama had in his entire eight years in office.<sup>95</sup>

How many of President Trump's inaccurate statements are lies, how many are honest mistakes, and how many are bullshit is anyone's guess. Continuing to adopt Frankfurt's definition, "bullshit" is an assertion made without regard for whether the assertion is true or not. For the bullshitter, whether a statement is true or false is a matter of convenience. When the statement happens to be true, there will be less criticism and, accordingly, less inconvenience.

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92. David Leonhardt & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES, [https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html?\\_r=0](https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html?_r=0).

93. *Id.*

94. *Id.*

95. David Leonhardt, Ian Prasad Philbrick & Stuart A. Thompson, *Trump's Lies vs. Obama's*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html>. The analysis, which claimed to use the same method to evaluate the truth of statements by both presidents that had been challenged as inaccurate, found that Trump had made 108 false statements in ten months in office, whereas Obama had made eighteen in his eight years in office.

Whether bullshit is morally more blameworthy than lying or deceiving, as Frankfurt argues, is subject to debate, at least as a psychological matter. Daniel Effron, a social psychologist on the faculty of London Business School, has explored the circumstances under which people forgive false statements, at least to some extent.<sup>96</sup> He found that when people are presented with a plausible counterfactual statement, suggesting how a change in circumstances may have resulted in the false statement being true, they judge the false statement as less unethical. Consider this example, taken from Effron:

“It’s a proven fact that Donald Trump won the electoral vote, but lost the popular vote to Hillary Clinton.” Yet, a person falsely states: “Trump won the popular vote.” Half the subjects also received this counterfactual passage: “Trump did not campaign for the popular vote, because the law says that the winner of the electoral vote wins the presidency. Consider the following thought: *If Trump had tried to win the popular vote, then he would have won the popular vote.*”<sup>97</sup>

In one of the studies, the other half of the subjects were presented with the vignette without the counterfactual statement quoted above, but instead with a passage that also contains an *if-then* statement that had nothing to do with Trump’s not having won the popular vote: “Senator Mitch McConnell is a Republican from Kentucky. He is currently the Senate Majority Leader. Consider the following thought: *If Mitch McConnell runs for President in 2020, then he will win the popular vote.*”<sup>98</sup>

Effron found that when presented with a statement that provides a plausible alternative state of affairs in which the false statement could have actually been a true statement, people found the false statement less ethically objectionable and the person who uttered it less immoral for having done so.<sup>99</sup> Moreover, half of the scenarios contained false statements that aligned with the political preferences of Trump supporters, and the other half contained false statements that aligned with the preferences of Clinton supporters.<sup>100</sup> The studies showed that when the false statement aligned

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96. Daniel A. Effron, *It Could Have Been True: How Counterfactual Thoughts Reduce Condemnation of Falsehoods and Increase Political Polarization*, 44 PERSONALITY AND SOCIAL PSYCHOL. BULL. 729 (2018).

97. *Id.* at 732 (emphasis in original).

98. *Id.*

99. *Id.* at 736-37.

100. *Id.* at 732.

with the participant's preferences, the participant condemned the falsehoods significantly less harshly than when the false statement was not aligned with their own views.<sup>101</sup>

What is more, when asked to create their own counterfactuals by imagining a scenario in which the false statement became a true statement, subjects' own imagined alternative scenario led them to judge the original falsehood less harshly.<sup>102</sup> To the extent that we do this in everyday life, it begins to explain our willingness to forgive false statements made by those with whom we agree.

Effron's study does not directly answer Frankfurt. The pass we give to bullshitters with whom we agree as long as we can imagine what they said is true may well be a moral blind spot rather than evidence that such behavior is less objectionable upon reflection. It does explain, however, how it is that Trump's supporters do not become enraged when he falsely claimed that people living in portions of Tennessee had no health insurers, when in fact they did.

### *B. How the Law Reacts to Bullshit*

Bullshit does not meet the criteria for either lying or deceiving because the requisite state of mind is absent. The person who neither knows nor cares about the truth cannot tell a lie. Moreover, bullshit may be the result of wishful thinking. People may have a general sense of a situation and fill in the details without adequate evidence. The law is not consistent in its treatment of bullshit, but it is specifically disapproved in particular contexts.

#### *1. Federal Pleadings*

Rule 11 of the Federal Rules of Civil Procedure requires that all court filings be signed and that the signature is a certification of various representations, including:

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . .

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101. *Id.* at 741-42.

102. *Id.* at 738.

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.<sup>103</sup>

This rule removes from lawyers (and pro se litigants) the right to make claims in court based on the hope that the evidence will later support the claim, unless it is specifically stated that the filer lacks evidence at the time to support the claim. In other words, it severely limits bullshit.

Added to this rule are cases decided by the U.S. Supreme Court requiring detailed, factually-based pleadings in civil litigation. In *Ashcroft v. Iqbal*,<sup>104</sup> decided in 2009, the Supreme Court set standards for a court's decision on whether to grant a motion to dismiss a complaint for failure to state a claim. Restating the test it had established in *Bell Atlantic Corp. v. Twombly*,<sup>105</sup> the Court held that:

[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.<sup>106</sup>

Taken together, these cases require those who file civil cases in federal court have significant knowledge of facts, which are sometimes not in their control. When one adds to the pleading requirements the certifications under Rule 11, the likelihood of bullshit in federal

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103. FED. R. CIV. P. 11(b).

104. 556 U.S. 662 (2009).

105. 550 U.S. 544 (2007).

106. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citations omitted).



pleadings has surely been reduced. I take no position here on concerns expressed that these cases have the effect of closing the court house door on many meritorious claims that require discovery to be adequately developed to meet the pleading standards.

## 2. *Expanded Definition of Fraud*

Recall that fraud requires an effort to lead someone to believe something that the speaker believes to be false. Yet some statutes, and many statements of the common law, include “reckless disregard for the truth” as a substitute for knowingly making a false statement.<sup>107</sup> This standard requires somewhat more regard for the truth than does Frankfurt’s bullshit because the truth must be fairly overt for it to be recklessly disregarded. Nonetheless, the fact that an individual can commit fraud without knowing the truth and flouting it is a significant step away from classic definitions of deceit.

By the same token, the Restatement (Second) of Contracts makes a contract voidable for misrepresentation when the aggrieved party relies on a representation that is either fraudulent or material (or both).<sup>108</sup> And a fraudulent misrepresentation includes bullshit:

- (1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker
  - (a) knows or believes that the assertion is not in accord with the facts, or
  - (b) does not have the confidence that he states or implies in the truth of the assertion, or
  - (c) knows that he does not have the basis that he states or implies for the assertion.<sup>109</sup>

The broad definition of fraudulent misrepresentation makes sense in this context, where the remedy is rescission of a contract. If a person enters into an agreement because the other party misinformed her, that party should not be bound as long as the misinformation was of a material fact, regardless of the state of mind of the purveyor of falsity.

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107. See, e.g., *Pace v. Parrish*, 247 P.2d 273, 274-75 (Utah 1952).

108. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (AM. LAW. INST. 1981).

109. RESTATEMENT (SECOND) OF CONTRACTS § 162(1) (AM. LAW. INST. 1981).

## V. CONCLUSION

This essay has attempted to demonstrate differential tolerance for various forms of dishonest conduct in legal contexts. Lying is never allowed as a formal matter, but it is tolerated in courtrooms when offered by law enforcement agents. Deception short of lying is permitted by witnesses in court but not by people engaged in commercial life. Bullshit, the bread and butter of political life, is outlawed as a species of fraud in some circumstances, tolerated in others. When we add to this set of facts the materiality requirement in both perjury and fraud cases, the law appears to recognize the fact that people do not always tell the truth—but it ensures that the legal system operates with sufficient integrity such that dishonesty does not compromise the integrity of business interactions or the truth-seeking function of the courtroom.

IDENTIFYING “TRUTH” IN AMERICAN PUBLIC DISCOURSE

*Alina Ng Boyte*

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I. INTRODUCTION

My paper for this symposium deals with the decline of honest and open dialogue in American public discourse. My goal in this paper is to offer some ideas of how we could possibly find “truth” in all the rhetoric being thrown out there to find common ground, engender honest conversation about national and global concerns, and dispel fear of the “other.” To begin honest and open dialogue among people and constituencies with conflicting views, where fear and distrust take center stage, propositions that correspond to verifiable facts must be presented as propositions of truth, so that discussions of national and international significance will take their natural course without stalling because of fear and distrust. The political crisis in America today is so profound because parties situated in each side of a divided spectrum believe so sincerely in their point of view and how that point of view represents most accurately the constitutional democracy they, and those before them, fought so hard to attain.

The dilemma we face in public discourse today can be portrayed with a felicitous analogy. A wise shop owner in a small town once taught his son that the most difficult problem with operating a cash register, ringing up the purchases, taking the money from the customer, and handing them the change was less about deceptive customers who are dishonest about how much they handed the cashier.

The real problem and the more difficult to resolve is when the customer honestly believed that they gave the cashier \$20 while the cashier honestly believed with equal sincerity that the customer only handed them \$10.<sup>1</sup> This political crisis presents a similar conundrum, where parties to the political divide sincerely believe that they are fighting to uphold core American values that the other side is trying to rob them of. This is a very difficult problem to work out satisfactorily.

But with the store owner example, there is a single and actual amount that was exchanged between customer and cashier. That amount exists as the indisputable “truth” despite each party’s sincerely held belief of how much was exchanged. The real amount that was exchanged could be either \$10 or \$20 (or perhaps even another amount), and if the parties could identify that amount, the matter might be resolved amicably. Identifying that amount to the satisfaction of both parties may, however, be extremely difficult because both parties would have their own way of arriving at the right amount that was exchanged. The customer could say how much she had to begin with and how much she is left with after the exchange. Or the cashier could count what was in his cash register before and after the exchange. But neither one of these solutions to arrive at the “truth” of the matter would satisfy the other party that what was presented as true from one party’s perspective is indeed in fact true. In this situation, moreover, the cashier’s “truth” might differ considerably from the customer’s without any irrefutable way to resolve the problem. Letting the parties present their own “truth of the matter” would cause them to end up where they started. To deal with the problem more effectively, we would have to look to objective and unquestionable facts, such as eye witnesses or surveillance videos, which would provide verifiable and indisputable facts that would serve as truth to both the cashier and the customer. Such factual evidence is irrefutable and when presented to the parties, offers a decisive solution to the problem by demonstrating that some sincerely held beliefs can sometimes be distorted by one’s own idiosyncratic perception of actual facts and may have to be set aside to make way for an actual resolution.

In American public discourse, the pursuit and identification of truth is crucial at a time when political polarization has led to ideological silos and political gridlock. The Pew Research Center, for

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1. I owe this narrative to Charles Lipson, who wrote a commentary on the American political crisis for Real Clear Politics. See Charles Lipson, *Why America’s Political Crisis is So Profound*, REALCLEAR POLITICS (May 30, 2017), [https://www.realclearpolitics.com/articles/2017/05/30/why\\_americas\\_political\\_crisis\\_is\\_so\\_profound\\_134037.html](https://www.realclearpolitics.com/articles/2017/05/30/why_americas_political_crisis_is_so_profound_134037.html).

example, noted that 41% of Democrats see the Republican Party as a threat to the nation's well-being and that 45% of Republicans view the Democratic Party as posing a similar threat to the country.<sup>2</sup> More than half of Democrats (55%) say that the Republican Party makes them feel "afraid," while 49% of Republicans feel the same fear about the Democratic Party. Among members of these parties who are highly engaged with politics (i.e., partisans who vote regularly and who either volunteer for or donate to their party's political campaigns), "70% of Democrats and 62% of Republicans say they are afraid of the other party."<sup>3</sup> Healing these partisan divisions to allow for honest dialogue depends crucially on finding a common objective "truth" that might reveal how some sincerely held beliefs about the "other" and their agenda, moral values, social and economic life, and equality more generally may be distorted by personal biases and heuristics. For genuine discussion and compromise to occur, fear of political outgroups must be addressed and idiosyncratic perceptions of the facts set aside.

Seeing the "other"<sup>4</sup> as being a threat to the nation's well-being and being afraid of the "other" is significant because fear goes beyond mere distrust or exasperation of the "other." Fear conjures up trepidation, anxiety, and alarm. Fear leads to a shutdown of open dialogue and tolerance of the other. From an evolutionary view point, for our primate ancestors, fear kept them alive from predators—at least for as long as they could to reproduce and pass on their genes.<sup>5</sup> For our primate ancestors, fear served a purpose by ensuring their survivability in a physically dangerous environment. But fear in society today—when modern man is no longer pursued as food by sabre tooth tigers, venomous snakes, large constrictors, or animals of that sort—is debilitating. In political discourse in modern society, fear of the "other" leads to polarization. As there are no social norms or sanctions that discourage overt disapproval

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2. *Partisan and Political Animosity in 2016*, PEW RESEARCH CTR. (June 22, 2016), <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/>.

3. *Id.*

4. In psychology, the "other" is considered to be the "wide and wild world" that lies beyond our individual selves and "[o]utside our own ego-driven borders," which is "too great, too vast, unpredictable, and messy for us to feel safe." David M. Goodman & Mark Freeman, *Introduction: Why The Other?*, in *PSYCHOLOGY AND THE OTHER* 1, 1 (David M. Goodman & Mark Freeman eds., 2015). For the purposes of this paper, the "other" refers to individuals and groups who are different from us in viewpoint, beliefs, and ideals.

5. GORDON H. ORLANS, *SNAKES, SUNRISES, AND SHAKESPEARE: HOW EVOLUTION SHAPES OUR LOVES AND FEARS* 43 (2014).

and discrimination of political opponents, partisans have a tendency to openly discriminate against opposing partisans.<sup>6</sup> Much of this intolerance toward opposing political and ideological affiliation is attributable to hostility and animosity directed at the “other” rather than favoritism turned inward toward their own political party.<sup>7</sup> This tendency for open discrimination is based on false biases and partisan affects geared toward co-partisans and against political opponents,<sup>8</sup> while each partisan’s truth about policy positions, national expectations, and ideological ideals remain obscured under these incorrect assumptions about the “other.”<sup>9</sup>

Participants in public discourse must be aware of such biases and heuristics because they cause cognitive errors and obscure the truth about contemporary economic, social, and political issues, such that honest and open dialogues cannot take place, and answers to hard questions remain elusive in public spaces. This paper argues that “truth” can only be discoverable when we, like the customer and cashier in the shop owner example, are willing to set aside our sincerely held beliefs for the pursuit of objective and verifiable facts. Part II of this paper suggests that normative ethics can offer the analytical lenses through which philosophical “truths”—such as the fact that justice is an essential characteristic of any well-thriving and robust society, as well as a “fundamental moral virtue that extends beyond the individual to regulate proper conduct within a political community”<sup>10</sup>—can be identified and verified or supported through the natural sciences.<sup>11</sup> Part III suggests that while actual truth can be identified through normative ethics and verified through the natural sciences, truth about human nature and the essentials of certain virtues in a political economy is often obscured

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6. Shanto Iyengar & Sean J. Westwood, *Fear Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 690 (2015) (stating that “[u]nlike race, gender, and other social divides where group-related attitudes and behaviors are constrained by social norms, there are no corresponding pressures to temper disapproval of political opponents. . . . Partisans therefore feel free to express animus and engage in discriminatory behavior toward opposing partisans”) (internal citations omitted).

7. *Id.* at 691.

8. *Id.* at 704.

9. *Id.* at 704-05.

10. CLAIRE RICHTER SHERMAN, *IMAGING ARISTOTLE: VERBAL AND VISUAL REPRESENTATION IN FOURTEENTH-CENTURY FRANCE* 93 (1995).

11. This is not to say that philosophical knowledge of basic human truths and moral norms are to be deduced, inferred, or derived from the natural sciences or from facts about human nature. See ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 85 (1999). Factual findings about human nature from the cognitive and neurosciences or biology, however, can support what moral philosophers have identified as human “truths” without committing G.E. Moore’s naturalistic fallacy. See G.E. MOORE, *PRINCIPIA ETHICA* 38-39 (Dover Publications, Inc., 2004) (1903) (arguing that just because we find something to have “good” qualities does not necessarily make that thing good in itself).

by cognitive errors, which prevent us from accessing and knowing truth through our cognitive mechanisms. Part IV presents arguments that legal institutions and government intervention are necessary to correct these cognitive errors and establish common ground where truth may exist to dispel fear and distrust of the other and for fruitful dialogue to occur among opposing parties to public discourses in civil society.

## II. IDENTIFYING “TRUTH” THROUGH NORMATIVE ETHICS AND FINDING SUPPORT THROUGH THE NATURAL SCIENCES

The “truth” of a matter, in a practical sense, can be thought to be the epistemic justification for a known belief—possessing the factual knowledge that would prove an accepted proposition to be true and justify its acceptance by its believer.<sup>12</sup> Propositions that are true can be divided into philosophical truths, which are identified by accessing human knowledge of God or by accessing human reason and distinguishing the practically reasonable from the practically unreasonable,<sup>13</sup> and scientific or physical truths. For instance, water is a product of two hydrogen molecules and a single oxygen molecule, and the Statue of Liberty is in Liberty Island in New York Harbor—facts which are identified through empirical work, tests, and observations. For political and civil discourse in contemporary public life to make headway without the distrust and fear that has hindered the honest exchange of views and prevented opportunities for collaboration, objective verifiable propositions that are true must be presented to participants in this dialogue. Parties to the dialogue should be able to explain or justify their values, principles, or political positions by presenting evidence that supports their point of view as true. In practice, that which is true to ourselves is often a matter of theoretical and axiomatic principles that we adopt and which we cannot detach from philosophy. As Harvard’s political philosopher Michael J. Sandel states in the preface to his book *Democracy’s Discontent: America in Search of a Public Philosophy*:

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12. Earl Conee, *The Truth Connection*, 52 *PHIL. & PHENOMENOLOGICAL RES.* 657, 657 (1992).

13. JOHN D. CAPUTO, *TRUTH: PHILOSOPHY IN TRANSIT: THE SEARCH FOR WISDOM IN A POSTMODERN AGE* 19-20 (2013). See also THOMAS AQUINAS, *ST. THOMAS AQUINAS ON POLITICS AND ETHICS* 5 (Paul E. Sigmund ed. & trans., 1988) (stating that the “objects of the senses on which human reason bases its knowledge retain some traces of likeness to God, since they exist and are good”); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 18 (1980) (describing natural lawyers’ use of principles of practical rightmindedness to identify “good and proper order among men and in individual conduct”).

But if political philosophy is unrealizable in one sense, it is unavoidable in another. This is the sense in which philosophy inhibits the world from the start; our practices and institutions are embodiments of theory. We could hardly describe our political life, much less engage in it without recourse to a language laden with theory – of rights and obligations, citizenship and freedom, democracy and law. Political institutions are not simply instruments that implement ideas independently conceived; they are themselves embodiment of ideas. For all we may resist such ultimate questions as the meaning of justice and the nature of the good life, what we cannot escape is that we live some answer to these questions – we live some theory – all the time.<sup>14</sup>

Thus, because of the philosophical underpinnings of political life and civic engagement, one good way to begin to identify common objective “truths” for civil political discourse is to engage in philosophical inquiries about what is morally true and right. Moral questions that deal with standards of right and wrong, good and bad habits, and individual rights and duties central to normative ethics could provide analytical tools to help us determine whether particular beliefs and ideas are morally right and how an individual’s sincerely held beliefs measure against these moral “truths.” The analytical approach to identifying moral truths engages what moral philosophers call “prescriptive” or “normative” questions<sup>15</sup> to find answers as to what may be morally correct or “true” against an objective standard and in an absolute way while acknowledging that what may be morally right or wrong may be socially, historically, and culturally contingent.<sup>16</sup> These philosophical questions require us to engage with what might be the truth of a given situation regardless of the moral beliefs that an individual or community may have normalized. In most cases, these “truths” are considered self-evident truths in that they present various values, virtues, and

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14. MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY*, at ix (1998).

15. In this paper, I draw a distinction between normative and prescriptive analyses, even though “normative” and “prescriptive” are sometimes used interchangeably. Normative analysis proposes standards of what ought to be without necessarily referencing empirical facts (e.g., murder should be illegal because there is value to human life), whereas prescriptive analysis draws from empirical facts about what one should do in a particular situation (e.g., one needs to do x, y, and z to achieve a particular result because that is standard protocol).

16. JOHN W. COOK, *MORALITY AND CULTURAL DIFFERENCES* 8 (1999) (explaining that anthropologists have shown that there are “different moralities among the world’s various cultures”).



goods which are inherently good, such as knowledge, and which should be pursued—not as an instrument to an end, but as an end in itself.<sup>17</sup>

So, for example, one of the questions about moral truths that moral philosophy and normative ethics might help answer in America today is the question about immigration and whether allowing foreign citizens into the country would strengthen the country's economy and help the country grow. Whether a country like the United States should allow or restrict the inflow of immigrants might depend on identifying hard and difficult moral truths about the individual's rights and a society's collective right to flourish and grow and figuring out where the issue of immigration fits in this analysis. Moral philosophy and normative ethics might contribute to this analysis by offering rational arguments that might inform us of how a fully flourishing society should be or ought to be, whether there are certain inviolable moral laws to respect the dignity and well-being of fellow human beings, or if the decision to allow immigrants into the country will have beneficial consequences or outcomes that outweigh any potential costs. Thus, by asserting that a fully flourishing society depends on having diverse talents of individuals living in that society, a philosopher could make a normative proposition that immigration is a good thing that should be encouraged because the inflow of talent from other countries contributes to the betterment of that society and outweighs the cost of increased immigrants into the country.<sup>18</sup> Moral philosophy's quest for normativity is an excellent way to dispel claims that moral values and the ideals of justice and equity are subjective beliefs and therefore incapable of exhibiting any level of truth if objective standards for truth, such as the self-evident truth that all men are created equal and endowed with certain inalienable rights,<sup>19</sup> can be identified and accepted as a basis for political discourse.

Normative analyses, however, depend on lines of philosophical argumentation to support moral claims as truths. These philosophical argumentations are not normally empirically supported. A normative analysis may propose a hypothesis or assume an axiom for rational engagement but does not necessarily refer to empirical facts in its identification of "truth" because of the philosopher's be-

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17. David F. Forte, *The Natural Law Moment*, in *NATURAL LAW AND CONTEMPORARY PUBLIC POLICY* 6 (David F. Forte ed., 1998).

18. See Thomas B. Edsall, *What Does Immigration Actually Cost Us?*, *N.Y. TIMES* (Sept. 29, 2016), <https://nyti.ms/2dmt3wt>.

19. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

lief that moral norms, ends, are truths not reducible to nor vindicated by descriptive or empirical facts.<sup>20</sup> Ethics and morality, however, are concerned with “saying what contributes to the well-being of humans, human groups, and human individuals in particular natural and social environments”<sup>21</sup> and have linkages to how we as human beings think and behave in these environments. But naturalized moral inquiries cannot and should not be confined to only the study of human ecology.<sup>22</sup> Because of advances in the study of the human brain and mind in relation to moral judgment and behavior, cognitive science has shown that moral judgments and decisions are deeply affected by our cognitive functions.<sup>23</sup> For example, psychopathy and antisocial personality disorder (APD) are mental and personality disorders that manifest as a lack of empathy or kindness toward situations that would normally cause a person to feel distress (e.g., when looking at a picture of a crying child). The person with psychopathy and APD is often perceived to be an unkind or, even worse, an immoral person who has no compassion for human suffering. Such disorders are believed to arise because of a biological dysfunction of the amygdala and ventromedial prefrontal cortex (VMPFC) in the brain, which causes abnormal responses to morally salient stimuli.<sup>24</sup> Studies of various neural structures in neuroscience suggests that it would one day be possible to understand how the human brain makes moral decisions as it encodes and manipulates the content of thoughts,<sup>25</sup> and a naturalized study of morality and ethics should then be a study of individual human biology, neurology, and psychology as much as it is a study of human ecology.

The identification of truth through normative ethics and moral philosophy for the purposes of public discourse should be supported with empirical findings in the natural and biological sciences to validate propositions presented as true. In the shopkeeper’s example,

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20. Owen Flanagan, Hagop Sarkissian & David Wong, *What is the Nature of Morality? A Response to Casebeer, Railton, and Ruse*, in 1 MORAL PSYCHOLOGY: THE EVOLUTION OF MORALITY: ADAPTATIONS AND INNATENESS 45, 45 (Walter Sinnott-Armstrong ed., 2008).

21. Owen Flanagan, Hagop Sarkissian & David Wong, *Naturalizing Ethics*, in 1 MORAL PSYCHOLOGY: THE EVOLUTION OF MORALITY: ADAPTATIONS AND INNATENESS 1, 18 (Walter Sinnott-Armstrong ed., 2008).

22. *Id.* (stating that “[i]f ethics is like any science or is part of any science, it is part of human ecology, concerned with saying what contributes to the well-being of humans, human groups, and human individuals in particular natural and social environments”).

23. Joshua D. Greene, *The Cognitive Neuroscience of Moral Judgment and Decision Making*, in THE COGNITIVE NEUROSCIENCES 1013, 1013 (Michael S. Gazzaniga & George R. Mangun eds., 5th ed. 2014).

24. *Id.* at 1014-15.

25. *Id.* at 1019.

objectively verifiable and unquestionable facts, such as eye witnesses and surveillance videos, provide provable and indisputable facts about the actual cash exchange to serve as indisputable “truth” to disagreeing parties who believe so sincerely in their point of view that the possibility of error on their part becomes marginal. More and more philosophers and ethicists are drawing lessons from cognitive psychology, brain science, and evolutionary biology to address philosophical questions today despite opposition from more traditional philosophers;<sup>26</sup> if empirical science can support (or discredit) moral claims about what is normatively right or wrong, we would be able to, in a practical sense, discern whether a point of view advanced by a participant in the discourse is acceptable as a premise for engagement in civic discourse. Some sincerely held moral beliefs that contribute to today’s political crisis, for example, may be a result of complex evolutionary processes taking place over a long period of time and that has nothing to do with whether that particular act is morally right or wrong. The moral norm against having sexual relations with members of one’s own family may stem from an evolutionary need to have offspring that are strong and healthy and is not necessarily a normative standard that should be used to help us determine the moral value of a particular conduct or point of view.<sup>27</sup> Empirical evidence from these studies in evolutionary biology dilute moral assertions—even if they were sincerely held for a long time—about the wrongness of particularly non-socially conforming ideas or beliefs. When sincerely-held viewpoints are discredited by empirical science, they need be set aside to make way for more accurate beliefs that are consistent with factual knowledge if civil public discourse is to advance.

Other studies suggest that some moral qualities may be common to humanity. Empirical findings produced by these studies, such as studies in neuroscience that show that a child’s moral development follows a “universal sequence of stages” and is not idiosyncratic to the particular child,<sup>28</sup> suggest that moral sensibility in human beings is universal. Two-year-old children who are put in a room and

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26. Walter Sinnott-Armstrong, *Introduction*, in 1 MORAL PSYCHOLOGY: THE EVOLUTION OF MORALITY: ADAPTATIONS AND INNATENESS xiii, xiii-xiv (Walter Sinnott-Armstrong ed., 2008).

27. For example, the moral stance against incest has less to do with propriety than with the biological need to produce children without congenital, physical, and intellectual malformation. See Debra Lieberman, *Moral Sentiments Relating to Incest: Discerning Adaptation from By-Products*, in 1 MORAL PSYCHOLOGY: THE EVOLUTION OF MORALITY: ADAPTATIONS AND INNATENESS 165, 165-69 (Walter Sinnott-Armstrong ed., 2008).

28. Jerome Kagan, *Morality and Its Development*, in 3 MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT 297, 299-303 (Walter Sinnott-Armstrong ed., 2008).

presented with objects that have had their integrity flawed (e.g., a shirt with a button missing or a toy truck without its wheels) instinctively know that there is something wrong about the object when they respond by saying “yukky” or “boo-boo” upon seeing the object. Irrespective of culture, children know that a flawed object that he or she did not break has had its integrity violated by another person or force.<sup>29</sup> Knowledge of our inherently moral self can support the assertion that respecting the integrity of other people and things in our surroundings is a moral expectation that must be honored. When participants to political discourse disagree about rights to fossil fuel consumption and its greenhouse effects, a moral proposition that we respect our environment and prevent its destruction can be supported by a study that proves the ubiquity of moral sensibilities toward our surroundings as more consistent with “truth”—rather than the moral proposition that there should be an absolute right to economic growth and industrial development. In this sense, studies in neuroscience offer practical ways in which “truth” may be empirically tested to give one moral proposition greater weight over a less “true” moral proposition.

The study of babies and how morality is revealed in their interaction with their surroundings provides some evidence that moral foundations in human beings are not learned from social contexts, but are, rather, inherent to human nature. At the Yale Infant Cognition Center,<sup>30</sup> psychologist Karen Wynn has conducted baby studies showing that babies as young as three months old—an age before their parents or caretakers can influence them as to what is normatively “good” and “bad,” fair, and just—have an innate sense of morality that is not instilled but is “instead [a] product[ ] of biological evolution.”<sup>31</sup> In one experiment conducted at the center, a one-year-old boy is shown a puppet show in which one puppet played with a ball while interacting with two other puppets. The middle puppet would roll the ball to the puppet on the right, who would pass it back. This was the “nice” puppet. Then, the center puppet would roll the ball to the puppet on the left, who would run away with it. This was the “naughty” puppet. The two puppets on the ends were then brought down from the stage and set before the toddler. Each was placed next to a pile of treats. At this point, the toddler was asked to take a treat away from one puppet. Like most children in this situation, the boy took it from the pile of the “naughty” one. But this punishment wasn’t enough: The baby then

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29. *Id.* at 299.

30. PAUL BLOOM, JUST BABIES: THE ORIGINS OF GOOD AND EVIL 24-25 (2013).

31. *Id.* at 8, 28-29.

leaned over and smacked the “naughty” puppet in the head.<sup>32</sup> Paul Bloom in his interview with CNN had this observation to offer: “Humans are born with a hard-wired morality, a sense of good and evil is bred in the bone.”<sup>33</sup> But he also goes on to caution: “We are naturally moral beings, but our environments can enhance—or, sadly, degrade—this innate moral sense.”<sup>34</sup>

Empirical findings that human beings are hardwired with an innate sense of right and wrong on a fundamental level is evidence that can be used to adduce propositional truths to guide political discourse in America. This foundational moral sense of right and wrong that we see in babies is reminiscent of classical natural law theory that man’s desires and emotions must be “governed and moderated by the standards of reason” and good order because that is proper by the law of nature.<sup>35</sup> The one-year-old baby’s sense of right and wrong when one puppet does a good deed and the other a bad deed serves as the cornerstone for a more matured and nuanced sense of justice, a concept that must be central to the idea of “truth” in public discourse—where many contentious issues revolve around what the most “just” outcome would be in a difficult social or economic problem. In political life, natural law theories have a central role in advancing thinking about the role and limits of government and the proper purpose of law and legal institutions.<sup>36</sup>

Theoretically, these foundational moral truths about how we should behave, the types of things or goods we should pursue, the ideals we should hold, and what belonging to a good society looks like, which can be empirically demonstrated through the natural sciences, would be accessible through practical reason<sup>37</sup> as self-evident-truths—truths that require no justification for their acceptance because they are, by nature, true.<sup>38</sup> In theory, we should be able to know what these “truths” are to guide civil discourse in American public life. However, these “truths” are not always accessible to us through practical reason. The human mind is sometimes

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32. *Id.* at 7.

33. Paul Bloom, *Do Babies Know Right from Wrong?*, CNN, <http://www.cnn.com/2014/02/12/opinion/bloom-babies-right-wrong/index.html> (last updated Feb. 14, 2014, 12:02 PM ET).

34. *Id.*

35. John Finnis, *Classical Natural Law Theory*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 3 (Jules Coleman & Scott Shapiro eds., 2002).

36. Brian H. Bix, *Natural Law: The Modern Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 61 (Jules Coleman & Scott Shapiro eds., 2002).

37. FINNIS, *supra* note 13, at 18 (“A sound theory of natural law is one that explicitly . . . undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable[.]”).

38. *Id.* at 32.

prone to cognitive errors that are a result of heuristics, which are principles that help “reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations,”<sup>39</sup> and biases, “departures from the normative rational theory that served as markers or signatures of the underlying heuristics.”<sup>40</sup> In reality, heuristics and biases work to direct cognitive processes toward erroneous outcomes in human decision-making and prevent us from identifying moral truths to guide civil discourse toward socially, economically, and politically reasonable conclusions.

### III. COGNITIVE ERRORS PREVENT US FROM KNOWING TRUTH

To appreciate the effect of heuristics and biases on cognitive processes, consider this scenario of the “hedonic twins.”<sup>41</sup> The twins, Albert and Ben, have identical tastes and currently hold identical starting jobs, with little income and little leisure time. The firm in which they work offers them two improved positions—positions A and B—and lets the twins choose whether they would prefer a raise of \$10,000 (position A) or an extra day of paid vacation each month (position B). Since Albert and Ben are indifferent about their options from their current position (their reference point), they toss a coin, and Albert gets the \$10,000 raise while Ben gets the extra leisure time. After some time passes, both Albert and Ben get accustomed and used to their new positions. The firm now suggests that they both switch positions. Expected utility theory, which predicts that a person, when presented with a choice between two outcomes, will choose the outcome with the highest expected utility,<sup>42</sup> assumes that the twins will need little or no incentives to switch because both options are equally attractive to both of them. After all, both twins have identical tastes and did not have any preference when the firm initially presented them with positions A and B.

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39. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 2008).

40. Thomas Gilovich & Dale Griffin, *Introduction – Heuristics and Biases: Then and Now*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 3 (Thomas Gilovich, Dale W. Griffin & Daniel Kahneman eds., 2013).

41. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 291 (2011).

42. Rachael Briggs, *Normative Theories of Rational Choice: Expected Utility*, STANFORD: PLATO (Aug. 8, 2014), <https://plato.stanford.edu/archives/spr2017/entries/rationality-normative-utility> (last modified Feb. 7, 2017).

However, prospect theory, developed by psychologists Daniel Kahneman and Amos Tversky,<sup>43</sup> assumes that both twins will prefer to remain where they currently are because of a preference for the status quo (known as the “status quo bias”) and an aversion against loss (“loss aversion”).<sup>44</sup> From Albert’s first reference point when he was given a choice between positions A and B, he would have found both alternatives—a raise of \$10,000 or twelve extra days of paid vacation—equally attractive because he had neither high income nor high leisure time. After choosing a raise of \$10,000 and being in position A for a while, Albert’s reference point would have changed,<sup>45</sup> and his choice would have a new structure: Stay at position A (there is no gain and no loss), or move to position B (receive twelve extra days of paid vacation but also take a \$10,000 salary cut). In this new situation, it is unlikely that Albert will choose to move to position B because a salary cut of \$10,000 represents a loss, and there is a general aversion to loss. The same reasoning applies to Ben because giving up twelve days of paid vacation represents a greater loss than the gain of \$10,000 in extra income. The hedonic twins example demonstrates that preferences do not remain the same, changing with the reference point as it changes; the costs of a change often outweighs its benefit, as “changes that make things worse (losses) loom larger than improvements or gains,”<sup>46</sup> thereby “inducing a bias that favors the status quo.”<sup>47</sup>

Status quo bias and loss aversion represent anomalies to the economic belief that human behavior can be best explained by “assuming that [economic] agents have stable, well-defined preferences and [that they] make rational choices consistent with those preferences in markets that (eventually) clear.”<sup>48</sup> The anomalies that people tend to prefer the status quo when change involves incurring losses, identified by Kahneman and Tversky as being essential features of the prospect theory, commensurate with and provide support for the endowment effect (the idea that “losses from a reference position are systematically valued far more than commensurate gains” and that “[t]he minimum compensation people demand to

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43. See generally Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979).

44. KAHNEMAN, *supra* note 41, at 291.

45. Prospect theory assumes that preferences do not remain stable, unlike expected utility theory, which assumes that preferences are stable over time. *Id.*

46. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, in *CHOICES, VALUES, AND FRAMES* 165 (Daniel Kahneman & Amos Tversky eds., 2000).

