

Giving Reasons and Having Reasons: The Fine Line Between Telling the Truth and Lying

Abstract:

Public “reason-giving” is an essential duty of democracies. The giving of reasons ought to promote better public decision-making by keeping the government’s discretionary powers in check. However, this aim is compromised by the possibility that decision-makers may solely disclose insincere and misleading justifications as a means of preventing accountability. In the backdrop of institutional actors’ endemic recourse to less than candid justifications, this paper examines various arguments which articulate how truthfulness is necessary in the practice of law. This paper’s underpinning assumption is that the conventional view—whereby the difference between lying and being truthful is that decision-makers do not give the reasons they independently hold for a given decision, as opposed to accurately reciting all of the reasons they hold for making this decision—is problematic. To conclude, I briefly sketch out my own diagnosis of the problem, having argued that the conventional distinction drawn between lying and being truthful is flawed, particularly when applied to multi-member institutions.

Introduction:

In January 2004, Tariq Ramadan, a well-known scholar of Islam and a Swiss citizen, accepted an offer to become a tenured professor at the University of Notre Dame, Indiana. However, in July of that year, one week before Professor Ramadan’s scheduled move to Notre Dame, the American Embassy in Switzerland revoked his visa. Consular officials did not provide any explanation for the revocation.¹ Consequently, Ramadan resigned from his position

¹ The only reason the government gave for denial of Professor Ramadan’s visa is the unofficial one presented to the *Los Angeles Times* by Russ Knocke, a spokesman for the Immigration and Customs Enforcement Division of the Department of Homeland Security (“DHS”), namely, that Professor Ramadan had “endorse[d] or espouse[d] terrorist activity.” He further declared that the basis of the revocation was a provision of the Patriot Act, which permits the

at Notre Dame. The following year, he reapplied on several occasions for a visa to enter the United States for short periods of time to attend academic events. For months, no decision was made on Ramadan's visa application. As a result, Professor Ramadan filed a lawsuit challenging his ongoing exclusion for the United States in January 25, 2006, with the assistance of several American organizations, including the American Academy of Religion, the American Association of University Professors and the PEN American Center.²

Finally, on September 19, 2006, after months of unexplained delay in the proceedings, Ramadan was notified by telephone that his visa petition had been denied. He later received the following letter from John Kinder, a consular official in Bern.³

Dear Mr. Ramadan,

Your application for a B1/B2 non-immigrant visa has been refused. You have been found inadmissible to the United States for engaging in terrorist activity by providing material support to a terrorist organization. Please see sections 212(a)(3)(B)(i)(I) and 212(a)(3)(B)(iv)(VI) of the Immigration and Nationality Act (INA) (attached).

The basis for this determination includes the fact that during your two interviews with consular officials, you stated that you had made donations to the Comité de Bienfaisance et de Secours aux Palestiniens and the Association de Secours Palestinien. Donations to these organizations, which you knew, or reasonably should have known, provided funds to Hamas, a designated Foreign Terrorist Organization, made you inadmissible under INA § 212(a)(3)(B)(i)(I). Under U.S. law, this ineligibility is permanent and you will be unable to enter the United States in the near future unless the ineligibility is waived in accordance with INA Sec. 212(d)(3).

United States to exclude foreigners who use a "position of prominence within any country to endorse or espouse a terrorist activity." (See: "Muslim Scheduled to Teach at Notre Dame Has Visa Revoked," *L.A. Times*, August 25, 2004, p. A23; see also, on the Ramadan case generally: "U.S.-Barred Muslim Scholar Joins Key British Task Force," REUTERS, September 1, 2005 as well as Ramadan's own opinion about the whole affair: Tariq Ramadan, "Information items: straight from the source," September 12, 2005, available at http://www.tariqramadan.com/article.php3?id_article=0424&var_recherche=task+force).

² In *Am. Acad of Religion v. Chetoff*, 463 F.Supp.2d 400 (S.D.N.Y. 2006), the United States District Court of the Southern District of New York, ordered that the government was to issue a formal decision on Ramadan's pending visa application within ninety days. Judge Crotty, who wrote the opinion, argued that the government "may not invoke 'national security' as a protective shroud to justify the exclusion of aliens on the basis of their political beliefs.... If Ramadan is a threat to national security, or there is some other facially legitimate and bona fide reason for his exclusion, the Government may exclude him. But the Government must provide an explanation. It has not done so."

³ As transcribed in the Slip Opinion of *American Academy of Religion v. Chertoff*, 463 F.Supp.2d 400, 416-18 (S.D.N.Y. 2006).

Yours sincerely,

(original signature)
John O. Kinder
Consul
US Embassy Bern

Upon reading the letter, Ramadan and his supporters amended the complaint to challenge the decision on the ground that the government’s proffered reason for denying the visa was not “facially legitimate and bona fide” as required by case law.⁴ The complaint further contended that the official reason for Ramadan’s exclusion—that he engaged in terrorist activity by providing material support to a terrorist organization—was supplied in bad faith and unsubstantiated by facts. In particular, the complaint pointed out that the Association de Secours Palestinien (ASC) was not considered to be a terrorist group by the United States at the time when Ramadan made his donations—between 1998 and 2002. Only on August 21, 2003, a year after Ramadan made his last donation, did the U.S. Department of Treasury list ASC as an entity supporting terrorism because it provided funding to Hamas. In addition, plaintiffs argued that the government had failed to demonstrate that Ramadan “knew,” in the sense required by the law, that he was supporting “terror” by making donations to this organization.

The Ramadan case raises the question of whether the “facially legitimate” reason standard should allow State Department officials to present grounds for denying entry to the United States which differs from the actual reasons underlying the decision. If this were the case, bureaucrats would be entitled to publicly give any acceptable reason, while actually making their determinations based on other—perhaps odious or simply frivolous—considerations. In this

⁴ The complaint was amended on February 2, 2007. The “facially legitimate and bona fide” standard has been articulated in *Kliendienst v. Mandel*, 408 U.S. 753 (1972). It requires that when a consular official denies a visa, which implicates a United States citizen’s First Amendment rights, he or she must have a facially legitimate and bona fide reason for doing so.

hypothesis, the requirement for public officials to give reasons justifying their decisions would be disconnected from the question of whether or not they have any reason for their decisions and what kind of reasons they have. This would mean that the requirement to give reasons is formal, in the sense that the usual assumptions we make about the connection between what people say and what they believe would be suspended: as long as public officials disclose acceptable reasons to the public, their underlying motives become irrelevant to the legality of the decision. According to this understanding, deciders are unconstrained by truthfulness when discharging their duty to offer reasons for their actions. Yet something must have gone wrong in this reasoning, for why would one even impose a duty to give reasons on governmental agents if the duty did not include the requirement that they give *sincere* reasons for their decisions? If any reason, sincere or insincere, truthful or misleading, were to pass the test, it is unclear how the requirement could constrain in any way the decision-making process.

The purpose of this paper is to discuss the relationship between truthfulness and reason giving in the legal process. In particular, I intend to evaluate the suggestion that legal systems should implement a “giving reasons requirement,” demanding that public officials provide candid statements of reasons for their decisions. As the Ramadan case illustrates, the nature and the extent of the disclosure triggered by the requirement is unclear in practice.

Perhaps it is worth briefly mentioning here that the question at issue here is not that of determining whether legal propositions have truth-value, that is, can be qualified as true or false, but whether there is truthfulness in legal decision-making and justificatory discourse.⁵ I discuss truthfulness *in* the legal process and not law’s truth. What interests me is whether public

⁵ I will not address the question of whether or not law can be described in terms of truth and falsehood. This is a wholly different question, which has been analyzed, e.g., by Dennis Patterson, *Law and Truth* (NY, Oxford: Oxford University Press, 1996) and Anna Pintore, *Law Without Truth* (Liverpool: Deborah Charles Publications, 2000).

officials' claims about what reasons inform their decision-making in the legal process should always be sincere and what it means to say that they are misrepresenting the law or giving deceitful justifications. My focus is on the extent to which the reasons public officials put forward can be qualified as sincere or insincere. My goal is neither to articulate a "pro-candor" theory of legal justification, nor to defend the controversial view that legal justification should be indifferent to truthfulness or deception. I argue only that the way in which the debate has been framed distorts the question by ignoring important underlying epistemological questions.

This paper is structured in four main parts. I begin by clarifying the concept of candor in the law and by rendering more explicit what the legal community ordinarily expects from the requirement to give reasons. Parts two and three examine in greater details arguments for and against imposing on institutional players a requirement to give sincere reasons for their decisions. Lastly, I discuss an epistemological assumption which is implicit in the way the existing candor debate has been framed. The assumption is that having reasons for an action or a decision belongs to a first-order lever, or a more fundamental level. By contrast, "reason giving" is conceived as a second-order enterprise, both logically and chronologically. The activity of giving reasons to justify the holding a certain belief, or for performing a certain action, is conditioned upon the preexisting state of having reasons for that belief or that action. This conception of the relationship between the reasons one has and the reasons one gives implies that each time one does not give all and only the reasons one "has," one is engaging in some form of deceit. I argue that this is an over-simplification as applied to the legal context. In this context, the line between lying and being truthful is not so clear.

I—Delineating the Problem: Defining Candor in the Law

Is The Giving Reasons Requirement A Requirement to Give Candid Reasons?

