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Truthfulness as an Ethical Form of Life

W. Bradley Wendel

Cornell Law School, bradley-wendel@lawschool.cornell.edu

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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.”¹ 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[.]”² Philosophers, and then general readers, became familiar with Harry Frankfurt’s strikingly similar definition of bullshit.³ 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.”⁴ 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.”⁵ The original target of Frankfurt’s little essay was probably fashionable academic postmodernism—“various forms of skept-

* 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”⁶—but it was quickly pressed into service by critics of partisan media and the seeming indifference to truth of certain political candidates.⁷

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,”⁸ and contending that the National Park Service Photo, showing the obviously much smaller Trump crowd, had been doctored somehow.⁹ 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.”¹⁰ 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 Oswald¹¹), 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 collapsed¹²), to the utterly trivial (he said there are no chess grandmasters in the United States¹³). Remarkably, the New York Times keeps a frequently updated online list of the lies Trump has told since taking office.¹⁴ 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 program¹⁵), 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,¹⁶ or stating that he witnessed damage from Hurricane Harvey firsthand, which was contradicted by reporters traveling with the President¹⁷), 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 campaign¹⁸), to alleging that, unlike his predecessors, he made calls to the families of American service personnel killed in action.¹⁹ 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

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 Maligned 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.²⁰

Other presidents have lied, of course, but generally in order to conceal serious misconduct or the effects of misbegotten policies.²¹ 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.²²

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."²³ 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*²⁴),

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.²⁵ 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"²⁶—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.²⁷ This does not mean that truth has a value that is merely instrumental; the value of truth is not reducible to its virtues.²⁸ 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

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.²⁹ 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.³⁰

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”³¹ 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.³² 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?*”³³ 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.³⁴ 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”³⁵ where strategically useful, so be it. If

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."³⁶

Similarly, in *The Ethics of Advocacy*,³⁷ 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.³⁸

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."³⁹

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.⁴⁰ 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.⁴¹ 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.⁴² It destroys the trust that is a precondition for communicating information and maintaining social relationships.⁴³ 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.⁴⁴ 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

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."⁴⁵ 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.⁴⁶

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.⁴⁷ 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.⁴⁸ 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

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.⁴⁹ 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.⁵⁰ 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),⁵¹ 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[.]⁵²

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

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.⁵³ 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.⁵⁴ 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.⁵⁵ 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

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.⁵⁶ 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.⁵⁷ 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.⁵⁸ A lawyer may not introduce evidence that the lawyer knows to be false,⁵⁹ 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.⁶⁰ In ordinary moral

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.⁶¹

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.⁶² 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.⁶³ 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

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.⁶⁴ 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.⁶⁵

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.⁶⁶ 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.⁶⁷ Those issues, to quote Joshua Cohen, are “politically idle.”⁶⁸ Rather, the value of truth in law, government, the media, and similar public domains depends on the idea of public justification.⁶⁹ 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.⁷⁰ 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.⁷¹

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?⁷²

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 judgment⁷³—it is not a straightforward matter to conduct a discussion that is likely to lead the participants out of error.

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.⁷⁴ 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.⁷⁵

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.”⁷⁶ 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.”⁷⁷ These virtues and practices are *political* in the sense that they derive their intelligibility from the problems they are aimed at solving.⁷⁸ I like to quote Hugo Grotius’s characterization of people as “quarrelsome but socially minded beings.”⁷⁹ 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.”⁸⁰ The personal problem is that of “stabilizing the

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.”⁸¹

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.⁸² 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.”⁸³ 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.⁸⁴ Courts require the parties to certify that the

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.⁸⁵ 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.⁸⁶ “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.⁸⁷ 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 trust⁸⁸) and Accuracy (getting it right, which allows members of a community to pool reliable information about the world⁸⁹). 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).⁹⁰ As President, however, he possesses

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.⁹¹ 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.⁹² 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.⁹³ Courts generally decline to engage in “judicial psychoanalysis” to root out evidence of discriminatory intent.⁹⁴ One would therefore expect courts to treat the Trump

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 16.⁹⁵ 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.⁹⁶

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.⁹⁷ 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.⁹⁸ 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-

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,⁹⁹ and the injunction was affirmed by the Fourth Circuit.¹⁰⁰ 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.¹⁰¹ The second travel ban order includes a recitation of facts supposedly justifying restrictions on entry from several countries, identified as state sponsors of terrorism.¹⁰² 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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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

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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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.¹¹² 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,"¹¹³ 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.¹¹⁴ 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

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.”¹¹⁵

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.”¹¹⁶ 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,’”¹¹⁷ 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

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.¹¹⁸ 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,¹¹⁹ 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.¹²⁰ 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.¹²¹ 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

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.¹²² 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.

122. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9 (2001).