47. KAHNEMAN, *supra* note 41, at 292.

48. Kahneman, Knetsch & Thaler, *supra* note 46, at 159.

give up a good has been found to be several times larger than the maximum amount they are willing to pay for a commensurate entitlement<sup>49</sup>). The endowment effect, a term coined by Chicago economist Richard Thaler and used to refer to the observation that people would demand much more to give up an object or entitlement than they would be willing to pay to acquire the same object or entitlement, cause people to hold on to objects, rights, or entitlements because of the pain of giving it up (loss aversion). Whereas one who does not have the object, right, or entitlement to begin with is not willing to spend as much to acquire the object, right, or entitlement because the disadvantage of parting with the money (or any other measurement of value) to acquire the object, right, or entitlement outweighs any benefit of acquiring them (the status quo bias). The endowment effect plays out in reality because of our cognitive processes and has got nothing to do with the inherent value of the object, right, or entitlement per se.<sup>50</sup>

Because of how the mind processes information when it is faced with situations that require quick decision-making, the mind uses heuristics to make quick and intuitive judgments that are at times erroneous because of the presence of cognitive biases. Psychologists call the mind's method of making quick automatic decisions with minimal information and external input "System 1," which is contrasted with "System 2," the more deliberate, careful, and slower mental activity that is "often associated with the subjective experience of agency, choice, and concentration."<sup>51</sup> System 1's intuitive judgment and quick decision-making process would explain the endowment effect, loss aversion, and status quo bias that Kahneman, Tversky, and Thaler considered anomalies to standard economic behavior. Why else would a wine collector who bought wine at auctions for a maximum amount of \$35 be only willing to sell that same bottle of wine for no less than \$100, neither buying nor selling the bottle at prices between \$35 and \$100? The minimum selling price of \$100 was significantly higher than the buying price of \$35, which is inconsistent with standard economic theory, which assumes that the wine collector would have a single value for the bottle (e.g., \$50) and would sell if he receives an offer above the value (more than \$50) and be willing to pay up to \$50 for the same bottle of wine.<sup>52</sup>

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49. Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, in CHOICES, VALUES, AND FRAMES 171 (Daniel Kahneman & Amos Tversky eds., 2000).

50. Kahneman, Knetsch & Thaler, *supra* note 46, at 163 ("[T]he main effect of endowment is not to enhance the appeal of the good one owns, only the pain of giving it up.").

51. KAHNEMAN, *supra* note 41, at 20-22.

52. *Id.* at 292-93.



Other studies have shown the same discrepancy between the minimum selling price and maximum buying price.<sup>53</sup>

Heuristics and cognitive biases do not only explain anomalies in economic behavior. They also explain how moral truths about the right course of action in political life could remain inaccessible to the human mind. The value of moral truths only becomes evident after a person, having “experienced the urge to question, [ ] has grasped the connection between question and answer” and realizes that knowledge is a product of “correct answers to particular questions.”<sup>54</sup> Identifying moral truths for the purposes of political discourse means asking the right questions and getting to the right answers. This process can be interrupted by heuristics and cognitive biases that prevent us from arriving at true knowledge about an issue. Take, for example, the political issue of whether to place limits on the amount of carbon that polluters are allowed to emit to address global climate change. Suppose the federal government proposes to restrict carbon emission by introducing “carbon pricing,” a market-based strategy for lowering global warming emissions by putting a price (an actual monetary value) on carbon emissions so that the costs of climate impacts and the opportunities for low-carbon energy options are better reflected in our production and consumption choices.

The question can be presented in two ways depending on what people believed was the status quo. If people were convinced that climate change was not the status quo, they can be asked for the minimum amount of money they would be willing to accept (WTA) to agree to carbon emission and the possibility of irreversible global warming. One way is to ask how much of a discount consumers would be willing to accept in the price of goods or services produced by companies for every one ton of carbon dioxide that the company releases into the atmosphere. On the other hand, if people were convinced that climate change was already part of the status quo, they can be asked what they would be willing to pay (WTP) to reduce or eliminate the effects of global climate change through a carbon tax imposed on companies, the cost of which would be transferred to consumers in the price of goods or services. Based on previous studies conducted,<sup>55</sup> the discrepancy between the WTA and WTP responses would be significant with the WTA responses greatly exceeding the WTP. The more extreme WTA responses can

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53. See Kahneman, Knetsch & Thaler, *supra* note 46, at 160-70.

54. FINNIS, *supra* note 13, at 63.

55. Kahneman, Knetsch & Thaler, *supra* note 46, at 167-68.

be explained by protests to the acceptance of a new risk,<sup>56</sup> but it is less comprehensible why people would pay less to reduce or eliminate the effects of climate change that is already felt (save for the endowment effect and the general reluctance to spend money to acquire something that they do not yet own). This discrepancy is likely to manifest despite the fact that protecting the environment and creating a sustainable and livable planet for ourselves would be a moral imperative for human flourishing. This moral truth might not be not accessible because the interplay of heuristics and biases in our cognitive processes, such as the status quo bias, loss aversion, and endowment effect, produce anomalies in ordinarily reasonable thinking about morality and truth.

#### IV. THE ROLE OF LAW AND LEGAL INSTITUTIONS IN IDENTIFYING TRUTH

The law has a unique and important role to play in contemporary political life in America when partisan divides and distrust are perpetuated by the lack of accessibility to the truth because of our cognitive processes. The way we frame and present the issue has significant impact on the outcome of a discourse. For example, framing a price as a “discount” or a “surcharge” will evoke markedly different responses from people because of the aversion to losses. Tversky and Kahneman explain that “[i]t is easier to forgo a discount than to accept a surcharge because the same price difference is valued as a gain in the former case and a loss in the latter.”<sup>57</sup> Hence, to appease consumers, credit card companies “insist that any price difference between cash and credit purchases should be labeled as a cash discount rather than a credit surcharge.”<sup>58</sup> Framing and presenting an issue for political discourse in a way that is constructive (rather than destructive) is important for American public life, and careful thought must be made so that the speech or language used to frame and present the issue highlights, rather than obscures, the truth.

The late Emory law professor Harold Berman emphasizes the value of language and its capacity to build and destroy communities when he stated in his book *Law and Language: Effective Symbols of Community*:

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56. *Id.* at 168.

57. Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. 251, 261 (2003).

58. *Id.*

Language can, indeed, be a most dangerous – *the* most dangerous – weapon. It can be used to enslave an individual or, indeed, a whole nation. It can be used to whip men into fury against each other. It can be used to break a person down. Yet these destructive uses of language are only possible because of its constructive power – that is, the power of men through speech to reach out to each other, to share each other’s experience, to achieve some sort of meeting of minds and hearts, some sort of agreement. These constructive uses of language are the basis upon which its power to confuse and divide is built.<sup>59</sup>

Law is a type of language that goes beyond mere legal rules. Law adds “rhetorical, ethical, and political meanings to what appears as a merely ‘logical,’ that is, declarative, statement”<sup>60</sup> and must be morally congruent.<sup>61</sup> When there is evidence that heuristics and biases affect our cognitive processes to prevent us from knowing the truth of an issue, which is theoretically accessible to us through practical reason, laws and legal institutions need to address these cognitive errors to ensure that policy decisions that emerge from political and civil discourse are a result of deliberate, calculated, and careful discussions that are not affected by the quick, intuitive, and often anomalous judgments of the mind’s system. The idea of the law and legal institutions stepping in to correct deviations from accepted norms and standards is not novel. In fact, government and legal institutions have corrected market failures to align imperfect markets, where transfers of rights and entitlements cannot occur due to the presence of externalities, monopolistic practices, or transaction costs, to the economist’s ideal of the perfect market.<sup>62</sup> The doctrine of fair use in copyright law, for example, has been seen as the law’s way to permit uncompensated uses of copyrighted works that cannot be effectuated through the market because of the public good nature of copyrighted works, excessive costs of negotiating the right to use, and the impracticality of enforcing rights

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59. HAROLD J. BERMAN, *LAW AND LANGUAGE: EFFECTIVE SYMBOLS OF COMMUNITY* 43 (John Witte, Jr. ed., 2013).

60. *Id.* at 72.

61. Jules L. Coleman, *The Architecture of Jurisprudence*, 121 *YALE L.J.* 2, 55 (2011) (Coleman states that the view that morality and law are connected applies to both natural law and exclusive legal positivism: “The exclusive positivist is committed to the view that the relationship is instrumental: law necessarily serves morality. The natural lawyer holds that the relationship is at least in part intrinsic; morality is intrinsic to the nature of law.”).

62. In a perfect market, rights and entitlements will transfer to parties who value the right and entitlement the most regardless of how that right or entitlement is allocated, assuming that there are no transaction costs. R.H. Coase, *The Problem of Social Cost*, *J.L. & ECON.* 1, 19 (1960) (recognizing that “courts directly influence economic activity”).

against non-purchasers. Fair use is the law's way of facilitating transfers of the ability to use copyrighted works where "the possibility of consensual bargain has broken down in some way."<sup>63</sup> The use of liability rules where the transfer of an initial entitlement to a party who is willing to pay more for it than what it is worth to the owner is another example of the law stepping in to correct market failures.<sup>64</sup>

If the law and legal institutions work to facilitate economically efficient transfers when markets fail to effectuate them because of transaction costs, hold outs, or externalities by assuming the value of the right to the right holder and forcing the transfer of rights as if a hypothetical fair arms-length negotiation occurred on the market,<sup>65</sup> the law and legal institutions can work in the same way to effectuate civil discourses about morally right courses of action through deliberate and careful identification of truths to guide dialogue toward just and fair outcomes regardless of how hard the questions are and how difficult the answers may be. To ask the hard questions and arrive at difficult answers through open and honest dialogue where participants are not fearful and distrusting of the other, heuristics and biases that affect discourse and policy outcomes must be abandoned for the truth of an issue. Participants must acknowledge that living in a healthy and sustainable planet is of utmost importance before they can even discuss whether carbon pricing—and what they would actually be willing to pay if carbon pricing was implemented as a policy—is a viable solution to global climate change.

One way to remove these biases, heuristics, and other cognitive errors to allow open and honest dialogue to take place is to get all participants to the dialogue to agree as a community that they will set aside personal interests and be guided by principles of justice and fairness toward the good of their community or country. Of course, individuals will have their own ideas as to what would constitute justice, fairness, and the "best" moral outcome to the deliberations. And it would also be unrealistic to expect participants to not be influenced by their status quo (the status quo bias) when they deliberate policies that address distributional goals, the economy, and redistribution of rights and entitlements. To this end, it

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63. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982).

64. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-07 (1990).

65. *Id.* at 1108 ("In practice, it is so hard to determine [the property owner's] true valuation that eminent domain simply gives him what the land is worth 'objectively,' in the full knowledge that this may result in over or under compensation.").

would be useful to deliberate from a hypothetical position that assumes everyone to be ignorant of their status in life so that they will not be influenced by their status quo.

John Rawls's idea of justice central to his book, *A Theory of Justice*, is instructional here in my proposal of how "truth" may be attained for open and honest dialogue. Rawls's proposal that to attain justice for society is for parties to the political debate to think and discuss issues from an "original position," where "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like" or even "their conceptions of the good or their special psychological propensities."<sup>66</sup> Beginning civil and political discourse from this original position forces participants to shed their biases, heuristics, and beliefs to come to the table without predisposed ideas and expectations, allowing for a more open, honest, and truthful dialogue that is constructive. Without the knowledge of one's position in life, one would not be influenced by the status quo, be averse to losses, or be influenced by an endowment effect. The truth of an issue, which theoretically is accessible through practical reason, would actually be more accessible from the original position than it would be by sheer will.

## V. CONCLUSION

Identifying truth in American public discourse is essential for open and honest dialogue to take place, and it has not been easily accessible because of our innate fear and distrust of the "other" and because of our cognitive biases and psychological make-up. Political dialogue and civil discourse must occur in situations where these biases are abandoned for more deliberate and careful deliberations. Where these deliberations fail because of cognitive errors, the law and legal institutions have to facilitate policy outcomes as if these dialogues occurred in circumstances that were open, honest, and truthful. A decision to abandon carbon pricing, for example, could be due to the fact that consumers were not willing to pay the full price for reducing carbon emissions in the environment despite the harm that such emissions would cause. A court of law in a nuisance case could impose a permanent injunction against a company to prevent the release of carbon dioxide into the atmosphere, but that would require the company to install appliances to prevent

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66. JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1st ed. 1971).

emissions and invest in renewable energy. The cost of these improvements would be transferred to the price of the goods and services, which the consumer ultimately pays for. Here, the court would have made the decision that consumers would have made but for the endowment effect that affects human decisions. The path of identifying truth for honest and open political dialogue is not going to be easy, but it is worthwhile to stay on the path. Ultimately, fair, just, and reasonable political, social, and economic decisions depend on all parties to American public discourse accessing “truth” to guide their deliberations and discussions.

# What Lawyers Can and Should Do About Mendacity in Politics

*Heidi Li Feldman\**

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## I. INTRODUCTION

Donald Trump has brought new attention to the mendacity of politicians. Both major national newspapers have reported tallies of Trump's false and misleading claims.<sup>1</sup> On November 14, 2017, The Washington Post reported that in the 298 days that President Trump has been president, he had made 1,628 false or misleading claims, telling them at a rate of nine per day in the thirty-five days

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1. *In 365 Days, President Trump Has Made 2,140 False or Misleading Claims*, WASH. POST, [https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm\\_term=.b22a8f3a6c87](https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm_term=.b22a8f3a6c87) (last updated Jan. 19, 2018); David Leonhardt & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES (last updated Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html>.

prior to November 14.<sup>2</sup> Trump, the Post reported, has made fifty false or misleading claims “that he as repeated three or more times.”<sup>3</sup> The Post also catalogued scores of “flip-flops” from Trump.<sup>4</sup> In general, from 2016 into 2017, journalistic political fact-checking has surged in frequency and scope.<sup>5</sup> Newspapers and magazines regularly run articles, columns, and features on Trump’s record-breaking lying.<sup>6</sup>

Though the frequency and blatancy with which Trump lies is exceptional, he is not the only elected political leader active today whose mendacity has been documented. Catalogues exist for Speaker of the House Paul Ryan, Vice President Mike Pence, Senate Majority Leader Mitch McConnell, Senate Minority Leader Chuck Schumer, and Senate Minority Leader Nancy Pelosi.<sup>7</sup> Trump cabinet members and White House spokespeople have also come under scrutiny for their untruthfulness.<sup>8</sup>

2. Glen Kessler, Meg Kelly & Nicole Lewis, *President Trump Has Made 1,628 False or Misleading Claims Over 298 Days*, WASH. POST (Nov. 14, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/11/14/president-trump-has-made-1628-false-or-misleading-claims-over-298-days/?utm\\_term=.a34199e1d252](https://www.washingtonpost.com/news/fact-checker/wp/2017/11/14/president-trump-has-made-1628-false-or-misleading-claims-over-298-days/?utm_term=.a34199e1d252).

3. *Id.*

4. *Id.*

5. Alexios Mantzarlis, *How Has Political Fact-Checking Changed After Trump’s First 100 Days? Not Much.*, POYNTER (May 1, 2017), <https://www.poynter.org/news/how-has-political-fact-checking-changed-after-trumps-first-100-days-not-much>.

6. Glenn Kessler & Meg Kelly, *President Trump Has Made More Than 2,000 False or Misleading Claims over 355 Days*, WASH. POST (Jan. 10, 2018), [https://www.washingtonpost.com/news/fact-checker/wp/2018/01/10/president-trump-has-made-more-than-2000-false-or-misleading-claims-over-355-days/?utm\\_term=.8f8332107d16](https://www.washingtonpost.com/news/fact-checker/wp/2018/01/10/president-trump-has-made-more-than-2000-false-or-misleading-claims-over-355-days/?utm_term=.8f8332107d16); David Leonhardt, Ian Prasad Philbrick & Stuart A. Thompson, *Trump’s Lies vs. Obama’s*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html> (comparing Trump and Obama as to “demonstrably and substantially false statements” without counting repeated mentions of same lie, and showing that, in the first ten months of his presidency, Trump told six times the number of lies Obama told during his entire two terms of office); *see also* Bella DePaulo, *I Study Liars. I’ve Never Seen One Like President Trump*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/outlook/i-study-liars-ive-never-seen-one-like-president-trump/2017/12/07/4e529efe-da3f-11e7-a841-2066faf731ef\\_story.html?utm\\_term=.b6bf3f09119f](https://www.washingtonpost.com/outlook/i-study-liars-ive-never-seen-one-like-president-trump/2017/12/07/4e529efe-da3f-11e7-a841-2066faf731ef_story.html?utm_term=.b6bf3f09119f); Lauren Duca, *Gaslighting 2: Revenge of the Reality-Based Community*, TEEN VOGUE (Nov. 9, 2017, 10:31 AM EST), <https://www.teenvogue.com/story/gaslighting-2-revenge-of-the-reality-based-community>; Sean Illing, *“The Fish Rots from the Head”: A Historian on the Unique Corruption of Trump’s White House*, VOX, <https://www.vox.com/2017/11/16/16643614/trump-administration-corruption-russia-investigation> (last updated Mar. 1, 2018, 9:53 AM EST).

7. Venues covering these politicians include POLITIFACT, [www.politifact.com](http://www.politifact.com); SNOPEs, <https://snopes.com>; and FACTCHECK, <https://www.factcheck.org>.

8. Dan Alexander, *The Case of Wilbur Ross’ Phantom \$2 Billion*, FORBES (Nov. 7, 2017, 6:00 AM), <https://www.forbes.com/sites/danalexander/2017/11/07/the-case-of-wilbur-ross-phantom-2-billion/>; Igor Bobic, *The First 100 Lies: The Trump Team’s Flurry of Falsehoods*, HUFFINGTON POST (Feb. 26, 2017, 9:44 AM EST), [https://www.huffingtonpost.com/entry/donald-trump-administration-lies-100\\_us\\_58ac7a0fe4b02a1e7dac3ca6](https://www.huffingtonpost.com/entry/donald-trump-administration-lies-100_us_58ac7a0fe4b02a1e7dac3ca6); Chris Cillizza, *Donald Trump Just Keeps Lying*, CNN (Aug. 3, 2017, 7:41 AM EST), <http://www.cnn.com/2017/08/03/politics/donald-trump-mexico-boy-scouts-lies/index.html>; Leigh Cuen & Politifact, *4 Times Trump and His Cabinet Have Lied About Immigration*,



Clearly, not all mendacity is of equal concern. Some mendacity is not even troubling at all. Small white lies told to protect another's feelings about a trivial matter are at one end of the scale, while serial deception to defraud investors out of their life savings or to sustain two families, each kept secret from the other, are at another. Similarly, political hype or bluster may not be troublesome, whereas lying about criminal activity or scientific fact seems clearly so. Most political mendacity falls into a middle ground. Understanding when and how middle-ground mendacity is dangerously harmful is crucial. Decrying all mendacity is overkill, yet narrowing the field is difficult. Press tallies and online databases vary in what they count as lies. Entries run the gamut of fibs to whoppers, fudges to half-truths or falsehoods. Yet even calibrated catalogues of mendacious statements from politicians do not identify when and how mendacity from politicians should alarm us. Fact-checkers spot mendacity and sometimes put it on a scale of deceptiveness, but this is not the same as identifying harmful mendacity.

With mendacity in politics receiving so much attention, it is important to figure out which mendacity is dangerous and why. Lawyers, I will demonstrate, have a particular expertise in parsing mendacity. They can and should put that expertise to use in identifying the political mendacity that is particularly problematic for the health of representative democracy.

## II. THE LAW'S APPROACH TO MENDACITY: A CASE STUDY

When non-lawyers think of the law's concern with dishonesty, they naturally think of perjury or lying under oath in a formal legal proceeding, such as a trial or congressional hearing. But the law of perjury is not the locus of the most robust and nuanced legal doctrines and codes that deal with mendacity. Mendacity in marketplaces receives far more legal scrutiny than lying under oath, for example. Many different areas of law address truthfulness and dishonesty in marketplaces: the common law of tort and contract; state

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TEEN VOGUE (Aug. 16, 2017, 8:00 AM EST), <https://www.teenvogue.com/story/trump-lies-immigration>; Pema Levy & Dan Friedman, *3 Times Jeff Sessions Made False Statements to Congress Under Oath*, MOTHER JONES (Nov. 8, 2017, 6:00 AM), <http://www.motherjones.com/politics/2017/11/3-times-jeff-sessions-made-false-statements-to-congress-under-oath/>; Chris Strohm & Billy House, *Sessions Says He Forgot About Russia Meeting But Didn't Lie*, BLOOMBERG (Nov. 14, 2017, 10:32 AM EST), <https://www.bloomberg.com/news/articles/2017-11-14/sessions-says-he-s-never-lied-about-russia-trump-connections>; Eric Uman-sky & Marcelo Rochabrun, *5 Trump Cabinet Members Who've Made False Statements to Congress*, PROPUBLICA (Mar. 2, 2017, 6:36 PM EST), <https://www.propublica.org/article/five-trump-cabinet-members-made-false-statements-to-congress> (noting lies during the confirmation hearings of Scott Pruitt, Betsy DeVos, Steve Mnuchin, Tom Price, and Jeff Sessions).

statutory codifications applicable specifically to merchants; federal laws dealing with the sales of securities; and state consumer protection laws, to name but some. Only a small proportion of doctrine in each of these areas relates to straight up lying or knowing expression of falsehood with an intent to deceive. Instead, much doctrine focuses on misleading or deceptive practices, not isolated statements whose description depends on knowledge of the intent of the speaker. Other doctrine attempts to limit deception by requiring precision in communication and content. And much that might be considered mendacious is not prohibited by law, even in settings where the law bans some mendacity: not all mendacity harmfully compromises markets, and the law does not attend to mendacity for its own sake. Only certain kinds of mendacity in specific contexts has the capacity to corrode a market's operations. Law attempts to pinpoint these instances so as to regulate them. I definitely do not and would not recommend the promulgation of new law for regulating political mendacity; however, examining what the law pinpoints as problematic mendacity in the context of markets illuminates both the sort of mendacity problematic in politics and why lawyers with even modest training or education about market-threatening mendacity are likely to be good at spotting the kinds of mendacity that threaten American representative democracy.

It is useful to consider why the law regulating mendacity in markets is so extensive. What is it about markets that provokes mendacity? Why has American law ended up replete with doctrines to redress the problem?

Adam Smith may well have been right that as social creatures, people are literally born with a disposition "to truck, barter, and exchange,"<sup>9</sup> but that disposition alone does not give rise to a functioning market. Ongoing commercial activity requires that buyers and sellers trust one another in the transactional setting or else they will not be willing to engage there. On a very small scale, in hyper-local markets, people can draw on their common sense to evaluate each other's truthfulness in transactions, although even in comparatively small settings, participants quickly augment common sense with other means of verification—such as with public scales, for example.<sup>10</sup>

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9. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (Edwin Cannan ed., Methuen & Co. 1904) (1776).

10. Public scales, meant to ensure honesty in transactions, have a long history in North America. See, e.g., PROCEEDINGS OF THE COMMON COUNCIL OF THE CITY OF BUFFALO. FROM

In markets where transactions are generally arms-length and in-person evaluation of a buyer's or seller's truthfulness is generally impossible, mendacity occurs more often. It emerges because people are both social and self-interested. Self-interest drives us to make ourselves better off; sociability inclines us to trust one another. When an activity can serve self-interest by capitalizing on others' credulousness, conditions are ripe for mendacity. In these contexts, mendacity is a kind of predation and exploitation: it harms or wrongfully uses others to further the interests or goals of the mendacious one. This predatory or exploitative conduct can be objected to on deontological or aretaic grounds. A deontologist may urge that respect for human dignity makes exploitation, via mendacity or any other mechanism, wrong. A virtue theorist may argue that mendaciousness is inconsistent with epistemic excellence. But legal intervention in mendacity in markets is probably provoked by a more consequentialist consideration: American law favors the existence of markets, and markets cannot expand and operate efficiently if they are riddled with mendacity.

American law particularly promotes the existence and large scope of markets for mass-produced consumer goods—goods manufactured by large scale producers and sold to many individuals throughout a state, region, or even the entire country. The volume of goods made and sold, the distance between manufacturer and end consumer, the string of middlemen typically involved in distribution, and the very flourishing of markets for consumer goods make them simultaneously ripe for mendacity on the part of sellers (manufacturers, wholesalers, and retailers) but vulnerable to too much mendacity. Sellers know there are numerous consumers, each of whom makes many purchases. They also know that consumers have scarce time and opportunity for face-to-face, common-sense evaluations of sellers' truthfulness or even to gather secondhand reputational information about sellers' truthfulness. This creates the opportunity for seller mendacity at the expense of consumers. But of course, the more sellers who act mendaciously toward consumers, the less willing or eager people will be to purchase mass-produced goods. Shrinking demand tends to diminish supply. Eventually, pervasive mendacity can undermine a market's very

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JANUARY 1, 1885, TO DECEMBER 31, 1885, 1337 (1886) (discussing the establishment of a public scale on city property by the Merchants Exchange, defining "public scale," and noting such scales' prevalence in "eastern cities"); MINUTES OF THE COMMON COUNCIL OF THE CITY OF PHILADELPHIA. 1704 TO 1776. 786-87 (1847) (resolving to immediately construct "public Scales for weighing of Hay" at the "Meal Market" so that "Country people" would be protected from "Hucksters of Meal").

existence. Sellers face a collective action problem: the collective level of truthfulness required is high, but the individual seller incentive to be mendacious is also high. Consumers face a trust problem: unless mendacity among sellers is overall relatively low, they have no reason to trust—or risk purchasing from—any given seller.

It is important to note that the problem here is with the quality of information about goods and especially about the terms on which they are being sold. If the problem were only about the quality of the goods themselves, personal experience with the goods would give consumers reason, or not, to continue to buy from particular sellers. For potential purchasers, the difficulty is knowing whether sellers are giving them accurate information about quality, content, and terms of sale with regard to any specific future transaction. Even explicit warranties and guarantees cannot resolve the problem of possible mendacity. These instruments themselves can be vehicles of mendacity, and individual sellers have the same incentives to use them mendaciously as they have to be mendacious about goods themselves, even if all sellers would be better off if none were mendacious about either.

Laws and regulations governing false and misleading advertising take direct aim at the problem of reducing mendacity in the market for consumer goods. By focusing on advertising, these laws take advantage of a necessary activity for sellers in a crowded, robust market: informing potential customers, who have other opportunities, of the existence and merit of the option provided by a particular seller. Sellers advertise to gain attention for their products and sales venues and to inform potential buyers about the comparative advantages of both. Consumer protection law related to false and misleading advertising capitalizes on sellers' felt need to advertise in the first place.

In the United States, much consumer protection law is state law. To show how a state curtails false or misleading advertising, I consider a small portion of California law: California's regulation of advertising of home furnishings. In addition to its statutory law pursuant to false or misleading advertising, California has an administrative code of regulations to address the phenomenon. Within that code, there is an entire division that sets up the Bureau of Electronic and Appliance Repair, Home Furnishings and Thermal Insulation (Bureau of Home Furnishings),<sup>11</sup> created by the authority of the Home Furnishings Act.<sup>12</sup> Among its other activities, the Bureau

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11. CAL. CODE REGS. tit. 4 § 1101 (2018).

12. CAL. BUS. & PROF. CODE § 19034 (2018).

of Home Furnishings enforces an article of the California administrative code that pertains to false and misleading advertising,<sup>13</sup> and it is this article's sections that convey the highly contextualized and particularized approach California takes in this area.

The regulations start with a definition of falsity or misleadingness.

In determining whether advertising is false or misleading it shall be considered in its entirety and as it would be read by the persons to whom it is designed to appeal. It shall be considered to be misleading if it tends to deceive the public or impose upon credulous or ignorant persons.<sup>14</sup>

Several features of this definition are particularly salient. First, the regulation does not belabor distinctions between falsity, misleadingness, and deception. Second, it requires no information about the intent of the advertiser, instead approaching the question of an advertisement's meaning entirely from the perspective of the targeted audience. Third, it evaluates deceptiveness from the vantage point of both the general public and a slice of it: those who are "credulous" or ignorant.

The article then turns to very specific practices, noted and dealt with in precise yet colloquial terms. For example, consider this section on "Bait and Switch Advertising":

The term "Bait and Switch Advertising" means an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. The purpose thereof is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. Bait and switch advertising of any article subject to the provisions of the Home Furnishings Act shall be deemed to be false and misleading. Practices which shall be considered as evidence of unlawful bait and switch advertising include but are not limited to the following:

- (a) Refusal to show the product advertised;
- (b) Disparagement in any respect of the advertised product or the terms of sale;

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13. *Id.* § 19150. These regulations are promulgated pursuant to section 17500.

14. CAL. CODE REGS. tit. 4 § 1300.1 (2018).

- (c) Failure to have available at all outlets listed in the advertisement sufficient quantities of the product to meet reasonable anticipated demands;
- (d) Refusal to take orders for the advertised merchandise for delivery within a reasonable period;
- (e) Showing or demonstrating a defective product unusable or impractical for the purposes implied in the advertisement;
- (f) Accepting a deposit for the product and then switching the purchaser to a higher priced item;
- (g) Failure to make deliveries within a reasonable time or to make a refund.<sup>15</sup>

This section does include a reference to the seller's intentions. It does not, however, rely on these as evidence of an "alluring but insincere offer" meant to entice customers, but to get them to buy something different. A concrete set of practices, listed in clauses (a)-(g), shows how bait and switch is done. These practices, not the inner mental states of the seller, evidence bait and switch.

The article also has a section dedicated to ads about factory outlets. That section insists that when an ad refers to a "factory outlet" or a "factory store":

such terms shall not be used in any advertisement, sign, or by any other device or printed material unless the establishment is owned in its entirety by the factory and the factory is responsible for its operation, function, and pay of the employees and unless a minimum of 51 percent in dollar volume of the articles of furniture and bedding sold or offered for sale are manufactured by the factory.<sup>16</sup>

This might seem oddly tautological if one did not know that, in contemporary America, manufacturers commonly operate stores in exurban malls devoted exclusively to so-called factory outlets—attracting people to these inconvenient (for the shopper) but low-rent (for the manufacturer) locations by suggesting that deals are to be had by cutting out the usual middlemen. Indeed, the article goes on to provisions regulating use of terms like "Factory Direct," "Factory to You," "Manufacturer to You," [and] "Direct to You," requiring

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15. *Id.* § 1304.1.

16. *Id.* § 1309.

that these must refer to transactions where the factory bills the consumer, and the consumer's payment directly goes to the factory.<sup>17</sup> These regulations tackle advertising that raises the bait and switch specter in a very specific manner. The "factory outlet" and "factory direct" regulations guard against a highly contextual practice that could easily "deceive the public or impose upon credulous or ignorant persons" by taking advantage of contemporary American consumer assumptions about wholesale and retail selling of consumer goods—assumptions that may be largely tacit or implicit, not entirely conscious to consumers themselves.

There are additional regulations directed against advertising goods as "Custom Made" (an article must be made to specifications for a particular customer and noting an article does not count "merely because the customer has a choice of coverings")<sup>18</sup> and prohibiting advertising a sale as "Going Out of Business" unless the business is indeed winding down (merchandise must already be on premises or previously ordered and "mere change of business location, business name, or type of business entity" does not count).<sup>19</sup>

All in all, California's statutes and regulations regarding false advertising of home furnishings display a remarkable degree of particularity and reach. This combination is the hallmark of a method that identifies problematic mendacity so as to prevent it. By incorporating context, the regulations pinpoint how mendacity is practiced. Then, the practices themselves can be banned or used to identify prohibited communications. Neither the statutes nor the regulations focus on the intentional states of sellers. Enforcement does not require a determination of whether a seller is straight up lying, carelessly misinforming, or somewhere in between these poles. Instead, the focus is on practices that indicate the promulgation of inaccurate information, particularly inaccurate information likely to exploit buyers in order to benefit, at least in the short term, those who purvey it. Applying the regulations requires detection of practices such as bait and switch, improper references to factory sales or outlets, and so forth. This, in turn, calls for competence in knowing how to identify and discover evidence of these practices. This sort of competence is developed holistically. It calls for familiarity with the market for consumer goods as it operates in California; a sense of the perspective of the general public and the susceptibilities of credulous or ignorant members of it; knowledge of the numerous channels for advertising; awareness of the ways both lawful

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17. *Id.* § 1309.2.

18. *Id.* § 1310.

19. *Id.* § 1312.

and unlawful ads communicate and lawful and unlawful sellers operate; detailed knowledge of the purpose, history, and content of relevant statutes and regulations; and a grasp of how administrative boards and courts apply them. But it does not necessitate contentious claims about the mental states of those who are in violation.

### III. PARALLELS BETWEEN AMERICAN REPRESENTATIVE DEMOCRACY AND MODERN MARKETS

The general populace parallels consumers, and elected officials and candidates for elected office parallel purveyors of consumer goods. As in the market for consumer goods, politicians and voters have limited opportunity for the sort of repeated face-to-face personal interaction in which people can best deploy commonsense methods for evaluating truthfulness. Because of the size of the population, the distances between capitals and home districts and states, and the fact that voters have many concerns other than politics, politicians—like sellers—can use mendacity to persuade voters to support them or at least refuse support to their rivals. This is true not just in regard to elections, but with regard to policies pursued and decisions taken by elected officials. Mendacity about these can provoke public support or opposition. Whether seeking office or already in it, politicians can have various motives to be mendacious in their communications to the general public—ranging from raw desire for power, to a need to curry favor with certain special interest groups, to a dedication to implementing an overall agenda.

Consumer goods markets and democratic politics both are mechanisms for aligning social results with individual choices—for mediating what is on the market at what price; who occupies elected office; and what laws and policies government pursues. You need not glorify the role of individual choice in life, nor think that either politics or markets work perfectly, to appreciate the value of mechanisms that protect individuals whose choices would unlikely be respected or vindicated by alternative methods, whether for production and distribution of goods or for who serves in government and what government does. But for this sort of thing to work even roughly, the mechanism that aligns individual choices with social results must reflect minimally *meaningful* choices made by the relevant individuals. Individual choices based on inaccurate information are not meaningful indicators of what the choosers favor, want, need, or care about. When a politician supplies inaccurate



information to the public to further a politician's own objectives, he manipulates and exploits those whose choices he is supposed to represent. If the mendacity of politicians becomes pervasive, democratic government loses the very basis for representation: the separateness of the public interest from the politician's own goals. Mendaciousness makes it possible for politicians to coopt representative democracy for purposes other than popular self-governance.

Potential voters who come to believe that voting itself has become a mechanism for oppression are unlikely to flock to the polls. This is another way mendacity from politicians threatens large-scale representative democracy, which is premised on the existence of a connection, forged by the ballot, between the general populace and those who serve in governmental office. If large numbers of people refrain from voting, no such connection is possible.

So, contemporary American representative democracy in some ways resembles modern markets for consumer goods and is thus similarly susceptible to erosion via mendacity. But as with untruthfulness in markets, not all untruthfulness in politics is equally pernicious. In both settings, hype, for example, can attract attention without hoodwinking. When politicians exaggerate or oversimplify, their mendacity is not necessarily harmful. American representative democracy is safe from some measure of hyperbole or bromide. How can the public know when mendacity menaces? Here is where lawyers can be useful. Lawyers can deploy their expertise in parsing unproblematic mendacity from pernicious mendacity. They can examine politicians and identify patterns and practices of mendacity that strike at the essential components of representative democracy.

#### IV. LAWYERS SHOULD AID THE PUBLIC IN IDENTIFYING AND CONDEMNING PERNICIOUS MENDACITY

In the United States, the legal profession stands in a special relationship to representative democracy, popular sovereignty, and the rule of law—and thus the profession has responsibilities to protect these from pernicious mendacity in politics. The slogan “no one is above the law” is a motto for democracies founded on popular sovereignty. If politics in a representative democracy is to function properly, laws must be creditable as laws in the interest of the populace. They cannot be vehicles for personal gain or raw power. When politicians are systematically mendacious, the laws they

make and the policies they propose are suspect. They put the rule of law in doubt.

All members of a representative democracy founded in popular democracy have an interest in and arguably some obligation to maintain the health of democratic institutions and political discourse. But lawyers have a custodial role to play, by virtue of their expertise and by the way they themselves particularly benefit from a system of governance premised on rule of law.<sup>20</sup>

Part of why the legal profession is so prominent in American culture, and why it provides a living and social standing for so many who enter it, is precisely because the country is one of laws, not people. It takes a lot of law to substitute for personal decree and whim or extralegal social control. That law has to be written, argued for, explained, used, modified, adapted, improved. This is all work done by lawyers, who make their livings this way. In a country less law-governed, lawyers' work would be less valuable and less valued. Lawyers have a concrete, material interest in preserving the rule of law. As particular financial beneficiaries of this system of governance, lawyers owe it to their fellow citizens to protect the rule of law and thereby preserve representative democracy.

Lawyers' educations give them a particular ability to anticipate when and how mendacity can undo a practice that serves a desirable social purpose. Lawyers are schooled in how mendacity can endanger the quality and even the existence of socially beneficial institutions. Their awareness of this kind of threat and their skills in dealing with it make them similar to doctors in emergency health situations. Confronted with an emergency, even a specialist who does not ordinarily deal with the particular medical problem presented should provide assistance. If the emergency is epidemic, not only individual physicians should help—so should hospitals and medical professional organizations. Similarly, law firms, legal organizations, and lawyers' professional organizations may have obligations to address pernicious political mendacity, particularly if it is pervasive.