Legal justification, in the sense that interests me here, is best understood as the activity of showing that a certain decision or proposition is true or false within a given legal system. It is an open question whether an insincere or a deceptive reason could contribute to demonstrating the validity of any action or assertion. At first, when reflecting on the requirement to give reasons in the public domain, it seems obvious that what is demanded of decision-makers is that they give the reasons that they actually “have” in making a decision, in the sense that they need state the reasons which in fact guided their reasoning in making a decision. In other words, it is expected that the normative reasons public officials put forward to justify their decisions also be their motivating reasons for picking a particular solution.⁶ Of course, the mere fact that the reasons supplied are not the reasons that motivated the decision does not in itself undermine that they may be good reasons, or indeed their capacity to justify. If it is true that Ramadan supports terrorism, then this fact remains a good reason for justifying his exclusion, even if it turns out that the State Department had based its decision on another consideration. Therefore, if it is legally a sufficient ground, then why worry about the subjective motivations? Suppose we find out that consular officers denied Ramadan’s visa because they are islamophobes. Even if this were the

⁶ I am referring to the distinction between normative and motivating reasons, which has become ubiquitous in the literature on moral reasons over the past twenty years, at least since Bernard Williams’ “Internal and External Reasons,” reprinted in *Moral Luck: Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981), pp. 101-113. The criterion for a motivating reason is roughly that it explains rather than justifies a person’s actions or decisions, whereas the criterion for a normative reason is that it justifies, rather than explains that person’s actions or decisions. For more recent discussions, see, e.g., Stephen Darwall, “Internalism and Agency,” *Philosophical Perspectives*, Vol. 6, 1992, pp. 155-74; Derek Parfit, “Reasons and Motivation,” *Proceedings of the Aristotelian Society, Supplementary Volume*, Vol. 77, 1997, pp. 99-130; Susan Hurley, “Reason and Motivation: the Wrong Distinction?” *Analysis*, Vol. 61, 2001, pp. 151-55; John J. Tilley, “Justifying Reasons, Motivating Reasons, and Agent Relativism in Ethics,” *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 118, No. 3, 2004, pp. 373-399 and Simon, Robertson, “Reasons and Motivation—Not a Wrong Distinction,” *Proceedings of the Aristotelian Society*, Vol. 106, 2006, pp. 393-399.

case, they would have justified their rejection based on a valid reason (as a matter of law): the Immigration and Nationality Act indeed states that visas are to be denied to applicants who are engaged in terrorist activity. Why care about their subjective motivation if the publicly-given justification is legally valid? In other words, if there is a legally good reason for denying the visa, namely, if Ramadan did provide financial support to a terrorist group, then why bother about what the decision-makers really thought?

One may object that the legal duty to give reasons is often, as a matter of positive law, not a duty to give any reason, but a duty to give candid reasons. The “facially legitimate and bona fide” standard raised in the Ramadan case provides a good example, as it includes the requirement that the reasons disclosed be “bona fide.” The reasons advanced must be sincere and honest: the government cannot lie about its reasons. The *bona fide* clause shows that the requirement to give reasons has an epistemic component built into it, in the sense that it calls for an evaluation of the decider’s state of mind. This is problematic, for it is often very difficult, if not impossible, to ascertain whether governmental agents are telling the truth or lying when justifying their decisions. We have no guarantee of access to their actual beliefs, so how are we to verify that the reasons they give are sincere? Our only ground for determining their subjective motives is their own testimony. However, this seems a very weak basis.

This leads to a further problem, for how is the epistemological difficulty of accessing public officials’ beliefs relevant to the legitimacy of the requirement not to lie? From the epistemic fact that it is seldom possible to discover decision-makers’ subjective motives, it should not follow that public officials have permission to lie about their reasons. Otherwise, following the same logic, one could argue that because we do not have access to other human beings’ mental states, lying is morally permissible. The point here is that we need an account of

reason giving within the legal process which clarifies the relationship between the normative requirement to give sincere reasons and the epistemological problem of ascertaining what those reasons are.

Truthfulness in Law and Politics

As the Ramadan case shows, law sometimes entertains a paradoxical relationship to truth. On the one hand, most people would agree that courts and other law-creating or law-applying institutions are not meant to deliberately mislead the public. Instead, they should constitute neutral fora, insulated from social pressures and private interests, where truth is able to manifest itself. On the other hand, legal institutions are increasingly criticized for their lack of candor.⁷ Judges, but also legislators, administrators and other public officials are routinely accused of feeding lies to the public, or at least of embellishing the truth, when justifying their actions. To be sure, the broadly defined topic of transparency, lying, and secrecy in political life has become somewhat fashionable.⁸

The evaluation of deception, however, varies across different domains of social life. There is an important difference between law and politics in this regard. Hanna Arendt has pointed out that secrecies, lies and deception have been entangled with politics since its very inception—at

⁷ In a famous article, legal scholar Martin Shapiro has thus declared: “Courts and judges always lie. Lying is the nature of the judicial activity. [...] Worrying about whether judges ought or ought not to lie is foolhardy. Judges necessarily lie because it is the nature of the activity they engage in.” (Martin Shapiro, “Judges as Liars,” *Harvard Journal of Law & Public Policy*, Vol. 17, 1994, p. 156).

⁸ For instance, in chronological order, a selection of this literature: Itzhak Galnoor (ed.), *Government Secrecy in Democracies* (NY: Harper & Row, Publishers, 1977); Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Pantheon Books, 1978); Lionel Cliffe and Maureen Ramsay, *The Politics of Lying* (London: Macmillan, 2000); Harry Frankfurt, *On Bullshit* (Princeton: Princeton University Press, 2005) and *On Truth* (New York: Knopf, 2006); Elizabeth Markovits, “The Trouble With Being Earnest: Deliberative Democracy and the Sincerity Norm,” *The Journal of Political Philosophy*, Vol. 14, No. 3, 2006, pp. 249-269 and Ann Florini (ed.), *The Right to Know* (New York: Columbia University Press, 2007).

least since Plato's argument on the noble lie.⁹ Truthfulness has hardly ever been counted as a political virtue, so it should come as no surprise that the issues of transparency and deception resurface regularly in political discourse. In contrast, the legal process is generally thought to require unconditional transparency. Truthfulness is often cited as a legal virtue. Candor towards and between public institutions, honesty in statements to others, and accurate depictions of the law, are some of the defining features of legal ethics.¹⁰ Candor is arguably a defining feature of the democratic legal system itself: the ideal of the rule of law has traditionally been understood as comprising, among its most important requirements, the principle of publicity.¹¹ The publicity principle mandates not only disclosure but also truthfulness. Making the law public exposes it to public deliberation and censure: publicity is inseparable from some degree of truthfulness in the sense that no serious discussion of the law could occur if most citizens were not aware of its content or only had access to a misleading depiction of it. More specifically, legal institutions such as courts, parliaments and various public administrations, are distinct from other social institutions through the frequent use of formal procedures aimed at furthering the requirement of truthfulness, such as taking oaths, calling witness, convening expert panels, producing evidence, securing cross-examinations, and so on.

Assuming that candor is of special importance to the legal process, are we to conclude that public officials should always be truthful about their reasons when justifying their decisions? As is often the case in contemporary jurisprudence, the current academic discussion on truthfulness in the law is usually judge-centric. Legal scholars have mostly focused on what has come to be

⁹ Hanna Arendt, "Truth and Politics," in her *Between Past and Future* (NY: Penguin Books, 1993), pp. 227-264; Plato, *Republic*, Book III, 414b-e.

¹⁰ Lawyers—be they attorneys, judges, arbitrators, or administrators—must usually take oaths and comply with local rules of ethics laid down in professional responsibility codes, such as the American Bar Association Model Rules of Professional Conduct for attorneys.

¹¹ See, e.g., Lon Fuller, *Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969).

known as “judicial candor.”¹² They concentrate on the fact that judges might hold certain assumptions, motivations, and theories, which underlie their decisions (their “true” reasons for deciding in favor of a particular outcome), on the one hand, but give, on the other hand, very different “official” reasons to publicly justify their decisions. Typically, while the reasons given in public and put on record appear to be purely “legal”—in the sense that they are borrowed from acknowledged legal sources such as the Constitution, statutes, precedents, or even the intent of framers or legislators—commentators often suspect that the “real reasons” underlying a decision rest on political, economical, moral, philosophical, or religious, preferences.¹³

Much legal scholarship on candor has been built around an opposition between those who favor judicial candor and those who criticize it. Two camps have emerged: if most legal scholars insist that it is an inherent requirement of the judicial function to give candid reasons,¹⁴ more recently, some commentators have urged that judges may sometimes be justified in misrepresenting their reasons.¹⁵ The dispute over the vices and virtues of candor, however, can

¹² For a presentation of the legal scholarship on judicial candor, see David L. Shapiro, “In Defense of Judicial Candor,” *Harvard Law Review*, Vol. 100, 1987, pp. 731-750 (arguing in favor of judicial candor).

¹³ This is a typical legal realist and Critical Legal Studies type of challenge, which develops by denouncing the fictitious character of axiologically neutral reasons in the law, in an effort to “unmask” the underlying motivations for public decisions. See, e.g., Jerome Frank, *Law and The Modern Mind*, (New York: Brentano’s, 1930); Allan C. Hutchison and Patrick J. Monahan, “Law, Politics and the Critical Legal Scholar: The Unfolding Drama of American Legal Thought,” *Stanford Law Review*, Vol. 36, No. 1/2, 1984, pp. 199-245 (emphasizing, p. 206, the Critical Legal Studies thesis that “[l]egal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes.”); and Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model*, (Cambridge; New York: Cambridge University Press, 1993), arguing that supreme court justices decide cases based on their political viewpoint rather than on the law.

¹⁴ Proponents of judicial candor include: David L. Shapiro, “In Defense of Judicial Candor,” *Harvard Law Review*, vol. 100, 1987, pp. 731-750; Paul Gewirtz, “Remedies and Resistance,” *Yale Law Journal*, Vol. 92, No 4, 1983, pp. 585-681; Schwartzman, Micah, “The Principle of Judicial Sincerity,” (September 2006). Available at SSRN: <http://ssrn.com/abstract=931435>.