## V. CONCLUSION

I started by noting Donald Trump's extreme mendacity compared to other politicians'. Trump currently serves in the Executive Office

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20. This line of argument will be familiar to scholars and practitioners of tort law. In that context, it is used to justify the imposition of legal duties of care, whereas here, I am arguing that lawyers have an ethical duty to protect against pervasive mendacity in American politics.

of President of the United States. For many Americans, he is the politician they most often see and hear, via his own rallies, Twitter, and press reports. In all these venues, Trump repeatedly speaks mendaciously. While particular instances are more or less egregious departures from truthfulness, it is the fact that Trump has incorporated mendacity into his political brand, as it were, that makes his mendacity so dangerous. By repeatedly and constantly dissembling, lying, telling half-truths, and denying facts, Trump epitomizes the mendacious politician. As President, he is the most salient example of a politician many people have. If the most salient politician is also an exemplar of mendacity, people may well conclude he is typical, that all politicians are similarly mendacious. This can erode people's willingness to participate in representative democracy, as I explained above. If Trump's baked-in mendacity becomes a trend among politicians, representativeness itself becomes impossible: a populace whose votes have been mendaciously manipulated by the beneficiary of those votes has not in any way expressed its own authentic will. Nobody elected on such a basis can be seen as representing an aggregation of the populace's choices, since the members of the populace did not, in fact, make a real choice. Rather, they went through the motions of voting but did so on the basis of mendacity that voided the significance of the votes they cast.

Pernicious mendacity in politics is not limited to Donald Trump. Lawyers should be examining mendacity from other politicians to decide whether it is harmful to the rule of law and representative democracy. Sometimes, it will make more sense to analyze political speech not through an analogy to false and misleading advertising, but through other legal frameworks that preserve practices vulnerable to mendacity. For example, lawyers who specialize in contracts law, particularly contracts between merchants, will be aware of how the Uniform Commercial Code (U.C.C.) addresses the problem of truthfulness in warranties. On one hand, the U.C.C. does not want to write merchants' contracts for them. Merchants are presumed to be sophisticated at contracting and are therefore best left to formulate the terms of their own agreements. On the other hand, even sophisticated transactors face versions of the collective action problem generated by the combination of self-interest and credulity that arises in social activities. The U.C.C. drills down on a particular locus in bargains between merchants, a locus where the temptation to mendacity is high as is the overall benefit of blocking it: affirmations of fact merchants make about the goods they are pur-

veying, otherwise known as express warranties. An express warranty is an extra commitment from buyer to seller that a good will live up to agreed-upon specifications. One can see how this would add value to a contract and how easily a purchaser could be exploited via a mendacious express warranty.

The U.C.C. handles the problem by distinguishing promises about goods into two categories, implied and express. Implied warranties go without saying, so to speak.<sup>21</sup> These are representations about goods every buyer and seller can assume the seller is making and are restricted to guarantees of merchantability<sup>22</sup> and fitness.<sup>23</sup> The exact scope and content of these warranties is defined by trade practices. By giving them default status, the U.C.C. underwrites implicit representations about the quality of goods being sold.

Beyond merchantability and fitness, any other guarantees about goods must be explicit and are themselves part of what the U.C.C. takes the parties to be bargaining over.<sup>24</sup> In calling for terms to be expressed, the U.C.C. does not confine merchants to linguistic agreements. The U.C.C. specifically recognizes that sellers of goods may affirm facts about goods via exhibition of samples or use of technical specifications or blueprints, for example. Nor does the U.C.C. suggest that affirmations of fact are to be ascertained by an inquiry into the intentional state of a seller who conveys. What matters is whether a description of a good or the exhibition of a sample was a basis for the agreement to purchase the goods. If so, that description is itself part of the “fabric of the agreement.” As such, it can be the subject of claims for breach of contract. Of course, whether a description, linguistic or otherwise, actually constitutes an affirmation of fact that is essential to the entire bargain can be, factually, quite a complicated matter. My point is not that the U.C.C. provisions on express warranties make all cases easy. Rather, my point is that these U.C.C. provisions approach the entire issue of accuracy of information in a very particular context—the mercantile one, where all parties are assumed and expected to

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21. “‘Implied’ warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.” U.C.C. § 2-313 cmt. 1 (AM LAW INST. & NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 2018).

22. Under the U.C.C.’s definition of “merchantability,” goods must be at least of average quality, properly packaged and labeled, and fit for the ordinary purposes they are intended to serve. *Id.* § 2-315.

23. Fitness refers to a seller’s knowledge that a buyer is going to use goods for a particular purpose, and that the buyer is relying on the seller’s expertise in order to select suitable goods. *Id.*

24. *See id.* § 2-313 cmt. 1 (Specific affirmations of act must be expressed because these go to the “essence of the bargain” that is the very product of the parties’ “dickering.”).

be sophisticated about the nature and purpose of their communications.

There are political settings that are more like the one regulated by the U.C.C. than the one regulated by California's law and regulation on false and misleading advertising. Examples might include when officials make representations on background checks for security clearances or when nominees for high office address questions at confirmation hearings. These are more special purpose and ritualized areas of communication, and like bargains between merchants, it may make sense to hold people accountable for both implied and express affirmations they make.

Lawyers from all sorts of specialties have experience and knowledge related to the sort of mendacity that can wreck socially beneficial practices and institutions. They can and should use their professional education and skills to inform their fellow citizens of pernicious mendacity in politics.<sup>25</sup> I am not maintaining that courts or legislatures should regulate mendacity in political speech, not arguing for the creation of a body of law on the topic. Rather, I urge that lawyers and the institutions associated with the profession have civic work to do.

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25. Some lawyers are already showing the way. Walter Shaub, former director of the United States Office of Government Ethics, joined Campaign Legal Center as Senior Director, Ethics in July 2017. Shaub regularly uses Twitter to unpack lying on federal forms, such as the one used to apply for national security clearances. See, e.g., Walter Shaub (@waltshaub), TWITTER (Dec. 11, 2017, 8:19 AM), <https://mobile.twitter.com/waltshaub/status/940254666113404929> ("New! Below is the email from the FBI regarding Session's claim that he was told not to disclose foreign contacts. This email does not corroborate the DOJ's explanation, which was that he got advice from FBI 'In filling out the SF-86 form.>"). Renato Mariotti, now in private practice and running for Attorney General of Illinois, also uses Twitter to examine lies related to the ongoing FBI investigation into Russian influence on the 2016 U.S. presidential elections. See, e.g., Renato Mariotti (@renato\_mariotti), TWITTER (Nov. 1, 2017, 6:41 PM), [https://mobile.twitter.com/renato\\_mariotti/status/925900578672332800](https://mobile.twitter.com/renato_mariotti/status/925900578672332800) ("THREAD: Is the President of the United States under investigation?"). Stephen J. Harper, a lawyer who has authored several books and serves as an adjunct professor at Northwestern University Law Center, dissects lies from Trump, Pence, Jared Kushner, and others as part of an interactive timeline related to the various investigations into connections between the Trump administration and Russia. *Interactive Timeline: Everything We Know About Russia and President Trump*, MOYERS & CO., <http://billmoyers.com/story/trump-russia-timeline/> (last updated Feb. 27, 2018).



# Truthfulness as an Ethical Form of Life

W. Bradley Wendel\*

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## I. INTRODUCTION: WHAT IS THE PROBLEM?

Oxford Dictionaries’ 2016 word of the year, “post-truth,” is defined as “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.”<sup>1</sup> Worries about a post-truth politics are not new, however. Over a decade earlier, political satirist Stephen Colbert introduced the concept of “truthiness,” which according to Colbert means “sort of what you want to be true, as opposed to what the facts support . . . a truth larger than the facts that would comprise it—if you cared about facts, which you don’t[.]”<sup>2</sup> Philosophers, and then general readers, became familiar with Harry Frankfurt’s strikingly similar definition of bullshit.<sup>3</sup> Frankfurt distinguished lies, which require the speaker’s awareness of and intent to deviate from the truth, from bullshit, which is “unconnected to a concern with the truth.”<sup>4</sup> A bullshitter “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.”<sup>5</sup> The original target of Frankfurt’s little essay was probably fashionable academic postmodernism—“various forms of skept-

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\* Professor of Law, Cornell Law School.

1. Amy B. Wang, “*Post-Truth*” Named 2016 Word of the Year by Oxford Dictionaries, WASH. POST (Nov. 16, 2016).

2. Jacques Steinberg, 2005: *In a Word; Truthiness*, N.Y. TIMES (Dec. 25, 2005).

3. HARRY G. FRANKFURT, *On Bullshit*, in THE IMPORTANCE OF WHAT WE CARE ABOUT 117 (1998). The paper was reprinted as a stand-alone book in 2005. Citations are to the book version.

4. HARRY G. FRANKFURT, ON BULLSHIT 30 (2005).

5. *Id.* at 32.

ticism which deny that we can have any reliable access to an objective reality”<sup>6</sup>—but it was quickly pressed into service by critics of partisan media and the seeming indifference to truth of certain political candidates.<sup>7</sup>

Which brings us to Donald Trump and his administration. One of the unforgettable events from the early days of his presidency was then Press Secretary Sean Spicer vehemently claiming that the crowd at Trump’s inauguration was “the largest audience to ever witness an inauguration — period — both in person and around the globe,”<sup>8</sup> and contending that the National Park Service Photo, showing the obviously much smaller Trump crowd, had been doctored somehow.<sup>9</sup> The combative press conference might have been long since forgotten if White House Senior Advisor Kellyanne Conway had not then appeared on *Meet the Press* and told an incredulous Chuck Todd that Spicer had simply presented “alternative facts.”<sup>10</sup> The attitude of the administration should not have come entirely as a surprise. As a candidate, Trump told lies ranging from the bizarre (his embrace of the conspiracy theory that there was a relationship between the father of Senator Ted Cruz and Lee Harvey Oswald<sup>11</sup>), to the horrifying (he stated that he saw “with his own eyes” thousands of Muslims cheering in New Jersey when the Twin

6. *Id.* at 64.

7. See, e.g., Matthew Yglesias, *The Bullshitter-in-Chief*, VOX (May 30, 2017); Quinta Jurecic, *On Bullshit and the Oath of Office: The “LOL Nothing Matters” Presidency*, LAWFARE (Nov. 23, 2016).

8. Glen Kessler, *Spicer Earns Four Pinocchios for False Claims on Inauguration Crowd Size*, WASH. POST (Jan 22, 2017).

9. See Julie Hirschfeld Davis & Matthew Rosenberg, *With False Claims, Trump Attacks Media on Turnout and Intelligence Rift*, N.Y. TIMES (Jan. 21, 2017). Spicer later resigned as Press Secretary in protest of the appointment of Anthony Scaramucci as White House Communications Director. Glenn Thrush & Maggie Haberman, *Sean Spicer Resigns as White House Press Secretary*, N.Y. TIMES (July 21, 2017). Not long afterward, Scaramucci was fired after giving a bizarre interview to a reporter for New Yorker magazine. See Ryan Lizza, *Anthony Scaramucci Called Me to Unload About White House Leakers, Reince Priebus, and Steve Bannon*, NEW YORKER (July 27, 2017). Spicer’s post-White House history would be less significant if he did not appear to be so concerned with restoring his reputation. See, e.g., Libby Casey, *Who Spun It Best: Former Trump Staffers Fight to Cement Their Post-White House Reputations*, WASH. POST (Sept. 19, 2017). For all the talk of a post-truth White House, it seems that there may be informal social penalties for brazen lying. For one thing, Spicer is apparently having difficulty securing an on-air role as a television commentator due to his lack of credibility. See Rebecca Savransky, *TV Networks Won’t Hire Spicer Due to ‘Lack of Credibility’: Report*, HILL (Sept. 20, 2017, 8:28 AM EDT).

10. See Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Era of ‘Alternative Facts’*, WASH. POST (Jan. 22, 2017). To his credit, Todd responded that “[a]lternative facts are not facts. They are falsehoods.” *Id.*

11. See Dan Spinelli, *Trump Revives Rumor Linking Cruz’s Father to JFK Assassination*, POLITICO (July 22, 2016, 11:25 AM EDT).



Towers collapsed<sup>12</sup>), to the utterly trivial (he said there are no chess grandmasters in the United States<sup>13</sup>). Remarkably, the New York Times keeps a frequently updated online list of the lies Trump has told since taking office.<sup>14</sup> These, too, range in seriousness from relatively innocuous political puffing, such as taking credit for positive outcomes that would have happened anyway (e.g., defense contractor Lockheed Martin's agreement to cut the cost of its F-35 fighter program<sup>15</sup>), to pointless and easily disproven lies (such as claiming to have received phone calls from the head of the Boy Scouts and the President of Mexico, which never happened,<sup>16</sup> or stating that he witnessed damage from Hurricane Harvey firsthand, which was contradicted by reporters traveling with the President<sup>17</sup>), to causing a severe rupture in the relationship with one of our closest allies (Trump's repeated and unsubstantiated claim that British intelligence officers eavesdropped on his communications during the campaign<sup>18</sup>), to alleging that, unlike his predecessors, he made calls to the families of American service personnel killed in action.<sup>19</sup> Trump is also notoriously quick to label as "fake news" any press coverage that makes him look bad, such as criticism of his administration's

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12. See Glenn Kessler, *Trump's Outrageous Claim That "Thousands" of New Jersey Muslims Celebrated the 9/11 Attacks*, WASH. POST (Nov. 22, 2015).

13. See Louis Jacobson, *Trump Wrongly Maligns U.S. Chess Prowess*, POLITIFACT (Oct. 14, 2016).

14. David Leonhart & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html> (last updated Dec. 14, 2017).

15. See Michelle Ye Hee Lee, *Trump's Claim Taking Credit for Cutting \$600 Million from the F-35 Program*, WASH. POST (Jan. 31, 2017).

16. See Julie Hirschfeld Davis, *Those Calls to Trump? White House Admits They Didn't Happen*, N.Y. TIMES (Aug. 2, 2017). For another example, consider Trump's claim, in a tweet, that "[t]he Fake News Media will not talk about the importance of the United Nations Security Council's 15-0 vote in favor of sanctions on N. Korea!" Conservative writer and Trump critic Conor Friedersdorf lined up several articles from the Washington Post, New York Times, and Los Angeles Times, all treating the Security Council vote as a major story. See Conor Friedersdorf, *Why Do Trump's Supporters Allow Him to Insult Their Intelligence?*, ATLANTIC (Aug. 7, 2017). As Friedersdorf noted, it would not be difficult for Trump to find examples somewhere of unfair or biased press coverage, so why invent an easily disproven grievance out of whole cloth?

17. See Aaron Blake, *Trump Claimed He Witnessed Harvey's Devastation "First Hand." The White House Basically Admits He Didn't*, WASH. POST (Aug. 31, 2017).

18. See Peter Baker & Steven Erlanger, *Trump Offers No Apology for Claim on British Spying*, N.Y. TIMES (Mar. 17, 2017).

19. See Glenn Kessler, *Trump's Claim That Obama 'Didn't Make Calls' to Families of the Fallen*, WASH. POST (Oct. 16, 2017). Trump later was accused of insensitivity in his call to the family of one service member; he denied making the comment that the deceased soldier "knew what he signed up for," but the soldier's mother confirmed that he had made that statement. See Philip Bump, *Yet Again, Trump's Defensiveness Makes His Handling of a Gold Star Family's Grief Worse*, WASH. POST (Oct. 18, 2017).

delayed response to the devastation in Puerto Rico caused by Hurricane Maria.<sup>20</sup>

Other presidents have lied, of course, but generally in order to conceal serious misconduct or the effects of misbegotten policies.<sup>21</sup> Trump is different in that he lies routinely, both for understandable reasons and for no reason at all. As liberal political commentator Kevin Drum wrote, in the good old days

[p]residents lied infrequently, but when they did, they told real whoppers. And those whoppers were designed to cover up serious misdeeds. This is what makes Donald Trump so different. He tells lies constantly, but his lies are mostly trivial. It's easy to understand why Nixon or Clinton lied, regardless of whether we approve. But it's not so easy to understand the point of Trump's torrent of fibs.<sup>22</sup>

The senselessness, and shamelessness, of Trump's lies contributes to their disorienting effect, because they appear unconnected from any strategic vision, whether well-intentioned or malevolent. This is a novel form of Frankfurtian bullshit. The ordinary bullshitter, according to Frankfurt, may not deceive us about the facts, but does deceive us about the objective. "His only indispensably distinctive characteristic is that in a certain way he misrepresents what he is up to."<sup>23</sup> Voters knew why Bill Clinton lied about having had sex with Monica Lewinsky, even while they disagreed over whether it mattered to the assessment of Clinton in his official capacity. But it is unclear even what *personal* end of Trump's—let alone what interest of his supporters, or the Republican party, or the country as a whole—is furthered by his apparent indifference to the truth.

Politics, including political campaigns, advertising (now supercharged with money from Super PACs, thanks to *Citizens United*<sup>24</sup>),

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20. See, e.g., Jon Greenberg, *Fact-Checking Donald Trump's Tweets About Puerto Rico*, POLITIFACT (Oct. 1, 2017).

21. See Sheryl Gay Stolberg, *Many Politicians Lie. But Trump Has Elevated the Art of Fabrication*, N.Y. TIMES (Aug. 7, 2017) (discussing lies told by Eisenhower, LBJ, Nixon, and Clinton, and the allegations that the Bush administration lied about intelligence on weapons of mass destruction in Iraq).

22. Kevin Drum, *Donald Trump's Lies Are Different*, MOTHER JONES (Aug. 7, 2017, 11:22 AM), <http://www.motherjones.com/kevin-drum/2017/08/donald-trumps-lies-are-different/>.

23. FRANKFURT, *supra* note 4, at 54.

24. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365-66 (2010) (invalidating, on First Amendment grounds, restrictions in federal campaign-finance law on independent expenditures by corporations, unions, and other groups). Political-action committees that operate independently of a candidate, and supposedly spend money only on issue advertising, are known as Super PACs. See, e.g., Center for Responsive Politics, *Super PACs*, OPENSECRETS, <https://www.opensecrets.org/pacs/superpacs.php> (last visited Mar. 22, 2018).

partisan and the increasingly beleaguered mainstream journalism outlets, and the legislative sausage-making process, has long been associated with lies, exaggeration, hucksterism, and other forms of untruthful behavior. One who complains about lying in politics risks sounding like Captain Renault expressing shock at the gambling in Rick's joint in *Casablanca*. But this should not mean simply acquiescing in the inevitable forward march of a post-truth culture.<sup>25</sup> A certain amount of flimflam in politics, like the venerable tradition of bragging about good economic numbers over which a president has little control, may be tolerable. But other lies and evasions may be considerably more damaging to the long-term stability of a political community. Perpetrating the belief that critical news coverage is "fake news" erodes the capacity of an independent press to hold government officials to account. Seeking to advance policy goals by making flatly untrue factual assertions—such as the claim, never clearly refuted by Republican Congressional leaders, that the Affordable Care Act included a provision for "death panels"<sup>26</sup>—prevents rational deliberation about the merits of the opposing position.

Truthfulness in public life is accordingly an ethical ideal. Seeking to learn the truth and communicate it accurately to other people are virtues that are necessary to a common form of life characterized by trust, respect, and the protection of human dignity.<sup>27</sup> This does not mean that truth has a value that is merely instrumental; the value of truth is not reducible to its virtues.<sup>28</sup> But it does provide a way into debates about truth that avoids technical problems in the philosophy of language and metaphysics. Practical disciplines like law, politics, and journalism have a practical concern with truth, but this does not mean that practical considerations exhaust the value of truth. It is only to suggest that the concerns which motivate this Symposium may be addressed from the standpoint of political ethics. Truth and truthfulness are related to other things we care about, such as justice, dignity, liberty, solidarity, and protection against arbitrary power. The most dangerous forms of

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25. Compare the observation that a certain amount of deception is to be expected, and may even be acceptable, "in the rough-and-tumble of markets," but, nevertheless, it is possible to define a subset of deception as actionable fraud. See Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 638 (2011).

26. See, e.g., Don Gonyea, *From the Start, Obama Struggled With Fallout From a Kind of Fake News*, NAT'L PUB. RADIO (Jan. 10, 2017) (recounting the history of the "death panels" myth, beginning with Sarah Palin's statement that her parents or her baby with Down Syndrome should not "have to stand in front of Obama's 'death panel' so his bureaucrats can decide, based on a subjective judgment of their 'level of productivity in society'").

27. See generally BERNARD WILLIAMS, *TRUTH & TRUTHFULNESS* (2002).

28. See *id.* at 57-61, 90-92.

lying, manipulation, and bullshit by government officials do not relate to matters that can be resolved by observation, at least not directly. Untruthful practices in political life are not offenses against empirical reality but against political ideals such as equality, reciprocity, and the moral agency (and, hence, the dignity) of citizens.

Section II begins by considering an issue of general significance in ethical theory—whether people acting in a professional role are subject to limited or differentiated moral demands. After clearing the groundwork and arguing that public officials, candidates for office, journalists, and other actors sometimes tell genuinely dangerous, damaging lies, and that their professional role does not create a wholesale exemption from the requirements of morality, Section III then confronts directly the problem of truth and objectivity. Drawing from the work of Bernard Williams, it argues that truth in politics is not primarily an epistemic problem but an ethical one, having to do with the way political communities handle disagreement and error. In turn, the value of truthfulness must be expressed in a system of institutions, practices, and dispositions in order to be effective.<sup>29</sup> These social practices are informed by the moral ends of the political community, and so are related to values like truthfulness, although sometimes indirectly. From something of an armchair perspective, the legal profession and much of mainstream journalism appear to be holding up fairly well under the assault of bullshit from the Trump administration. Finally, Section IV concludes with an illustration of the capacity of public institutions to enforce norms of truthfulness, notwithstanding a concerted effort by powerful actors to obfuscate the truth. The example of Trump's travel ban and the litigation that ensued shows how the constitutive features of adversarial litigation can sustain truthful practices.

## II. TRUTH-DIFFERENTIATED DOMAINS?

One of the central questions in professional ethics is whether the evaluation of persons acting in a professional role—as executive branch officials, legislators, lawyers, policy advisors, journalists, public-relations flacks, and so on—must be guided by the principles and values of everyday, ordinary-person morality, or whether their conduct should be evaluated using special norms and principles.<sup>30</sup>

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29. *Id.* at 208.

30. ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 1-3 (1980); THOMAS NAGEL, *Ruthlessness in Public Life*, in *MORTAL QUESTIONS* 75, 78 (1979) (“Either public morality will be derivable from individual morality or it will not.”).

The latter view, generally known as role-differentiated morality, does not posit public and professional domains as a free-fire zone, altogether ungoverned by moral principles. Rather, the idea is that there is some “deeper moral teleology”<sup>31</sup> of the profession that justifies special principles, permissions, and obligations that may deviate from those applicable to persons generally. As against the general moral value of anything, such as truth, there often stands the claim associated with Machiavelli and Weber that the responsibilities of professionals or government officials are different enough that distinctive duties and virtues—some of which may seem like vices when looked at from the ordinary moral perspective—are necessary for the realization of some end such as the security of the country or the functioning of an adversarial system of justice.<sup>32</sup> A couple of well-known articles about business and legal ethics, respectively, adopt an unsentimental, hard-headed perspective on the distinctive norms applicable to professionals. They are not only bona fide classics in their fields, but they nicely illustrate the sorts of arguments and attitudes that might be used by politicians, advisors, spokespersons, and others accused of playing fast and loose with the truth.

Albert Carr’s notorious 1968 article “*Is Business Bluffing Ethical?*”<sup>33</sup> continues to serve as a foil for arguments that business managers should respect the same ethical norms in business as they do in their private lives, including the obligation of truthfulness. Carr thinks this view is naïve, an illusion that should be cast aside.<sup>34</sup> Business ethics is not continuous with private morality but should be understood as a game with constitutive rules, and as long as one does not transgress the rules of the game, she is not a wrongdoer. Misrepresenting the value of one’s hand in poker, bluffing, is simply a strategy available to a player and something that makes the game interesting. Marking cards is cheating, because it is not permitted by the rules of the game, but bluffing is perfectly acceptable. The implication for business is that the only constraint on a manager’s actions is the profit of the enterprise. If this means engaging in “small or large deceptions”<sup>35</sup> where strategically useful, so be it. If

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31. GOLDMAN, *supra* note 30, at 7.

32. See, e.g., WILLIAMS, TRUTH, *supra* note 27, at 207; BERNARD WILLIAMS, *Politics and Moral Character*, in MORAL LUCK (1981); STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE (1989); MAX WEBER, *Politics as Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 121, 123 (Hans H. Gerth & C. Wright Mills eds., 1946); NICCOLÒ MACHIAVELLI, THE PRINCE 84 (Luigi Ricci trans., E.R.P. Vincent ed., 1935).

33. Albert Z. Carr, *Is Business Bluffing Ethical?*, 46 HARV. BUS. REV. 143 (1968).

34. *Id.* at 148.

35. *Id.* at 153.

it is cheaper to engage in industrial espionage than to innovate, go for it (as long as it is not against the law). “Espionage in business is not an ethical problem; it’s an established technique of business competition.”<sup>36</sup>

Similarly, in *The Ethics of Advocacy*,<sup>37</sup> Charles Curtis caused consternation among elite lawyers when he observed that lawyers are not only better at lying than most people are, but that he could see no ethical reason for lawyers not to lie:

Complete candor to anyone but ourselves is a virtue that belongs to the saints, to the secure, and to the very courageous. Even when we do want to tell the truth, all of it, ultimately, we see no reason why we should not take our own time, tell it as skillfully and as gracefully as we can, and most of us doubt our own ability to do this as well by ourselves and for ourselves as another could do it for us. So we go to a lawyer. He will make a better fist of it than we can.

I don’t see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client; and on rare occasions, as I think I have shown, I believe it is. Happily they are few and far between, only when his duty gets him into a corner or puts him on the spot.<sup>38</sup>

This is not an amoral system, but a special role-differentiated one, according to Curtis: “We are not dealing with the morals which govern a man acting for himself, but with the ethics of advocacy. We are talking about the special moral code which governs a man who is acting for another.”<sup>39</sup>

Since Curtis’s time there has been a sea change in the law governing lawyers, from essentially informal norms of etiquette to a comprehensive system of binding legal rules backed by sanctions. In the case of lies told by lawyers to courts, or lawyers knowingly presenting false testimony, the penalties are severe, and it is simply

36. *Id.* at 146 (quoting a pseudonymous “Midwestern [business] executive”).

37. Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

38. *Id.* at 8-9. The Harvard *Crimson* reported that the head of the Massachusetts Bar had this to say in response:

That statement is so contrary to every concept of legal ethics as I read and understand them. . . . Either Mr. Curtis’ views are in conflict with those of every decent member of the legal profession, or he has expressed them in a manner that can only be described as inordinately stupid.

*Curtis Statement on Court Lying Mums Law Professors*, HARV. CRIMSON (Sept. 27, 1952).

39. Curtis, *supra* note 37, at 16.

not the case that a lawyer may lie with impunity for her client.<sup>40</sup> But never mind the law. Curtis's point, and Carr's as well, is that a professional is not properly subject to criticism appealing to the usual moral categories of lies, deceit, trickery, manipulation, and so on. On the familiar Kantian understanding, the wrongfulness of lying is related to the way it denies the humanity—the capacity for free, rational choice—of its intended victim; it would be impossible for the victim to give uncoerced assent to a way of being treated that involves robbing the victim of her capacity to act in another way.<sup>41</sup> Lying, along with violence, is a form of deliberate assault on another, treats the other as merely a means and not an end in herself, and represents an unjustified assumption of power by the liar over the victim.<sup>42</sup> It destroys the trust that is a precondition for communicating information and maintaining social relationships.<sup>43</sup> These considerations, however, all belong to the domain of ordinary morality; they are not necessarily within the constitutive norms that govern the “game” of business, law, or some other practice such as political campaigning or speaking on behalf of the government at a press conference. Carr's argument, however, is that because certain “moves” with the “game” of law, governance, political campaigning, and so on, are permitted, someone who makes those moves should not be subject to moral criticism.

Several conditions must be satisfied before the appeal to the rules of the game can establish a permission for what would otherwise be wrongful conduct.<sup>44</sup> The players must have given actual consent to play the game, with knowledge of what the rules permit and require. They must have a genuine option not to play the game. Arguably any “move” within the game that causes harm to a player must be necessary for the ongoing success or stability of the game as a mutually advantageous scheme of cooperation. These conditions are readily satisfied for a game like poker or pickup basketball—where a player can expect a certain amount of shoving and the occasional thrown elbow—but it is much less clear that moral

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40. See W. BRADLEY WENDEL, *PROFESSIONAL RESPONSIBILITY: EXAMPLES & EXPLANATIONS* 233-60 (5th ed. 2016).

41. See, e.g., CHRISTINE M. KORSGAARD, *Two Arguments Against Lying*, in *CREATING THE KINGDOM OF ENDS* 335, 346-47 (1996); Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 *PHIL. & PUB. AFF.* 325, 331-32 (1986).

42. SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 18, 22 (1978).

43. SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 9-12 (2014).

44. See ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 113-24 (1999).

permissions can be generated using the same pattern of justification with respect to an arena of public life that is only metaphorically a game. The element of genuine consent, for example, is likely to be lacking where a party was compelled to participate by a legal summons. In the usual example of settlement negotiations, a party may have elected to attempt to mediate a resolution of the dispute, but from the defendant's point of view, the lawsuit was initiated by a compulsory process, and from the plaintiff's point of view, the defendant's injurious conduct was not consensual. Thus, when a lawyer claims permission to bluff or deceive the adversary, the analogy of a poker game is not exactly fitting. The parties did not freely choose to sit down at the table and subject themselves to deception and manipulation. The game analogy is even more strained as applied to a large-scale cooperative scheme such as a political community. As Hume argued, every actual government was founded "either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people."<sup>45</sup> Other than immigrants who voluntarily sought a new country of citizenship, most of us have never expressly agreed to become "players" in the "game" of American politics. Nor does the appeal to tacit consent help, since most acts of receiving benefits from government are not truly voluntary.<sup>46</sup>

A variation on the tacit consent argument for using only the rules of the game to evaluate conduct is the familiar claim that "everybody does it." This may be seen as a kind of reverse fairness argument. Generally, arguments from fairness posit a duty to cooperate in a mutually beneficial project and not free-ride on the efforts of others.<sup>47</sup> If a cooperative scheme breaks down, however, there is no benefit to those who continue to comply with its requirements and significant cost resulting from compliance. Under those circumstances, fairness would not require assuming additional obligations, but it is hard to see how fairness considerations would justify engaging in conduct, like deception, that violates the rights of others.<sup>48</sup> Can fairness considerations ever justify departures from impartial moral requirements? Partial compliance with the principle of beneficence may limit the extent of the requirement to promote

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45. David Hume, *Of the Original Contract*, reprinted in SOCIAL CONTRACT 151 (Ernest Barker ed., 1947).

46. A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 83-95 (1979).

47. See, e.g., H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955); JOHN RAWLS, *Legal Obligation and the Duty of Fair Play*, in COLLECTED PAPERS (Samuel Freeman ed., 1999).

48. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 92-95 (1974).



the well-being of others.<sup>49</sup> That is very different from the claim that violations of rights by others will excuse one's own violation of a victim's rights. Even if violating A's rights will result in fewer rights violations overall (i.e., will protect B, C, and D from having their rights violated), it would impermissibly treat A merely as a means to the ends of B, C, and D to violate her rights.<sup>50</sup> If the wrongfulness of lying or deception consists in violating the moral agency of the listener, who has a reason to seek the content of the speaker's mind (at least under some circumstances),<sup>51</sup> then it should not matter that lying and deception are widespread. Untruthfulness does tend to undermine a social economy of trust, but it is also a wrong within the speaker-listener relationship because it interferes with the listener's legitimate interest in knowing the content of the speaker's beliefs.

A better argument, still in the neighborhood of "rules of the game," is that some *apparent* instances of wrongdoing actually do not count as wrongdoing within a justified social practice. Carr's example of bluffing in poker is an obvious analogy; bluffing isn't really lying—it is misrepresenting the value of one's hand in a context in which other players know not to rely on any player's representations of the value of her hand. As we shift the evaluation from games with clearly defined rules to more complex practices in which the rules are contested, however, it is important not to make unwarranted assumptions about the actions that are permitted by the norms of the practice. For example, a plaintiff's lawyer may tell the defendant's insurer that "my client won't settle for a penny less than \$100,000," even though the lawyer had previously been given authorization by the client to settle for any amount over \$50,000. A comment to the anti-deception provision of the rules of professional conduct applicable in most states simply excludes that statement from the definition of a false statement of material fact:

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. . . . [A] party's intentions as to an acceptable settlement of a claim are ordinarily in this category[.]<sup>52</sup>

Under the rules of the applicable game, as stated by the comment to the anti-deception rule, the lawyer's statement is not a false

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49. See generally LIAM B. MURPHY, *MORAL DEMANDS IN NONIDEAL THEORY* (2000).

50. See APPLBAUM, *supra* note 44, at 138-43.

51. SHIFFRIN, *supra* note 43, at 9.

52. MODEL RULES OF PROF'L CONDUCT, r. 4.1 cmt. 2 (AM. BAR ASS'N 1983).

statement at all. Other than clearly defined exceptions such as statements about acceptable settlements, however, lawyers' deceptive statements may subject them to professional discipline or other legal sanctions.<sup>53</sup> There may also be ambiguity or contestability in the rules of the game. There is some debate, for example, concerning whether lawyers may permissibly employ agents to engage in deceptive investigative techniques.<sup>54</sup> The all-things-considered *moral* permissibility of deception permitted by the norms of legal practice remains an open question, but it also may be unclear whether a particular act would be acceptable within the rules of the game as it is presently constituted.

The important, and often overlooked, aspect of Carr's poker analogy is that the game itself must answer to standards of moral acceptability. Poker is a trivial example, but applied to public life more generally, it is clear that public institutions and practices must have a deeper moral teleology—they must be designed to serve the purposes of a political community and its members.<sup>55</sup> It may be a feature of the design of these institutions and practices that they exclude reference back to ordinary moral considerations such as the prohibition on deception, relying instead on internal

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53. See, e.g., *Ausherman v. Bank of America Corp.*, 212 F. Supp. 2d 435 (D. Md. 2002). A number of cases involve false statements about whether the lawyer's client had died before a settlement was finalized. See, e.g., *In re Lyons*, 780 N.W.2d 629 (Minn. 2010); *People v. Rosen*, 198 P.3d 116 (Colo. 2008); *Kentucky Bar Ass'n v. Geisler*, 938 S.W.2d 578 (Ky. 1997). The ABA has stated that failure to disclose to opposing counsel that one's client has died is tantamount to making a false statement of material fact under Rule 4.1. See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 95-397 (1995).

54. See, e.g., *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (lawyers hired former FBI agent, who misrepresented his identity and secretly taped conversations; evidence excluded from proceedings); *In re Ositis*, 40 P.3d 500 (Or. 2002) (lawyer may not direct investigator to pose as journalist); *In re Gatti*, 8 P.3d 966 (Or. 2000) (attorney misrepresented his identity to medical records review company); *Gidatex v. Campaniello Imports Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (permitting deceptive investigation to determine compliance with civil consent decree); *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998) (permitting undercover investigation to ascertain violation of consent decree regarding intellectual property); *In re Air Crash Disaster Near Roselawn, Indiana*, 909 F. Supp. 1116 (N.D. Ill. 1995) (sanctioning plaintiffs' lawyers for hiring investigators to conduct research on training received by pilots on conditions similar to those encountered in the accident leading to the litigation); *Richardson v. Howard*, 712 F.2d 319 (7th Cir. 1983) (permitting the use of discrimination "testers" to uncover violations of civil-rights statutes). Government lawyers have traditionally been permitted to direct undercover investigations and other law enforcement activities involving deception. See, e.g., D.C. Bar Op. 323 (2004) (federal government attorneys may use deceit if they reasonably believe their official duties require it and their actions are authorized by law); Virginia State Bar Legal Ethics Op. 1765 (2003).

55. NAGEL, *supra* note 30, at 82-83.

rules of conduct that may permit certain categories of deceptive conduct.<sup>56</sup> Adversarial practices within the legal system are often justified in this way. Consider one of the central instances of permissible deception by lawyers—the representation of a criminal defendant who has admitted to her factual guilt to the lawyer. The defendant, nevertheless, has the right to demand a jury trial, to testify in her own defense, and, more broadly, to “put the state to its proof” by insisting that the prosecution prove every element of the offense beyond a reasonable doubt.<sup>57</sup> There is a difference between what might be termed “legal guilt” and factually having committed an offense.

The norms of criminal defense advocacy, including qualified permission to introduce evidence inconsistent with the guilt of the defendant, is one way our legal system protects individuals against the unrestrained power of the state.<sup>58</sup> A lawyer may not introduce evidence that the lawyer knows to be false,<sup>59</sup> but may the lawyer introduce true evidence that supports a false inference? Arguably, the answer is “yes” because persuading the jury that the state has not proven its case beyond a reasonable doubt is possible only by permitting defense lawyers to tell a coherent narrative inconsistent with the state’s evidence and theory of guilt.<sup>60</sup> In ordinary moral

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56. This pattern of argument is familiar from indirect consequentialism. See, e.g., John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (arguing that a utilitarian justification can be given for practices, such as promising, that in operation exclude direct reference to utilitarian considerations).

57. John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyer’s “Different Mission”*, 1 GEO. J. LEGAL ETHICS 339 (1987).

58. *Id.* at 341-42.

59. MODEL RULES OF PROF’L CONDUCT r. 3.3(a) (AM. BAR ASS’N 1983); *Nix v. Whiteside*, 475 U.S. 157 (1986).

60. Mitchell’s example involves a client accused of shoplifting an inexpensive Christmas ornament. The client admits intending to steal the item. When she was stopped by the store manager, however, the client had a ten-dollar bill in her pocket. The ethical issue concerns the permissibility of making the following closing argument to the jury:

The prosecution claims my client stole an ornament for a Christmas tree. The prosecution further claims that when my client walked out of that store she intended to keep it without paying. Now, maybe she did. None of us were there. On the other hand, she had \$10.00 in her pocket, which was plenty of money with which to pay for the ornament without the risk of getting caught stealing. Also, she didn’t try to conceal what she was doing. She walked right out of the store holding it in her hand. Most of us have come close to innocently doing the same thing. So, maybe she didn’t. But then she cried the minute she was stopped. She might have been feeling guilty. So, maybe she did. On the other hand, she might just have been scared when she realized what had happened. After all, she didn’t run away when she was left alone even though she knew the manager was going to be occupied with a fire inside. So, maybe she didn’t. The point is that, looking at all the evidence, you’re left with “maybe she intended to steal, maybe she didn’t.” But, you knew that before the first witness was even sworn. The prosecution has the burden, and he simply can’t carry any burden let alone “beyond a reasonable doubt” with a maybe she did, maybe she didn’t case.

terms, this would still count as deception because the lawyer's object is to manipulate the listener (in this case, the jury) into forming the false belief that the client did not do what the prosecution alleges.<sup>61</sup>

However, the legal system works with the concept of legal, not factual guilt. The concept of legal guilt, which plays an important explanatory and justifying role in evaluating the lawyer's conduct, is an artifact of the legal system and its constitutive rules. It does not really have an analogue in ordinary morality. To the extent a defense lawyer is justified *morally* in appealing to legal, not factual guilt, it is because the role of criminal defense lawyer—and the associated permission to tell stories made up of true evidence that support false inferences of factual innocence—is justified by political ends such as protecting individuals against state power.<sup>62</sup> The role in this case does create a moral permission to engage in what would otherwise be wrongful deception, and the defense lawyer's conduct should be evaluated on the basis of norms internal to the legal system and its associated roles. This conclusion depends on the justification of the system and its roles, without which the lawyer is back in the predicament of being simply a deceiver. Within the system, however, the lawyer may properly redescribe her aim as protecting her client against abuses of power by putting the state to its proof.

The idea is that ostensibly role-differentiated domains do not insulate lawyers, journalists, businesspeople, and politicians from ethical criticism. Instead, they substantially shift the locus of criticism from individual acts to more general considerations of institution design. Charles Curtis can be accused of exaggerating when he said that one of the functions of a lawyer is to lie for his or her client.<sup>63</sup> It may be the case, however, that one of the functions of a lawyer is to do something that, outside the context of the legal system, would be counted as a lie. We tolerate lawyers engaging in these practices not because we are indifferent to lying, but because

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Mitchell, *supra* note 57, at 344-45. In ordinary moral terms, the defense lawyer's argument is an attempt to deceive the jury into believing that there was an innocent explanation for how the client ended up outside the store with the Christmas ornament in her possession. The lawyer's justification is that the jury is not being asked to decide factual truth, but legal truth—i.e., did the prosecution prove its case beyond a reasonable doubt?

61. See SHIFFRIN, *supra* note 43, at 22-23 (locating the wrongfulness of deception in violation of the duty to take care not to cause another to form false beliefs).

62. See DAVID LUBAN, *LAWYERS AND JUSTICE* 130-39 (1988) (arguing that an institutional excuse for what would otherwise be wrongdoing in moral terms must follow a pattern in which the institution is itself morally good, the role is required by the structure of the institution, and the action is required to support the end of the role).

63. See Curtis, *supra* note 37, at 9.

we recognize that bluffing in negotiations and arguing for false inferences are means to broader institutional ends such as protecting liberty and enabling citizens to have access to the rights allocated to them by law. The assessment of public actors as truthful or untruthful requires situating their conduct in context, including the expectations and beliefs of others who participate in the relevant social practices and institutions.<sup>64</sup> This contextual, community-grounded evaluation also suggests that we may do better at realizing the value of truthfulness by instituting and reinforcing certain methodologies and practices that are adapted to the obstacles one is likely to encounter to the maintenance of truth.<sup>65</sup>

### III. TRUTHFULNESS WITHOUT OBJECTIVITY

Invocations of the idea of truth in public discourse have a tendency to become bogged down in debates over objectivity. Is a belief (or a proposition, or a sentence) *true* just in cases where it corresponds with an independently existing reality? This is certainly a commonsensical view, but it leads to familiar problems such as characterizing just what it means for a mental picture to correspond to something in external reality, how an object can be similar to its mental representation, how the content of a belief is determined by the external world, how we can occupy distinct standpoints from which we judge that *p* and that *it is true that p*, and so on.<sup>66</sup> Fascinating as these issues are in their own right, the problem of truth and objectivity in practical ethics is not best understood as seeking to explain how moral judgments are related to the external world.<sup>67</sup> Those issues, to quote Joshua Cohen, are “politically idle.”<sup>68</sup> Rather, the value of truth in law, government, the media, and similar public domains depends on the idea of public justification.<sup>69</sup> Political liberalism is founded on the mutual recognition of members of

64. See Catherine Z. Elgin, *Williams on Truthfulness*, 55 *PHIL. Q.* 343, 347 (2005).

65. *Id.* at 347-48.

66. See, e.g., DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* (1984); HILARY PUTNAM, *REASON, TRUTH AND HISTORY* (1981). For a helpful overview of contemporary theories of truth, see Simon Blackburn & Keith Simmons, *Introduction*, in *TRUTH 1* (Simon Blackburn & Keith Simmons eds., 1999).

67. My claim is not that these issues are not interesting, only that they can be a distraction when working on topics within practical ethics. For good summaries of the theoretical issues, see *ESSAYS ON MORAL REALISM* (Geoffrey Sayre-McCord ed., 1988); Joseph Raz, *Notes on Value and Objectivity*, in *OBJECTIVITY IN LAW AND MORALS* 194 (Brian Leiter ed., 2007); Geoffrey Sayre-McCord, *Moral Realism*, in *THE OXFORD HANDBOOK OF ETHICAL THEORY* 39 (David Copp ed., 2006).

68. Joshua Cohen, *Truth and Public Reason*, 37 *PHIL. & PUB. AFF.* 2, 15 (2009).

69. See RAINER FORST, *CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM* 185-93 (John M. M. Farrell trans., 2002) (1994).

our political community as free and equal.<sup>70</sup> We reason as *citizens*, not as isolated individuals, about the rights and duties owed among members of a community. Insofar as we participate in public life, we recognize an obligation to justify our actions to each other on the basis of reasons that can, in principle, be shared. A proposition is true if reasonable and rational persons would endorse it, or at least sufficiently narrow their disagreement about it, upon reflection and consideration of the facts that bear upon the matter.<sup>71</sup>

One might say, with Rawls, that this is all that is needed for a political conception of objectivity. That is acceptable as a manner of speaking as long as it is understood that the notion of objectivity is related to the maintenance of a particular form of life—a liberal political community whose members regard each other as free and equal. It follows from this political conception of the value of truthfulness that there are better and worse ways of handling disagreement among members of the community. As Bernard Williams writes in a brilliant paper:

Many different things have been discussed as the question of objectivity, but they all tend either to come to nothing, or to come back to one issue: the proper understanding of ethical disagreement. Some philosophers have been very exercised, for instance, with the question whether moral judgments can be true or false. . . . The concepts of truth and falsehood carry with them the ambitions of aiming at the truth and avoiding, so far as we can, error; the question must be, how those ambitions could be carried out with regard to ethical thought. I see no way of pursuing that question, which does not lead back to questions such as these: if an ethical disagreement arises, must one party think the other in error? What is the content of that thought? What sorts of discussions or explorations might, given the particular subject matter, lead one or both of them out of error?<sup>72</sup>

The value of truth is related to the avoidance of error, but in a community characterized by ethical pluralism, empirical uncertainty, and resulting dissensus and conflict—which Rawls refers to as the burdens of judgment<sup>73</sup>—it is not a straightforward matter to conduct a discussion that is likely to lead the participants out of error.

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70. See JOHN RAWLS, *POLITICAL LIBERALISM* 29, 33, 38 (1993).

71. *Id.* at 119.

72. BERNARD WILLIAMS, *Saint-Just's Illusion*, in *MAKING SENSE OF HUMANITY* 135, 145 (1995).

73. RAWLS, *supra* note 70, at 56-58.

In fact, it may be necessary to bracket the idea of truth altogether and work with a different regulative ideal, such as reasonableness.<sup>74</sup> Principles of reasonableness would then be related to formal principles such as reciprocity and generality, and political ideals such as fairness, dignity, and equality, which are respected by treating others with respect in conditions of disagreement and conflict.<sup>75</sup>

Williams rightly observes that we have debates about politics and morality only within an actual social world “within which we encounter various political and ethical demands and ideals, argue with them, adapt ourselves to them, try to form a conception of an acceptable life within them.”<sup>76</sup> Pervasive disregard for the virtues of truthfulness threatens to pull apart the community that is sustained by the practices of encountering varying demands and ideals, wrestling with them, and constructing individual and social conceptions of well-lived lives. The response to this threat is not to double down on the abstract notion of objectivity. It is instead to focus attention on truthfulness as a cluster of “virtues and practices, and ideas that go with them, that express the concern to tell the truth.”<sup>77</sup> These virtues and practices are *political* in the sense that they derive their intelligibility from the problems they are aimed at solving.<sup>78</sup> I like to quote Hugo Grotius’s characterization of people as “quarrelsome but socially minded beings.”<sup>79</sup> The liberal political project, as carried out by thinkers from Rousseau and Locke through Gauthier and Rawls, aims to reconcile individuality (and associated values such as liberty and autonomy) with the demands of living in a society with other individuals who must be recognized as in some sense equals. Williams gives a vivid description of the problem to which truthfulness is the solution. In its modern form, the problem of relating to others in circumstances of cooperation and trust takes two forms—political and personal. The political problem consists of “finding a basis for a shared life which will be neither too oppressively coercive . . . nor dependent on mythical legitimations.”<sup>80</sup> The personal problem is that of “stabilizing the

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74. FORST, *supra* note 69, at 186-87.

75. *Id.* at 192-93.

76. WILLIAMS, *Saint-Just's*, *supra* note 72, at 139.

77. WILLIAMS, TRUTH, *supra* note 27, at 20.

78. *Id.* at 208-09 (arguing that political truthfulness is associated with other values and expressed in institutions and practices that stand against tyranny).

79. See J. B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* 72 (1998) (citing this observation as one of the distinctively modern insights in moral philosophy).

80. WILLIAMS, TRUTH, *supra* note 27, at 201.

self into a form that will indeed fit with these social and political ideals.”<sup>81</sup>

For present purposes at least, I am less concerned with the personal problem, which pertains to theories of education and culture that are beyond my expertise as a legal scholar. I do think it is possible, however, to understand many of the institutions and practices associated with the legal system as aimed at sustaining communal life without resorting either to coercion or mystification. Truthfulness is therefore related to the problem of constructing and supporting legitimate political institutions in a pluralistic democratic political community. Legitimacy, for its part, may be enhanced by relying on procedures that embody Williams’s insight that the ideal of truth is oriented toward leading people out of error. An under-appreciated contribution of the legal system to the legitimacy of a democratic political order is the process of *adjudication*, which allows citizens to present claims against the state, or against each other, for resolution on a reasoned basis, relying on both empirical facts and normative principles.<sup>82</sup> The parties to an adjudicated proceeding must give reasons that are well-supported in fact and law for the result they are seeking; judges, in turn, owe the parties a reasoned decision that takes into account the competing positions, the evidence for both sides, and the legal principles that bear on the resolution of the dispute. The process of adjudication “allows rival and competing claims to confront and engage with one another in an orderly process . . . without degenerating into an incoherent shouting match.”<sup>83</sup> Not only that, but the law also presents its claims as something people can make sense of and comply with as rational agents, as opposed to being coerced or terrified into following the command of a sovereign.

In order to function as a means of ordering in a society of free and equal citizens, who are presumed to be capable of using their faculties of reason to understand and comply with the law as it applies to their own situations, legal procedures must take truthfulness as a regulative ideal.<sup>84</sup> Courts require the parties to certify that the

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81. *Id.*

82. See Jeremy Waldron, *Thoughtfulness and the Rule of Law*, 18 BRIT. ACAD. REV. 1, 7 (2011) (discussing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978)). See also Burton Dreben, *On Rawls and Political Liberalism*, in THE CAMBRIDGE COMPANION TO RAWLS 316, 339-40 (Samuel Freeman ed., 2003) (analogizing Rawlsian public reasons to the kinds of considerations on which a judge would rely in resolving a litigated dispute).

83. Waldron, *supra* note 82, at 7.

84. See W. Bradley Wendel, *Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J. L. & HUMAN. 105 (2016) (exploring some of these themes in connection with lawyers’ ethical obligations of truthfulness).



factual contentions they make have sufficient grounding, and that their legal arguments are well-founded in existing law, or a good faith argument for its extension, modification, or reversal.<sup>85</sup> This is not to say that the parties may only bring claims grounded in truth. Even in civil litigation—setting aside the special case of the adjudication of criminal cases, discussed above, with its distinctive background of constitutional rights of the accused—lawyers need only satisfy themselves that the “facts” they advance have evidentiary support.<sup>86</sup> “Evidentiary support” is a much lower threshold than reasonable belief, let alone knowledge. But it is not nothing, and the parties may not rely on fanciful stories without an adequate factual foundation. Legal arguments must also be true, in a sense, to existing law. There must be some basis for claiming that a party has an entitlement that will be respected by the court. These norms of procedure are familiar to lawyers, but their significance in relation to democratic legitimacy often goes unrecognized.<sup>87</sup> The point I want to emphasize here is that legal procedures have a built-in relationship with what Williams contends are the two hallmarks of truth: Sincerity (saying what you mean, which sustains social trust<sup>88</sup>) and Accuracy (getting it right, which allows members of a community to pool reliable information about the world<sup>89</sup>). To illustrate this connection, I would like to close with an example from recent political life, President Trump’s travel ban executive orders. The government’s position concerning the lawfulness of the orders, and the response of courts to those arguments, provide a compelling example of the power of truthful practices to resist deception and bullshit in public life.

#### IV. PEEKING BEHIND THE CURTAIN OF BULLSHIT

As a candidate, Trump promised to bar entry into the United States, either of Muslims or people from countries with a history of supporting terrorism (which is pretty much a code word for “Muslims” to his base of voters).<sup>90</sup> As President, however, he possesses

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85. See MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 1983).

86. FED. R. CIV. P. 11(b)(3).

87. *But see* DANIEL MARKOVITS, A MODERN LEGAL ETHICS (2008) (putting legitimacy at the forefront of a conception of ethical lawyering, which emphasizes the obligation to tell clients’ stories faithfully).

88. See WILLIAMS, TRUTH, *supra* note 27, at 11, 87, 96.

89. See *id.* at 11, 124-26.

90. See, e.g., Abby Phillip & Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: ‘You Know My Plans’*, WASH. POST (Dec. 22, 2016); Jenna Johnson, *Donald Trump is Expanding His Muslim Ban, Not Rolling It Back*, WASH. POST (July 24, 2016) (quoting Trump saying, in his acceptance speech at the Republican National Convention, that the

broad statutory authority to bar the entry of an alien or class of aliens into the United States, upon his finding that their entry would be detrimental to the interests of the United States.<sup>91</sup> The Supreme Court has taken an extremely deferential approach to the power of the executive under this section and has repeatedly denied challenges based on discriminatory animus. The leading case, arising out of a First Amendment claim filed by a Marxist professor prevented from entering the United States to give lectures, requires only that the President articulate a “facially legitimate and bona fide” reason for denying entry into the U.S.<sup>92</sup> The Court recently reaffirmed that standard, and in a concurring opinion, Justice Kennedy stated that courts will not look behind the articulated standard to find improper motives.<sup>93</sup> Courts generally decline to engage in “judicial psychoanalysis” to root out evidence of discriminatory intent.<sup>94</sup> One would therefore expect courts to treat the Trump

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country “must immediately suspend immigration from any nation that has been compromised by terrorism until such time it’s proven that vetting mechanisms have been put in place”). As a candidate, Trump’s first statement on the issue had been a call for a “total and complete” ban on Muslims entering the United States. See Jenna Johnson & David Weigel, *Donald Trump Calls for ‘Total’ Ban on Muslims Entering United States*, WASH. POST (Dec. 8, 2015). Trump’s political advisor Rudy Giuliani claimed that Trump had asked him how to implement a Muslim ban lawfully. See Rebecca Savransky, *Giuliani: Trump Asked Me How to Do a Muslim Ban ‘Legally’*, HILL (Jan. 29, 2017, 8:48 AM EST). Trump promised that once the new “extreme vetting” procedures were in place, his administration would give priority for admission to Christians. See Carol Morello, *Trump Signs Order Temporarily Halting Admission of Refugees, Promises Priority for Christians*, WASH. POST (Jan. 27, 2017).

91. 8 U.S.C. § 1182(f). This statutory authority is limited by a provision elsewhere in the Immigration and Nationality Act prohibiting discrimination on the basis of national origin in the issuance of immigrant visas. See 8 U.S.C. § 1152(a)(1)(A). A district court in Maryland, considering the second executive order, held that the prohibition on discrimination in issuing immigrant visas, being narrower than the broad authority under Section 1182(f), controlled with respect to the President’s authority to issue immigrant visas. See *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 554-55 (D. Md.), *aff’d in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *vacated and remanded*, 138 S. Ct. 353 (2017). Because the district court held that the limitation in Section 1152(a)(1)(A) did not restrict the President’s authority to bar entry, the Fourth Circuit did not address the statutory construction argument in its review of the President’s executive order, which sought to ban entry altogether of citizens of certain designated countries. See *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 580-81 (4th Cir.), *vacated and remanded*, 138 S. Ct. 353 (2017).

92. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

93. *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring). In a case arising in the Clinton administration, the Court similarly refused to look behind facially legitimate reasons for executive action in the context of immigration and national security:

The Executive should not have to disclose its “real” reasons for deeming nationals of a particular country a special threat – or indeed for simply wishing to antagonize a particular foreign country by focusing on that country’s nationals – and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

*Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999).

94. *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005).

travel ban as they did a policy established by the Bush administration, called National Security Entry-Exit Registration System (NSEERS), which, among other provisions, required the registration, fingerprinting, and questioning of aliens present in the U.S. from Muslim-majority countries and North Korea who were males over the age of 16.<sup>95</sup> Federal courts sustained the registry features of the NSEERS program against due process and equal protection challenges and claims that the program amounted to racial profiling.<sup>96</sup>

Trump's first travel ban order, entered soon after he took office, prohibited entry into the United States by all refugees and all citizens of seven majority-Muslim countries, even those with lawful permanent residence in the United States.<sup>97</sup> The enactment of the order led to scenes of chaos at airports and highly unusual (and gratifying) images of lawyers rushing to the assistance of travelers affected by the ban. It was subsequently enjoined nationwide by a district judge in the Western District of Washington, and that injunction was upheld by the Ninth Circuit.<sup>98</sup> Following the decision of the Ninth Circuit to leave the injunction in place, Trump issued a second executive order narrowing somewhat the scope of the first order, providing for limited waivers on a case-by-case basis, and in-

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95. See *Rajah v. Mukasey*, 544 F.3d 427, 433-34 (2d Cir. 2008) (describing program); see also *Registration of Certain Nonimmigrant Aliens from Designated Countries*, 67 Fed. Reg. 70526, 70526-70527 (Nov. 22, 2002). The NSEERS also required registration, fingerprinting, and photographs at the port of entry. Countries covered by this provision, depending on the date of entry into the United States, were Afghanistan, Algeria, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen. See *Rajah*, 544 F.3d at 433 n.3 (citing 8 C.F.R. 264.1(f)).

96. See, e.g., *Kandamar v. Gonzales*, 464 F.3d 65, 73-74 (1st Cir. 2006) (holding there was no equal protection violation in requiring aliens to appear for interviews, even though NSEERS applies only to certain countries); *Ali v. Gonzales*, 440 F.3d 678, 680 n.4 (5th Cir. 2006) ("We note that NSEERS's nationality classification has been repeatedly upheld by this Court and others against constitutional attack.") (citations omitted). The Department of Homeland Security under the Obama Administration rescinded the regulations relating to the NSEERS. See *Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants*, 81 Fed. Reg. 94231, 94231 (Dec. 23, 2016). Reporting at the time suggested that the Obama Administration's determination to shut down NSEERS was motivated by the enthusiasm shown by Trump political advisor Kris Kobach, who had a role in the Bush Administration's implementation of NSEERS, for using it as a template for Trump's promised Muslim ban. See *Abigail Hauslohner & Ellen Nakashima, Obama Administration Tries to Shut Down Visitor Registry Program Before Trump Takes Office*, WASH. POST (Dec. 22, 2016).

97. See, e.g., Michael D. Shear, Nicholas Kulish & Alan Feuer, *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017).

98. See *State of Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at \*2 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, 858 F.3d 1168, 1168 (9th Cir. 2017).

cluding additional factual findings intended to support the assertion of executive power in the interest of national security; it, too, was enjoined by a district court, this time in Maryland,<sup>99</sup> and the injunction was affirmed by the Fourth Circuit.<sup>100</sup> It is the Fourth Circuit opinion that provides some grounds for hoping that robust institutions and practices responsive to the value of legality can enforce standards of truthfulness against an onslaught of bullshit.

The court's opinion fully accepted the framework just described, which gives the President broad statutory authority to bar entry of non-citizens if he believes doing so will be in the interests of the United States, and which instructs reviewing courts to defer to a facially legitimate and bona fide reason for the President's action.<sup>101</sup> The second travel ban order includes a recitation of facts supposedly justifying restrictions on entry from several countries, identified as state sponsors of terrorism.<sup>102</sup> On their face, these reasons would justify the denial of permission to enter the United States. But the court also included a lengthy and detailed compilation of statements made by Trump, both as a candidate and after taking office, tending to show that he had always intended to enact a "Muslim ban," regardless of whether there was a bona fide national security justification for doing so.<sup>103</sup> One might therefore put the question this way: When may a court inquire into whether the reasons given by the President are not in good faith, even though they are facially legitimate? As Ninth Circuit Judge Bybee argued, dissenting in a proceeding involving the first travel ban order:

Even if we have questions about the basis for the President's ultimate findings—whether it was a "Muslim ban" or something else—we do not get to peek behind the curtain. So long as there is *one* "facially legitimate and bona fide" reason for the President's actions, our inquiry is at an end.<sup>104</sup>

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99. See *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *vacated and remanded*, 138 S. Ct. 353 (2017).

100. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir.), *vacated and remanded*, 138 S. Ct. 353 (2017). The Supreme Court order vacating the Fourth Circuit's decision was based on the expiration of the executive order on September 24, 2017.

101. *Id.* at 590. Dissenting from the court's denial of reconsideration *en banc*, Ninth Circuit Judge Jay Bybee provided a forceful case for deference to the President's authority under Section 1182(f), *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry v. Din*, 135 S. Ct. 2128 (2015). See *Trump*, 858 F.3d at 1179-84 (Bybee, J., dissenting).

102. See *Int'l Refugee Assistance Project*, 857 F.3d at 573-74.

103. *Id.* at 575-77.

104. *Trump*, 858 F.3d at 1183 (Bybee, J., dissenting).

That is certainly a reasonable summary of the law prior to the Trump presidency. The Fourth Circuit, reviewing the second travel ban order, was even willing to concede (as I think it must) that the asserted national security interests are facially legitimate.<sup>105</sup> But then the court also reached the truly remarkable conclusion that the President had not offered this justification in good faith. It acknowledged that Justice Kennedy's concurring opinion in *Kerry v. Din* set a high bar for a claim of bad faith to be justiciable but concluded that the plaintiffs had plausibly alleged bad faith with particularity.<sup>106</sup> It did so by peeking behind the curtain of facially legitimate justifications, to use Judge Bybee's language, and finding what the President said about the reasons for the travel ban were not the real reasons at all. In fact, he was motivated by the desire to keep a promise to his supporters to engage in invidious discrimination against adherents of a particular religion.

Think about that for a minute. Nine judges (out of thirteen) on a federal court of appeals determined that the plaintiffs are likely to succeed on the merits of their argument that the President is lying about the reasons for issuing the executive orders.<sup>107</sup> Saying someone acted in bad faith is a big deal, but a statement that strong may be what is needed in order to serve the more general values of a liberal democratic society. The Fourth Circuit opinion can be understood as doing exactly what Bernard Williams recommended in his *Saint-Just's Illusion* paper, namely, directing the attention of the disputing parties toward those considerations that would lead them out of error.<sup>108</sup> As is generally true in litigated disputes, one of the parties is right and the other wrong: Either the President has the inherent executive power and statutory authorization to bar entry of certain classes of non-citizens, or he does not. But if the President says one thing and does another, by giving one justification for his decision in a formal legal document while offering a very different explanation to his base of supporters, the social process of communicating information to others breaks down. Among other

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105. *Int'l Refugee Assistance Project*, 857 F.3d at 591.

106. *Id.* at 592 (citing *Kerry*, 135 S. Ct. at 2141 (Kennedy, J., concurring)).

107. Six judges joined in full in Judge Gregory's opinion for the majority. *Id.* at 572 n.1. Judge Keenan, in a separate concurring opinion joined by Judge Thacker, concluded that the reasoning underlying the executive order did not pass the "bona fide" test. *See id.* at 606 (Keenan, J., concurring). Judge Thacker's concurrence limited the evidence of invidious discrimination to statements made by President Trump after he took office, excluding statements made on the campaign trail, but nevertheless still found a substantial likelihood of success on the merits of the plaintiffs' bad faith argument. *Id.* at 630-33 (Thacker, J., concurring).

108. WILLIAMS, *Saint-Just's*, *supra* note 72, at 145.

functions, speech is intended to serve the human interest in acquiring and sharing true information.<sup>109</sup> The President's words are supposed to communicate something to others about his beliefs and intentions, appeal to facts about the world, and incorporate values that justify his actions.<sup>110</sup> Any interested audience, including a reviewing court, non-citizens affected by the order, or the general population of voters, should be able to make sense of the President's actions. Only if there is some relationship between the President's words and reality would it be possible for any other institution to check the power of the Executive Branch. To continue Judge Bybee's metaphor, maybe there is no curtain to peek behind if the President has not bothered to offer an explanation for his actions that could constitute a facially legitimate and bona fide reason.

The Trump Administration issued a third travel ban order, which was immediately enjoined by federal courts; the Supreme Court granted certiorari to consider the constitutionality of the revised order, which was accompanied by a much more fully developed record.<sup>111</sup> Although lower federal courts had reacted with considerable skepticism to the government's claim to have a facially legitimate and good faith reason for the travel ban, a majority of the Court found that the President was still owed deference in matters related to immigration and national security.<sup>112</sup> The key to Chief Justice Roberts's opinion for the majority was the record of an extensive factfinding process, which the majority referred to as a "worldwide, multi-agency review,"<sup>113</sup> aimed at supporting the national-security rationale for the order. Justice Sotomayor's dissenting opinion calls this a "blinker" approach to deference—too willing to accept what any reasonable observer would recognize as a pretext for Trump's desire to fulfill a campaign promise.<sup>114</sup> In response to this argument, and Justice Sotomayor's invocation of the *Korematsu* decision, Chief Justice Roberts says something extremely interesting, apropos the rule of law: "The entry suspension is an act that is well within executive authority and could have been taken by any other

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109. WILLIAMS, *supra* note 27, at 126.

110. *See id.* at 233-37.

111. *See Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017), *aff'd in part, vacated in part* 878 F.3d 662 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018).

112. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

113. *Id.* at 2408; *see also id.* at 2421 (again referring to "a worldwide review process undertaken by multiple Cabinet officials and their agencies").

114. *Trump v. Hawaii*, 138 S. Ct. 2392, 2438 n.3 (2018) (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.").

President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.”<sup>115</sup>

The rhetorical opposition between the authority that could have been exercised by “any other President” and the action taken by “this particular President” is a revealing commentary not only on Trump’s bullshit, but also on a way for a liberal democracy to avoid drowning in it. The obligation of other actors within the Executive Branch, and reviewing courts, is to ensure that there is sufficient legal authority for the President’s actions. The standard of review is objective and sometimes counterfactual—*could* a well-motivated President have ordered this particular action within the exercise of his statutory and inherent authority? Although the Court majority does not peek behind the curtain, its opinion should be read as setting a high bar for other government officials to ensure that there is a sufficient basis for actions ordered by a whimsical President who is unconcerned by the requirements of truth. In this way, the Supreme Court travel ban decision underscores the value of the political ethics of truthfulness.

Some commentators have suggested that the deference traditionally accorded to the President by the other two branches of government rests on the assumption that the President will comply with his “oath to faithfully execute [his] office.”<sup>116</sup> They ask whether “a bullshitter, whose entire method of engaging with the world is incompatible with the concept of fidelity and whose fundamental slipperiness and laxity in shouldering responsibility makes impossible the notion of ‘taking care,’”<sup>117</sup> can comply with a solemn pledge of faithfulness to the demands of the office. But the point I want to close with is less about the dangers of bullshit, which are readily apparent, and more about the value of the legal system and the ideal of legality in a political environment characterized by slipperiness, or even contempt, for the very idea of truth. Perhaps by focusing more directly on the virtues of the rule of law we can avoid getting bogged down in competing assertions that a claim is “fake news” or some public actor is biased. Although the rule of law is often understood in formal terms, as involving something like Lon Fuller’s eight criteria of legality, or else as a requirement that the law be capable of determinate meaning in contested cases, an underappreciated aspect of the rule of law is the maintenance of a

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115. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

116. Benjamin Wittes & Quinta Jurecic, *What Happens When We Don’t Believe the President’s Oath?*, LAWFARE (Mar. 3, 2017, 12:30 PM).

117. *Id.*

structure in which evidence is presented and evaluated.<sup>118</sup> The requirement that the parties and the adjudicator give *reasons* turns out to be surprisingly powerful. Reasoned arguments require a connection with empirical reality that can withstand scrutiny in the form of introduction of contrary evidence, challenges for unreliability or bias, and exclusion of irrelevant considerations. Picking up on Williams's point that we encounter moral and political ideals only within an actual, lived form of life,<sup>119</sup> the legal system exemplifies a form of life in which the ideal of truthfulness is taken quite seriously, because of its relationship to the social values secured by the rule of law. A form of life which insists that a system of logic, rules, and procedures be insulated from manipulation and gross abuses is likely to be one in which citizens are protected from arbitrary power.<sup>120</sup> Doing so requires concern for truth, but not necessarily worrying about metaphysical ideals like objectivity. Rather, truthfulness is a characteristic of a well-functioning legal system.

## V. CONCLUSION

Ironically, despite the frequently-expressed concern about the role-differentiated morality of the legal profession, the distinctive ethical obligations of lawyers may in some cases reflect a heightened concern for ethical ideals such as truthfulness. Criminal defense lawyers may work with the artificial notion of "legal truth," but, in general, lawyers in both litigation and advising contexts must respect constraints on the presentation of arguments and evidence. These constraints are designed to ensure that a legal judgment, whether that of an adjudicator or a lawyer in an advisory capacity, is more than "fake news." The virtues of truthfulness, which Williams labels Accuracy and Sincerity, are compelling ethical ideals in connection with the goal of preventing the government from abusing its power, but their effectiveness demands that they be expressed in a set of institutions and practices that are dedicated to the virtues of truthfulness.<sup>121</sup> Arbitrary power can be checked by insisting that official action be based on true information about the world, and that powerful actors not act in secret or obfuscate their intentions, but reveal the true motivations for their conduct. Of course, truthfulness may be necessary, but it is certainly not sufficient for justice. A powerful majority may oppress a minority and

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118. See Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in GETTING TO THE RULE OF LAW 3, 15 (James E. Fleming ed., 2011).

119. WILLIAMS, *Saint-Just's*, *supra* note 72, at 139.

120. E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 260-66 (1975).

121. WILLIAMS, *TRUTH*, *supra* note 27, at 207-08.



be perfectly truthful about its reasons for doing so, as was the case with the apartheid government in South Africa. In many cases, however, fidelity to other values such as equality and human dignity can be enhanced by public institutions that are designed to require reasoned arguments, evidentiary support, and challenges to the veracity of another party's position. The American tendency to conduct policymaking and policy implementation through lawyer-dominated litigation has been noted and criticized by political scientists.<sup>122</sup> Litigation can be protracted, costly, and unpleasant. But in these times of apparent indifference to truth, the legal profession with its characteristic ethical standards may turn out to offer hope for the maintenance of democratic standards of accountability and limits on the power of the government. For all the criticism often directed at lawyers, they can at least respond with this brief for a contribution to an ethical form of life.

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122. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9 (2001).



# Unjust Incarceration: Problems Facing Pennsylvania's Preliminary Hearing and How to Reform It

*Drew Sheldon\**

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\* Drew Sheldon is a 2018 J.D. candidate at Duquesne University School of Law. He graduated from the University of Pittsburgh in 2014 with a B.A. in History.

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## I. INTRODUCTION

A pretrial detention<sup>1</sup> can be devastating to an innocent party forced to sit in jail awaiting their day in court.<sup>2</sup> A way to decrease this devastating risk is to ensure that only prosecutions likely to result in a conviction will result in long-term pretrial incarceration. The importance of a speedy trial is demonstrated by the media frenzy related to Kalief Browder, who was arrested as a sixteen-year-old based on a questionable identification, spent three years in the Rikers Island Jail awaiting trial, and attempted to commit suicide multiple times during his confinement.<sup>3</sup> Browder was arrested based on a single identification by the victim, was identified two weeks after the robbery, and the police did not recover any physical evidence.<sup>4</sup> Browder's family believed his mental condition was worn down so greatly during his confinement that he tragically committed suicide after his release.<sup>5</sup> Browder's case stresses the importance of making an accurate pretrial determination of guilt to ensure only those who are most dangerous and likely to have committed crime endure pretrial detention.<sup>6</sup> An accurate pretrial determination of guilt likely could have screened out cases like Browder's that are unlikely to result in a conviction. This article will discuss the constitutional and statutory protections for pretrial detention. Next, it will discuss major problems facing Pennsylvania's pretrial detention scheme. Finally, it will advocate that Pennsylvania's current pretrial detention regime, which is based on the Fourth Amendment, does not adequately provide protection against unnecessary confinement.

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1. Pretrial detention is defined as: "holding a defendant prior to his trial on criminal charges either because he cannot post the established bail or because he has been denied pretrial release under a pretrial detention statute." *Pretrial detention*, BARRON'S LAW DICTIONARY 155 (6th ed. 2010).

2. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

3. Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>.

4. *Id.*

5. Peter Holley, *Kalief Browder Hanged Himself After Jail Destroyed Him. Then 'a Broken Heart' Killed His Mother*, WASH. POST (Oct. 18, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/10/18/kalief-browder-hanged-himself-after-jail-destroyed-him-then-a-broken-heart-killed-his-mother/?utm\\_term=.7969df42d586](https://www.washingtonpost.com/news/post-nation/wp/2016/10/18/kalief-browder-hanged-himself-after-jail-destroyed-him-then-a-broken-heart-killed-his-mother/?utm_term=.7969df42d586).