¹⁵ Critics of judicial candor include: Richard Posner, *Law, Pragmatism and Democracy* (Cambridge: Harvard University Press, 2003), especially, pp. 350-352; Scott C. Idleman, “A Prudential Theory of Judicial Candor,” *Texas Law Review*, Vol. 73, 1995, pp. 1307-1417 (arguing that judges, subject to prudential considerations, may enjoy substantial discretion as to candor); Martin Shapiro, “Judges as Liars,” *Harvard Journal of Law & Public Policy*, Vol. 17, 1994, pp. 155-156 (arguing that all judges lie all the time) and Nicholas S. Zeppos, “Judicial Candor and Statutory Interpretation,” *Georgetown Law Journal*, Vol. 78, 1989, pp. 353-413 (arguing that judicial candor in

be traced back to older discussions about legal reasoning, such as the debate between legal realist positions and the movement for reasoned elaboration.¹⁶ The main premise of realist approaches to reason giving is that judges and other decision-makers rarely disclose their genuine reasons. Instead, they are always involved in some kind of ex-post rationalizing—where rationalizing is taken in a pejorative sense.¹⁷ By contrast, partisans of reasoned elaboration maintain that the key ends served by reason giving cannot be achieved in the absence of candor. In their view, a decision that is justified by false reasons is necessarily an unreliable guide to the future because

statutory interpretation poses legitimacy concerns and calls into question judges' checking function).

¹⁶ The most important discussions of “reasoned elaboration” views can be found in: Herbert M. Hart & A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge, Mass.: Tentative Editions, 1958), developing the idea of judicial opinions as “reasoned elaborations” and stressing that the thinking of judges about particular cases could mature into “reason,” an interpersonal notion; Herbert Wechsler, “Towards Neutral Principles of Constitutional Law,” *Harvard Law Review*, Vol. 73, 1959, pp. 1-35 (implying that judges should be required to support their choices through a “type of reasoned explanation,” which involves reaching judgment on neutral principles and reasons transcending the immediate result); Lon L. Fuller, “The Forms and Limits of Adjudication,” *Harvard Law Review*, Vol. 92, 1978, pp. 353-409 (arguing that the “essence” of adjudication lies in the mode of participation it accords the affected party, i.e. the presentation of proof and reasoned arguments); G. Edward White, “The evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change,” *Virginia Law Review*, Vol. 59, 1973, pp. 279-302 (arguing that the reasoned elaboration movement is due to a reaction against legal realism and can be historically traced back to the second world war, when jurists started to seek for a jurisprudence that would guarantee against totalitarianism) and Kent Greenawalt, “The Enduing Significance of Neutral Principles,” *Columbia Law Review*, Vol. 78, 1978, pp. 982-1021 (defending Wechsler against his critics and arguing that if judges hold themselves to neutral principles, they are more likely to render appropriate decisions and that the decision and the opinion supporting it will better promote the development of the law). For realist arguments demythologizing so-called “reasons,” see: Joseph C. Hutcheson, Jr., “The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision,” *Cornell Law Quarterly*, Vol. 14, 1929, pp. 274-288 (arguing that the rules are merely means by which judges justify a result they had previously reached on the basis of intuitive “hunches”); Max Radin, “The Requirement of Written Opinions,” *California Law Review*, Vol. 18, 1930, pp. 486-496 (criticizing the requirement of written opinions from a time management point of view as inconvenient; for judges, who lose time preparing opinions; lawyers, who lose time reading them and for the litigants, who see an increasing delay in the final disposition of causes); Moses Lasky, “Observing Appellate Opinions From Below the Bench,” *California Law Review*, Vol. 49, 1961, pp. 831-44 (arguing that opinions fail to fulfill their three functions, i.e. they fail to state the law, because judges make the laws they like, they fail to mollify litigants: often courts decide issues that were not argued at all by the litigants or do not decide issues that were presented by litigants and opinions do not even “make the judges think”); and Duncan Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology,” *Journal of Legal Education*, Vol. 36, 1986, pp. 518-562 (arguing that judges are essentially pursuing political agendas when adjudicating cases and that the reasons provided in support for their decisions mainly serve disguise their manipulations of the “law” so as to justify the outcomes that they like).

¹⁷ For example, Jerome Frank, “What Courts Do in Fact,” *Illinois Law Review*, Vol. 26, 1932, pp. 645-666 (arguing, p. 653 that “[o]pinions... disclose but little of how judges come to their conclusions. The opinions are often ex post facto; they are censored expositions.”)

the real—albeit concealed—reasons, and not the false ones, will actually determine the resolution of later cases.

The Candor Problem: Not Circumscribed to Courts

My project is much broader than what has been discussed earlier, in the sense that I am not only interested in judges, but also in all the decision-makers who are entrusted with the task of making public decisions based on the law and who are required to publicly justify those decisions—be it in virtue of a formal legal duty to give reasons, or in virtue of a dominant social practice that pressures them to give reasons. In most legal systems, it is not only courts, but also administrative agencies that are required to give reasons to substantiate their decisions.¹⁸ Legislators and members of the executive increasingly tend to put forward reasons in support of their actions.¹⁹ Even public or semi-public institutions such as hospitals, law-enforcement agencies, schools and universities, banks and other financial institutions, are compelled to justify

¹⁸ For example, in the United States, the Administrative Procedures Act requires reasons for certain administrative decisions (5 U.S.C. § 553 (c) (1988)). In France, the July 11, 1979 statute (*Loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs*), established the duty for all administrative agencies to justify unfavorable individual decisions. In England, the Tribunal and Inquiries Act 1958 created an obligation to give reasons for tribunals (now s.10(1) Tribunal and Inquiries Act 1992). For a comparative analysis of the giving reason requirement in American and European law, see Martin Shapiro in “The Giving Reasons Requirement,” *University of Chicago Legal Forum*, 1992, pp. 179-221.

¹⁹ Of course, Parliaments are generally not required by law to give any reason for their decisions, i.e. for the statutes they enact. For instance, a background rule of American constitutional law is that Congress is not required to furnish reasons for enacting a statute. See, e.g., *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). This means that a court could uphold the constitutionality of a federal statute despite the fact that Congress has not provided any formal statement of reasons for it. Representatives can but need not justify legislation—for instance, by a declaration of principle at the beginning of the legislative text—and they traditionally seldom do so. However, we are now witnessing the emergence of a new trend towards more accountability for legislators, which in practice translates into an increased tendency for representatives to volunteer reasons for their decisions. In most legal systems, this is merely a matter of informal social norm, but the European Parliament and the European executive (i.e., the Council and the Commission), are now duty-bound to give reasons. Article 253 of the EC Treaty thus states: “Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.”

their actions to a greater extent.²⁰

In short, because decision-makers across all major public institutions are potentially subjected to the duty to give reasons, it makes little sense, in my view, to limit the discussion to judicial decision-making. The question of candor should be raised with the same urgency applied to public institutions in general as to courts, particularly at a time when there is talk of transparency and publicity at every level of government. In practice, the giving reasons requirement is often enacted in legal systems as part of a more general plan to promote transparency and to protect the public's "right to know."²¹ We therefore need to ask ourselves whether we intend to impose a requirement to give truthful, genuine reasons when we proclaim a duty to provide reasons.

My purpose here is to critically assess the common way of understanding the requirement to give reasons in the legal process. Much liberal theorizing in the last few decades has been taken up with a belief in the democratic virtues of reason giving.²² It is generally expected that decision-makers will give candid, truthful reasons, thereby enabling citizens to act on those reasons and criticize them if they disagree. This expectation is supported by the fact that in most democratic legal systems, the requirement to give reasons has been constructed on the principle

²⁰ Michael Power, who argues that contemporary democracies are faced with an "audit explosion," affecting an ever-increasing range of institutions, has analyzed this phenomenon. See: Michael Power, *The Audit Society: Rituals of Verification* (New York: Oxford University Press, 1997). Similarly, Onora O'Neill points out that this type of demand leads to "defensive" decision-making rather than improving the quality of public decisions. See Onora O'Neill, *A Question of Trust*. (Cambridge: Cambridge University Press, 2002).

²¹ For instance, the French parliamentary debate concerning the July 11th, 1979 statute that (partially) extended the duty to give reasons to administrative agencies turned on the principle that reasons would not only promote an ideal of transparency, but would introduce democratic practices often lacking in the traditionally secretive and sometimes seemingly arbitrary administration. For a synthesized discussion of the French debate, see Bruno Lasserre, Noëlle Lenoir and Bernard Stirn, *La transparence administrative* (Paris: PUF, 1987).

²² This view is particularly popular among deliberative democratic theorists, e.g., Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Belknap Press, 1996).

that public institutions should not enjoy arbitrary power.²³ The practice of public institutions—and sometimes their duty—to give reasons is required so that citizens may view public action as reasonable and therefore, according to deliberative democratic theory, legitimate. In this tradition, reason giving is conceived of as a transparent window giving access to the decision-maker’s thinking, such that the reasons offered are, or ought to be, the reasons that account for the outcome of the decision.

But what is it that we really expect as a “candid statement of reasons”? What is it that we wish was disclosed? The conventional view is that public officials should give the reasons they “have” in order to be sincere. This understanding is premised on the fact that there is a distinction between having a reason and giving a reason for an action or a decision—in the sense of showing that one has a reason. Candid reason giving, it is thought, consists of decision-makers offering the reasons which they actually possess as an explanation of their decision, and not reasons which are just out there and whose status as reasons is independent of their being aware of and endorsing them. This idea is problematic for if the requirement is plausibly applicable to individuals, can it extend to collective decision-makers?