6. *Id.*

## II. BACKGROUND ON THE PROTECTIONS AGAINST PRETRIAL CONFINEMENT

Current legal protections against unlawful confinement are largely rooted in the Fourth Amendment.<sup>7</sup> The Fourth Amendment requires both arrests and subsequent long-term detentions to be based on probable cause.<sup>8</sup> Courts prefer that arrests are made after a neutral and detached magistrate determines there is probable cause for an arrest rather than relying on the judgment of a police officer in the “competitive enterprise of ferreting out crime.”<sup>9</sup> However, while there is a preference that arrests be made with a warrant signed by a magistrate,<sup>10</sup> the vast majority of arrests are made pursuant to a warrantless, on-the-scene finding of probable cause by a police officer.<sup>11</sup> Exceptions to the ordinary arrest warrant requirement are premised upon the practical consideration that when time is of the essence, applying for an arrest warrant takes a considerable amount of time and may result in the suspect getting away.<sup>12</sup> But once a suspect is in custody and there is no longer any risk of escape from law enforcement a magistrate’s probable cause determination is necessary.<sup>13</sup>

In the seminal case on pretrial detention, *Gerstein v. Pugh*, the United States Supreme Court determined the constitutional requirements for pretrial procedures.<sup>14</sup> Prior to this decision, individuals in Florida, where this case was decided, could be arrested solely based on police discretion, i.e. arrested without a warrant, and faced the possibility of being detained for significant periods of time prior to their trial without ever having an opportunity to challenge the existence of the probable cause resulting in their arrest.<sup>15</sup> Before *Gerstein*, prosecutors in Florida were only required to file an

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7. See *Gerstein*, 420 U.S. at 111.

8. *Id.* at 111. Probable cause is defined as: “the existence of facts and circumstances within one’s knowledge and of which one has reasonably trustworthy information, sufficient in themselves to warrant a person of reasonable caution to believe that a crime has been committed.” *Probable cause*, BARRON’S LAW DICTIONARY 419 (6th ed. 2010).

9. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

10. *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

11. *Gerstein*, 420 U.S. at 113-14.

12. *Id.* at 114.

13. *Id.*

14. See generally *Gerstein*, 420 U.S. 103.

15. *Id.* at 116.

information<sup>16</sup> to detain individuals prior to trial.<sup>17</sup> Prosecutors for the State of Florida asserted the mere act of filing an information was a sufficient determination of probable cause to justify incarceration for the entire period of time from arrest until trial.<sup>18</sup>

In *Gerstein v. Pugh*, the United States Supreme Court held that the Fourth Amendment requires that within forty-eight hours of a warrantless arrest a neutral and detached party must determine that probable cause existed for the arrest in order to justify further detention.<sup>19</sup> The Court recognized how pretrial detention is often more intrusive than the actual arrest because a suspect risks losing their job, their source(s) of income, and disruption to their family.<sup>20</sup> The Supreme Court found that a prosecutor filing an information was insufficient to justify long-term incarceration because the prosecutor's law enforcement responsibilities are "inconsistent with the constitutional role of a neutral and detached magistrate."<sup>21</sup>

The Court also found defendants are not entitled to representation by an attorney because probable cause determinations are not adversarial.<sup>22</sup> Defense counsel is only required at "critical stages" in a criminal proceeding.<sup>23</sup> A proceeding is considered critical only if there is a chance of losing or sacrificing a constitutional right or impairing the defendant's defense; here, the Court found that probable cause defendants do not risk losing constitutional rights and consequently do not require representation.<sup>24</sup> Additionally, the Supreme Court encouraged states to experiment with different types of probable cause determinations,<sup>25</sup> such as allowing procedures

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16. Information is defined as: "a written accusation of a crime signed by the prosecutor, charging a person with the commission of a crime; an alternative to indictment as a means of starting a criminal prosecution." *Information*, BARRON'S LAW DICTIONARY 269 (6th ed. 2010).

17. *Gerstein*, 420 U.S. at 116-17.

18. *Id.*

19. *Id.* at 103.

20. *Id.* at 114.

21. *Id.* at 117; *see also* *Shadwick v. City of Tampa*, 407 U.S. 345, 348 (1972) (holding "someone independent of the police and prosecution must determine probable cause").

22. *Gerstein*, 420 U.S. at 123.

23. *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961).

24. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *see, e.g., United States v. Cronin*, 466 U.S. 648, 659 (1984) (opining that the trial is a critical stage where defendants must have the opportunity for representation); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (establishing defendants must have the opportunity to be represented during sentencing); *United States v. Wade*, 388 U.S. 218, 237-38 (1967) (recognizing pretrial lineups are critical stages); *Masiah v. United States*, 377 U.S. 201, 206 (1964) (holding pretrial questioning while charged with a crime is a critical stage); *Hamilton*, 368 U.S. at 54 (finding an arraignment where an insanity defense must be pleaded is a critical stage).

25. *Gerstein*, 420 U.S. at 123-24.

like arraignments<sup>26</sup> and initial bail determinations<sup>27</sup> to occur at the same time. Finally, while only a single probable cause determination is necessary, jurisdictions can provide greater protection than what is required by the Fourth Amendment by providing multiple pretrial determinations.<sup>28</sup>

### A. *Types of Probable Cause Determinations*

There is no single preferred pretrial procedure for determining probable cause.<sup>29</sup> Different types of pretrial procedures allow experimentation and flexibility for states.<sup>30</sup> Common procedures include arrest warrants issued by a magistrate or judge,<sup>31</sup> indicting grand juries,<sup>32</sup> and non-adversarial probable cause determinations in front of a magistrate, known as Gerstein hearings.<sup>33</sup>

#### 1. *Arrest Warrant*

Arrest warrants are generally used when police officers have the luxury of time before an arrest must be made.<sup>34</sup> An arrest warrant may be issued upon a finding of probable cause by a magistrate.<sup>35</sup> The arrest warrant is requested by the affiant, usually a police officer, in an affidavit of probable cause.<sup>36</sup> Affidavits of probable cause must be approved by magistrates.<sup>37</sup> Despite the requirement for only minimal legal training,<sup>38</sup> a magistrate's "determination of probable cause should be paid great deference by reviewing

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26. Arraignment is defined as the "initial step in the criminal process wherein the defendant is formally charged with an offense, i.e., given a copy of the complaint or other accusatory instrument, and informed of his or her constitutional rights . . . ." *Arraignment*, BARRON'S LAW DICTIONARY 35 (6th ed. 2010).

27. Bail is defined as: "a hearing to determine if a monetary or other form of security may be given to "insure the appearance of the defendant at every state of the proceedings." *Bail*, BARRON'S LAW DICTIONARY 45 (6th ed. 2010).

28. *Gerstein*, 420 U.S. at 123-24. Pennsylvania requires a finding of probable cause during a preliminary arraignment, PA. R. CRIM. P. 540, and a prima facie finding of guilt. PA. R. CRIM. P. 542.

29. *Gerstein*, 420 U.S. at 123.

30. *Id.*

31. PA. R. CRIM. P. 513.

32. *Shadwick v. City of Tampa*, 407 U.S. 345, 351-52 (1972).

33. *Gerstein*, 420 U.S. at 103.

34. *United States v. Watson*, 423 U.S. 411, 455 n.22 (1976) (recognizing that an incentive for using search warrants is that the police may continue to collect evidence without penalty if a magistrate initially refuses to sign a search warrant).

35. *Shadwick*, 407 U.S. at 345 n.1.

36. *Id.*

37. *Illinois v. Gates*, 462 U.S. 213, 234-35 (1983).

38. 201 PA. CODE 601 (2015). In Pennsylvania, you do not need to be a member of the bar or even have a law degree to become a magistrate. *Id.* Magistrates who are not lawyers must pass a Minor Judiciary test and take continuing legal education. *Id.*

courts.”<sup>39</sup> Therefore, the use of search warrants by police officers is incentivized by the courts as reviewing courts give the magistrates’ judgment deference.<sup>40</sup> If magistrates’ judgment and analysis of affidavits of probable cause were heavily scrutinized, “police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search.”<sup>41</sup>

## 2. *Grand Jury*

Federal constitutional rights require that a grand jury<sup>42</sup> find the existence of probable cause for all criminal indictments.<sup>43</sup> The right to a grand jury only exists for federal criminal prosecutions; the right to a grand jury indictment is not selectively incorporated<sup>44</sup> and thus states are not required to use grand juries.<sup>45</sup> Historically, grand juries:

[Deliberate] in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.<sup>46</sup>

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39. *Spinelli v. United States*, 393 U.S. 410, 419 (1969), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983).

40. *United States v. Watson*, 423 U.S. 411, 455 n.22 (1976).

41. *Gates*, 462 U.S. at 236.

42. Grand jury is defined as: “a body of people drawn, selected, and summoned according to law to serve as a constituent part of a court of criminal jurisdiction.” *Grand jury*, BARRON’S LAW DICTIONARY 239-40 (6th ed. 2010). The purpose of the body “is to investigate and inform on crimes committed within its jurisdiction and to accuse persons of crimes when it has discovered sufficient evidence to warrant holding a person for a trial.” *Id.*

43. U.S. CONST. amend. V. The founders of the United States believed grand juries were essential to preventing “arbitrary and oppressive” government action. *United States v. Calandra*, 414 U.S. 338, 342-43 (1974). Consequently, grand juries are given wide latitude in both investigating crime and determining the existence of probable cause. *Id.*

44. Selective incorporation is defined as: “the process by which certain [] guarantees expressed in the Bill of Rights become applicable to the states through the Fourteenth Amendment.” *Selective incorporation*, BARRON’S LAW DICTIONARY 490 (6th ed. 2010).

45. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citing *Hurtado v. Peoples*, 110 U.S. 516, 538 (1884)).

46. *Calandra*, 414 U.S. at 343 (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)).



Grand juries are seen as a way of protecting individuals against “arbitrary and oppressive governmental action.”<sup>47</sup> Because a grand jury’s deliberations are secret, they are able to avoid many of the inconveniences of a public hearing.<sup>48</sup> Pennsylvania currently allows indicting grand juries, but only in limited circumstances.<sup>49</sup> Grand juries are only used when witness intimidation has already occurred.<sup>50</sup> In that case, a common pleas judge must petition the Supreme Court of Pennsylvania for permission to use a grand jury.<sup>51</sup> Moreover, the use of the grand jury recognizes the inconvenience of testifying in a criminal trial and the dangerous consequences of witness intimidation.<sup>52</sup>

### 3. *Gerstein Hearings*

A Gerstein Hearing refers to a probable cause determination that is required to occur after a warrantless arrest.<sup>53</sup> An influential Yale Law Review article, published before the decision in *Gerstein v. Pugh*, theorized an analytical framework splitting these types of probable cause determination procedures into two categories: backward looking procedures and forward looking procedures.<sup>54</sup>

#### a) *Backward Looking Model*

The backward looking model’s “primary concern is with the legality of the arrest and the validity of the detention of the arrested person.”<sup>55</sup> Under this model, evidence is presented to a magistrate in the form of affidavit<sup>56</sup> and cannot be challenged by the defendant.<sup>57</sup> These procedures are more akin to a request for an arrest warrant rather than an actual trial because of the factual, rather than legal inquiry, the court makes.<sup>58</sup> The backward looking model

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47. *Id.* at 342-43.

48. *Id.* at 343. The secret nature of grand jury proceedings avoids the embarrassing stigma of being accused of a crime publically. *Id.* Further, it allows investigation into incidents when it is not entirely clear a crime even occurred. *Id.*

49. PA. R. CRIM. P. 556.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Gerstein v. Pugh*, 420 U.S. 103, 103 (1975).

54. *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 774 (1974).

55. *Id.* at 775.

56. Affidavit is defined as a “written, ex parte statement made or taken under oath before an officer of the court.” *Affidavit*, BARRON’S LAW DICTIONARY 18 (6th ed. 2010).

57. *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, *supra* note 54, at 776.

58. *Id.*

is not subject to formal rules of evidence and normally inadmissible evidence like hearsay<sup>59</sup> is considered in determining if probable cause exists.<sup>60</sup> Ultimately, these types of procedures are meant to screen out types of illegal detentions<sup>61</sup> such as: (1) good faith, but still illegal arrests; (2) knowingly illegal arrests; and (3) legal arrests where later evidence reveals the arrestee's innocence.<sup>62</sup>

*b) Forward Looking Model*

The forward looking conceptual model inquires into whether there is "sufficient probability of conviction" to warrant further criminal proceedings.<sup>63</sup> This model envisions that cases unlikely to succeed on their merits can be screened out at an early stage.<sup>64</sup> Under this model, evidence would be presented to a magistrate who would be required to determine if there was a legal and factual basis for the criminal charges.<sup>65</sup> If the prosecution successfully demonstrates a basis for the charges, the magistrate could hold the charges over for trial.<sup>66</sup> Because the goal is to determine if a case would be successful at trial, the forward looking model would not consider hearsay or other evidence likely to be inadmissible at trial.<sup>67</sup> A forward looking probable cause determination would resemble a trial in that a defendant has the right to counsel, to cross-

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59. Hearsay is defined as:

a rule that declares not admissible as evidence any statement other than that by a witness while testifying as the hearing and offered into evidence to prove the truth of the matter stated. The reason for the hearsay rule is that the credibility of the witness is the key ingredient in weighing the truth of this statement; so when that statement is made out of court, without benefit of cross-examination and without the witness's demeanor being subject to assessment by the trier of fact, there is generally not adequate basis for determining whether the out-of-court statement is true.

*Hearsay*, BARRON'S LAW DICTIONARY 246 (6th ed. 2010).

60. *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, *supra* note 54, at 778. Pennsylvania's preliminary arraignment is an example of a Backward Looking probable cause determination. See discussion *infra* 1. Backward Looking – Preliminary Arraignment.

61. *Id.*

62. *E.g.*, *Brown v. Illinois*, 422 U.S. 590, 592 (1975) (demonstrating where detectives acknowledged an arrest was made, not based on probable cause, but solely for the purpose of questioning an individual during a murder investigation).

63. *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, *supra* note 54, at 778.

64. *Id.* at 781.

65. *Id.* at 782.

66. *Id.* at 781. Holding charges for trial means the charged crimes can be tried at trial. *Id.* Pennsylvania's preliminary hearing is an example of a Forward Looking probable cause determination. See discussion *infra* 2. Forward Looking – Preliminary Hearing.

67. *Id.* at 779-80.

examine witnesses, and to present affirmative defenses on his behalf.<sup>68</sup>

### *B. Pennsylvania's Pretrial Procedures*

While the United States Constitution only requires a single probable cause determination prior to trial,<sup>69</sup> Pennsylvania provides two separate guilt determinations.<sup>70</sup> The first, a preliminary arraignment, is an ex parte procedure occurring shortly after the arrest where a magistrate determines if probable cause exists.<sup>71</sup> The preliminary arraignment has many of the characteristics of the backward looking model procedure.<sup>72</sup> The second, a preliminary hearing, is an adversarial procedure which mimics some of the procedures of an actual trial.<sup>73</sup> The preliminary hearing shares many of the similarities of the forward looking model procedure.<sup>74</sup>

#### *1. Backward Looking - Preliminary Arraignment*

Pennsylvania's preliminary arraignment is similar to a backward looking procedure.<sup>75</sup> In Pennsylvania, defendants arrested without a warrant are given a probable cause determination within forty-eight hours of being arrested.<sup>76</sup> This procedure is described in Pennsylvania Rules of Criminal Procedure Rule 540.<sup>77</sup> The comment to Rule 540 explains that the preliminary arraignment fulfills the *Gerstein* probable cause requirement that a probable cause determination be made by a neutral and disinterested magistrate within forty-eight hours of a warrantless arrest.<sup>78</sup>

Pennsylvania's preliminary arraignment, as proscribed in Pennsylvania Rule of Criminal Procedure 540, combines many necessary pretrial procedures. Necessary pretrial procedures includes presenting the arrestee with the criminal complaint.<sup>79</sup> If the defendant is arrested with an arrest warrant, they are provided with both the

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68. *Id.* Under the forward looking model, the credibility of witnesses would be at issue since the goal is to test if the case would likely succeed under trial like conditions. *Id.* at 784.

69. *Gerstein*, 420 U.S. at 126.

70. PA. R. CRIM. P. 540; PA. R. CRIM. P. 542.

71. PA. R. CRIM. P. 540.

72. See discussion *supra* a) Backward Looking Model.

73. PA. R. CRIM. P. 542.

74. See discussion *supra* b) Forward Looking Model.

75. PA. R. CRIM. P. 540; *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, *supra* note 54, at 775.

76. PA. R. CRIM. P. 540; see *Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

77. PA. R. CRIM. P. 540.

78. PA. R. CRIM. P. 540 cmt.; see *Riverside*, 500 U.S. at 56.

79. PA. R. CRIM. P. 540(C).

warrant and the affidavit of probable cause used to obtain the arrest warrant.<sup>80</sup> If a warrantless arrest occurs, a *Gerstein* hearing, probable cause determination is made.<sup>81</sup> Whether a warrant was issued or not, the magistrate will inform the defendant of the right to secure counsel, the right to have a preliminary hearing, and the opportunity to post bail.<sup>82</sup>

## 2. *Forward Looking - Preliminary Hearing*

Pennsylvania's preliminary hearing is a forward looking procedure because it is meant to prove the Commonwealth has a realistic chance of succeeding on the merits of its case at trial.<sup>83</sup> The purpose of the preliminary hearing is to protect accused individuals from unlawful detention.<sup>84</sup> Preliminary hearings must be scheduled to occur within fourteen days of an arrest if the defendant is incarcerated and twenty-one days if the defendant posted bail.<sup>85</sup>

The Commonwealth is required to establish a prima facie case against the defendant to show the crime was committed by the accused.<sup>86</sup> Prima facie is a standard lower than reasonable doubt,<sup>87</sup> but still high enough that a reasonable jury could find each element of the offense.<sup>88</sup> Probable cause merely requires a showing of "facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime."<sup>89</sup> However, a prima facie showing of guilt requires a showing of "each of the material elements of the crime charged" and the "existence of facts which connect the accused to the crime charged."<sup>90</sup> Hearsay evidence is admissible at a preliminary hearing and the Commonwealth may introduce hearsay evidence to meet its burden of establishing a prima facie case.<sup>91</sup> There is no

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80. PA. R. CRIM. P. 540(D).

81. PA. R. CRIM. P. 540(E).

82. PA. R. CRIM. P. 540(F).

83. PA. R. CRIM. P. 542; *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, *supra* note 54, at 779.

84. *Commonwealth v. Ruza*, 511 A.2d 808, 810 (Pa. 1986).

85. PA. R. CRIM. P. 540.

86. PA. R. CRIM. P. 542.

87. *Victor v. Nebraska*, 511 U.S. 1, 18, 20 (1994) (finding reasonable doubt is "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon").

88. *Commonwealth v. Wojdak*, 466 A.2d 991, 996 (Pa. 1983).

89. *Commonwealth v. Rodriguez*, 585 A.2d 988, 990 (Pa. 1991).

90. *Commonwealth ex. rel. Buchanan v. Verbonitz*, 581 A.2d 172, 174 (Pa. 1990).

91. *Commonwealth v. Tyler*, 587 A.2d 326, 328-29 (Pa. Super. Ct. 1991).

constitutional right, federal or state, to a preliminary hearing.<sup>92</sup> As will be later discussed, the justification for requiring a second pre-trial procedure in the form of a preliminary hearing is eroding away and, as it currently stands, it no longer demonstrates the prosecution's chance of succeeding on the merits of the case.<sup>93</sup>

### III. CURRENT PROBLEMS FACING PENNSYLVANIA'S PRETRIAL PROCEDURES

Pennsylvania's preliminary arraignment fulfills the federal constitutional obligation to make a determination of probable cause in warrantless arrests.<sup>94</sup> However, the preliminary hearing no longer fulfills the goal of ensuring only meritorious cases reach trial.<sup>95</sup> Rather, the preliminary hearing has become redundant to the preliminary arraignment and acts as a prosecutorial rubberstamp. After discussing the problems facing Pennsylvania's preliminary arraignments and preliminary hearings, this article will propose certain reforms that can hopefully make these pretrial procedures more efficient for weeding out bad criminal cases.

#### A. *Admission of Hearsay Evidence*

In *Commonwealth v. Ricker*, the Pennsylvania Superior Court decided the Confrontation Clause is not violated where the prosecution proves a prima facie case at a preliminary hearing through hearsay alone.<sup>96</sup> The Confrontation Clause is encompassed in the Sixth Amendment and states, “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.”<sup>97</sup> The Confrontation Clause is meant to guarantee open and fair trials “by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.”<sup>98</sup> Other jurisdictions analyzing this issue have found that the federal Confrontation Clause does not apply to preliminary hearings.<sup>99</sup>

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92. *Commonwealth v. Ruza*, 511 A.2d 808, 810 (Pa. 1986) (citing *Commonwealth v. Mayberry*, 327 A.2d 86 (Pa. 1974); *Coleman v. Alabama*, 399 U.S. 1 (1970)).

93. PA. R. CRIM. P. 540; *see generally* *Riverside v. McLaughlin*, 500 U.S., 44, 56 (1991).

94. *McLaughlin*, 500 U.S. at 56.

95. *Id.*

96. *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. 2015).

97. U.S. CONST. amend. VI.

98. *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

99. *See, e.g., State v. Tillerman*, 218 P.3d 590, 594 (Utah 2009); *State v. Rivera*, 192 P.3d 1213, 1218 (N.M. 2008); *Sheriff v. Witzenburg*, 145 P.3d 1002, 1003 (Nev. 2006); *State v. Woinarowicz*, 720 N.W.2d 635, 641 (N.D. 2006); *State v. Sherry*, 667 P.2d 367, 376 (Kan. 1983); *State v. Jones*, 259 S.E.2d 120, 122 (S.C. 1979); *People v. Felder*, 129 P.3d 1072, 1074

*Commonwealth v. Ricker* demonstrates the consequences of not requiring confrontation at the preliminary hearing.<sup>100</sup> David Edward Ricker was charged with attempted murder, assault of a law enforcement officer, and aggravated assault stemming from a shootout with police.<sup>101</sup> Pennsylvania State Trooper Michael Trotta was dispatched to Ricker's West Hanover home after a truck, known to be driven by Ricker, allegedly ran over a neighbor's mailbox and lawn ornament.<sup>102</sup> Ricker's wife opened the family's driveway gate and consented for the officers to enter their driveway.<sup>103</sup> Trooper Trotta was warned that Ricker was drunk and carrying a gun but proceeded to drive up to the home where he was confronted by Ricker.<sup>104</sup> Ricker demanded Trooper Trotta leave the premises.<sup>105</sup> At one point Trooper Trotta drew his taser and Ricker slammed the police car door, preventing Trooper Trotta from exiting the vehicle.<sup>106</sup> When Trooper Trotta did leave the vehicle, Ricker drew a handgun.<sup>107</sup> Another Pennsylvania state trooper, Trooper Gingerich, then arrived on the scene.<sup>108</sup> Ricker proceeded to retreat to his garage where he procured an assault rifle.<sup>109</sup> Troopers Trotta and Gingerich drew their guns and demanded Ricker drop his rifle.<sup>110</sup> Ricker refused to comply with the officers' commands.<sup>111</sup> Trooper Trotta entered the garage where he saw Ricker leveling a rifle towards him.<sup>112</sup> Trooper Trotta then shot Ricker twice with his handgun.<sup>113</sup> Ricker fell to the ground, returned fire, and shot Trooper Trotta multiple times.<sup>114</sup>

Neither Trooper Trotta or Gingerich, the only officers with first-hand knowledge of the event, testified at the preliminary hearing.<sup>115</sup> The Commonwealth was likely trying to insulate Trooper Trotta from cross examination. Trooper Trotta was investigated by a grand jury for shooting Ricker, though he was ultimately

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(Colo. App. 2005); *Vanmeter v. State*, 165 S.W.3d 68, 74 (Tex. Crim. App. 2005); *State v. Padilla*, 329 N.W.2d 263, 268 (Wis. Ct. App. 1982).

100. *Ricker*, 120 A.3d at 353.

101. *Id.*

102. *Id.* at 351.

103. *Id.*

104. *Id.*

105. *Id.* at 352.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

absolved, because his actions arguably escalated the situation and caused an unnecessary shooting.<sup>116</sup> Trooper Trotta also had a history of police misconduct which the prosecution likely was trying to avoid, including a September 2013 incident where the state police settled a lawsuit alleging Trooper Trotta strip-searched a man without securing a search warrant.<sup>117</sup> Additionally, on May 16, 2015 Trooper Trotta was involved in a recorded incident, where a skateboarder was beaten after standing in a roadway and giving the officers the middle finger.<sup>118</sup> As a result of this incident of police brutality, Trotta's employment as a trooper was terminated for an unrelated "internal affair" and his partner was charged with official oppression, simple assault, and harassment.<sup>119</sup> Because of these questionable incidents involving Trooper Trotta, the prosecution was likely trying to avoid scrutiny of his behavior during Ricker's prosecution.

Instead of Trooper Trotta testifying at the preliminary hearing, the prosecution called Trooper Douglas Kelly who did not witness any first-hand criminal conduct, but instead testified about his second-hand investigation of the shooting and played for the magisterial district court a tape of an interview with Trooper Trotta.<sup>120</sup> Based solely on the hearsay evidence provided by Trooper Kelly of the event and the taped interview, the magistrate found a prima facie showing of facts for the charges and bound the case for trial.<sup>121</sup> In response, Ricker filed a pretrial writ of habeas corpus<sup>122</sup> which the trial court denied.<sup>123</sup> Ricker alleged he was denied his constitutional right to confront his witnesses because he was only able to cross-examine Trooper Kelly, but not able to cross-examine the taped statement made by Trooper Trotta. Ricker then appealed to the Pennsylvania Superior Court.<sup>124</sup> Ricker alleged the current rules of Pennsylvania Criminal procedure violated his

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116. See Matt Miller, *Man Who Was Strip-Searches Settles Excessive Force Lawsuit Against Fired State Trooper*, PATRIOT-NEWS (Aug. 16, 2016, 11:30 AM), [http://www.pennlive.com/news/2016/08/man\\_who\\_was\\_strip-searched\\_set.html](http://www.pennlive.com/news/2016/08/man_who_was_strip-searched_set.html).

117. *Id.*

118. See Michael Tanenbaum, *Pennsylvania Trooper Charged in Recorded Beating of Skater*, PHILLY VOICE (Feb. 13, 2016), <http://www.phillyvoice.com/pa-trooper-charged-beating-skater-after-obscene-gesture/>.

119. *Id.*

120. *Ricker*, 120 A.3d at 352.

121. *Id.*

122. Habeas corpus is defined as a challenge "for obtaining a judicial determination of the legality of an individual's custody. Technically, it is used in the criminal law context to bring the petitioner before the court to inquire into the legality of his confinement." *Habeas corpus*, BARRON'S LAW DICTIONARY 243 (6th ed. 2010).

123. *Ricker*, 120 A.3d at 352.

124. *Id.*

confrontation rights under both the state and federal constitutions.<sup>125</sup> Specifically, Rule 542 of the Pennsylvania Rules of Criminal Procedure regarding hearsay provides:

[h]earsay as provided by law shall be considered by the issuing authority in determining whether a prima facie case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.<sup>126</sup>

The comment to Rule 542 of the Pennsylvania Rules of Criminal Procedure further clarifies the extent to which hearsay is used:

[t]raditionally our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, especially with regard to the use of hearsay to establish the elements of a prima facie case. See the Pennsylvania Rules of Evidence generally, but in particular, Article VIII. Accordingly, hearsay, whether written or oral, may establish the elements of any offense. The presence of witnesses to establish these elements is not required at the preliminary hearing. But compare Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172 (Pa. 1990) (plurality) (disapproving reliance on hearsay testimony as the sole basis for establishing a prima facie case).<sup>127</sup>

Ricker primarily relied<sup>128</sup> upon the Pennsylvania Supreme Court plurality decision in *Commonwealth v. ex rel. Buchanan v. Verbonitz* to argue that the prosecution could not solely use hearsay evidence to advance past the preliminary hearing stage.<sup>129</sup> The

125. *Id.*

126. PA. R. CRIM. P. 542(E).

127. PA. R. CRIM. P. 542. cmt.

128. Brief for the Appellee at 10-11, *Commonwealth v. Ricker*, 135 A.3d 175 (2016) (No. 1693).

129. *Commonwealth ex. rel. Buchanan v. Verbonitz*, 581 A.2d 172, 174-75 (Pa. 1990) (plurality). Bill Cosby, former stand-up comedian and actor, raised a similar argument at a preliminary hearing in Pennsylvania where he is accused of rape. Memorandum of Law in Support of Petition for Writ of Habeas Corpus at 10-11, *Commonwealth v. Cosby*, 2016 WL 4254264 (2016) (No. CP-46-MD-3156-2015). Cosby's defense attorney described the testimony of the victim which was read by a criminal investigator as: "[a]fter hearing the weak, inconsistent and incredible evidence presented, it is clear why the prosecution did not allow its witness to speak and be confronted by the person she has accused. Instead, they chose to rely on an 11-year-old hearsay statement from that witness, riddled with numerous corrections and inconsistencies." Kaitlyn Foti, *Attorneys React to Bill Cosby Preliminary Hearing Decision*, TIMES HERALD (May 24, 2016, 4:34 PM), <http://www.timesherald.com/general-news/20160524/attorneys-react-to-bill-cosby-preliminary-hearing-decision>.



plurality in *Buchanan* decided “[w]hile the United States Supreme Court has not specifically held that the full panoply of constitutional safeguards (i.e., confrontation, cross-examination, and compulsory process) must attend a preliminary hearing, it has inferred as much in *Gerstein v. Pugh*.”<sup>130</sup> However, the inferred right to confrontation that the *Buchanan* plurality inferred from *Gerstein* was disapproved by a plurality of the United States Supreme Court in *Pennsylvania v. Ritchie* just three years earlier.<sup>131</sup> A plurality of the United States Supreme Court in *Ritchie* held the right of confrontation is a trial right, and does not implicate pretrial discovery.<sup>132</sup> Additionally, the other jurisdictions which have analyzed this question have determined the federal right to confrontation does not prevent the prosecution from advancing past the preliminary hearing while using only hearsay evidence.<sup>133</sup>

The Pennsylvania Supreme Court initially granted Ricker’s appeal but later dismissed the appeal as improvidently granted.<sup>134</sup> Dismissing the appeal meant that the Superior Court’s decision would continue to be controlling law throughout Pennsylvania. The dismissal featured a concurring opinion by Chief Justice Saylor and a dissenting opinion by Justice Wecht. In Saylor’s concurring opinion, the Chief Justice recognized the problems associated with allowing hearsay into preliminary hearings could better be addressed by “refinement in the rulemaking arena”<sup>135</sup> given that the court was presently too “deeply divided concerning the appropriate approach” for resolving the issue with a constitutional analysis.<sup>136</sup>

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130. *Buchanan*, 581 A.2d at 175.

131. *Pennsylvania v. Ritchie*, 480 U.S. 39, 54 (1987) (plurality). “The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.” *Id.* Surprisingly, neither the concurrence or dissent in *Verbonitz* recognized the decision in *Ritchie*. See generally *Buchanan*, 581 A.2d 172.

132. *Ritchie*, 480 U.S. at 52. While the decision in *Ritchie* was only a plurality, the United States Supreme Court has recognized the Confrontation Clause usually only applies to the trial. See *Barber v. Page*, 390 U.S. 719, 725 (1968) (finding “[t]he right to confrontation is basically a trial right”).

133. See *supra* note 99.

134. *Commonwealth v. Ricker*, 135 A.3d 175 (Pa. 2016), *appeal dismissed*, 170 A.3d 494 (Pa. 2017). The concurring opinion by Chief Justice Saylor recognized that the case “does not present a suitable vehicle by which to resolve the questions presented” largely because the prosecution did “not rely exclusively on hearsay in addressing the elements of the crimes with which [Ricker] was charged.” *Id.* at 495, 501-02 (Saylor, C.J., concurring).

135. For example, Chief Justice Saylor recognized the seemingly contradictory function of Rule 573(c), which allows the defendant to “cross-examine witnesses”, with Rule 573(e), which states that “[h]earsay evidence shall be sufficient to establish any element of an offense.” *Id.* at 507.

136. *Id.* at 504.

Justice Wecht filed the sole dissenting opinion and argued that while the court only granted allocatur<sup>137</sup> to resolve the confrontation clause issue, the court could still legally decide the appeal on the basis of statutory construction or procedural due process.<sup>138</sup> Additionally, Justice Wecht recognized that “[t]housands of preliminary hearings occur across this Commonwealth each year” and that the Superior Court’s decision would consequently be “imposed upon every defendant in this Commonwealth until the best case arrives on our doorstep.”<sup>139</sup>

Thus, the Pennsylvania Supreme Court will likely lack the opportunity to address this issue for the foreseeable future.<sup>140</sup> On October 26, 2017, shortly after the Supreme Court denied the appeal, David Ricker pleaded guilty to aggravated assault, drug possession, and leaving the scene of an accident in exchange for the prosecution withdrawing the count of attempted homicide and was subsequently sentenced to a period of incarceration of five to ten years, thereby ending his consequential impact on Pennsylvania jurisprudence.<sup>141</sup>

### B. *The Unavailable Witness Farce*

Pennsylvania’s laws for preliminary hearings and rules of criminal procedure allowing use of testimony from preliminary hearings creates a perverse incentive for defense attorneys to not adequately represent their clients by not fully cross-examining witnesses in anticipation that the witness may be unavailable at trial. The current laws also create an unintended consequence of discouraging

137. The question presented that that the Pennsylvania Supreme Court granted allocatur was: “Whether the Pennsylvania Superior Court wrongly held, in a published opinion of first impression, that a defendant does not have a state or federal constitutional *right to confront* the witness against him at a preliminary hearing and that a prima facie case may be proven by the Commonwealth through hearsay evidence alone, which is what the trial and magisterial district courts concluded in Petitioner’s case?” *Commonwealth v. Ricker*, 135 A.3d 175 (Pa. 2016) (emphasis added).

138. *Ricker*, 170 A.3d at 510-17 (Wecht, J., dissenting). However, a recent Pennsylvania Superior Court case in *Commonwealth v. McClelland* decided that neither substantive or procedural due process rights are violated by allowing hearsay to prove all the elements of the charged crimes. 165 A.3d 19 (Pa. Super. Ct. 2017). However, *McClelland* does carry the caveat that “[t]his decision does not suggest that the Commonwealth may satisfy its burden by presenting the testimony of a mouthpiece parroting multiple levels of rank hearsay.” *Id.* at 27. Thus, in Pennsylvania there appears to be at least *some* constitutional limit on the amount of hearsay that may be used at preliminary hearing.

139. *Ricker*, 170 A.3d at 509 (Wecht, J., dissenting).

140. *Commonwealth v. Ricker*, 120 A.3d 349, 354 (Pa. Super. Ct. 2015) (recognizing the “[a]ppellant’s claim [is] capable of evading review”).

141. Matt Miller, *East Shore Man Pleads Guilty, Gets Prison Term for Gun Battle with State Trooper*, PENN LIVE (Oct. 26, 2017), [http://www.pennlive.com/news/2017/10/east\\_shore\\_man\\_pleads\\_guilty\\_g.html](http://www.pennlive.com/news/2017/10/east_shore_man_pleads_guilty_g.html).

prosecutors from objecting to irrelevant questioning in fear that an objection will prevent the admission of the preliminary hearing testimony at trial if the witness were to become unavailable. The Pennsylvania rules of evidence permit at trial, as an exception to the hearsay rule,<sup>142</sup> the admission of previously recorded testimony from a preliminary hearing, provided that: (1) the witness responsible for that testimony is presently unavailable; (2) the defendant had counsel at the preliminary hearing; and (3) the defendant had a full and fair opportunity to cross-examine the witness during the earlier proceeding.<sup>143</sup> Problems associated with the admission of preliminary hearing testimony often intersect with the right to cross-examine under the Pennsylvania Constitution<sup>144</sup> and the United States Constitution.<sup>145</sup> However, because the credibility of a witness is not at issue during a preliminary hearing,<sup>146</sup> the nature of the questions the defense attorneys are allowed to ask change and a full and fair opportunity to cross-examine the declarant can be inhibited.<sup>147</sup>

In Pennsylvania, it is difficult to prove that a defendant did not have an opportunity to fully and fairly cross-examine a witness at a preliminary hearing. Courts will usually only find a defendant lacked such an opportunity when the prosecution fails to disclose to the defense prior to the preliminary hearing that the witness (1) gave prior inconsistent statements to the police, (2) has a criminal conviction that is admissible to attack their credibility,<sup>148</sup> (3) is

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142. PA. R. EVID. 802. Hearsay is ordinarily not admissible during a criminal case. *Id.*; see also *Hearsay rule*, BARRON'S LAW DICTIONARY 246 (6th ed. 2010) (stating that the hearsay rule "declares not admissible as evidence any statement other than that by a witness while testifying at the [current] hearing and offered into evidence to prove the truth of the matter asserted").

143. Commonwealth v. Bazemore, 614 A.2d 684, 685 (Pa. 1992).

144. P.A. CONST. art. I, § 9. "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel . . . [and] to be confronted with the witnesses against him." *Id.*

145. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense." *Id.* The Confrontation Clause has been interpreted to guarantee the right to cross-examine witnesses. *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965).

146. Commonwealth v. Carmody, 799 A.2d 143, 149 (Pa. Super. Ct. 2002).

147. See, e.g., discussion *infra* pp. 19-20 and note 146.

148. PA. R. EVID. 609(a). Evidence of prior conviction is admissible "for the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, must be admitted if it involved dishonesty or false statement." *Id.* However, when the criminal conviction is public record and accessible to the defense, a failure by the prosecution to provide evidence of the conviction to the defendant prior to the preliminary hearing will not deprive the defendant of a full and fair opportunity to cross examine witness. Commonwealth v. Brown, 872 A.2d 1139, 1148 (Pa. 2005).

cooperating for a more lenient sentencing,<sup>149</sup> or (4) is under investigation for the same crime currently being litigated.<sup>150</sup> Ultimately, what is important is whether “the defense has been denied access to vital impeachment evidence either at or before the time of the prior proceeding at which that witness testified.”<sup>151</sup> However, a failure or inability to impeach a witness through other more subjective means, like questioning perception, memory, or clarity<sup>152</sup> will not prevent the defendant from being provided the opportunity to fully and fairly cross-examine a witness.<sup>153</sup>

The cases of *Commonwealth v. Johnson* and *Commonwealth v. Douglas* demonstrate how attorneys are required to arbitrarily ask an undetermined amount of questions, tangentially related to the witnesses’ credibility, in order for the testimony to count as full and fair opportunity to cross-examine.<sup>154</sup> In *Commonwealth v. Johnson*, a murder prosecution relied upon the admission of preliminary hearing testimony for a witness who was no longer available for trial.<sup>155</sup> During the preliminary hearing the defense attorney attempted, and failed, to elicit testimony regarding the credibility of the key prosecution witness:

BY APPELLEE COUNSEL:

Q. You were aware that Doug had beaten up Vera a number of times; is that correct?

COMMONWEALTH:

Objection.

THE COURT:

Sustained.

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149. *Commonwealth v. Smith*, 647 A.2d 907, 915 (Pa. Super. Ct. 1994).

150. *Commonwealth v. Bazemore*, 614 A.2d 684, 687 (Pa. 1992).

151. *Id.* at 688. Impeachment is defined as: “to call into question the veracity of the witness by means of evidence offered for that purpose, or by showing that the witness is unworthy of belief.” *Impeachment*, BARRON’S LAW DICTIONARY 256 (6th ed. 2010).

152. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

153. *Commonwealth v. Thompson*, 648 A.2d 315, 322 (Pa. 1994) (finding “[t]he Commonwealth may not be deprived of its ability to present inculpatory evidence at trial merely because the defendant, despite having the opportunity to do so, did not cross-examine the witness at the preliminary hearing stage as extensively as he might have done at trial”), *abrogated on other grounds by Commonwealth v. Widmer*, 744 A.2d 745 (Pa. 2002).

154. *See Commonwealth v. Douglas*, 737 A.2d 1188 (Pa. 1999); *Commonwealth v. Johnson*, 758 A.2d 166 (Pa. Super. Ct. 2000).

155. *Johnson*, 758 A.2d at 168.

BY APPELLEE COUNSEL:

Q. Ma'am, after the separation of Doug and Vera, you were aware that Doug had beaten up Vera; is that correct?

COMMONWEALTH:

Objection.

THE COURT:

Sustained.

BY APPELLEE COUNSEL:

Q. While Vera was living at your mom's house after the separation, did Vera tell you-

THE COURT:

Save it for trial.

BY APPELLEE COUNSEL:

Q. Ma'am, what was your state of mind in regard to Doug and Vera based upon what Vera had told you?

COMMONWEALTH:

Objection.

THE COURT:

Sustained.<sup>156</sup>

The defense attorney was asking questions relevant for a trial but irrelevant for a preliminary hearing, so the Commonwealth objected, and the court rightly sustained the objections.<sup>157</sup> At trial, when this key witness became unavailable, the Commonwealth admitted the evidence of the preliminary hearing testimony arguing the defendant was provided a full and fair opportunity to cross-examine the witness.<sup>158</sup> However, the Pennsylvania Superior Court ruled that the testimony was inadmissible because the Commonwealth continually objected to questions regarding credibility and

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156. *Id.* at 172.

157. *Id.* at 172.

158. *Id.* at 170.

deprived the defendant of the opportunity to fully and fairly cross-examine the witness.<sup>159</sup> This demonstrates how the prosecution was punished and the defense was rewarded for how they handled an irrelevant line of questioning.<sup>160</sup> While the questions bearing on credibility were not relevant at the preliminary hearing and the prosecutor was justified in objecting to the line of questioning, the prosecution was still punished at trial as the testimony was not admissible.

On the other hand, *Commonwealth v. Douglas* demonstrates how when the defense attorney elects to not follow a line of questioning fearing objections from the prosecution, the testimony could still be admissible at trial.<sup>161</sup> This homicide case hinged upon a key witness to a murder who testified at the preliminary hearing but was later unavailable at the time of trial.<sup>162</sup> In asserting the defendant was deprived of the opportunity to fully and fairly cross-examine the witness, the defendant pointed to the following transcript from the preliminary hearing:

Defense Attorney: Now, you're presently in custody, is that correct?

McLaurin: Yes.

Defense Attorney: For what?

Prosecutor: Objection.

Defense Attorney: Well, are you awaiting trial or have you been sentenced?

Court: As to whether he's presently in custody, the objection is sustained.

Defense Attorney: I'll get it on discovery anyhow.<sup>163</sup>

This line of questioning was meant to lead towards whether the witness had pending robbery and burglary charges.<sup>164</sup> Because these preliminary hearing questions bearing upon credibility were objected to by the prosecutor, the defense attorney abandoned the

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159. *Id.* at 172, 174.

160. *Id.* at 172, 174; *see also* *Commonwealth v. Carmody*, 799 A.2d 143, 149 (Pa. Super. Ct. 2002) (holding that credibility is not at issue during a preliminary hearing).

161. *Commonwealth v. Douglas*, 737 A.2d 1188, 1196 (Pa. 1999).

162. *Id.*

163. *Id.*

164. *Id.*

line of questioning and never asked about the pending charges.<sup>165</sup> The Pennsylvania Supreme Court ruled that the prior testimony would be admissible because the defense attorney simply “chose not to pursue that line of questioning.”<sup>166</sup> Here, the defense attorney was required to ask questions, which almost certainly would have been objected to by the prosecutor, for any hope of keeping out the testimony if the witness were to become unavailable at trial. A defendant will only be considered to have been denied the opportunity to fully and fairly cross-examine a witness when the court or Commonwealth causes the denial.<sup>167</sup> Therefore, if the defense attorney is interested in ensuring the testimony does not become admissible in the case if the witness becomes unavailable at trial, the defense attorney is required to ask irrelevant questions bearing on credibility and be denied an answer.<sup>168</sup>

### C. *Probable Cause v. Prima Facie Legal Standard Confusion*

Pennsylvania Courts of Common Pleas and magistrates diminish the distinction between preliminary arraignments and preliminary hearings by conflating the probable cause<sup>169</sup> and prima facie legal standards.<sup>170</sup> In *Commonwealth v. Smith* the Pennsylvania Superior Court conflated prima facie and probable cause by stating “all that was necessary for the Commonwealth to do was to show a prima facie case, i.e., sufficient probable cause to believe that the defendant had committed the offense.”<sup>171</sup> The Superior Court in *Commonwealth v. Morman* described prima facie as “sufficient probable cause to believe, that the person charged has committed the offence stated.”<sup>172</sup> Even the Pennsylvania Supreme Court has described preliminary hearings as requiring “sufficient probable cause to believe that the person charged has committed the offense stated.”<sup>173</sup>

The Philadelphia County District Attorney’s office implemented a rearrest policy in 2000, causing further confusion over the prima

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (finding probable cause is a matter of probability based on whether a prudent person would believe that an individual committed a crime based on reasonably trustworthy facts and circumstances).

170. *Commonwealth v. Wojdak*, 466 A.2d 991, 996 (Pa. 1983) (finding a prima facie case must show “the existence of each of the material elements of the charge is present”).

171. *Commonwealth v. Smith*, 244 A.2d 787, 789 (Pa. Super. Ct. 1968).

172. *Commonwealth v. Morman*, 541 A.2d 356, 359 (Pa. Super. Ct. 1988).

173. *Wojdak*, 466 A.2d at 996.

facie and probable cause standards.<sup>174</sup> The Philadelphia rearrest policy stated that if a magistrate dismissed charges at a preliminary hearing, police could rearrest the suspect, thus subjecting them to another preliminary arraignment, the need to reacquire money for bail, and another preliminary hearing.<sup>175</sup> This policy was likely an attempt by the district attorney to magistrate shop; the Commonwealth could rearrest until a more prosecution-friendly magistrate received the case. The legal basis for the District Attorney's practice was based on the idea that since a prima facie case is a higher standard than a probable cause standard, a magistrate finding there was not a prima facie case would not preclude a future arrest based upon probable cause.<sup>176</sup> For an example of this policy, in the *Stewart* case, a magistrate at a preliminary hearing dismissed the case because of testimony that, even if believed to be credible, would not support a conviction as a matter of law.<sup>177</sup> Despite the magistrate's ruling, the defendant was immediately rearrested in the courtroom and jailed for an additional two weeks because he could not post bail.<sup>178</sup> Philadelphia's re-arrest policy, which placed defendants in a legal purgatory, was challenged by a class action suit which argued the policy violated the Fourth Amendment because the subsequent arrests were not based upon probable cause.<sup>179</sup> The federal district court handling the civil rights claim against the district attorney's office found that the Philadelphia District Attorney was "usurping" the role of the magistrate.<sup>180</sup> The court reasoned that because the magistrate did not find a prima facie case and refused to hold the charges for trial, it was not possible that the re-arrest could be based upon probable cause.<sup>181</sup>

Upon appeal to the Third Circuit, the Court of Appeals found that the re-arrest policy did not violate the Fourth Amendment.<sup>182</sup> The court recognized that a prima facie case at the preliminary hearing created a "different and greater assurance" of guilt than the

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174. See *Stewart v. Abraham*, 275 F.3d 220 (3d Cir. 2001). The district court could not discern the difference between probable cause and prima facie. *Stewart v. Abraham*, No. 00-2425, 2000 WL 1022958, at \*6 (E.D. Pa. 2000).

175. *Stewart*, 275 F.3d at 224.

176. See discussion on difference between probable cause and prima facie *supra* Section II.B.

177. *Id.* at 236 (McKee, J., concurring).

178. *Id.* at 236-37.

179. *Id.* at 224.

180. *Stewart v. Abraham*, No. 00-2425, 2000 WL 1022958, at \*9 (E.D. Pa. 2000).

181. *Id.* at \*7. Much of the district court's confusion was likely caused by the "district Attorney [being] unable to articulate any practical distinction between the terms probable cause and *prima facie* case" in briefing the case. *Id.* (emphasis added).

182. *Stewart*, 275 F.3d at 231.



probable cause standard required at preliminary arraignments.<sup>183</sup> The court reasoned it would be reasonable to re-arrest even if a magistrate did not find a *prima facie* case because the probable cause arrest standard is lower than the magisterial *prima facie* standard.<sup>184</sup> Just because a higher legal standard was not met, here the *prima facie* standard, does not preclude a finding that a lower standard could be fulfilled, here the probable cause arrest standard. Further, a prosecutor's determination of probable cause can consider more inadmissible or unadmitted information<sup>185</sup> than the magistrate's decision for a *prima facie* case.<sup>186</sup> Therefore, because the re-arrest policy does not violate the 4th Amendment, the preliminary hearing creates a bizarre scenario where the defendant has everything to lose and no opportunity to win. Even if the defendant does prevent the charges from being held for trial, the defendant can simply be rearrested based on the probable cause from the initial arrest.<sup>187</sup>

#### *D. Reform Outside of Pennsylvania*

The State of Wisconsin acts as a case study for how another state has called into question the benefits of preliminary hearings. In 2011, a bill was introduced in the Wisconsin legislature seeking to reform the state's preliminary hearings.<sup>188</sup> The bill was meant to streamline the procedure by allowing unlimited use of hearsay.<sup>189</sup> Prior to the bill's passage there was considerable debate regarding the merits of the bill and whether allowing unlimited hearsay would undermine a defendant's rights by preventing defendants from confronting the testimony of his accusers at preliminary hearings.<sup>190</sup> During the debate over the usefulness of the preliminary hearing, the Wisconsin Attorney General stated he believed reform would not be appropriate because of a perceived lack of utility in the

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183. *Id.* at 229.

184. *Id.*

185. *Id.* Prosecutors can consider any information a reasonable prudent man would consider when determining if probable cause exists for an arrest. *McKibben v. Schmotzer*, 700 A.2d 484, 492 (Pa. 1997).

186. *Stewart*, 275 F.3d at 229. A magistrate may only consider legally admissible evidence at a preliminary hearing. *Commonwealth ex. rel. Buchanan v. Verbonitz*, 581 A.2d 172, 174 (Pa. 1990) (plurality).

187. *Stewart*, 275 F.3d at 229.

188. S.B. 399, 100th Leg., Reg. Sess. (Wis. 2011).

189. *Id.*

190. Joe Forward, *Supreme Court Upholds New Law: Hearsay Okay at Preliminary Hearings*, STATE BAR OF WIS. (July 10, 2014), <http://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=11657>.

preliminary hearing.<sup>191</sup> Rather, the Attorney General advocated for the complete elimination of the preliminary hearing.<sup>192</sup> The Attorney General recognized that the preliminary hearing is statutorily created and is not guaranteed by the state or federal constitution.<sup>193</sup> The Attorney General alleged the preliminary hearing was an inefficient system where witnesses were required to be subpoenaed to multiple proceedings which were often postponed or waived by the defendant because the threshold for holding charges is so low.<sup>194</sup> The Attorney General also argued that by eliminating the preliminary hearing, the entire criminal prosecution process would be expedited and the defendant could be provided discovery earlier, because discovery is usually not provided until after the preliminary hearing.<sup>195</sup> Ultimately, Wisconsin chose to keep the preliminary hearing and passed the bill allowing unlimited use of hearsay.<sup>196</sup> By allowing unlimited use of hearsay, Wisconsin's preliminary hearing did not provide the defendant with the ability to confront witnesses and diminished the utility of the preliminary hearing as a forward looking procedure meant to screen out cases unlikely to result in a conviction.<sup>197</sup> The bill eventually survived a constitutional challenge alleging the bill violated the Confrontation Clause in a 2014 case before the Wisconsin Supreme Court.<sup>198</sup>

#### IV. PROPOSED REMEDIES TO PENNSYLVANIA'S PRETRIAL DETENTION

While there are many problems facing Pennsylvania's pretrial detention system, preliminary arraignments and preliminary hearings are still great tools for protecting individual rights and ensuring only legitimate cases make it to trial. Rather than abandoning the preliminary hearing as has been proposed in some jurisdictions,<sup>199</sup> legislative reforms to the preliminary hearing could restore its utility and help prevent defendants from being burdened by a prosecution unlikely to result in a conviction.

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191. John Byron Van Hollen, Wis. Att'y Gen., Remarks to the Senate Committee on Judiciary, Utilities, Commerce, and Government Operations (Feb. 8, 2012) [hereinafter *Prepared Remarks*].

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Forward, *supra* note 190.

197. See discussion on utility of a forward looking preliminary hearings *supra* Section II.A.3.b.

198. *State v. O'Brien*, 850 N.W.2d 8, 21 (Wis. 2014).

199. *Prepared Remarks*, *supra* note 191.

A. ANALYSIS OF PROBLEMS FACING PENNSYLVANIA'S PRETRIAL PROCEDURES

1. *Analysis of Use of Hearsay*

While confrontation at a preliminary hearing might not be constitutionally required, there are dire consequences for its absence.<sup>200</sup> A lack of confrontation at a preliminary hearing would undermine the purpose of the preliminary hearing; preliminary hearings should ensure accused individuals are not unnecessarily burdened by a prosecution unlikely to succeed on its merits.<sup>201</sup> Admission of hearsay flips the purpose of the preliminary hearing from a forward looking hearing procedure into another backward hearing procedure.<sup>202</sup> If confrontation of witnesses is not required at this early portion of the criminal procedure, the preliminary hearing is essentially fulfilling the same function as the preliminary arraignment, to act as a backwards looking hearing, only determining if the initial arrest was justified.<sup>203</sup> The preliminary hearing will fail to ascertain if the prosecution is likely to succeed in near trial like conditions.<sup>204</sup>

In the *Ricker* case, if hearsay was not allowed at the preliminary hearing, the prosecution would have struggled to advance the case past the preliminary hearing considering Trooper Trotta's history of dishonesty.<sup>205</sup> But under Pennsylvania's current law, because Trooper Trotta's prerecorded testimony described the elements of the crimes necessary to advance Ricker's preliminary hearing, the prosecution could merely play the prerecorded statement, denying the defendant the ability to cross-examine Trooper Trotta potentially showing Ricker's shooting was in self-defense. A completely incredible witness like Trooper Trotta can have his version of events played over a tape to fulfill each element of a crime and magistrates are not allowed to weigh the credibility of the prerecorded

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200. *California v. Green*, 399 U.S. 149, 158 (1970). The Court found that confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

*Id.* (internal footnotes omitted).

201. *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, *supra* note 54, at 783-84.

202. *Id.* at 780.

203. *Id.*

204. *Id.*

205. *See Miller*, *supra* note 116.

statements.<sup>206</sup> Under the current law, the preliminary hearing is essentially a rubberstamp for the prosecution and fails to evidence the prosecution's chances for success beyond what is proven at the preliminary arraignment. The usefulness of the preliminary hearing is questionable especially considering the high social-economic costs it creates for defendants.<sup>207</sup> In addition to monetary costs where defendants are required to pay for attorneys, if defendants miss a preliminary hearing their bond will be forfeited and they will be sent back to jail.

Because the Pennsylvania Supreme Court elected not to decide the issue, the limitless use of hearsay will continue to be allowed and drastically undermine the utility of the preliminary hearing.<sup>208</sup> As previously discussed, Pennsylvania's preliminary hearing is a forward looking procedure meant to ensure the prosecution is reasonably likely to succeed at trial.<sup>209</sup> By allowing a case to advance past the preliminary hearing when the prosecution has only introduced hearsay evidence, it is difficult to argue only those likely to be convicted would have their cases held for trial.

## 2. *Analysis of Unavailability of Witnesses*

Under the current legal regime, a level of gamesmanship is introduced into the legal system where prosecutors must selectively choose when to object, on the basis of relevance, to a defense attorney's questioning regarding credibility. Prosecutors are encouraged to not play by the rules of evidence and allow irrelevant cross-examination in order to not preclude the admission of preliminary hearing testimony if the witness becomes unavailable at trial.<sup>210</sup> Similarly, defense attorneys are encouraged to question witnesses on a topic completely irrelevant to a preliminary hearing, credibility, and any of this testimony can be introduced if the witnesses testify inconsistently at trial.<sup>211</sup> Since the purpose of the preliminary hearing is not to establish credibility, the threat of an objection

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206. *Commonwealth v. Carmody*, 799 A.2d 143, 149 (Pa. Super. Ct. 2002) (holding that a preliminary hearing magistrate is not empowered to make credibility determination).

207. FIFTH JUD. DISTRICT PA. ANN. REP. (2014), <https://www.alleghecourts.us/downloads/Annual%20Reports/2014.pdf>. In Allegheny County in 2014 alone, 983 bond forfeitures occurred as a result of an individual misting their preliminary hearing. *Id.*

208. See *supra* note 99 and accompanying text.

209. *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, *supra* note 54, at 779.

210. See also *supra* notes 157-160 and accompanying text.

211. PA. R. EVID. 804.

whenever a question even remotely relating to credibility is asked hangs over the heads of defense attorneys.<sup>212</sup>

If a prosecutor were to anticipate the witness was unlikely to appear at trial, either because of old age, sickness, or a reputation for being unreliable, the prosecutor could purposefully not object to questions on credibility and the defendant could be deprived of the opportunity to confront the witness at trial. However, if the prosecutor anticipates the defendant will be available at trial, the prosecutor will be required to object to any question bearing upon credibility or the witness may be subjected to impeachment at trial for testifying inconsistently.<sup>213</sup> As a result, the preliminary hearing is a charade where the defense attorney is obligated to ask questions outside of the scope of the hearing, the prosecutor is obligated to object to those questions, and the magistrate is obligated to grant the objection.<sup>214</sup> This type of gamesmanship is unbecoming and unfitting for a fair legal system and should be discouraged as it undermines the justice system and cross-examination as a tool for discovering the truth.<sup>215</sup>

### 3. *Analysis of Probable Cause v. Prima Facie Legal Standard Confusion*

If courts are unclear on the definitions of prima facie and probable cause, the reason for two distinct pretrial probability of guilt determinations is drastically undermined. The probable cause determination being made at a preliminary arraignment is supposed to demonstrate the arrest was justified and that there is a likely probability the arrestee committed the crime.<sup>216</sup> In contrast, a prima facie determination is required at the preliminary hearing because by requiring each element of a crime to be shown, the preliminary hearing should eliminate cases fatally flawed where a required element to a crime cannot be proven.<sup>217</sup> The incremental increase in the burden of proof required to be shown by the prosecution helps justify prolonged pretrial incarceration.<sup>218</sup> A failure to appreciate the distinction between the two procedures

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212. See *supra* notes 149-152 and accompanying text.

213. PA. R. EVID. 613. A witness may be examined concerning a prior inconsistent statement made by the witness to impeach the witness's credibility. *Id.*

214. See, e.g., *Commonwealth v. Douglas*, 737 A.2d 1188, 1196 (Pa. Super. Ct. 2000).

215. See *California v. Green*, 399 U.S. 149, 158 (1970) (describing cross-examination as "the greatest legal engine ever invented for the discovery of truth").

216. *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, *supra* note 54, at 776.

217. *Id.* at 779.

218. *Id.* at 784.

undermines the preliminary arraignment's purpose as a backwards looking procedure meant to determine whether the arrest was justified and the preliminary hearing as a forward looking procedure, ensuring individuals are not needlessly dragged through the criminal justice system in a case destined to fail at trial.<sup>219</sup>

### *B. Proposed Reforms for Pennsylvania*

Reforms to Pennsylvania's preliminary hearing should revolve around making the preliminary hearing more like a real trial.<sup>220</sup> In order to restore the utility of preliminary hearings, the Pennsylvania legislature could eliminate the use of hearsay at preliminary hearings. Additionally, the legislature could allow magistrates to consider a witness's credibility while testifying at a preliminary hearing. Finally, grand juries should see greater use to avoid the embarrassing hassle of being criminally investigated.

Legislatively eliminating the use of hearsay at preliminary hearings would instantly resolve many of the issues plaguing the preliminary hearing. A legislative solution is probably the only potential solution because, as previously discussed, the Confrontation Clause is only a trial right and not a pretrial right.<sup>221</sup> The use of hearsay at preliminary hearings in Pennsylvania is purely statutory construction and consequently could be restricted by the legislature.<sup>222</sup> While eliminating the use of hearsay would increase the burden on the prosecution in preparing for preliminary hearings, it would also ensure the prosecution is not required to prepare for trial for a case unlikely to succeed. As a compromise with the prosecution for a more stringent preliminary hearing, the legislature could extend the deadline for being required to prove a prima facie case at a preliminary hearing.<sup>223</sup> By expanding the period of time for the prosecution to prepare for a preliminary hearing, the prosecution could ensure that the witnesses who would actually testify. By passing these reforms, the legislature could ensure a more trial-like and forward-looking preliminary hearing, allowing prosecutors to focus on cases likely to result in a conviction.

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219. *Id.* at 775-76, 779.

220. *See supra* note 135 (describing how Chief Justice Saylor of the Pennsylvania Supreme Court called for "refinement in the rulemaking arena" in light of the *Ricker* decision).

221. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 54 (1987) (plurality).

222. PA. R. CRIM. P. 542.

223. *See* PA. R. CRIM. P. 540. Currently, preliminary hearings must be scheduled within fourteen days if the defendant is incarcerated and twenty-one days if the defendant posted bail. *Id.*

Another legislative solution to reform to the preliminary hearing would be to allow magistrates to consider the credibility of witnesses. Currently, magistrates are not allowed to consider the credibility of witnesses unless the witness is patently unbelievable.<sup>224</sup> By allowing a magistrate to consider the credibility of a witness the preliminary hearing would share more similarities with a trial. Allowing magistrates to recognize the weakness of a case based on the lack of credibility in testifying witnesses would allow weak cases to be dismissed or worked out at an earlier stage in the criminal proceedings. Additionally, because the burden at the preliminary hearing is still a relatively low *prima facie* standard, the consideration of credibility would not be a major hindrance to prosecutions. Allowing consideration of credibility at preliminary hearings would allow magistrates to not hold the charges for trial, thus saving defendants from the burden of pretrial detention.

Finally, the use of indicting grand juries could be greatly expanded in Pennsylvania. Pennsylvania's current use of grand juries is greatly limited because they are only allowed to be used when witnesses are being intimidated.<sup>225</sup> A movement towards the expansion of indicting grand juries would encourage witnesses to testify without the coercive pressures of witness intimidation that occurs in an open court proceeding like a preliminary hearing. Additionally, the secretiveness of grand juries would save the innocently accused from the humiliation of being publicly accused of a crime, when no such crime has occurred. All three of these reforms could be accomplished through legislative action and could potentially save individuals time from being erroneously accused of a crime, and save the Commonwealth money from wasted prosecution costs.

## V. CONCLUSION

Preliminary hearings in Pennsylvania are not protecting the innocent. Constitutional jurisprudence on pretrial detention does not provide an adequate basis for protecting defendants from unjust prosecutions. In Pennsylvania, the use of hearsay at preliminary hearings and the confusing distinction between probable cause and *prima facie* undermines the utility of the preliminary hearing as a forward looking pretrial procedure. Additionally, magistrates not weighing credibility at preliminary hearings adds a sense of

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224. *Liciaga v. Lehigh County*, 566 A.2d 246, 251 (Pa. 1989) (citing *Pennsylvania Benchbook for Criminal Proceedings*, Preliminary Hearing -- Procedure in Court Cases, § I, 5 at II-G-19, Scope of the Defense Presentation & Cross-Examination, (Pennsylvania Conference of State Trial Judges 1986)).

225. PA. R. CRIM. P. 556.

gamesmanship not warranted in the truth-finding mission of the criminal justice system. Presently, resources on prolonged prosecutions are wasted when cases can easily survive a preliminary hearing, but are likely to fail at trial.

Pennsylvania can resolve many of these problems by legislatively excluding hearsay from preliminary hearings and allowing magistrates to consider the credibility of witnesses. Preliminary hearings will be drastically more useful compared to their current role as a prosecutorial rubberstamp. Additionally, an expanded use of grand juries could entirely avoid many of the problems associated with preliminary hearings. By implementing these reforms and remembering the preliminary hearing's role as a forward looking screening procedure, purposeless incarcerations of individuals like Kalief Browder can be avoided.



# State Anti-BDS Laws Counteracting the BDS Movement . . . And the Constitution

Sara J. Watkins\*

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## I. INTRODUCTION

When two groups of people have claims to the same piece of land, conflict is likely to ensue. For the Israelis and the Palestinians, the

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\* Sara Watkins is a 2018 Juris Doctor candidate at Duquesne University School of Law. She graduated from Washington & Jefferson College in 2015 with a B.A. in Political Science and Studio Art. The author would like to thank Professor Bruce Ledewitz for all of his guidance and support.

conflict over a piece of land around the size of the state of New Jersey has created one of the longest standing conflicts in modern times.<sup>1</sup> While the United States has attempted to mediate peace discussions between the two groups for decades, Israelis and Palestinians continue to feud over the small piece of land.<sup>2</sup> Energized by the resentment that Israel occupies Palestinian land, the Palestinians devised an international campaign that encourages individuals and companies to put economic and political pressure on Israel.<sup>3</sup> These pressures take the form of boycotts, divestments, and sanctions, which inspired the movement's name (the "BDS Movement").<sup>4</sup>

In order to protect and stand by Israel, several states have enacted anti-BDS laws that sanction any company that supports the BDS Movement by boycotting Israel.<sup>5</sup> Subsequently, the federal government also implemented legislation to shield Israel from the dangers of boycotts.<sup>6</sup> While state anti-BDS legislation is rooted in strong public policy to protect the states' economies and to protect the nation's alliance with Israel,<sup>7</sup> the anti-BDS laws raise constitutional issues. Since the state anti-BDS laws take a stand on foreign relations, and foreign policy is typically within the federal government's authority and not within the states' authority,<sup>8</sup> the state anti-BDS laws raise three constitutional issues: (1) whether they impede on the federal government's exclusive power to conduct foreign policy,<sup>9</sup> (2) whether they violate the dormant Foreign

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1. See Max Singer, *What the Fight in Israel is All About*, SIMPLETOREMEMBER (Nov. 8, 2002), <http://www.simpletoremember.com/articles/a/what-the-fight-in-israel-is-all-about/>.

2. See generally *The Oslo Accords and the Arab-Israeli Peace Process*, STATE: HISTORY, <https://history.state.gov/milestones/1993-2000/oslo> [hereinafter *Oslo Accords*] (last updated 2016).

3. *Intro to BDS*, BDS MOVEMENT, <https://bdsmovement.net/what-is-bds> [hereinafter *Intro to BDS*] (last updated 2017).

4. *Id.*

5. See generally Yonah Jeremy Bob, *How US States are Countering the BDS Movement Against Israel*, JERUSALEM POST (Oct. 17, 2016), <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/The-success-story-of-US-state-legislatures-steadily-hammering-away-at-BDS-470233>.

6. Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C.A. § 4452 (West 2016).

7. See Rubio Commends Florida Legislature for Passing Law Targeting Anti-Israeli Boycotts, SENATE: RUBIO (Feb. 24, 2016), <http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=E67F5281-3B91-4A0C-ADD5-FE3B626EF200>.

8. See generally U.S. CONST. art. I, § 10, cl. 1.

9. "Power over external affairs is not shared by the States; it is vested in the national government exclusively." Michael John Garcia & Todd Garvey, *State and Local Economic Sanctions: Constitutional Issues*, CONG. RES. SERV. 1, 5 (2013) (quoting *U.S. v. Pink*, 315 U.S. 203, 232 (1942)); see U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. II, § 2, cl. 1.

Commerce Clause,<sup>10</sup> and (3) whether they are preempted by federal law.<sup>11</sup> While this article examines the aforementioned constitutional issues, anti-BDS laws raise First Amendment challenges, as well.<sup>12</sup>

Even though states have implemented laws similar to the anti-BDS laws at various times throughout the past three decades to take a stand on foreign issues, there is surprisingly little case law addressing their constitutionality.<sup>13</sup> When determining whether the anti-BDS laws are unconstitutional, the Supreme Court of the United States (the “SCOTUS”) would likely look to the limited number of lower court cases that analyze other state sanctions, and its own narrow authority on the preempted state sanction.<sup>14</sup>

Due to the complex nature of the Israeli-Palestinian conflict, it is unlikely that the states are permitted to take a stand on the dispute by implementing anti-BDS laws.<sup>15</sup> Specifically, state anti-BDS laws likely interfere with the president’s ability to conduct diplomacy between the Israelis and Palestinians.<sup>16</sup> In addition, since the anti-BDS laws discriminate against foreign commerce, the state

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10. The Constitution grants Congress the authority to regulate interstate and foreign commerce. U.S. CONST. art. I, § 8, cl. 3. Even when Congress is silent, the Commerce Clause is interpreted to “invalidate state laws that inappropriately interfere with interstate or foreign commerce,” which is known as the dormant Commerce Clause. Joel P. Trachtman, *Non-actor States in U.S. Foreign Relations?: The Massachusetts Burma Law*, 92 AM. SOC’Y INT’L L. PROC. 350, 354 (1998).

11. Preemption is defined as: “the principal (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.” *Preemption*, BLACK’S LAW DICTIONARY (10th ed. 2014); see U.S. CONST. art. VI, cl. 2.

12. In January of 2018, a federal judge in Kansas issued an injunction halting the enforcement of the state’s anti-BDS law by opining that the law violates First Amendment freedoms to participate in boycotts. *US: Kansas Judge Temporarily Suspends Anti-BDS Law*, ALJAZEERA (Jan. 30, 2018), <https://www.aljazeera.com/news/2018/01/kansas-judge-temporarily-suspends-anti-bds-law-180130181725634.html>; see also *First Amendment—Political Boycotts—South Carolina Disqualifies Companies Supporting BDS From Receiving State Contracts.—S.C. Code Ann. § 11-35-5300 (2015)*, 129 HARV. L. REV. 2029, 2031 (2016) [hereinafter *Political Boycotts*].

13. See Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT’L L. & BUS. 563, 565 (1993). Few federal courts have reviewed state sanctions and determined that they were unconstitutional, while one state court ruled that a local sanction was constitutional; additionally, the SCOTUS ruled that a state sanction was preempted by federal law but skirted the issues of whether the state sanction interfered with the federal government’s authority to conduct foreign affairs and whether it violated the dormant Foreign Commerce Clause. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 375-77 (2000); *Nat’l Foreign Trade Council, Inc. v. Giannoulis*, 523 F. Supp. 2d 731, 750 (N.D. Ill. 2007); *Bd. of Trs. of the Emps.’ Ret. Sys. v. Baltimore*, 562 A.2d 720, 757 (Md. 1989).

14. See, e.g., *Crosby*, 530 U.S. at 363; *Giannoulis*, 523 F. Supp. 2d at 733; *Bd. of Trs. of the Emps.’ Ret. Sys.*, 562 A.2d at 720.

15. See generally Singer, *supra* note 1.

16. See *Crosby*, 530 U.S. at 381; *Giannoulis*, 523 F. Supp. 2d at 745.

anti-BDS laws likely violate Congress' foreign commerce power.<sup>17</sup> However, since the federal government also isolates companies that boycott Israel, it is unlikely that the state anti-BDS laws are preempted by existing federal legislation.<sup>18</sup> Moreover, the SCOTUS should thoroughly analyze state anti-BDS laws to finally determine whether states are permitted to take a stand on foreign affairs in the form of economic sanctions.

## II. BACKGROUND

The Israeli-Palestinian conflict is an intricate dispute over the same land.<sup>19</sup> Currently, the conflict is centered around the West Bank, since the Palestinians want the region for their own state, but Israelis continue to construct settlements on the land.<sup>20</sup> As a result of the land dispute, the Palestinians launched an international campaign, known as the BDS Movement, to encourage boycotts against Israel.<sup>21</sup>

The United States responded to the BDS Movement and enacted laws to counteract it.<sup>22</sup> Designed after popular anti-apartheid laws in the 1980s,<sup>23</sup> the state anti-BDS laws support Israel by withdrawing state money from companies that support the BDS Movement.<sup>24</sup> To support the states in their endeavor, the Senate introduced a bill attempting to denounce the potential constitutional challenges to

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17. See *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 434 (1979).

18. See Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C.A. § 4452(c) (West 2016).

19. Damon Linker, *Sorry, There Is No Solution to the Israeli Palestinian Conflict*, WEEK (Apr. 9, 2015), <http://theweek.com/articles/448116/sorry-there-no-solution-israelipalestinian-conflict>.

20. See Cal Perry & Ayman Mohyeldin, *Israeli Settlements Controversy Explained—and Why It Matters*, NBC NEWS (Dec. 29, 2016, 10:50 AM), <http://www.nbcnews.com/news/world/israeli-settlements-controversy-explained-why-it-matters-n700761>.

21. Peter Tatchell, *Israel Sanctions: BDS Is the Gandhian Non-Violent Strategy to End Palestine Occupation*, INT'L BUS. TIMES (Nov. 5, 2015), <http://www.ibtimes.co.uk/israel-sanctions-bds-gandhian-non-violent-strategy-end-palestine-occupation-1527331>.

22. See generally Bob, *supra* note 5.

23. As a reaction to South Africa's racially discriminatory political system, known as the apartheid, over 140 state and local governments enacted sanctions against South Africa. Fenton, *supra* note 13, at 564. While each state and local law varied, generally, these anti-apartheid laws prohibited investments in companies doing business with South Africa. *Id.* at 568. After the federal government passed its own sanctions against South Africa, one state court examined whether a local anti-apartheid law was constitutionally valid and ultimately determined that the local sanction was constitutional. See *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 720.