My point is that we routinely ascribe reasons to multi-member institutions but it is controversial whether such bodies really “have” reasons in any meaningful sense.²⁴ There is an

²³ For example, the French requirement to give reasons, which can be traced back to the August 16th and 24th, 1790 revolutionary statute on judicial organization, was based on the principle—a corollary of legislative sovereignty—that the arbitrary power of the courts under the *Ancien Régime*, (the “*Parlements*”), must end.

²⁴ A significant literature in social choice and political theory exists on the difficulties of determining a group’s reasons. The topic is often associated with the “discursive dilemma,” which was first formalized in a legal context under the name “doctrinal paradox” by Lewis A. Kornhauser and Lawrence G. Sager, “The One and the Many: Adjudication in Collegial Courts,” *California Law Review*, Vol. 81, 1993, pp.1-51; and Evan H. Caminker, “Sincere and Strategic Voting Norms on Multimember Courts,” *Michigan Law Review*, Vol. 97, No. 8, 1999, pp.2297-2380. The topic is often associated with the “discursive dilemma,” which was first formalized in a legal context under the name “doctrinal paradox” by Kornhauser and Sager, e.g., Kornhauser, L.A. “Modeling collegial courts II. Legal doctrine,” *Journal of Law, Economics and Organization*, Vol. 8, 1992, pp. 441-470. The paradox was then

important difference between individual and collective institutional actors in this respect: members of a collective must agree on a common reason for a decision before any reason can be properly counted as “the institution’s reason.” Strictly speaking, collective decision-makers “have” no (common) reason unless they reach an agreement on their common reasons by some procedure designed to this effect—be it by voting, deliberation, consensus, the throwing of dice or simply by recognizing that they happen to have the same reason(s). For collective bodies, the having of reasons is dependent on the “collectivization of reason,” to use an expression introduced by Philip Pettit.²⁵ As far as multi-member institutions are concerned, sincerity can thus hardly be defined as the correspondence between the reasons decision-makers have for a given decision and the reasons they give to justify it publicly: a collective institution’s so-called reasons are the result of a conscious decision, which often takes place among members precisely thanks to an existing requirement to give reasons.

Before going any further, we must articulate what it means for a decision-maker to be candid. The notions of candor, sincerity and truthfulness should be given, at the least, a preliminary definition. As Micah Schwartzman has pointed out about judicial candor, the debate is too often obscured by the use of confused and undefined concepts.²⁶

Defining the Terms of the Problem

generalized by Philip Pettit, e.g., in Pettit, P. “Deliberative democracy and the discursive dilemma,” *Philosophical Issues* (supplement 1 of *Nous* 35), Vol. 11, 2001, pp. 268-295. See also generally the recent survey article by Christian List, “The Discursive Dilemma and Public Reason,” *Ethics*, Vol. 116, No. 2, 2006, pp. 362-402.

²⁵ Philip Pettit, *A Theory of Freedom* (New York: Oxford University Press, 2001).

²⁶ Micah Schwartzman, “The Principle of Judicial Sincerity,” (September 2006). Available at SSRN: <http://ssrn.com/abstract=931435>. More specifically, Schwartzman suggests that we should distinguish the concepts of sincerity and candor. In his view, sincerity demands a more limited constraint on judges than candor.

Perhaps as a point of departure, characterizing the opposite notions—lying, deceiving or misrepresenting—may be helpful. In order to lie, one must say something that he or she believes to be false. This belief is a necessary, but not sufficient condition for the statement to be a lie. There are many situations in life in which we say things we believe to be false but would not want to say that we are lying, e.g., when we are acting, playing, imitating, being ironic, sarcastic, and so forth. Different criteria have been advanced in philosophical literature. Some philosophers argue that an additional component is the intent to deceive. Saint Augustine thus defined lying as having one thing in one's heart and uttering another with the intention to deceive.²⁷ In Augustine's view, a lie is a statement *intended* to mislead: the speaker's state of mind is crucial.

The problem with this criterion is that it sets too strict a standard for our purposes. Is there something specifically relevant about the lack of candor when applied to legal reasoning? Most often, in the legal context, reasons lacking candor cannot be described as lies in the strict sense, even if they are present as deceptive components such as with the aim of intentionally leading the public to believe something untrue, or failing to express certain relevant beliefs of decision-makers—such as one piece of knowledge—which was very closely related to what they asserted. In fact, there are many situations in which public officials feed the public with less than exact justifications despite not having a clear intent to deceive. In these cases, we want to say that they are engaged in some form of deception even though it is difficult to ascertain their mental state. More specifically, it is often unclear whether they have the intent to

²⁷ Augustine, "Lying" and "Against Lying," in *St. Augustine: Treatises on Various Subjects*, ed. Roy J. Deferreri, vol. xvi of the series, *Fathers of the Church*. (Washington DC: Catholic University of America Press, 1952). Sissela Bok agrees with Augustine that lying involves the intent to deceive. In particular, she stresses that "[t]he moral question of whether you are lying or not is not *settled* by establishing the truth or falsity of what you say. In order to know whether you are truthful or not, one must know whether you intend your statement to mislead." See: Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Pantheon Books, 1978), p. 6.

deceive or whether they are merely indifferent to whether their statements are truthful. In this sense, disingenuous reasons are not always instances of intentional deception but may amount to negligent deception. Negligence suggests that every so often, decision-makers do not lie intentionally or on purpose. In these cases, intent is irrelevant: negligence means that some deceptive statement of reasons was made, the decision-maker proffered it, and, based on training, knowledge, and experience, he or she should have known better. But for the decision-maker's statement of reasons, the interested citizen(s) would not have been deceived. An adequate definition of lying should accommodate this possibility.

Throughout the remainder of this paper, I will rely on a conception of deception according to which lying involves not necessarily the intent to deceive, but merely the belief that one might deceive.²⁸ This conception allows for different levels of deceptive reason giving practices. Deception may occasionally result from the mere fact that the decision-maker is aware that his listeners are justified in believing that he or she believes that what he/she says is true, without having to suppose an intent to deceive. Further points of clarification may be useful: I propose that we distinguish between four levels of truthfulness in reason giving, along a continuum spanning from completely deceptive statements to absolutely truthful ones. The four levels can be used to describe four increasingly strict disclosure requirements which legal systems may choose implement.

Four Levels of Truthfulness

²⁸ This is the conception defended by Roderick M. Chisholm and Thomas D. Feehan, "The Intent to Deceive," *Journal of Philosophy*, Vol. 74, 1977, pp. 143-159. They point out that "[o]ur concern when we have the intent to deceive is rather this: there is a proposition that we believe to be false—or that we believe not to be true; we act in order to bring about or to preserve the acceptance of this proposition; and we do this in order that such acceptance may contribute to some further end" (p. 148).

1—Lying about one's reasons. A decision-maker is lying about his reasons when he or she purposefully gives r as a reason for his or her decision while not believing r . This type of deceptive statement is equivalent to a lie. There is a clear intent to deceive. To see more clearly why this is equivalent to a lie, it is worth noting that a public statement of reasons can be analyzed as comprising a reason, (“Your construction permit is denied because your well would result in groundwater contamination”), together with an assertion that the decision-maker believes the reason. But what does it mean to assert that one believes something? For the purposes of this discussion, I shall assume that “believing a reason” is best understood, in this context, as the acknowledgement, by a decision-maker, that this or that particular consideration tipped the balance in favor of the outcome in the decision-making process. To believe a reason in this sense is to treat it as a deciding factor, to recognize it as the basis for a particular decision. If the decision-maker did not actually rely on the reason in question while deciding, then he or she does not “believe” it in the required sense. Suppose an administrator denies a construction permit to a landowner for a well on the basis that the well would result in groundwater contamination. This reason is deceptive if the administrator really decided against the permit based solely on aesthetic impact. The administrator picked the contamination ground simply because it is an easy ground to prove, whereas it is much harder to produce sufficient aesthetic evidence to substantiate the denial. The justification remains deceptive even if it turns out that in fact the well would have a detrimental impact on the groundwater because this fact did not play any role in the administrator’s decision.

2—Misrepresentation of reasons. A decision-maker is misrepresenting his or her reasons when he or she purposefully gives r as a reason for his or her decision while either not fully believing r , or while having simultaneously relied on another, undisclosed reason in the decision-

making process. The difference between a misrepresentation and a straightforward deception such as a lie, is that when misrepresenting, a decision-maker only has the intent to mislead others as to what he or she believes, not as to what actually justifies the decision.²⁹ He or she has reservations or conflicts about the reason that is offered because he/she thinks that the reason exhibited only partially justifies the outcome. The aim here is not to delude the public. Yet decision-makers display some degree of negligence with respect to what the public winds up believing. Misrepresenting one's reasons for a decision could therefore be characterized as operating with indifference as to whether the public is deceived. For instance, failure to disclose one of the relevant reasons may in some circumstances be designed to leave the wrong impression about what has been said. It may result in obscuring some objective, something the deceived citizen wanted to do or obtain, e.g., by making the objective seem unattainable or no longer desirable. To illustrate, consider cases in which consular officers deny visas on the basis that applicants have not presented proof of sufficient funding to support their residency, while at the same time failing to disclose other factors which may lead to future visa denials in case of re-application (such as diplomatic or security-based considerations). Unsuccessful applicants may go out of their way to collect documents such as bank statements, scholarship award letters, letters from employers, and so on, hoping to prove that they have sufficient funding at their disposal, only to see their application rejected yet again. Had they known that the deciding factor was not limited to the criterion of financial resource, they might have acted differently, e.g., by applying for a different visa or by modifying their travel plans altogether.

²⁹ In this sense, the public official who misrepresents the justification for a decision is closer to what Frankfurt calls a "bullshitter" than to conventional liars. Misrepresenting one's reasons involves not the intent of getting others to believe something we know is false, but rather indifference to the truth-values of our statements. In other words, the only intent behind misrepresentations is an intent to neither report the truth faithfully nor to conceal it. See Harry G. Frankfurt, *On Bullshit* (Princeton: Princeton University Press, 2005).