24. See Yolanda Rondon, *New Jersey Is Pushing Unconstitutional Anti-BDS Legislation Because No More Plausible Deniability*, HUFFINGTON POST (Mar. 21, 2016, 3:13 PM), [http://www.huffingtonpost.com/yolanda-rondon/new-jersey-is-pushing-unc\\_b\\_9502288.html](http://www.huffingtonpost.com/yolanda-rondon/new-jersey-is-pushing-unc_b_9502288.html).

state anti-BDS laws.<sup>25</sup> Further, the federal government passed a separate act, intended to protect trade, which also punishes companies who boycott Israel.<sup>26</sup>

### A. *Overview of the Israeli-Palestinian Conflict*

The Israeli-Palestinian conflict is one of the longest standing conflicts in modern times.<sup>27</sup> Centered around two groups of people with competing claims to the same land, the conflict is nothing short of complex.<sup>28</sup> Land disputes are at the heart of this tumultuous history.<sup>29</sup> Israeli and Palestinian officials have negotiated over land disputes intermittently throughout their history in the hopes of achieving peace.<sup>30</sup> The Gaza Strip and the West Bank have been at the center of the conflict's land dispute, since both groups have claims to these regions.<sup>31</sup> In 2005, Israel permanently withdrew from the Gaza Strip as a step to achieving peace with the Palestinians.<sup>32</sup> The Israeli settlements in the West Bank, however, remain at the forefront of the conflict.<sup>33</sup>

The Israeli settlements in the West Bank are controversial because many political leaders believe Israeli settlements are preventing the Israelis and Palestinians from reaching a peace agreement.<sup>34</sup> Due to clashing ideas as to how land should be divided, the

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25. See Combating BDS Act of 2017, S. 170, 115th Cong. (2017).

26. See Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C.A. § 4452(c) (West 2016).

27. See Bobbette Deborah Abraham, *From Mandate to Mineshaft: The Long Rocky Road to the Modern State of Israel*, 5 REGENT J. INT'L L. 123, 172 (2007) (noting that "the fight for possession of Israel's inheritance" began when Israel proclaimed independence in 1948 and still "continues to this day").

28. Linker, *supra* note 19. Some believe that there is no solution to the conflict at all, due to the demands from each side. *Id.* These thoughts are the consequences of Israel's and Palestinian leaders' demands: Israel wanting Palestinian recognition of the Jewish state and Palestinians wanting the Palestinian "right of return." *Id.* Commentators believe these demands cannot coexist unless both sides are willing to compromise. *Id.*

29. See Singer, *supra* note 1.

30. See generally Mitchell G. Bard, *Israel-Palestinian Negotiations: History & Overview*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/history-and-overview-of-israel-palestinian-negotiations> (last visited 2017).

31. See generally *id.* Jerusalem is also heavily fought over in this dispute. *Id.*

32. Daniel Byman, *Israel's Gaza Withdrawal 10 Years Later: More Successful Than You Think*, WAR ON THE ROCKS (Aug. 13, 2015), <https://warontherocks.com/2015/08/israels-gaza-withdrawal-more-successful-than-you-think/>.

33. See Josef Federman, *Israel Government Approves 3,000 New Settler Homes*, ABC NEWS (Jan. 31, 2017, 5:30 PM), <http://abcnews.go.com/International/wireStory/israel-media-army-orders-residents-west-bank-outpost-45161919>.

34. Carlo Munoz, *John Kerry, Benjamin Netanyahu Clash Angrily About Peace*, WASH. TIMES (Dec. 28, 2016), <http://www.washingtontimes.com/news/2016/dec/28/israel-settlement-controversy-makes-john-kerry-ben/>.

Israeli-Palestinian conflict polarizes the world.<sup>35</sup> Often at the forefront of the United Nations, various tactics have been used to attempt to settle the dispute.<sup>36</sup> Recently, the world ignited in a fierce debate regarding the Israeli settlements in the West Bank after the United Nations (the “UN”) passed a resolution condemning Israeli settlements.<sup>37</sup> The UN resolution caused such a controversy because the United States did not veto the vote to condemn Israeli settlements in the West Bank.<sup>38</sup>

Dating back to Israel’s independence in 1948, the United States has remained a present figure in the journey to achieve peace between the Israelis and Palestinians.<sup>39</sup> Specifically, United States presidents have held and mediated peace discussions with Israeli and Palestinian leaders.<sup>40</sup> President Bill Clinton, one of the most involved presidents in the conflict, held and mediated serious discussions between Israeli and Palestinian officials throughout his presidency; however, the Israeli and Palestinian leaders failed to reach a compromise.<sup>41</sup> Since then, the Israeli-Palestinian conflict has remained at the top of each president’s diplomatic goals.<sup>42</sup> Understanding the intricacies of the conflict, each current president handles the Israeli-Palestinian conflict with care in the hopes of finally bringing peace to the Middle East.<sup>43</sup>

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35. See generally Rami G. Khouri, *How the World’s View of the Palestine-Israel Conflict Is Changing Dramatically*, ALTERNET (Apr. 3, 2016), <http://www.alternet.org/grayzone-project/how-worlds-view-palestine-israel-conflict-changing-dramatically>.

36. See generally Phyllis Bennis, *What Has Been the Role of the UN in the Israel-Palestine Struggle?*, TRANS ARAB RESEARCH INST. (Jan. 2001), [http://tari.org/index.php?option=com\\_content&view=article&id=14&Itemid=15](http://tari.org/index.php?option=com_content&view=article&id=14&Itemid=15). The UN played a role in Israel’s independence and maintained its presence throughout disagreements between Israelis and Palestinians. *Id.*

37. See S.C. Res. 2334 (Dec. 23, 2016); see generally Guy Milliere, *Obama’s Betrayal of Israel*, GATESTONE INST. (Jan. 13, 2017, 5:00 AM), <https://www.gatestoneinstitute.org/9755/obama-betrayal-israel>.

38. See Milliere, *supra* note 37. While the Obama administration viewed the resolution as a feasible answer to achieve peace between the Israelis and Palestinians, Israel viewed the United States’ actions as betrayal. See *id.*

39. See generally Abraham Ben-Zvi, *The United States and Israel: 1948-2008*, JEWISH VIRTUAL LIBRARY (Apr. 2009), <http://www.jewishvirtuallibrary.org/israel-studies-an-anthology-the-u-s-and-israel>.

40. See, e.g., *Oslo Accords*, *supra* note 2 (detailing the Clinton administration’s efforts in the 1990s to facilitate Israeli-Palestinian negotiations).

41. *Id.* President Clinton held a summit at Camp David with Israeli and Palestinian leaders after a hostile period between the two groups. *Id.*

42. See generally Ben-Zvi, *supra* note 39. President Obama conducted diplomacy in the hopes of achieving peace between the Israelis and Palestinians; additionally, within his first days in office, President Trump is already making strides to influence the Israeli-Palestinian conflict. Ian Fisher, *Trump Presidency Is Already Altering Israeli-Palestinian Politics*, N.Y. TIMES (Jan. 22, 2017), [https://www.nytimes.com/2017/01/22/world/middleeast/israel-benjamin-netanyahu-jerusalem-maale-adumim-donald-trump.html?\\_r=0](https://www.nytimes.com/2017/01/22/world/middleeast/israel-benjamin-netanyahu-jerusalem-maale-adumim-donald-trump.html?_r=0).

43. See generally Fisher, *supra* note 42.

### B. *What is the BDS Movement?*

Palestinians launched an international campaign in July of 2005 to put economic pressure on the state of Israel in the form of boycotts, divestments, and sanctions, or “BDS.”<sup>44</sup> The movement was created to pressure Israel into vacating territories highly disputed between the Israelis and the Palestinians, particularly the West Bank settlements.<sup>45</sup> To achieve this goal, the BDS Movement encourages entities to withdraw their investments from companies that support Israel.<sup>46</sup> The movement also encourages people to boycott Israeli products, Israeli professionals, Israeli professional associations, Israeli academic institutions, and Israeli artistic performances.<sup>47</sup> Ultimately, the campaign urges people, organizations, churches, academic associations, and unions to join their movement to pressure Israel “to comply with international law.”<sup>48</sup>

Since the BDS Movement encourages companies to economically boycott Israel, lawmakers recognize the BDS Movement as a threat to Israel’s existence.<sup>49</sup> The alliance between the United States and Israel is an important relationship that affects the citizens of both nations immensely.<sup>50</sup> For example, the United States entered into its first ever free trade agreement on April 22, 1985 — and this agreement was with Israel.<sup>51</sup> Trade between the two countries has expanded immensely over the three decades this agreement has stood, reaching approximately \$40 billion each year.<sup>52</sup> In order to sustain the strong economic relationship between the United States and Israel, the United States began to counteract the effects of the BDS Movement.<sup>53</sup>

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44. *Political Boycotts*, *supra* note 12, at 2031.

45. Tatchell, *supra* note 21. The BDS Movement’s goals also include dismantling the wall separating Israeli and Palestinian territories, non-discrimination of Palestinians, and the right to return for all Palestinians that vacated after Israel’s independence. *Id.*

46. See *BDS: The Global Campaign to Delegitimize Israel*, ANTI-DEFAMATION LEAGUE (2016), <http://www.adl.org/israel-international/israel-middle-east/content/backgrounders-articles/bds-campaign-backgrounder.html#.WDTFORt5nww>.

47. *Id.*

48. See *Intro to BDS*, *supra* note 3.

49. See Aaron Menenberg, *Israel Gives Much More to the U.S. Economy Than You Imagined*, TOWER (Mar. 2016), <http://www.thetower.org/article/israel-gives-much-more-to-the-u-s-economy-than-you-imagined/>.

50. See *id.*

51. *Id.*

52. *Id.* Aside from trade, the United States and Israel also expand their research together in the most important aspects of their citizens’ lives: healthcare, agriculture, national security, and technology. *Id.*

53. See *4 Things You Should Know About the Bipartisan BDS Bill*, AJC: GLOBAL JEWISH ADVOCACY (May 13, 2015, 12:00 AM), <http://www.ajc.org/site/apps/nlnet/content3.aspx?c=7oJILSPwFfJSG&b=9077565&ct=1467438>.

### C. *Anti-BDS Legislation*

Realizing the threats that the BDS Movement posed on Israel, states and the federal government sought to protect their ally through anti-BDS legislation.<sup>54</sup> The state and federal anti-BDS laws were designed after legislation enacted in the late 1980s which penalized companies doing business in South Africa as a way to disapprove of South Africa's apartheid regime.<sup>55</sup> State and local governments had also previously implemented sanctions modeled after the anti-apartheid laws to target countries such as Burma, China, Cuba, Indonesia, Nigeria, and Switzerland in the late 1990s.<sup>56</sup> Generally, such state and local laws are enacted in response to political or human rights problems within foreign countries, in the hopes of changing the countries' behavior.<sup>57</sup>

State and local sanctions are most often in the form of divestment and procurement laws.<sup>58</sup> Procurement laws are selective purchasing laws that forbid the state from contracting with, or purchasing goods and services from, any entity that does business with the targeted country.<sup>59</sup> Divestment laws are selective investment laws that forbid state or local agencies from investing state funds in companies that do business with the targeted country.<sup>60</sup> Both forms of sanctions "attempt to force companies to choose between doing business with the state or local government or doing business in the target country."<sup>61</sup> Since the term "sanctions" accurately describes state and local legislation directed at foreign nations, the term is used throughout this article when referring to either type of these laws.<sup>62</sup>

#### 1. *State Anti-BDS Legislation*

In order to negate the effects of the BDS Movement, state legislatures enacted laws to prevent the boycotts against Israel.<sup>63</sup> South

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54. See generally Bob, *supra* note 5.

55. See generally Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307, 307 (1999).

56. *Id.* at 308.

57. Garcia & Garvey, *supra* note 9, at 1.

58. See *id.*

59. *Id.* See Peter J. Spiro, *State and Local Anti-South Africa Action As an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 821 (1986). These restrictions prevent government purchases of goods and services from entities that do business with the targeted nation. *Id.*

60. See Spiro, *supra* note 59, at 819-20.

61. Denning & McCall, *supra* note 55, at 311.

62. *Sanction*, BLACK'S LAW DICTIONARY (9th ed. 2009).

63. Bob, *supra* note 5.



Carolina and Illinois led this effort by proposing legislation to counteract the BDS Movement as early as June 2015.<sup>64</sup> As of July 2017, North Carolina became the twenty-second state to enact anti-BSD legislation.<sup>65</sup> Generally, the anti-BDS laws are state sanctions that divest state assets from corporations, entities, and non-profits that boycott Israel by refusing to conduct business with Israel or declining to purchase goods and services from Israel; however, each state's anti-BDS law is slightly different.<sup>66</sup> Some of the state anti-BDS laws prohibit state pension funds from investing in companies that participate in the boycotts against Israel, while other anti-BDS laws prohibit the state from entering into contracts with companies that fall within those criteria.<sup>67</sup>

## 2. *Federal Anti-BDS Legislation*

After multiple states passed their specific anti-BDS laws, the Senate introduced a bipartisan bill supporting the states known as the "Combating BDS Act of 2017."<sup>68</sup> The bill expressly states that Congress supports the states divesting state assets from entities that participate in economic boycotts targeting Israel.<sup>69</sup> This bill

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64. *Id.*

65. *North Carolina Becomes 22nd US State to Pass Anti-BDS Legislation*, UNITED WITH ISRAEL (July 2, 2017), <https://unitedwithisrael.org/north-carolina-becomes-22nd-us-state-to-pass-anti-bds-legislation/>. See, e.g., ARIZ. REV. STAT. ANN. § 35-393.02 (West 2016); CAL. PUB. CONT. CODE § 2844 (West 2016); COLO. CODE REGS. § 24-54.8-202 (West 2016); FLA. STAT. ANN. § 215.4725 (West 2016); GA. CODE ANN. § 50-5-85 (West 2016); 40 ILL. COMP. STAT. ANN. 5/1-110.16 (West 2015); IOWA CODE ANN. § 12J.2 (West 2016); N.J. STAT. ANN. § 52:18A-89.14 (West 2016); N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016); OHIO REV. CODE ANN. § 9.76 (West 2016); 62 PA. STAT. AND CONS. STAT. ANN. § 3602 (West 2016); S.C. CODE ANN. § 11-35-5300 (West 2015).

66. See Reuters, *Ohio Anti-BDS Law Signed by Former Presidential Candidate Kasich*, JERUSALEM POST (Dec. 20, 2016), <http://www.jpost.com/Arab-Israeli-Conflict/Ohio-anti-BDS-bill-singed-into-law-by-former-White-House-candidate-Kasich-475968>. South Carolina's law is broader than most, in that it does not even mention Israel by name. Bob, *supra* note 5. As described by South Carolina state senator Alan Clemmons, the law "prohibits those who engage against trade based on national origin, against our allies and against the state of South Carolina." *Id.* The companies that fall within that criterion are prohibited from receiving state contracts. *Id.* On the other hand, California's anti-BDS law requires every company receiving a state contract over \$100,000 to declare, under penalty of perjury, that they do not have anti-Israel policies. *California State Assembly Unanimously Passes Bill Against Israel Boycotts*, TOWER (Aug. 31, 2016, 6:27 PM), <http://www.thetower.org/california-state-assembly-unanimously-passes-bill-against-israel-boycotts/print/>.

67. *Political Boycotts*, *supra* note 12, at 2031.

68. See Combating BDS Act of 2017, S. 170, 115th Cong. (2017). This bill updates a similar bill proposed in 2016. *Rubio, Manchin Introduce Bill to Counter BDS Movement Targeting Israel*, SENATE: RUBIO (Jan. 18, 2017), <https://www.rubio.senate.gov/public/index.cfm/press-releases?id=B88174F9-4DBC-4AC5-A2ED-A6142C864219> [hereinafter *Rubio, Manchin*].

69. Combating BDS Act of 2017, S. 170 § 2, 115th Cong. (2017). The bill states that states may divest from companies that partake in commerce related boycotts against Israel, if there is credible information available about the companies' actions. *Id.* § 2(a)(1).

attempts to shield the state laws from future legal challenges by granting congressional approval.<sup>70</sup> The policy behind the Combating BDS Act is to protect the United States' and Israel's shared economic and security interests.<sup>71</sup>

The federal government also passed the "Trade Facilitation and Trade Enforcement Act of 2015" (the "Trade Act") in February of 2016.<sup>72</sup> To promote United States trade, the act, like the state anti-BDS laws, requires the United States to isolate companies that participate in the boycotts against Israel.<sup>73</sup> The federal act protects Israel as well as all "Israeli-controlled territories."<sup>74</sup> The Trade Act's inclusion of Israeli settlements in the West Bank potentially poses a challenge for the president to conduct diplomacy over the land dispute.<sup>75</sup> Realizing this potential risk, President Barack Obama included a signing statement to the Trade Act which expressed his disapproval of the act's inclusion of the "Israeli-controlled territories."<sup>76</sup> President Obama said this provision of the act was "contrary to longstanding bipartisan United States policy, including with regard to the treatment of settlements[.]"<sup>77</sup> though, ultimately, President Obama said he would enforce the bill, so long as it did not interfere with diplomacy.<sup>78</sup> Notably, many state anti-BDS laws include protection of Israeli settlements.<sup>79</sup>

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70. *Id.* § 2(d). The bill expressly states that the state anti-BDS laws are not preempted. *Id.*

71. *Rubio, Manchin, supra* note 68. Senator Manchin stated, "Israel has been our strongest ally in the Middle East and we need to send them a strong signal that we will do everything in our power to fight the BDS [M]ovement." *Id.*

72. *See* Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C.A. § 4452 (West 2016).

73. *Id.* § 4452(b)(3). The bill mandates that a report must be submitted of all politically motivated boycotts against Israel. *Id.* § 4452(d)(1). After the report is submitted, the United States must take "specific steps" to discourage the boycotts against Israel. *Id.* § 4452(d)(2)(B).

74. *See* § 4452(d)(2)(A).

75. *See* Ron Kampeas, *Obama Weighs in on BDS Settlement Fight- But Battle Likely Won't End There*, JERUSALEM POST (Feb. 26, 2016), <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Obama-weighs-in-on-BDS-settlement-fight-but-battle-likely-wont-end-there-446184>.

76. *Id.* Presidential signing statements are used when the president signs the bill but wants to include a short document to express his concerns with the bill, to explain it, or even to praise it. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006). While presidential signing statements may express the president's disapproval on a particular bill, the president signed the bill into law; therefore, "no executive statement denying efficacy to the legislation could have either validity or effect." *DaCosta v. Nixon*, 55 F.R.D. 145, 145 (E.D.N.Y. 1972).

77. Kampeas, *supra* note 75.

78. *Id.* In other words, President Obama would not enforce the bill with regards to Israeli settlements. *See id.*

79. *Id.*

## III. CONSTITUTIONAL ISSUES

The states are taking a position on foreign policy when they enact anti-BDS laws by using their buying power to influence the views of companies in order to challenge the BDS Movement.<sup>80</sup> Since the states have little, if any, authority in foreign relations, anti-BDS laws raise constitutional issues.<sup>81</sup> First, the state anti-BDS laws may intrude upon the federal government's power to conduct foreign affairs.<sup>82</sup> Second, the state anti-BDS laws may violate the dormant Foreign Commerce Clause.<sup>83</sup> Finally, an existing federal law may preempt the state anti-BDS laws.<sup>84</sup>

Intruding into the federal government's authority to conduct foreign affairs, violating the dormant Foreign Commerce Clause, and preemption by existing federal legislation are three separate and distinct constitutional issues.<sup>85</sup> In other words, if a state statute violates one of the doctrines, this does not necessarily mean the statute also violates the other two doctrines.<sup>86</sup> While courts may focus on one constitutional challenge and skirt the other two issues, state sanctions raise all three challenges.<sup>87</sup>

A. *Intrusion into Foreign Affairs*

The federal government possesses superior power to conduct the nation's foreign relations.<sup>88</sup> As a result, state laws containing foreign policy elements may be unconstitutional if the state law hinders the federal government's ability to conduct foreign affairs.<sup>89</sup> Commonly referred to as the one-voice doctrine, the SCOTUS maintains that the United States must be able to speak with one voice

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80. See Fenton, *supra* note 13, at 564; Whit Cox, *Constitutional Implications of California's Anti-BDS Legislation*, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE (Feb. 3, 2016), <http://www.adc.org/2016/02/the-constitutional-implications-of-californias-anti-bds-legislation/>.

81. See *generally* U.S. CONST. art. I, § 10.

82. See Garcia & Garvey, *supra* note 9, at 5.

83. See *id.* at 2.

84. See *id.* at 6.

85. Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 747 (Apr. 2017).

86. See *id.*

87. See *id.* at 765-66. For example, the SCOTUS in *Crosby* only analyzed whether the state sanction against Burma was preempted by federal law, even though the state statute also likely violated the dormant Foreign Commerce Clause and intruded into the federal government's authority to conduct foreign affairs. *Id.*; see *generally* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

88. See, e.g., *U.S. v. Pink*, 315 U.S. 203, 233 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941).

89. See *Zschernig v. Miller*, 389 U.S. 429, 429 (1968).

when dealing with foreign nations.<sup>90</sup> This idea has played a role in restricting the states from conducting foreign affairs.<sup>91</sup> The two primary SCOTUS cases that control the issue of whether state laws relating to foreign policy are permissible or impermissible are *Clark v. Allen* and *Zschernig v. Miller*.<sup>92</sup>

In the 1947 opinion of *Clark v. Allen*, the SCOTUS analyzed the constitutionality of a California statute which held that nonresident aliens could only inherit property from residents of California if Americans could also inherit personal property in the alien's home country.<sup>93</sup> The Court analyzed whether California intruded into the realm of foreign affairs by enacting the statute.<sup>94</sup> Writing for the majority, Justice Douglas opined that local law controls the rights of succession of property.<sup>95</sup> The Court determined that so long as state legislation does not conflict with treaties and do not enter into the "forbidden domain" of negotiating with a foreign country, legislation pertaining to rights of succession would be constitutional.<sup>96</sup> The Court determined that California did not enter "the forbidden domain of negotiating with a foreign county or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution."<sup>97</sup> Thus, the SCOTUS concluded that the statute was constitutional by stating, "[w]hat California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."<sup>98</sup>

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90. David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 954-55 (2014).

91. *Id.* at 959. When it comes to "national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"; that "in respect of our foreign relations generally, state lines disappear... [and] the State... does not exist." *Id.* at 959-60 (quoting *U.S. v. Belmont*, 301 U.S. 324, 331 (1937)). Further, the "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *Id.* at 960 (quoting *U.S. v. Pink*, 315 U.S. at 233).

92. *Bd. of Trs. of the Emps.' Ret. Sys. v. Baltimore*, 562 A.2d 720, 744 (Md. 1989); see generally *Zschernig*, 389 U.S. at 429; *Clark v. Allen*, 331 U.S. 503, 503 (1947).

93. *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 744-45 (citing *Clark*, 331 U.S. at 516-17). After a California resident left her entire estate to German citizens, "the California Attorney General vested himself in all right, titled, and interest to the estate." Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 510 (1987).

94. *Clark*, 331 U.S. at 517.

95. *Id.* The California statute was challenged based on preemption but the Court determined that the Treaty of 1923 with Germany did not preempt the statute. Lewis, *supra* note 93, at 510.

96. Lewis, *supra* note 93, at 510.

97. *Clark*, 331 U.S. at 517. (internal citations omitted) (citing *U.S. v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-17 (1936)); U.S. CONST. art. I, § 10, cl. 1. Article I, Section 10 of the Constitution places limitations on states such as entering into treaties with foreign countries and issuing money. *Id.*

98. *Clark*, 331 U.S. at 517.

Twenty-one years after the *Clark* opinion, the SCOTUS overruled a similar Oregon statute in *Zschernig v. Miller*.<sup>99</sup> The statute at issue in *Zschernig*, like the California statute in *Clark*, restricted inheritance by aliens if Americans did not have reciprocal rights to inherit in the alien's home country; however, the Oregon statute in *Zschernig* also prohibited the alien's home country from confiscating any of the inheritance received from their American heir.<sup>100</sup> Again writing for the majority, Justice Douglas analyzed whether the Oregon statute intruded into the federal government's authority to conduct foreign affairs.<sup>101</sup> This time, the SCOTUS determined that the state intruded into matters of foreign affairs, which the "constitution entrusts to [the] President and Congress."<sup>102</sup> Unlike the California statute in *Clark*, the Court found the Oregon law in question had more than an incidental or indirect effect on foreign nations.<sup>103</sup> Further, the Court opined that, while states traditionally regulate the distributions of estates, the regulations need to be submissive if they impair the Nation's foreign policy power.<sup>104</sup> The Court determined that state laws are forbidden if they have "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."<sup>105</sup>

The difference between the statute in *Clark* and the statute in *Zschernig* was that the statute in *Zschernig* mandated that the foreign heirs "receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries."<sup>106</sup> This provision required Oregon judges to examine how foreign law protected rights and how Oregon law protected rights.<sup>107</sup> The Majority felt uncomfortable with that provision, stating, the "statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own."<sup>108</sup> Thus, the Court determined that Oregon was in effect conducting its own foreign policy review by enacting this statute and found that the statute had a direct impact on foreign affairs.<sup>109</sup>

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99. *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 745; see *Zschernig*, 389 U.S. at 429.

100. Trachtman, *supra* note 10, at 357; see *Zschernig*, 389 U.S. at 430.

101. *Zschernig*, 389 U.S. at 429.

102. *Id.*

103. *Id.* at 434-35.

104. *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 746 (citing *Zschernig*, 389 U.S. at 440).

105. *Zschernig*, 389 U.S. at 441.

106. Lewis, *supra* note 93, at 510 (quoting *Zschernig*, 389 U.S. at 430).

107. *Id.*

108. *Id.* (quoting *Zschernig*, 389 U.S. at 440).

109. Lewis, *supra* note 93, at 511.

Ultimately, the SCOTUS in *Zschernig* determined that state statutes that may disrupt the federal government from conducting diplomacy are unconstitutional.<sup>110</sup> The Court determined that the Oregon statute provided “great potential” to disrupt the federal government’s foreign relations or could cause an embarrassment for the nation as a whole.<sup>111</sup> Further, the SCOTUS found that, by disrupting foreign relations, the statute could cause great international controversy.<sup>112</sup>

### B. *Violation of the Commerce Clause*

The Commerce Clause of the United States Constitution grants Congress the power “to regulate Commerce with foreign Nations, and among the several States...”<sup>113</sup> Although the Commerce Clause is an affirmative grant of power to Congress, the SCOTUS has consistently held that Congress has the authority to control anything pertaining to commerce, even when Congress does not explicitly act, which is known as the dormant Commerce Clause<sup>114</sup> Although the scope of the dormant Commerce Clause is abstract since it is not expressly stated in the Constitution, the SCOTUS applies the dormant Commerce Clause when a state discriminates or burdens interstate commerce.<sup>115</sup> When a state discriminates against interstate commerce facially or purposefully, the Court will apply strict scrutiny.<sup>116</sup> In order to survive strict scrutiny, the state must show that there is a legitimate state purpose in enacting the legislation and an absence of non-discriminatory alternatives; however, since this test is difficult to survive, the discriminatory state laws are considered per se invalid.<sup>117</sup> Conversely, non-discriminatory laws that indirectly burden interstate commerce are analyzed under a

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110. Alexandria R. Strauss, *Supremacy of the Supremacy Clause: A Garamendi-Based Framework for Assessing State Law That Intersects with U.S. Foreign Policy*, 83 *FORDHAM L. REV.* 417, 427 (Oct. 2014).

111. *Id.*

112. *Id.* at 427-28.

113. *Bd. of Trs. of the Emps.’ Ret. Sys. v. Baltimore*, 562 A.2d 720, 749 (Md. 1989) (quoting U.S. CONST. art. I, § 8, cl. 3).

114. *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

115. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also* Trachtman, *supra* note 10.

116. Will Sears, *Full-Impact Regulations and the Dormant Commerce Clause*, 39 *COLUM. J. ENVTL. L.* 157, 163 (2014). Under a dormant Commerce Clause analysis, discrimination means “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Id.* (quoting *Or. Waste Sys. V. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994)).

117. *Id.* at 164.

balancing test and have a better likelihood of survival.<sup>118</sup> Such laws will be upheld unless the burden on interstate commerce excessively outweighs the local benefits.<sup>119</sup>

The primary exception to the dormant Commerce Clause is known as the market participant exception.<sup>120</sup> When a state or local government acts as a seller or a buyer, rather than acting within its distinctive governmental capacity, the Commerce Clause does not limit the state's activities.<sup>121</sup> In other words, if the state or local government is acting as a market participant rather than a market regulator, the dormant Commerce Clause does not affect the actions of the state.<sup>122</sup>

After the dormant Commerce Clause was established, the Court extended the same principals to state actions that discriminate or burden foreign commerce, known as the dormant Foreign Commerce Clause.<sup>123</sup> Further, the Court added additional requirements to the dormant Foreign Commerce Clause – the state legislation may not increase the risk of double taxation or hinder the federal government from conducting foreign affairs.<sup>124</sup> Since state action affecting foreign affairs can cause retaliation from foreign nations, the Court requires a closer analysis when foreign commerce is involved, rather than just applying an interstate dormant Commerce Clause analysis when affirmative congressional approval is absent.<sup>125</sup>

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118. *Id.* at 165. The balancing test is applied when “the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental.” *Id.* (quoting *Pike*, 387 U.S. at 142).

119. *Id.* at 166 (citing *Pike*, 387 U.S. at 142).

120. *See, e.g.*, *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984).

121. *Id.*

122. *Id.*

123. *Wilson*, *supra* note 85, at 753. The Court has held that various activities conducted by the state are shielded from Commerce Clause scrutiny since their activities fall into the realm of the market participant exception. *See* Michael J. Polelle, *A Critique of the Market Participation Exception*, 15 *WHITTIER L. REV.* 647, 647 (1994). *See, e.g.*, *White v. Massachusetts Council of Const. Emp'rs, Inc.*, 460 U.S. 204, 204 (1983) (opining that an executive order by the Mayor requiring all construction projects funded by the city hire at least half of the workers from city residents was protected under the market participant exception of the dormant Commerce Clause); *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980) (finding South Dakota was a market participant when it sold its surplus of cement from a state-operated plant to out-of-state companies); *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1108 (8th Cir. 1996) (holding that commerce clause restrictions do not apply to a South Dakota statute prohibiting video lottery machine licenses for corporations that South Dakota residents do not hold a majority stake in because South Dakota acted as a market participant in the lottery industry).

124. *Wilson*, *supra* note 85, at 753. The primary purpose of the dormant Foreign Commerce Clause is to protect against foreign nations retaliating based on the state legislation. *Id.*

125. *Id.*; *Garcia & Garvey*, *supra* note 9, at 3.

*Japan, Ltd. v. Los Angeles* was the first SCOTUS case applying the dormant Foreign Commerce Clause, and it laid out the requirements for the states to avoid constitutional scrutiny under the dormant Foreign Commerce Clause.<sup>126</sup> The SCOTUS determined that when analyzing Congress' commerce power with foreign nations, rather than "purely interstate commerce," a "more extensive constitutional inquiry is required."<sup>127</sup> The Court ruled that a more stringent inquiry is required in cases involving foreign commerce for two reasons.<sup>128</sup> First, there is a heightened risk of multiple taxation upon goods involved in foreign commerce than goods involved in domestic commerce.<sup>129</sup> Second, the state "may impair federal uniformity in an area where federal uniformity is essential."<sup>130</sup> Namely, there is a strong need for the federal government to "speak with one voice when regulating commercial relations with foreign governments."<sup>131</sup> When a state acts as a participant in foreign affairs there is a good chance that foreign nations will correlate the state's action with the whole nation.<sup>132</sup>

While the SCOTUS has recognized the market participant exception to the dormant Commerce Clause for decades, it has yet to determine whether the market participant exception extends to foreign commerce.<sup>133</sup> Lower courts have expressed their skepticism and even their refusal to apply the market participant exception to the dormant Foreign Commerce Clause.<sup>134</sup> For example, the First Circuit in *National Foreign Trade Council v. Natsios* stated that it is more important for the nation to speak with a unified voice when it comes to foreign affairs than to extend the market participant exception to the dormant Foreign Commerce Clause.<sup>135</sup> After *Natsios*, the District Court of Puerto Rico in *Antilles Cement Corp. v. Calderon*, explicitly opined that the market participant exception does not apply to the dormant Foreign Commerce Clause.<sup>136</sup>

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126. Wilson, *supra* note 85, at 753.

127. *Id.* at 754.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 755 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

132. J.T. Hutchens, *The Market-Participant Exception and the Dormant Foreign Commerce Clause*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 445, 450 (2007).

133. *Id.* at 446.

134. *See id.* at 460.

135. *Id.* (quoting *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 66 (1st Cir. 1999)). Further, the First Circuit opined that the risk of "retaliation against the nation as a whole" was greater than the state's interest in enjoying the market participant exception. *Id.* (quoting *Natsios*, 181 F.3d at 66).

136. *Id.* (citing *Antilles Cement Corp. v. Calderon*, 288 F. Supp. 2d 187, 196 (D.P.R. 2003), *vacated on other grounds in part*, 408 F.3d 41 (1st Cir. 2005)).



Relying on *Natsios* and *Japan Line*, the district court ruled, “the risks of foreign commerce are too great to allow the extension of the market participant exception.”<sup>137</sup>

### C. Preemption By Existing Federal Law

The Supremacy Clause of the United States Constitution declares that federal statutes, treaties, and the Constitution are the “supreme Law of the Land.”<sup>138</sup> Accordingly, states can be restricted from taking action in certain fields if federal law controls.<sup>139</sup> Congress controls the extent to which the states are preempted by federal law in any given area.<sup>140</sup> Congress may clearly and expressly preempt state laws or an act of Congress can impliedly preempt state law.<sup>141</sup> If federal law does not expressly preempt state law, a court is permitted to infer Congress’ intent to preempt state law in at least two circumstances: (1) state law is preempted when Congress intends for federal law to “occupy the field,”<sup>142</sup> and (2) even if Congress does not intend for federal law to occupy the field, state law is naturally preempted to the “extent of any conflict with a federal statute.”<sup>143</sup>

Since it does not take much searching to determine whether Congress expressly preempted state laws or whether state laws actively conflict with federal law, field preemption is the most ambiguous form of preemption.<sup>144</sup> Courts are tasked with determining whether Congress left any room in the subject of the legislation for state legislation.<sup>145</sup> First, the court starts with a presumption against preemption, especially in areas traditionally regulated by the

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137. *Id.* (citing *Antilles Cement Corp.*, 288 F. Supp. 2d at 197).

138. *Garcia & Garvey*, *supra* note 9, at 6; *see* U.S. CONST., art. VI, cl. 2.

139. *Garcia & Garvey*, *supra* note 9, at 6.

140. *Id.* “A fundamental principle of the Constitution is that Congress has the power to preempt state law.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *see* U.S. CONST. art. VI, cl. 2.

141. *Garcia & Garvey*, *supra* note 9, at 6; *see* U.S. CONST. art. VI, cl. 2.

142. *Crosby*, 530 U.S. at 372. Otherwise known as “field preemption,” which means the federal regulation is “so pervasive that one can reasonably infer that states or localities have no role to play.” *Garcia & Garvey*, *supra* note 9, at 6. Courts will rule that state laws are preempted when they can reasonably infer that Congress “left no room” for state laws in that particular field. *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

143. *Crosby*, 530 U.S. at 372 (citing *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)). Otherwise known as “conflict preemption,” which means it is physically impossible to comply with both federal and state laws. *Garcia & Garvey*, *supra* note 9, at 6.

144. *See* Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 382 (1999).

145. *Id.*

state.<sup>146</sup> Beyond that, however, there is “no single method conclusively” to determine whether Congress intended to preempt state laws.<sup>147</sup> Nevertheless, the SCOTUS has opined that when foreign affairs are at issue, “concurrent state power that may exist is restricted to its narrowest of limits.”<sup>148</sup>

#### IV. NOTABLE SANCTION CASES

There is limited case law on the topic of state economic sanctions. A few lower court cases have determined that state economic sanctions are unconstitutional.<sup>149</sup> The SCOTUS denied granting certiorari in the only case to determine that a state economic sanction was constitutional.<sup>150</sup> The SCOTUS did, however, analyze one state sanction and determined that it was unconstitutional because federal law preempted it.<sup>151</sup>

##### A. *Board of Trustees of Employees' Retirement System v. Baltimore*

In July of 1986, the city of Baltimore enacted ordinances requiring city pension funds to divest funds from companies doing business with South Africa.<sup>152</sup> In December of that same year, the Trustees of city employee pension funds and two employee beneficiaries filed suit against the Mayor and City Council of Baltimore asking the Circuit Court of Baltimore City to declare the divestment ordinances invalid.<sup>153</sup> The Trustees argued that the ordinances were preempted by the federal Comprehensive Anti-Apartheid Act of 1986, the city ordinances intruded on the federal government's power to conduct foreign affairs, and that the ordinances violated the Commerce Clause of the United States Constitution.<sup>154</sup> Overall, the trial court upheld the ordinances and the Trustees appealed to the Maryland Court of Appeals,<sup>155</sup> which ultimately held that

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146. *Id.*

147. *Id.* at 383.