3—*Sincere statements of reasons.* A sincere or truthful statement of reasons is one in which the decision-maker purposefully gives *r* as a reason for his or her decision while believing *r*. The decider has no intent to deceive either with respect to the justification itself or with respect to what he or she actually believes. Sincere statements of reasons, however, allow for non-disclosure of some of the considerations which motivated the decision: a statement of reasons may be sincere but incomplete. To be sincere, one must say only things one believes, but one need not say all the things one believes to be the case. It is sufficient to disclose just enough information so as to prevent others from being misled. Bernard Williams has suggested the idea that sincerity consists of a disposition to make sure that one's assertion expresses what one actually believes.³⁰

4—*Candid statements of reasons.* Candor, which I use as synonymous with veracity or transparency, is the most exacting standard: to be qualified as candid, a statement of reasons must represent full disclosure. It must not only be sincere, but also complete. To put it somewhat differently, a decision-maker is candid if and only if he or she discloses all of the considerations that he or she believes explain the decision.³¹ As such, candor involves the duty to reveal all of one's reasons, in the sense of making public all the considerations bearing on the decision.

Which of these four standards should inform the requirement to give reasons? Before answering this question, the first and the fourth standards should be ruled out immediately. I submit that misrepresenting one's reasons and presenting sincere reasons are the most plausible ways of understanding the disagreement between proponents and opponents of "candor." Candid

³⁰ Bernard Williams, *Truth and Truthfulness* (Princeton and Oxford: Princeton University Press, 2002), Chapter 5.

³¹ On this point, see Scott C. Idleman, "A Prudential Theory of Judicial Candor," *Texas Law Review*, Vol. 73, 1995, p. 1316.

reasons evidently require too much from decision-makers, while deceptive reasons require too little. If the debate turned on the opposition between deceptive reasons and candid reasons, it would be too easy a subject. Who, after all, would argue in favor of lying? A requirement to give reasons which would enable decision-makers to intentionally give deceitful reasons would frustrate the purpose of reason-giving itself. Purposefully deceitful reasons would provide little guidance for citizens and would hardly establish any accountability for decision-makers. Conversely, who would maintain that candid justifications are always available? Uniformly requiring candid reasons is both an impossible and tedious enterprise. Impossible because virtually all of the things that comprise an agent's motivational set—that is, beliefs, commitments, desires, goals, and so on—influence to some extent any decision he or she makes. This means that if we take seriously the thought that candor equals full disclosure; decision-makers would be subjected to the obligation to recite meticulously the incredibly long list of considerations that have affected their decision in one way or another. Not only would this be impracticable in terms of time and resource constraints, but it would also be awfully dull: imagine having to read—or write—decisions compiling so many facts that the important pieces of information would disappear in a sea of details. In short, public reason giving is not—and should not be—intended to produce an exhaustive record of decision-makers' thought processes in reaching a decision.

This leaves us with a choice between the two intermediary standards: requiring sincere reasons or allowing for occasional misrepresentations. In what follows, I provide an overview of popular arguments that have been developed in favor of sincerity, before turning to the arguments in favor of permitting some degree of misrepresentation.

II—Arguments for Sincere Reasons

What is the point of sincerity in public reason giving? Those who endorse the view that the requirement to give reasons is a requirement to give *sincere* reasons generally do so from one of two different perspectives. In the non-consequentialist view, giving insincere reasons is intrinsically wrong in that it harms people's autonomy.³² Misrepresenting one's reasons is a way of disrespecting those affected by the decision. In this understanding, the lack of sincerity carries with it the implication that one's audience is less capable of dealing with the truth, and thus less worthy of respect than the decider.

In what follows, however, a pragmatic discussion of sincerity will be developed. I will not attempt to work out the value of sincerity *per se*. The purpose of the argument is merely to inquire into instrumental values for giving truthful reasons. Much scholarship on judicial candor unfolds not by setting forth the values fostered by sincerity, but rather by calling attention to the harms resulting from misrepresentations.³³ In this consequentialist perspective, allowing decision-makers to misrepresent their reasons harms society by damaging relationships while at the same time bringing discredit upon the legal system. It is not that deceptive reasons are intrinsically bad: they are to be avoided insofar as they produce bad results. To put things differently, sincerity in public reason giving can be defended on the ground that it is necessary to achieve two fundamental democratic values: establishing trust in public institutions and ensuring

³² This is the canonical Kantian view. Kant argues that lying is intrinsically and always wrong. When one lies, one not only harms others, but also oneself and humanity in general. See, e.g., "On a Supposed Right to Tell Lies from Benevolent Motives," in *Kant's Critique of Practical Reason and Other Works*, translated by T.K. Abbott, (London: Longmans, Green, 1973).

³³ A typical example of this way of presenting the issue can be found in Larry Alexander and Emily Sherwin, "Deception in Morality and Law," *Law and Philosophy*, Vol. 22, No. 5, 2003, pp. 393-450.

the guiding of citizens. I now turn to the assessment of two consequentialist arguments in favor of sincerity, according to which sincerity is indispensable to achieve trust and guidance.

Sincere Reasons Foster Trust

Insincere reasons harm relationships by undermining trust. Most of us agree that there must be a minimal degree of trust in communication. This is why some level of truthfulness has always been seen as essential to human society. As Plato has shown, even the worst crooks do not lie to one another, because their gangs could not subsist without truth any more than other human associations.³⁴ Socrates uses the gang example to argue that justice is more powerful than injustice as a matter of fact: if even immoral creatures must be just towards one another so as to succeed at crime, *a fortiori* regular people should aspire to just relationships. The parable, translated into the legal context, can be used to argue that truthfulness is more powerful than deceit because a society whose members are unable to distinguish truthful messages from deceptive ones would ultimately collapse. This explains why requiring sincere reasons is often presented as necessary to build up trust in the legal system as a whole and in public institutions in particular. This idea rests on the supposition that once one starts telling a lie, one is never believed again when telling the truth. In this view, the problem of deception rests in its consequences. As Geoffrey Warnock puts it:

It is not the implanting of false beliefs that is damaging, but rather the generation of the suspicion that they may be being implanted. For this undermines trust; and, to the extent that trust is undermined, all

³⁴ In the *Republic*, 351c-d, Socrates asks Thrasymachus, who claims that justice can be defined as the advantage of the mightier, the following questions: “would you have the good grace also to inform me whether you think that a state, or an army, or a band of robbers and thieves, or any other gang of criminal conspirators could act at all if they injured one another? No indeed, he said, they could not. But if they refrained from injuring one another, then they might work together more effectively? Yes. And this is because injustice creates factions and hatred and in-fighting, whereas justice imparts harmony and friendship; isn’t that the way it works, Thrasymachus?”

co-operative undertakings, in which what one person can do or has reason to do is dependent on what others have done, are doing or are going to do, must tend to break down.³⁵

By analogy, if a lie is discovered in the justification of a decision, the aim of achieving greater public acceptance of public decisions is compromised. There is no point in legal systems imposing a duty to give reasons if we cannot suppose that these reasons will actually express the decision-makers' opinions. As soon as one relinquishes the requirement of sincerity, dealings with public institutions run the risk of turning into "strategic interactions," in Erving Goffman's sense.³⁶ Coordination problems may appear if it is likely that decision-makers may give dishonest reasons. Game-like considerations develop, giving rise to game-theory calculations about securing assurances: decisions about whether or not to disclose genuine reasons may have a structure similar to a prisoners' dilemma, where sincerity corresponds to cooperation and submission of deceptive reasons corresponds to defection. A full discussion of the coordination implications of insincere reason giving would take us too far afield. For the purposes of the present argument, it suffices to note that making it common knowledge that public officials are under a duty to give sincere explanations for their decisions could possibly prevent game-like considerations from arising.

Only Sincere Reasons Provide Guidance

Another consequentialist way of arguing in favor of sincere reasons lies in pointing out that deceitful reasons frustrate a central function of the law: they jeopardize the law's capacity to guide people's conduct. Yet, if the law is to be obeyed, it must be capable of guiding the

³⁵ Geoffrey J. Warnock, *The Object of Morality* (London: Methuen, 1971), p. 84.

³⁶ Erving Goffman, *Strategic Interaction* (Philadelphia: University of Pennsylvania Press, 1969).

behavior of its addressees. It must at least be the case that legal professionals and ordinary citizens can find out what it is and be able to act on it.³⁷ A number of legal scholars have argued that judicial decisions should be forward-looking documents, conceived so as to guide lawyers, who must advise clients, and judges, who must adjudicate disputes.³⁸ This argument can be extended to public decisions in general. We usually value public justifications because we think they are reliable guides as to the beliefs and intents of those in charge. We want to identify those beliefs and those intents because they help us in predicting future legal outcomes and, therefore, in modifying our conduct accordingly. To fulfill this guidance function, reasons must be accurate representations of what decision-makers actually believe. The public cannot form adequate judgments on the law and its content unless all the relevant information is made available.

Citizens constantly rely on public justifications to ascertain the precise content of the law. It is often insufficient to consult sources such as constitutional texts, statutes, administrative or executive regulations, outcomes of past judicial and administrative decisions, and so on, to know the law. In fact, law school students, especially in Anglo-American legal systems, spend most of their academic careers studying the reasons that have been put forward by public officials to justify this or that statute, regulation or decision. When representing clients or causes, attorneys, as well as non-governmental organizations representatives or other counselors, use past statements of reasons to craft their arguments. Adjudicators look for guidance by relying on reasons given by other courts in preparing their own rulings. When applying statutes, to support their own preferred interpretation, judges often refer to the reasons legislators have developed

³⁷ Joseph Raz thus stresses that “the law must be capable of being obeyed” and hence “it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it.” *The Authority of Law* (Oxford: Clarendon, 1979), pp. 213-14.

³⁸ For example, Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960), p. 26 (stressing that the “opinion has one if not its major office to show how like cases are properly to be decided in the future”).

during the legislative debates. Lawyers and judges alike need to know the scope of a decision, and the purposes behind it, in order to determine whether and how it may bear on other, arguably analogous situations. For-profit and not-for-profit enterprises, but also private individuals, may also need to rely on previous justifications provided by certain institutions in deciding future courses of conduct.

The question then is the following: if everyone working within the system uses these reasons, does it mean that they all assume that such reasons are sincere? From the perspective of guidance, insincere reasons are unreliable guides for the future because the real—but concealed—reasons, and not the false ones, will actually determine the resolution of later cases decided by the same decision-makers. Most of our choices depend on our estimation of the situation. This guess relies in part on information we have acquired from others. Each time public officials supply misleading reasons, they adversely affect our conduct by making it more difficult for us to accurately picture the state of the law. Deceptive reasons affect the distribution of power: they confer a disproportionate power upon public officials. By the same token, they frustrate the democratic rationale for extending reason-giving requirements.³⁹

According to liberal democratic theory, public institutions' practice—and sometimes duty—of reason giving is required so that each individual may view the state as reasonable and therefore legitimate. This provides ground for criticism. Knowing the basis of a decision enables citizens to decide whether any further action should be undertaken. The underlying idea is that a government does not exercise arbitrary power insofar as it is effectively contestable.⁴⁰ The main problem with insincere reasons is that they alter citizens' choices at different levels. A

³⁹ On the democratic function of reason giving, see generally Gerald F. Gaus, *Justificatory Liberalism. An Essay on Epistemology and Political Theory* (New York: Oxford University Press, 1996) and Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004).

⁴⁰ This argument is developed in Philip Pettit, "Deliberative Democracy and the Discursive Dilemma," *Philosophical Issues*, Vol. 11, 2001, pp. 268-99.

misleading reason may make one's goals seem unfeasible or may create new ones. As we have just seen, deceptive reasons may also conceal relevant alternatives, as when a landowner is falsely told that his construction permit for a well has been denied on the ground that the well would contaminate groundwater. Had the owner known that the real basis for the rejection was the aesthetic impact of the well, he might have envisaged the possibility of constructing a different type of well or of choosing a different location for construction. The deceitful reason deprived him of this opportunity to choose.

The claim that sincere reasons are superior from a democratic point of view enjoys a certain initial plausibility, but there is a significant range of cases in which just the opposite is true. Proponents of selective disclosure take this discrepancy to show that in the law sincerity is a highly variable and contextual virtue. They emphasize that in some circumstances, less than candid reasons are not only justified, but also advantageous so as to accomplish equally important democratic ends.

III—What is Wrong With Sincere Reasons?

There are different varieties of arguments in the literature against sincerity.⁴¹ Some detractors focus on showing that certain deceitful statements are justified. If they concede that lying is usually wrong, they also urge us to recognize that this presumption can sometimes be overcome, e.g., when lying is morally justified. Other writers point out that sincerity can occasionally harm

⁴¹ For an overview, see: Alex Rubner, *The Mendacious Colours of Democracy: The Anatomy of Benevolent Lying* (Exeter: Imprint Academic, 2006).

democracy.⁴² The former adopt the point of view of decision-makers and consider the fact that requiring absolute truthfulness can pervert decision-making. The latter focus on the public's well-being in arguing that sometimes insincere reasons are preferable to sincere reasons.

Pragmatic Reasons Against Sincere Reasons

A requirement to give candid reasons may have a detrimental effect on the quality of public decisions, thereby ultimately harming consumers of public services. To see this more clearly, one should keep in mind that public decision-making, which is often idealized and set aside from other activities, is also a professional activity similar to many others. As such it is subjected to a host of professional norms. In practice, public institutions must accommodate multiple practical constraints. As Michael Lipsky has shown, “street-level bureaucracies,” that is, public institutions whose workers interact with and have discretion over the allocation of public benefits or sanctions, must deal with clients on a mass basis.⁴³ The proliferation of rules and regulations bearing on decision-makers, together with the growing number of cases they are in charge of adjudicating, make it unlikely that a generalized requirement to give sincere reasons would improve the quality of the service. Public services workers typically face choices and competing demands that compromise sincerity.

⁴² This is Elizabeth Markovits' view: she argues, from the standpoint of deliberative democratic theory, that the candor requirement poses dangers to democratic communication. See: Elizabeth Markovits, “The Trouble With Being Earnest: Deliberative Democracy and the Sincerity Norm,” *The Journal of Political Philosophy*, Vol. 14, No. 3, 2006, pp. 249-269

⁴³ I am relying on Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980), who defines street-level bureaucrats, (p. 3), as “workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work are called street-level bureaucrats in this study.”

A major impediment to sincere reason giving lies in time limitations and an endemic lack of resources, which prohibit individualized service. It is a well-known phenomenon that street-level bureaucracies are virtually never sufficiently accounted for in terms of budget, staff and facilities, partly because the demand for services tends to exceed the supply. The result is that public decision-making persistently occurs under conditions of limited time and information. If in an ideal world, public officials ought to respond to cases individually, in reality, they develop shortcuts to resolve broadly defined types of situations. People are processed into “clients,” and assigned to categories for treatment. Stereotypical justifications are developed accordingly. This leads to routinized and simplified reason giving. Accountability and monitoring mechanisms represent an additional constraint: governmental agents’ performances are increasingly measured and weighed against established standards such as performance indicators.⁴⁴ Policemen are typically expected to make a certain number of arrests. Administrators are often obliged to retain a certain level of intakes and case-closing rates. Researchers are required to publish a certain number of articles in academic journals, which are in turn ranked periodically.

These various obstacles to open and accurate reason giving raise the question of whether decision-makers are sometimes justified in sacrificing sincerity to expediency. The problem with non-individualized, standardized reasons is that rather than helping consumers or improving the administration’s transparency, they may end up confusing the public and obscuring the system’s functioning. Default clauses, jargon, and ready-made explanations act as barriers to understanding how to operate effectively within the system, especially for under-informed and underprivileged clients who call for individualized attention and clarifications. At times, fewer

⁴⁴ See generally: David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Reading, Mass.: Addison-Wesley Publ. Co., 1992); Christopher Hood, “The ‘New Public Management’ in the 1980s: Variation on a Theme,” *Accounting, Organization and Society*, Vol. 20, No. 2/3, 1995, pp. 93-109; and Richard H. Pildes and Cass R. Sunstein, “Reinventing the Regulatory State,” *The University of Chicago Law Review*, Vol. 62, No. 1, 1995, pp. 1-129.

reasons and incomplete reasons might be preferable to sincere but complicated reasons, provided the curtailed reasons are more pedagogical and widely accessible.

Strategic Reasons Against Sincere Reasons: the Case For Secrecy

Another way of arguing in favor of selective disclosure is to identify certain public decisions, which, because of their importance for citizens' security or welfare, should be exempted from the requirement to be sincerely argued for. Here, disingenuous reasons are justified with reference to the public interest. The underlying idea is that we cannot expect a government to give sincere reasons on certain strategic matters, especially when involving military interests and foreign affairs, but also economic interests such as plans for devaluation which cannot be disclosed without harm for the national economy. Decision-makers are justified in concealing or even misrepresenting certain pieces of strategic information, the argument goes, because such information could not be made available to other institutions or to the public at large without at the same time being divulged to the "enemy".

Politics has by tradition been associated with secrecy.⁴⁵ The law has often backed public institutions' use of secrecy. In the United States, secrecy is upheld by a series of laws and constitutional practices, the best known being the "executive privilege."⁴⁶ In virtue of the

⁴⁵ At least since Machiavelli's *The Prince* (1513). For a discussion of the connection between politics and secrecy, see Carl J. Friedrich's introduction to Itzhak Galnoor (ed.) *Government Secrecy in Democracies* (NY: Harper & Row, Publishers, 1977).

⁴⁶ Executive privilege is the American counterpart of the British doctrine of "crown privilege." The American executive privilege has no express textual source in the Constitution but jurists have long claimed that separation of powers implies that the executive branch has the right to withstand certain infringements by Congress and the judiciary such as undue demands for documents or information. In the UK, the House of Lords used to hold that a ministerial claim of privilege was unquestionable in law (*Duncan v. Cammell Laird & Co.*, A.C. 624 (1942)), but since its decision in *Conway v. Rimmer*, A.C. 910 (1968), courts will not allow claims of crown privilege unless the public interest in secrecy outweighs the goal of doing justice to the litigant.

executive privilege doctrine, the United States President is allowed to withhold certain information from Congress, the courts, and virtually any other public institution or private citizen. Presidents have claimed this privilege recently to justify withholding information when its release would, in their view, put at risk the country's security or impair their ability to make informed and effective decisions.⁴⁷

The President, however, is not the only public official afforded the right to abstain from giving sincere reasons. Many administrative officials share in this privilege. In recent years, for example, the American Environmental Protection Agency (EPA) has used the doctrine to refuse to provide lawmakers with a full explanation of why it rejected California's greenhouse gas regulations.⁴⁸ To be sure, American courts have declared that other members of the executive branch cannot invoke the executive privilege in the strict sense. However, many federal statutes allow or sometimes even require executive agencies to withhold information from the public.⁴⁹ Much of this legislation is designed to protect rights of privacy on the part of either individuals or organizations. Here, the argument in favor of allowing secret reasons is justified negatively by the desire to prevent harm. In what follows, selective disclosure is defended on the ground that it positively benefits the public.