148. *Id.* (quoting *Hines*, 312 U.S. at 68).

149. *See generally* *Odebrecht Constr., Inc. v. Prasad*, 876 F. Supp. 2d 1305 (S.D. Fla. 2012); *Nat'l Foreign Trade Council, Inc. v. Giannoulas*, 523 F. Supp. 2d 731, 731 (N.D. Ill. 2007).

150. *See generally* *Bd. of Trs. of the Emps.' Ret. Sys. v. Baltimore*, 562 A.2d 720, 720 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990).

151. *See* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 363 (2000).

152. *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 724.

153. *Id.* at 725.

154. *Id.*

155. *Id.* at 720.

Baltimore's divestment law was constitutional.<sup>156</sup> Notably, the case was appealed to the SCOTUS, which denied certiorari.<sup>157</sup>

When analyzing whether the ordinances were preempted by the federal Comprehensive Anti-Apartheid Act of 1986, the Maryland Court of Appeals had to analyze the congressional intent behind the act because the act did not expressly preempt state law.<sup>158</sup> The Maryland Court of Appeals opined that even though the Supremacy Clause states that federal law is the supreme law, in order to protect the sovereign states, preemption is not easily presumed.<sup>159</sup> When it comes to areas where states traditionally regulate, there is a "strong presumption against finding federal preemption."<sup>160</sup> When preemption is questioned in areas where state and local governments traditionally regulate there must be compelling evidence regarding the congressional intent to preempt.<sup>161</sup>

The Maryland Court of Appeals determined that regulating the investments of its employees' pension funds is obviously a field in which local governments traditionally regulate.<sup>162</sup> Since regulating investments is a traditional duty of state and local governments, there was a strong presumption that the state ordinances were not preempted by federal law.<sup>163</sup> The Maryland Court of Appeals found that the evidence to prove that Congress intended to preempt the states was completely lacking, and therefore, the state ordinances were constitutional.<sup>164</sup>

The Maryland Court of Appeals applied both *Clark* and *Zschernig* when it analyzed whether the ordinances intruded into the federal government's authority to conduct foreign affairs.<sup>165</sup> The court determined that the ordinances were beyond the scope of *Zschernig*, and thus, were constitutional.<sup>166</sup> Also, since the effect of the ordinances on South Africa were "minimal and indirect," the ordinances

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156. *Id.*

157. Fenton, *supra* note 13, at 565 n.4.

158. *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 741.

159. *Id.* (citing California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987)).

160. *Id.* (citing California v. ARC Am. Corp., 490 U.S. 93, 100 (1989)).

161. *Id.* (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959)).

162. *Id.*

163. *Id.*

164. *Id.* at 742-43.

165. *Id.* at 744; see *Zschernig v. Miller*, 389 U.S. 429, 435 (1968); *Clark v. Allen*, 331 U.S. 503, 517 (1947).

166. *Bd. of Trs. of the Emps.' Ret. Sys. v. Baltimore*, 562 A.2d 720, 746 (Md. 1989); see *Zschernig*, 389 U.S. at 441 (holding that state laws impermissibly intrude on the federal government's authority to conduct foreign affairs if the state laws have a direct impact on foreign relations and could prevent the federal government from conducting diplomacy).

were valid under *Clark*.<sup>167</sup> The Maryland Court of Appeals determined that “[w]hen a state sells its stock in a corporation doing business in South Africa, it has no immediate effect on foreign relations between South Africa and the United States.”<sup>168</sup>

The Trustees also argued that the ordinances violated the dormant Foreign Commerce Clause because the ordinances improperly played a role in interstate and foreign commerce.<sup>169</sup> The City responded to the Trustees’ dormant Commerce Clause argument by stating that the ordinances did not fall within the realm of the dormant Commerce Clause because of the market participant exception.<sup>170</sup> Ultimately, the Maryland Court of Appeals agreed with the City and determined that Baltimore was acting as a market participant under the ordinances; therefore, the ordinances requiring the city pension funds to divest in companies doing business with South Africa were outside of the limitations of the dormant Commerce Clause.<sup>171</sup>

The SCOTUS, however, has never held whether the market participant exception applies to actions affecting foreign commerce.<sup>172</sup> When foreign commerce is affected, a more stringent constitutional inquiry must ensue.<sup>173</sup> The Maryland Court of Appeals found that, while the Baltimore ordinances affected foreign commerce, the market exception of the dormant Commerce Clause still protected it from constitutional challenges.<sup>174</sup>

### B. *Crosby v. National Foreign Trade Council*

In 1996, Massachusetts enacted a law that prohibited state entities from purchasing products and services from companies that did business with the country then known as Burma, now Myanmar.<sup>175</sup> Three months after the Massachusetts law was enacted, Congress passed legislation placing sanctions on Burma.<sup>176</sup> The issue

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167. *Bd. of Trs. of the Emps.’ Ret. Sys.*, 562 A.2d at 746-47; see *Clark*, 331 U.S. at 517 (opining that state legislation that only has some incidental or indirect effect on foreign countries does not intrude into the federal government’s authority to conduct foreign affairs).

168. *Bd. of Trs. of the Emps.’ Ret. Sys.*, 562 A.2d at 747 (quoting *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CINN. L. REV. 543, 574 (1985)).

169. *Id.* at 749.

170. *Id.*

171. *Id.* at 752.

172. *Id.* (citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980)).

173. *Id.* (citing *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 445 (1979)).

174. *Id.* at 753.

175. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 363 (2000).

176. *Id.* at 369; see *Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997* § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus

examined in this case was whether Massachusetts' Burma law was unconstitutional under the Supremacy Clause.<sup>177</sup>

In April of 1998, the National Foreign Trade Council (the "Council"), a nonprofit corporation that represented multiple companies affected by the Burma law filed suit against the state officials who administered the Burma law (the "State").<sup>178</sup> The Council argued that Massachusetts' law infringed upon federal foreign affairs power, disrupted the Foreign Commerce Clause, and was preempted by federal legislation.<sup>179</sup> The United States District Court for the District of Massachusetts determined that the Burma law "unconstitutionally impinge[d] on the federal government's exclusive authority to regulate foreign affairs."<sup>180</sup> Upon appeal, the First Circuit affirmed on three independent grounds: (1) the act was unconstitutional because it interfered with the federal government's foreign affairs power under *Zschernig*,<sup>181</sup> (2) the act violated the dormant Foreign Commerce Clause of the Constitution,<sup>182</sup> and (3) the act was preempted by the federal Burma act.<sup>183</sup> The case was then appealed to the SCOTUS.<sup>184</sup>

While the circuit court examined the three constitutional challenges to the state economic sanctions, the SCOTUS only analyzed the preemption issue regarding the Massachusetts Burma Act.<sup>185</sup> The main analysis conducted by the SCOTUS in the *Crosby* case was whether Massachusetts' Burma law was preempted by the federal act sanctioning Burma.<sup>186</sup> Ultimately, the Court determined that Massachusetts' Burma Act was preempted by the intended purpose of the federal act, which was to grant the president control

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Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009-121 to 3009-172 (1996).

177. *Crosby*, 530 U.S. at 366; see Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009-121 to 3009-172 (1996)).

178. *Crosby*, 530 U.S. at 370-71.

179. *Id.* at 371.

180. *Id.* (quoting *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998)).

181. *Id.* at 372 (citing *Zschernig v. Miller*, 389 U.S. 429, 429 (1968)).

182. *Id.* (citing U.S. CONST. art. I, § 8, cl. 3).

183. *Id.* at 371; see Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570.

184. See *Crosby*, 530 U.S. at 371.

185. See generally *id.* at 370-71; see *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999).

186. See *Crosby*, 530 U.S. at 372; Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570.

of the economic sanctions on Burma.<sup>187</sup> During the Court's analysis of preemption it stressed that when Congress expressly or impliedly delegates authority to the president on a particular matter, his authority is great because it encompasses the power he was already granted under the Constitution plus the powers that Congress delegated.<sup>188</sup> The Court found that it is implausible for Congress to both delegate a particular power to the president and want the states to intrude on the power and compromise its effectiveness.<sup>189</sup>

The Court also determined that Massachusetts' act undermined the president's authority to speak for the whole nation with one voice in regards to foreign affairs.<sup>190</sup> The Court cited to one of the president's enumerated powers: "[the president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties" and "shall appoint Ambassadors, other public Ministers and Consuls."<sup>191</sup> The SCOTUS determined that Massachusetts' act sabotaged the powers of the president to conduct diplomacy,<sup>192</sup> and concluded that the state act hindered the president's authority to "speak for the Nation with one voice in dealing with other governments."<sup>193</sup>

The State argued that Congress never expressly preempted the state from acting; therefore, the State contended that implied permission was present.<sup>194</sup> The State elaborated by asserting that Congress refused to ultimately determine whether states can enact legislation that places sanctions on other state and local governments.<sup>195</sup> Specifically, the State argued that none of the various state and local economic sanctions against South Africa in the 1980s were preempted by the federal act.<sup>196</sup> In the end, the State asked the SCOTUS to conclude that because of Congress' continued silence on state sanctions targeting foreign nations, Congress intended to grant implied approval – especially because Congress has in fact expressly preempted state sanction laws before.<sup>197</sup> However,

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187. *Crosby*, 530 U.S. at 373-74; see Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570.

188. *Crosby*, 530 U.S. at 375.

189. *Id.* at 376.

190. *Id.* at 381.

191. *Id.* at 381 (quoting U.S. CONST. art. II, § 2, cl. 2).

192. *Id.*

193. *Id.*

194. *Id.* at 386-87.

195. *Id.* at 387.

196. *Id.*; see, e.g., *Bd. of Trs. of the Emps.' Ret. Sys. v. Baltimore*, 562 A.2d 720, 744-49 (Md. 1989) (holding that a state sanction against South Africa was not preempted by the Comprehensive Anti-Apartheid Act of 1986).

197. *Crosby*, 530 U.S. at 387; see Export Administration Act of 1979, 50 U.S.C. § 4607(c) (1988).

the Court stated that the State's argument of implied approval was "unconvincing."<sup>198</sup> It noted that Congress' lack of expressed preemption essentially means nothing because courts can then apply the implied preemption doctrine.<sup>199</sup> Additionally, the Supremacy Clause does not rely upon expressed congressional approval.<sup>200</sup> Further, the Court dismissed the State's argument that the state sanctions against South Africa were not preempted by noting that the SCOTUS never determined whether or not Massachusetts' South Africa laws were preempted or even valid.<sup>201</sup>

### C. *National Foreign Trade Council v. Giannoulas*

On June 25, 2005, after the government of Sudan committed various atrocities against individuals in the country's Darfur region, Illinois adopted an act to put economic pressure on Sudan in the form of state sanctions.<sup>202</sup> The Illinois Sudan Act had two main prongs.<sup>203</sup> First, the act amended the Deposit of State Moneys Act by requiring the state treasury to divest state funds from commercial instruments of Sudan and any company that did business with Sudan.<sup>204</sup> Second, the Illinois Sudan Act amended the Illinois Pension Act to prohibit retirement funds from investing in any company that did business with Sudan.<sup>205</sup> The National Foreign Trade Council (the "NFTC"), eight Illinois municipal pension funds, and eight beneficiaries of public pension funds brought suit against the Treasurer of Illinois, the Attorney General of Illinois, and the Secretary of the Illinois Department of Financial and Professional Regulation.<sup>206</sup> The plaintiffs challenged the act on the grounds that it was preempted by federal law, interfered with the federal government's authority to conduct foreign affairs, and violated the Foreign Commerce Clause.<sup>207</sup>

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198. *Crosby*, 530 U.S. at 387.

199. *Id.* at 387-88.

200. *Id.* at 388.

201. *Id.*

202. *Nat'l Foreign Trade Council, Inc. v. Giannoulas*, 523 F. Supp. 2d 731, 733 (N.D. Ill. 2007); Elizabeth Trachy, *State & Local Economic Sanctions: The Constitutionality of New York's Divestment Actions and the Sudan Accountability & Divestment Act of 2007*, 74 ALB. L. REV. 1019, 1032 (2010-2011).

203. *Id.*

204. Sapna Desai, *Genocide Funding: The Constitutionality of State Divestment Statutes*, 94 CORNELL L. REV. 669, 678 (2009) (citing 15 ILL. COMP. STAT. ANN. 520 §§ 22.5-22.6 (West 2007)).

205. *Id.* at 679 (citing 40 ILL. COMP. STAT. ANN. 5 § 1-110.5 (West 2007)).

206. *Giannoulas*, 523 F. Supp. 2d at 733.

207. *Id.* at 737.

First, the United States District Court of the Northern District of Illinois struck down the amendment to the Moneys Act because federal law preempted it.<sup>208</sup> The defendants argued that this amendment was not preempted by federal law by citing to the *Board of Trustees v. Baltimore*, which stated there is a strong presumption against preemption in areas traditionally regulated by the states, such as pension funds.<sup>209</sup> The *Giannoulis* court found the defendant's argument unpersuasive, however, because it concluded that the court in *Board of Trustees* did not cite any authority that determined state laws are presumed not to be preempted by federal foreign affairs laws.<sup>210</sup> Conversely, the *Giannoulis* court determined that "when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field."<sup>211</sup> The district court examined the difference between the Moneys Act and federal policy and determined that federal law preempted the amended Moneys Act because the "lack of flexibility, extended geographic reach, and impact on foreign entities interfere[d] with the national government's conduct of foreign affairs."<sup>212</sup>

When the district court analyzed whether the Illinois Sudan Act intruded on the federal government's authority to conduct foreign affairs, it noted that there was minimal case law on the issue.<sup>213</sup> The court reasoned that the act could influence multinational companies to withdraw from Sudan, which would be "more than an incidental or indirect effect in foreign countries."<sup>214</sup> Further, the Illinois Sudan Act impacted the national government's ability to regulate Sudanese relations.<sup>215</sup> Therefore, the district court concluded that the amended Moneys Act would interfere with the federal government's ability to address the Sudanese government.<sup>216</sup>

After the district court found the amended Moneys Act unconstitutional on the above-noted two grounds, it analyzed whether the

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208. *Id.* at 741-42.

209. *Id.* at 740 (citing *Bd. of Trs. of the Emps.' Ret. Sys. v. Baltimore*, 562 A.2d 720, 741 (Ct. App. Md. 1989)).

210. *Id.* The court noted, since the federal government possesses such a strong interest in regulating foreign affairs, it is not surprising that the defendants did not cite any such authority. *Id.*

211. *Id.* (citing *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 76 (1st Cir. 1999)).

212. *Id.* at 741-42.

213. *Id.* at 742.

214. *Id.* (citing *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

215. *Id.* The district court found that the Illinois Pension Code did not intrude upon the federal government's authority to conduct affairs. *Id.* Although it found that this provision merely barred state pension funds from investing in companies that did business with Sudan, this provision could only have a "hypothetical impact on the national government's conduct of foreign affairs." *Id.*

216. *Id.* at 745.



part of the act that amended the Illinois Pension Code violated the dormant Foreign Commerce Clause.<sup>217</sup> The court opined that this provision violated the dormant Foreign Commerce Clause because it burdened foreign commerce “by limiting the ability of banks and corporations to conduct business with Sudan and entities tied to Sudan.”<sup>218</sup> The defendants argued, however, that Illinois was acting as a market participant; therefore, the dormant Foreign Commerce Clause does not apply.<sup>219</sup> However, as mentioned above, it is not conclusive that the market participant exception applies to foreign commerce.<sup>220</sup> Nonetheless, this court opined that it did not need to determine whether the market participant exception applied to the dormant Foreign Commerce Clause because Illinois was not exclusively acting as a market participant.<sup>221</sup> Since the amendment to the Pension Code affected municipal pension funds, it was acting as a market regulator.<sup>222</sup> Without the protection of the market participant exception, the court held that the Pension Code amendment violated the dormant Foreign Commerce Clause.<sup>223</sup>

Two weeks after the *Giannoulis* decision, Congress proposed the Sudan Accountability and Divestment Act (the “SADA”) to protect state and local sanctions against Sudan from constitutional challenges.<sup>224</sup> The SADA authorizes “State and local governments to divest assets in companies that conduct business operation[s] in Sudan, [and] to prohibit United States Government contracts with such companies[.]”<sup>225</sup> The SADA resolves the constitutional issues challenged in *Giannoulis* by authorizing such state sanctions.<sup>226</sup> The legislation balances two essential interests — the federal government’s authority to manage foreign policy and the “ability of State and local governments to invest and divest their funds as they see fit.”<sup>227</sup> The SADA strikes “an appropriate balance by targeting state action in such a way that permits state divestment measures

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217. See Trachy, *supra* note 202, at 1032-33.

218. *Id.*

219. Nat’l Foreign Trade Council, Inc. v. Giannoulis, 523 F. Supp. 2d 731, 747 (N.D. Ill. 2007).

220. *Id.* at 748.

221. *Id.*

222. *Id.*

223. *Id.* at 749.

224. Trachy, *supra* note 202, at 1034.

225. Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516 (codified as amended at 50 U.S.C. § 1701 (2007)).

226. Trachy, *supra* note 202, at 1036.

227. *Id.* (citing S. REP. NO. 110-213, at 3 (2007)). The Tenth Amendment “may reserve to the states the power to determine with whom an individual state may deal...” *Id.*; see U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

based on risks to profitability, economic well-being, and reputations, arising from association with investments in a country subject to international sanctions.”<sup>228</sup> The SADA supports the actions of state and local governments in regards to the sanctions against Sudan and expressly states that the sanctions are not preempted by federal law.<sup>229</sup>

Although President George W. Bush signed the SADA, he attached a signing statement that cast doubt upon whether states were actually allowed to enact sanctions.<sup>230</sup> In his signing statement, President Bush declared that the SADA “purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan and thus risks being interpreted as insulating from Federal oversight State and local divestment actions that could interfere with implementation of national foreign policy.”<sup>231</sup> Further, he stressed that the Constitution grants the exclusive authority to conduct foreign affairs to the federal government; therefore, he asserted, “the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority.”<sup>232</sup> Thus, while the SADA was enacted, the question remains as to whether state sanctions enacted with Congressional approval may still be unconstitutional because they interfere with the federal government’s authority to conduct foreign affairs.<sup>233</sup>

## V. CONSTITUTIONAL ANALYSIS OF ANTI-BDS LEGISLATION

In order to analyze whether the state anti-BDS laws are unconstitutional, the first step is to determine the specific purpose for their enactment.<sup>234</sup> This issue begs the question of whether the state anti-BDS laws were enacted to affect the foreign affairs of the nations or whether they were enacted to serve a legitimate local purpose.<sup>235</sup> Reaching a conclusion on this inquiry will either resolve or greatly narrow the following constitutional analysis of the state anti-BDS laws.<sup>236</sup>

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228. S. REP. NO. 110-213, at 3 (2007).

229. *Id.*

230. Trachy, *supra* note 202, at 1037.

231. *Presidential Statement on Signing the Sudan Accountability and Divestment Act of 2007*, 43 WEEKLY COMP. PRES. DOC. 1646, 1646 (Dec. 31, 2007).

232. *Id.*

233. Trachy, *supra* note 202, at 1038.

234. See Fenton, *supra* note 13, at 571.

235. *Id.*

236. *Id.* at 573.

On the surface, the anti-BDS laws are merely a form of selective investment practices that divest money from companies that the states do not morally agree with; however, deeper consideration points to another purpose.<sup>237</sup> The political and public interests in creating the anti-BDS laws were to take a firm stand on the Israeli-Palestinian conflict.<sup>238</sup> The Israeli-Palestinian conflict is a delicate situation that must be handled with care.<sup>239</sup> For decades, the United States has conducted foreign policy to help the Israelis and the Palestinians reach an agreement over land.<sup>240</sup> Allowing states to take a position on the Israeli-Palestinian conflict will likely hinder the United States from conducting diplomacy with the Israelis and Palestinians.<sup>241</sup> Thus, since the anti-BDS laws were enacted to speak out against the Israeli-Palestinian conflict, and they likely interfere with the federal government conducting diplomacy, state anti-BDS laws are likely unconstitutional.<sup>242</sup>

#### A. *Intrusion into Foreign Affairs Analysis*

Conducting the nation's foreign affairs is a crucial matter. For this reason, the Constitution and case law assign this responsibility to the president and Congress, not to the states.<sup>243</sup> Any state action that interferes with the federal government's ability to conduct foreign affairs is forbidden.<sup>244</sup> Since the state anti-BDS laws protect and include the Israeli settlements in the West Bank, the states are promoting Israel's occupation of a territory that the Palestinian's want for their own state.<sup>245</sup> The West Bank causes controversy because Israel continues to build settlements in this territory.<sup>246</sup> Including Israeli settlements in the state anti-BDS legislation may compromise the president's ability to conduct diplomacy relating to the Israeli-Palestinian dispute over the West Bank.

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237. *See id.* at 574.

238. *See id.*

239. *See generally* Jill Allison Weiner, *Israel, Palestine, and the Oslo Accords*, 23 *FORDHAM INT'L L.J.* 230, 234 (1999). Israelis and Palestinians have been fighting since before Israel's independence in 1948. *Id.*

240. *See generally* *Oslo Accords*, *supra* note 2.

241. *See* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000); *Nat'l Foreign Trade Council, Inc. v. Giannoulis*, 523 F. Supp. 2d 731, 745 (N.D. Ill. 2007).

242. *See generally* Fenton, *supra* note 13, at 574.

243. *See, e.g.*, *U.S. v. Pink*, 315 U.S. 203, 233 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 63-64 (1941). Primarily, the president is in control of conducting diplomacy with foreign nations. *See Crosby*, 530 U.S. at 381.

244. *Id.* at 740 (citing *Bd. of Trs. of the Emps.' Ret. Sys. v. Baltimore*, 562 A.2d 720, 746 (Ct. App. Md. 1989)).

245. *See generally* Perry & Mohyeldin, *supra* note 20.

246. Perry & Mohyeldin, *supra* note 20.

State sanctions, such as the anti-BDS laws, are designed to affect foreign nations, which would naturally affect the federal government's ability to conduct diplomacy in that specific nation; however, courts analyzing state sanctions are split on this issue.<sup>247</sup> The *Giannoulis* court determined that state sanctions against Sudan would hinder the federal government from dealing with the Sudanese government.<sup>248</sup> Additionally, in *Crosby*, the Court ruled that state sanctions against Burma prevented the president from conducting diplomacy in Burma.<sup>249</sup> Conversely, the Maryland Court of Appeals in *Board of Trustees of Employees' Retirement System v. Baltimore*, that analyzed local sanctions against South Africa, determined that the state sanctions would have a minimal effect on foreign relations.<sup>250</sup>

The Maryland Court of Appeals seemingly overlooked the very purpose of the sanction against South Africa — to change the behavior of the South African government.<sup>251</sup> While the court ruled that the sanctions against South Africa would only have a “minimal and indirect” effect on South Africa, enacting local legislation on the intricate matter of the South African apartheid regime very likely hindered the federal government from conducting diplomacy.<sup>252</sup> The local sanction against South Africa further complicated the already intense foreign conflict.<sup>253</sup>

Like the delicate foreign affairs issues present in the other sanction cases, the Israeli-Palestinian conflict is an issue best handled by presidential diplomacy.<sup>254</sup> Presidents have conducted diplomacy over the Israeli-Palestinian conflict for decades.<sup>255</sup> Presidents have been the mediators between the Israelis and Palestinians during peace discussions over the years, working hand in hand with leaders from both groups.<sup>256</sup> Currently, the federal government's goal is to help the Israelis and Palestinians reach an agreement on the Israeli settlements in the West Bank, because many believe the settlements are halting peace negotiations.<sup>257</sup>

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247. See *Nat'l Foreign Trade Council, Inc. v. Giannoulis*, 523 F. Supp. 2d 731, 747 (N.D. Ill. 2007); *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 748.

248. *Giannoulis*, 523 F. Supp. 2d at 745.

249. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000). While the SCOTUS largely skirted the issue of the state's intrusion into foreign affairs, it still determined that the sanctions against Burma hindered the president from conducting diplomacy. See *id.*

250. *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 746.

251. See generally Fenton, *supra* note 13, at 574.

252. See generally *id.*

253. See generally *id.*

254. See generally Fisher, *supra* note 42.

255. *Oslo Accords*, *supra* note 2.

256. *Id.*

257. See generally Munoz, *supra* note 34.

Notably, the states and President Obama seemed to hold opposing views on the Israeli settlements.<sup>258</sup> In President Obama's signing statement to the Trade Act, he expressed his hesitation in shielding the Israeli settlements from harm due to boycotts, while the state anti-BDS laws include and support the Israeli settlements.<sup>259</sup> President Obama's reservation about including and protecting the Israeli settlements in the Trade Act was predicated on the fact that it could prevent him from conducting diplomacy.<sup>260</sup>

President Obama's reservations about protecting Israeli settlements is direct evidence that the states are likely not permitted to take a stand on the Israeli-Palestinian conflict by enacting anti-BDS laws.<sup>261</sup> During a land dispute of this nature, having the president express his view on the settlements while the states express the opposite view jeopardizes the Nation's foreign policy goals to achieve peace between the Israelis and Palestinians. For this reason, the state anti-BDS laws will likely impede the federal government's authority to conduct its foreign relations over the Israeli-Palestinian conflict, thus violating the constitution.<sup>262</sup>

### *B. Violation of the Commerce Clause Analysis*

Anti-BDS laws discriminate against any company, foreign or domestic, that supports the BDS Movement by boycotting Israel, which is a violation of the dormant Foreign Commerce Clause.<sup>263</sup> Courts rarely uphold laws that violate the dormant Foreign Commerce Clause.<sup>264</sup> The only way for the state anti-BDS laws to survive under a dormant Foreign Commerce Clause analysis is to fall within the market participant exception.<sup>265</sup> The states with anti-BDS laws would be considered market participants since they are deciding whom to contract with and whom to invest in, rather than working within their usual governmental capacity as market regulators; however, the SCOTUS has never determined whether the market participant exception applies to the dormant Foreign

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258. Kampeas, *supra* note 75.

259. *Id.* While President Trump does not and likely will not enforce President Obama's signing statement, President Obama's signing statement is evidence that the federal government must be able to speak with one voice when it comes to a delicate situation such as Israeli settlements. *See DaCosta v. Nixon*, 55 F.R.D. 145, 145 (E.D.N.Y. 1972).

260. Kampeas, *supra* note 75.

261. *See id.*

262. *See generally* *Zschernig v. Miller*, 389 U.S. 429, 429 (1968).

263. *See* *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 434 (1979).

264. *See generally id.*

265. *See, e.g.,* *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984).

Commerce Clause, and lower courts provide limited authority on the issue.<sup>266</sup>

The court in *Board of Trustees of Employees' Retirement System v. Baltimore*, analyzing the sanction against South Africa, referenced the fact that the SCOTUS had never applied the market participant exception to the dormant Foreign Commerce Clause.<sup>267</sup> Instead of being wary of this, the court determined that the local sanction would still be protected under the market participant exception.<sup>268</sup> While the *Giannoulis* court recognized the harm that state sanctions could have on diplomatic powers, it did not concretely determine whether the market participant exception applied to the dormant Foreign Commerce Clause.<sup>269</sup>

It is unlikely that the SCOTUS would rule that state sanctions should be protected under the market participant exception since state sanctions take a stand on fragile foreign conflicts.<sup>270</sup> It is more important for the Nation to speak with one voice on foreign affairs, than to extend the market participant exception to the dormant Foreign Commerce Clause.<sup>271</sup> Since the anti-BDS laws likely hinder the president from conducting foreign policy related to the Israeli-Palestinian conflict, it is extremely unlikely that the SCOTUS will extend the market participant exception to the states; therefore, the state anti-BDS laws are likely unconstitutional under the dormant Foreign Commerce Clause, currently.

While the anti-BDS laws are likely unconstitutional under the dormant Foreign Commerce Clause, Congress' proposed "Combating BDS Act of 2017" could prevent that constitutional challenge.<sup>272</sup> If passed, the proposed act would give the states expressed approval from Congress to divest state funding from companies that boycott Israel.<sup>273</sup> While it is well established that Congress can authorize

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266. Hutchens, *supra* note 132, at 446; *see, e.g.*, Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 66 (1st Cir. 1999) (stating it is more important for the nation to speak with one voice when conducting foreign affairs than to extend the market participant exception to the dormant Foreign Commerce Clause); Nat'l Foreign Trade Council, Inc. v. Giannoulis, 523 F. Supp. 2d 731, 748 (N.D. Ill. 2007) (opining that it is "not a foregone conclusion" whether the market participant exception applies to the dormant Foreign Commerce Clause); Antilles Cement Corp. v. Calderon, 288 F. Supp. 2d 187, 197 (D.P.R. 2003) (ruling that the market participant exception does not apply to the dormant Foreign Commerce Clause); Bd. of Trs. of the Emps.' Ret. Sys. v. Baltimore, 562 A.2d 720, 753 (Md. 1989) (applying the market participant exception to the dormant Foreign Commerce Clause in a state sanction case).

267. *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 752.

268. *Id.* at 753.

269. *Giannoulis*, 523 F. Supp. 2d at 745, 748.

270. *See Natsios*, 181 F.3d at 66; *Antilles Cement Corp.*, 288 F. Supp. 2d at 197.

271. *See id.*

272. *See Combating BDS Act of 2017*, S. 170 § 2, 115th Cong. (2017).

273. *Id.*

state action that would otherwise violate the dormant Commerce Clause, the SCOTUS has never opined whether the federal government can authorize state action that violates the dormant Foreign Commerce clause.<sup>274</sup> If the federal government can authorize state action that would violate the dormant Foreign Commerce Clause, the next issue is which federal branch could give the states this permission.<sup>275</sup> Ultimately, it depends on what the state action is intruding on, either a presidential area of foreign relations, a congressional area of foreign relations, or a shared area of foreign relations.<sup>276</sup>

On its face, the anti-BDS laws fall into the realm of affecting foreign commerce, since they are divesting from companies that participate in the Israeli boycotts and are restricting pension fund distribution.<sup>277</sup> In actuality, the anti-BDS laws were enacted to change the behavior of the Palestinian-led BDS Movement and its supporters, which interferes with the president's diplomatic power over the Israeli-Palestinian conflict.<sup>278</sup> Since the anti-BDS laws affect foreign commerce as well as the Nation's diplomacy, the anti-BDS laws will likely need Congressional and presidential authorization to survive.<sup>279</sup> When signing the SADA, an act nearly identical to the proposed Combating BDS Act of 2017, President Bush expressed his hesitation that the act was unconstitutional, most likely because the act hindered him from conducting diplomacy.<sup>280</sup> If President Bush's hesitation is any indication of the future of the proposed Combating BDS Act of 2017, state anti-BDS laws may not receive the authorization that they need to withstand constitutional scrutiny.

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274. Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 283 (2011).

275. *Id.* at 284.

276. *Id.* at 284-85. In other words, if the state action is purely affecting commerce, Congress should be able to authorize the state action. *Id.*; see U.S. CONST. art. I, § 8, cl. 3. If the state action is intruding on the president's diplomatic power, the president should be able to authorize the state action. Schaefer, *supra* note 274, at 285; see U.S. CONST. art II, § 2, cl. 1.

277. See Schaefer, *supra* note 274, at 286.

278. See *id.*

279. See *id.* The president can express his approval via signing the Combating BDS Act of 2017, if it gets passed in both houses of Congress. See generally *id.*

280. See Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516 (codified as amended at 50 U.S.C. § 1701 (2007)); *Presidential Statement on Signing the Sudan Accountability and Divestment Act of 2007*, 43 WEEKLY COMP. PRES. DOC. 1646, 1646 (Dec. 31, 2007).

### C. Preemption by Existing Federal Law Analysis

Congress controls the extent to which the state anti-BDS laws are preempted.<sup>281</sup> Since Congress did not expressly preempt states from sanctioning supporters of the BDS Movement, the primary issues are whether Congress intended to occupy the field with the Trade Act, or whether the state anti-BDS laws stand as an obstacle to the federal government achieving its goal to put pressure on the BDS Movement.<sup>282</sup> In order to determine whether Congress intended to preempt the anti-BDS laws, there is mixed authority.<sup>283</sup>

On one side, the court that analyzed the Baltimore sanctions against South Africa would determine that the anti-BDS laws would receive a strong presumption against preemption because the anti-BDS laws are monitoring state investments, which is a traditional duty of the states.<sup>284</sup> Further, that court determined that there must be compelling evidence to show that Congress intended to preempt the state sanction.<sup>285</sup> The *Giannoulis* court that analyzed the Illinois sanction against Sudan, however, rejected that argument.<sup>286</sup> Since Congress acted in an area of foreign relations when it passed the Trade Act, the Illinois state court would opine that there is a strong presumption that Congress intended to occupy the field, thus preempting the state anti-BDS laws.<sup>287</sup> Knowing that preemption is disfavored, it is likely that the *Giannoulis* court incorrectly determined that the state sanction against Sudan was preempted by federal law.<sup>288</sup> Rather, the Baltimore court correctly determined that presumption is not lightly presumed in instances similar to the state anti-BDS laws.<sup>289</sup>

One of the Trade Act's primary goals is to discourage companies from boycotting Israel, which is the same goal as the state anti-BDS

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281. See U.S. CONST. art. VI, cl. 2; Garcia & Garvey, *supra* note 9, at 6.

282. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

283. See *Bd. of Trs. of the Emps.' Ret. Sys. v. Baltimore*, 562 A.2d 720, 741 (Md. 1989) (stating that in areas where states traditionally regulate, there is a "strong presumption against finding federal preemption."); *but see Nat'l Foreign Trade Council, Inc. v. Giannoulis*, 523 F. Supp. 2d 731, 740 (N.D. Ill. 2007) (stating "when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field").

284. See *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 741. The Maryland Court of Appeals stated that monitoring state investments is clearly an area where states traditionally regulate; therefore, the state sanction was not preempted. *Id.*

285. *Id.* (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

286. See *Giannoulis*, 523 F. Supp. 2d at 740 (citing *Bd. of Trs. of Emps' Ret. Sys.*, 562 A.2d at 741).

287. *Id.*

288. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (stating "preemption is not to be lightly presumed").

289. See *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 741.



laws.<sup>290</sup> It is unlikely that a court will determine that Congress intended to occupy the field against the BDS Movement because, if anything, the states are helping Congress achieve its goal to dissuade economic warfare against Israel. The state anti-BDS laws do not hinder the federal government's goal to prevent boycotts against Israel; conversely, the anti-BDS laws promote the federal government's goal.<sup>291</sup> Thus, it is unlikely that Congress intended to preempt the states from acting against the BDS Movement.

## VI. CONCLUSION

While the state anti-BDS laws were created to stand by their ally, Israel, the anti-BDS laws may cause more harm than good. Due to the intricate nature of the Israeli-Palestinian conflict, it is best to allow the federal government, specifically the president, to speak out on the conflict, rather than the states.<sup>292</sup> The primary issue with the state anti-BDS laws is the inclusion of the highly disputed Israeli settlements in the West Bank.<sup>293</sup> Since the Israeli settlements are at the heart of the Israeli-Palestinian conflict, the states should not speak out about this delicate issue. This inclusion may harm the president's ability to conduct foreign policy with the Israelis and Palestinians.<sup>294</sup> Further, since the state anti-BDS laws discriminate against foreign commerce, they also likely violate the dormant Foreign Commerce Clause.<sup>295</sup> However, it is unlikely that the state anti-BDS laws are preempted by federal law, since the anti-BDS laws support federal legislation sanctioning companies that boycott Israel.<sup>296</sup> Even still, the future of the state anti-BDS laws and future state sanctions to come is unknown due to the lack of authority from the SCOTUS. Since the states may very well affect foreign affairs by establishing state sanctions, the SCOTUS must determine once and for all whether states are permitted to target foreign nations in the form of state sanctions.

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290. Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C.A. § 4452(b)(4) (West 2016).

291. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

292. See *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (stating the president is the "sole organ of the nation in its external relations, and its sole representative with foreign nations").

293. See generally *Presidential Statement on Signing the Sudan Accountability and Divestment Act of 2007*, 43 WEEKLY COMP. PRES. DOC. 1646, 1646 (Dec. 31, 2007).

294. See generally *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 744 (citing *Zschernig v. Miller*, 389 U.S. 429, 441 (1968)).

295. See generally *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 434 (1979).

296. See Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C.A. § 4452(c) (West 2016).







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