Sincere Reasons May Harm Citizens: Protecting the Public

⁴⁷ George W. Bush has asserted executive privilege on several occasions during his two mandates to deny requests for disclosure. For instance, on June 28, 2007, he invoked executive privilege in withholding subpoenaed documents concerning the White House and Justice Department's deliberations in the firing of nine U.S. attorneys.

⁴⁸ On January 18, 2008, the EPA thus refused to disclose to a congressional environmental committee the records the committee had requested on the agency's denial to allow California to adopt new emission standards.

⁴⁹ See, e.g., the July 4, 1966 Freedom of Information Act, (Amended 2002).

There is also a long tradition of justifying lies and deception in the political domain with reference to the good consequences they can bring about. Well-meant misrepresentations are produced with the intention to protect or bring about some other good. Several arguments have been developed to support this view. One such argument consists in pointing out that sincerity is harmful because it produces excessive complexity. This way of thinking can be traced back to discussions of what Bernard Williams has ironically called, “Government House utilitarianism.”⁵⁰ The expression refers to the thought, originally developed by Henry Sidgwick, that utilitarianism is the correct moral theory, but that it might sometimes be better if this were kept secret because most people are not able to use it properly as a decision-making procedure.⁵¹ From this, Sidgwick concluded the utilitarian calculus, which directs to maximize utility, is more suitable for policy makers than for private individuals.⁵² Most people should be given very general, simple rules to follow, while truly utilitarian decision-making procedures are reserved for public officials. In other words, sincere reasons should be saved for an elite. For the general public, simplified yet artificial reasons are to be preferred over sincere but intricate ones because most people would not be able to live by refined and complicated rules. In this view, sincerity is to be avoided when truthfulness would adversely affect the public or would cause an undesired kind of behavior.

⁵⁰ Bernard Williams argues for the necessity of consequentialism in politics, while acknowledging the wrongness of the actions involved is not cancelled by their good consequences: see his “Politics and Morality,” in Stuart Hampshire (ed.) *Public and Private Morality* (Cambridge: Cambridge University Press, 1978), pp. 55-73.

⁵¹ Henry Sidgwick [1874] *The Methods of Ethics*, Book 4, Chapter 5. The view has been criticized by Bernard Williams in *Utilitarianism: For and Against* (ed.) J. J. C. Smart and Bernard Williams, (Cambridge, UK: Cambridge University Press, 1973), pp. 138-40 and discussed, e.g., by Robert E. Goodin, *Utilitarianism as a Public Philosophy*. (Cambridge, UK: Cambridge University Press, 1995), especially Chapter 4, pp. 60-77. See also Larry Alexander, “Pursuing the Good—Indirectly,” *Ethics*, Vol. 95, No. 2, 1985, pp. 315-332.

⁵² Meir Dan Cohen has famously applied Government House Utilitarianism to Criminal Law and proposed that we distinguish between two kinds of rules: decision rules, which are only “heard” by public officials and conduct rules, which apply to ordinary citizens, (“Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” *Harvard Law Review*, Vol. 97, No. 3, 1984, pp. 625-677).

To summarize, many insincere justifying practices claim benevolence and concern for the deceived. Insincere reasons seem appealing because they are perceived as without bias and told in a disinterested wish to be helpful. The trouble with this line of argument is that it has an obvious paternalistic component. It illustrates what Alvin Goldman has labeled “epistemic paternalism.”⁵³ Goldman created the concept in the context of analyzing rules of evidence for jurors. He found that rules of evidence provide that some types of evidence must be kept from jurors on the grounds that they are likely to be misled by them. In this sense, rules of evidence are designed to protect jurors from their own shortcomings. One can analyze disingenuous reason giving in a similar fashion. But such paternalism conflicts with the fundamental purpose of requiring public institutions to give reasons. Institutions are primarily required to give reasons as a way to ensure their accountability towards the public. Reasons are supposed to enable ordinary citizens to verify that public officials are exercising their powers properly and not engaging in arbitrary decision-making. Decisions justified by concealed or artificial reasons would not really enable citizens to individually or collectively decide whether to support or reject them. Being deprived of any other access to decision-makers’ genuine reasons, the public may on occasion be unable to effectively contest public decisions.

This analysis leads us back to the initial proposition that sincerity is an indispensable aspect of the requirement to give reasons in democratic legal systems. So we reversed to the issue of whether it is in fact possible for decision-makers to always disclose their sincere, genuine, reasons for their decisions. To break out of this circle, we need to turn to the epistemological assumptions which underlie the debate. Of course, we might well prove unable to determine a

⁵³ Alvin I. Goldman, “Epistemic Paternalism: Communication Control in Law and Society,” *The Journal of Philosophy*, Vol. 88, No. 3, 1991, pp. 113-131. Goldman defines epistemic paternalism in the following way, p. 119: “I shall think of communication controllers as exercising epistemic paternalism whenever they interpose their own judgment rather than allow the audience to exercise theirs.”

whether or not sincere reason giving should be the norm. That being said, at this juncture, we should at least inquire into the relationship between what it is to have a reason for one's decisions and why that reason should be publicly explained to others.

IV—Revisiting the Distinction between Having Reasons and Giving Reasons

The Epistemological Problem

The academic discussion of candor in the law has conventionally relied on the implicit assumption that there is a clear distinction between having reasons and giving reasons for a given action or decision. The conventional picture, which epistemologist Adam Leite calls “the spectatorial view,”⁵⁴ is roughly this: having some reasons for performing a certain action or reaching a particular conclusion comes first, both logically and chronologically. By contrast, the giving of those reasons is a secondary, derivative practice. The two activities take place at distinct levels: there is the process of coming to having a reason, on the one hand, and the discursive practice of giving reasons, on the other hand. When a decision-maker presents his or her reasons for making a decision, he or she is merely reporting pre-existing mental states, which obtain independently from the activity of reason giving. The activity of giving reasons is thus derivative, in the sense that it is parasitic upon the prior, and more basic, state of having reasons for *x* or *y*.

An opposite view has emerged in recent analytic epistemology, which contends that giving reasons for holding a given belief, rather than having reasons for that belief, is the

⁵⁴ Adam Leite, “On Justifying and Being Justified,” *Philosophical Issues*, Vol. 14, Epistemology, 2007, p. 221.

primitive, more basic concept.⁵⁵ In this perspective, having reasons for believing or doing something is dependent on and derivative of the capacity to articulate those reasons—to oneself or others—because having a reason for a belief or an action presupposes that one can (at least) describe what it is that counts as a reason for it. Adam Leite defends a radical version of this view, according to which having reasons is an epistemic state which is brought about by the activity of giving reasons itself.⁵⁶ According to him, the criterion for having a reason for a belief is the ability to show that one has a reason: nothing is eligible to be held as a reason unless it can also be given as a reason.

Talks of candor, sincerity, and deception in the law ordinarily rely on the conventional view. The dispute about whether or not public officials should be required to give sincere reasons is premised on a presumed dependency between the state of having a reason for a decision and that of communicating one's reason. Following this line of inquiry, a governmental agent is sincere if and only if he or she gives all the reasons—and only those reasons—that he or she had for the given decision at the time the conclusion was reached. Decision-makers are thus regarded as having endorsed certain reasons for their decision prior to and independently from the action of stating them publicly.

I will not take a firm line on either the spectatorial view or its rival: I will only say a few words about how this debate has a bearing on the law. By the end of this paper, I hope to have articulated roughly my own understanding of the relationship between having reasons for a decision and giving those reasons publicly in a legal context. Until now, I have paid little attention to the fact that most public decisions are the product of multi-member institutions rather than individual decision-makers, e.g., most judicial decisions—starting from the appellate level,

⁵⁵ E.g., Mark Schroeder, "Having Reasons," *Philosophical Studies*, Vol. 139, No. 1, 2008, pp. 57-71.

⁵⁶ Adam Leite, "On Justifying and Being Justified," *Philosophical Issues*, Vol. 14, Epistemology, 2007, pp. 219-253.

and including administrative rulings, statutes enacted by legislatures, international resolutions ratified by assemblies, and so on.⁵⁷ It is an open question whether collective bodies are the kind of entities that can give sincere or truthful reasons in any meaningful sense precisely because it is unclear that they are the kind of entities that can “have” reasons for decisions in the first place. The question whether we should attribute mental or mental-like states, including beliefs, to collectivities is an ongoing one in contemporary social epistemology.⁵⁸ We need not settle the issue of whether or not collectives are legitimate bearers of epistemic states like having reasons, but we should at least ask ourselves whether the conditions under which a person “has” a reason for acting or deciding in a certain way are identical to those under which collective entities have reasons for actions or decisions.

There are many differences between individual and collective decision-making. One such difference is that collective decision-makers typically need to satisfy demands for collegiality and majority-building. Multi-member institutions, which are required to give reasons for their decisions, may find themselves in situations in which not all members agree on the reasons for or against a certain outcome, but are nevertheless duty-bound to reach an agreement. In case of a persistent divergence among members, the justification ultimately endorsed by the institution as a whole is the product of negotiations, compromises and trade-offs, rather than rational agreement.

⁵⁷ Collective public institutions can be roughly defined, for the purposes of the argument, as associations of more than one member which are entrusted with the task of making decisions based on rules affecting their co-citizens in terms of rights, allocation of resources and benefits, and so on. They are groups that exist as units and not simply as aggregations of individuals in virtue of the law.

⁵⁸ This debate roughly opposes partisans and opponents of the so-called “summative” account of group beliefs. On the classical summative account, a group believes *p* if all—or at least most—of the group members believe *p*. See Anthony Quinton, “Social Objects,” *Proceedings of the Aristotelian Society*, Vol., 1976, pp. 76:1-27, in particular, p. 17. Under non-summative accounts, it is sometimes possible for a group to have beliefs that are not the mere sum of the beliefs held by its members. Margaret Gilbert, in *On Social Facts* (London: Routledge, 1989, especially pp. 257-260), thus emphasizes that there are situations in which a group does not believe *p* even though most of the members of the group believe *p*. Similarly, Raimo Tuomela, in *The Importance of Us* (Stanford: Stanford University Press, 1995, pp. 314-316), argues that a group believes *p* if certain “operative members” (that is, those members entrusted with the task of determining the views of the group) adopt *p* as the view of the group.

In other words, multi-member institutions may adopt a common set of reasons not because they aim at truth, but based on certain non-epistemic goals, such as pleasing their colleagues, advancing their careers, or simply caring for the need to end the discussion. The resulting “common” justification rarely reflects faithfully any individual member’s actual reasons for or against the decision. Even where dissents and concurrences are allowed, the desire to avoid the excessive multiplication of separate justifications may act as a motive to set aside the requirement to give sincere reasons.⁵⁹

These discrepancies raise the question whether the spectatorial view is applicable to collective decision-makers. There is another important difference between individual and collective decision-makers in that respect. Indeed, the idea that the state of “having reasons” enjoys a logical and chronological priority over the activity of spelling out those reasons appears to be initially plausible as applied to individuals. However, this hierarchy seems breaks down when we move to collective institutions, for collective entities are not distinct from their individual members in the sense of being capable of existing in the absence of their members.

If this last point is true, it looks as if collectives do not have reasons independently of the individual members that compose them. Part of the problem is that the reasons an institution publicly discloses may come apart from the reasons members individually hold. Various members may have very different reasons for deciding *D*. For example, an agency made up of several administrators may agree on a particular decision, but the individual officers may have

⁵⁹ The thought at work is that it is preferable, from the point of view of the institution’s legitimacy or credibility, to give a common, but less than candid justification rather than publicly displaying its disarray. Michael Wells has thus argued that false but widely acceptable reasons are sometimes necessary to secure public acceptance of the Courts judgments: Michael L. Wells, (2007) “‘Sociological Legitimacy’ in Supreme Court Opinions,” *Washington and Lee Law Review*, vol. 64, Issue 3, p. 2. In a similar vein, Guido Calabresi and Philip Bobbitt have argued that a certain degree of dishonesty is not only unavoidable, but also sometimes desirable, especially when public officials are confronted with a “tragic choice” involving a clash of values, e.g., euthanasia. When it is impossible to reach a social consensus on such an issue, some degree of deception is preferable to rejecting one value in favor of the other. See Calabresi and Bobbitt, *Tragic Choices*, (New York: W.W. Norton & Company, 1978), pp. 67-64.

reached that decision for very different reasons. This results from the fact that we are talking about distinct agents: the collective entity is one agent; each member is another agent. In other words, members of an institution that has officially given the reason r for deciding D need not themselves endorse the reason r . They do not even need to act as if they personally hold r . The collective activity of justifying is distinct from each member's taking r or *not- r* as a reason for the decision, even though the former can affect the latter and vice versa.

Adam Leite's conception seems more appropriate than the spectatorial view in describing this phenomenon. According to Leite, just as individuals should not be said to have a reason for x belief before they undertake to describe this reason to others or to themselves, so too members of a collective institution end up "having" a certain set of reasons *qua* collective through the process of presenting their reasons to the public or, at the very least, to each other. This view has the advantage of accounting for the intuition that many institutions would rarely decide on their reasons unless they were bound to give them publicly. Instead, institutions would usually decide solely on the outcome, and not on the justification for that outcome. The so-called state of a multi-member institution's "having reasons" for a given decision is the consequence of the requirement to give reasons rather than a preexisting mental state waiting to be reported.

If this is an adequate account, then the conventional view according to which sincerity in the law can be defined as the correspondence between the reasons that are publicly offered and the reasons that decision-makers "have" for their decision is clearly questionable. The argument is circular because to explain deception in the law, it postulates a logical and chronological hierarchy between having reasons and giving reasons for a decision. From there, it goes on to define insincere reasons as statements where the supposedly correct hierarchy is violated, that is when decision-makers give reasons that they did not "have" in the required sense. This definition

is problematic in that it assumes the very thing the argument aims to prove, that is, that candor in the law is a problem of matching decision-makers' motivating and normative reasons. There is yet another problem with this account. I agree that having reasons for a decision is often coextensive with being capable of communicating one's reasons, but this equivalence is not metaphysically necessary, in the sense that it is not true in all possible worlds. The concept of having a reason is not reducible to the actual or potential activity of showing that one has reasons as there are possible worlds where one has reasons without being able to state one's reasons.

Epistemological Reasons for Requiring Reasons

Once again, we need not settle these complex questions here. All I take these epistemological arguments to establish is that there may be influences running from the state of having reasons for a decision to that of presenting those reasons and vice versa. My point is that this potential for reciprocal influence is really what informs the legal requirement to give reasons. The duty to give reasons is best understood as a duty to give certain kinds of (good) reasons rather than the duty to sincerely report one's preexisting and independent reasons. In other words, my claim is that the law is interested in the potential to influence the reasons governmental agents have, rather than in learning what reasons they happen to have.

Indeed, it is unclear why legal systems would go to the trouble of imposing a giving reasons requirement on public institutions if reason giving were merely a second-order, derivative, activity, which consists at best in faithfully reporting a decider's preexisting reasons. Certainly, citizens are curious—and perhaps entitled—to know the reasons for which officials act. But there are other—and more direct—means of ensuring that citizens have effective

access to these reasons. These other means include various publicity mechanisms, such as opening government meetings, legislative debates, judicial hearings, and other decision-making fora to the press and to the public; monitoring public budgets, (e.g., by making financial statements available and auditable), or still, by promoting citizens' effective access to government information through freedom of information statutes and requests, and so forth. Taken alone, popular goals such as transparency or access to information, do not explain why reason giving is accorded such a fundamental normative status in current liberal political theory.

I suspect that the requirement to give reasons has become such a widely popular check on public institutions precisely because of the peculiar epistemic consequences it produces. Requiring institutions to give reasons is not only requiring them to investigate and to report the reasons they independently have. The duty to give reasons is enforced because it also acts as a constraint on the reasons they are allowed to take into account. In strictly defined roles like that of an administrator, a judge or a policeman, only a very restricted set of considerations is supposed to bear on what one decides, while other considerations are ruled out.⁶⁰ The giving reasons requirement serves more as a method for monitoring the content of decision-makers' reasons rather than as a mere disclosure strategy. As an anthropological matter, when people know that they will be called to account for their justification, they often tend to be more careful: they think twice before they reach a conclusion. The prospect of having to show one's justification has the epistemic effect of influencing the reasons one has and, hence, it is hoped, the decision one makes. I am not claiming that the duty to give reasons has the power of modifying public officials' reasons: it is not part of my argument to suggest that some reasons I

⁶⁰ The idea that public officials should not act on certain reasons and not on others has become a commonplace in political theory and philosophy, particularly since John Rawls's discussion of the concept of "public reason." See: John Rawls, "The Idea of Public Reason" in Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 212-54 and "The idea of Public Reason Revisited" in Rawls, *Collected Papers*, (ed.) S. Freeman (Cambridge: Harvard University Press, 1999), pp. 573-615.

did not have I now have as a result of the requirement, or the other way around. Rather, because of the requirement to give reasons, I wind up acting on some—but not on others—of the reasons I independently have for a decision. In other words, I choose, among the (motivating) reasons I have, to act on some and not on others.

Let us summarize our overall response to this inquiry: talk of public reason-giving implicitly relies on the assumption that enacting a duty to give reasons is a means of restricting the type of reasons public institutions will consider, rather than on the desire to access those reasons, regardless of their content. Most democratic legal systems demand that decision-makers give their reasons not because citizens are interested or have a stake in discovering public officials' beliefs and motives, but primarily because they have relatively precise views about what kind of reasons officials ought to act on, e.g., they do not want welfare benefits to be distributed on grounds of racial bias, or environmental regulations to set pollution quotas based on pseudo-science. To summarize, my argument is that the legal duty to state reasons protects citizens against arbitrary decision-making—if at all—by virtue, not of sincere disclosures, but most importantly, of its epistemic effect on governmental agents' reasons.

Conclusion:

While the requirement to give reasons is often depicted as a transparency mechanism designed to ensure “straight talk” in the legal process, I hope to have shown that it possesses another, more ambitious, aspect. Throughout this paper, I have suggested that the requirement aims not only at guaranteeing truthful reasons, but also, and most significantly, at influencing the content of those reasons. The issue of candor in and of itself is perhaps not so important for legal

reason giving. Eventually, the reasons that are actually given, not the putative reasons that decision-makers had at the time when they made the decision are of great consequence. In the end, we are all left—with the exception of the decision-makers themselves—with the reasons that are offered publicly, not with hypothetical states of mind. Only these reasons are publicly recorded and occasionally published so that the legal community and the public at large can read them. To some extent, it is therefore immaterial whether governmental agents had or did not have a hidden agenda because the only reasons that become part of the law are the official ones.

But this should not be the end of our inquiry. Ultimately, it remains unclear whether it is more valuable for the public to receive good but disingenuous reasons rather than sincere but bad reasons. Not any sincere reason counts as an appropriate reason capable of justifying a public decision. We would not be satisfied with saying that an administrator gave sufficient reasons for his decision if the only reason he adduced was: “I decided x because today is Monday,” even if he or she is convinced that this explanation truthfully and exhaustively reflects his or her justification. For a decision to be deemed justified, it is not enough that candid reasons can be given for it: we additionally require that the reasons given count as “good” reasons. It is an open question whether it follows that the giving reasons requirement amounts to a requirement to give good reasons. To be sure, there must be some kind of substantive expectation of what counts as a valid reason for a public decision, but exploring specifically what are these substantive requirements are is a topic for another day.