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Sincerity and Reason-Giving: When May Legal Decision Makers Lie

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INTRODUCTION

The lawfulness of state actors' decisions frequently depends on the reasons they give to justify their conduct, and a wide range of statutory and constitutional law renders otherwise lawful actions unlawful if they are not justified by reasons or are justified by the wrong reasons.[1] A question that arises is whether sincerity in reason-giving is also—and should be—required. In other words, when public officials are under a duty to give reasons for their decisions, are they also under a duty to give *sincere* reasons? That is, do they have the duty to state their actual motives as their reasons?

In law, and often elsewhere, sincerity seems to be both the usual expectation and the ideal that regulates discursive practices and exchanges.[2] A series of legal mechanisms direct members of the Execu-

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1. This is typically the case with judicial review of administrative agencies. The established rule, formulated in *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943), is that a reviewing court may uphold an agency's action only on the grounds upon which the agency relied when it acted: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained."

2. The existence of causes of action such as fraud, misrepresentation, or libel in the common law seems to indicate the significance of sincerity, even if it would be much harder to point to a cause of action whose specific function was to remedy damages caused by insincerity. In this respect, citizens might be better protected against insincerity in their private dealings than citizens as members of the public because legal systems usually include a device for creating and bolstering loyalty between private parties: fiduciary duty. The imposition of a duty of loyalty on the fiduciary is constructed as a "prophylactic rule intended to remove all incentive to breach—not simply to compensate for damages in the event of a breach." ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 996 (1983).

tive,[3] including the President,[4] to reveal their views transparently when announcing to the public vital decisions such as that of going to war or that of adopting major new economic policies. They are expected to disclose facts and arguments supporting their action in which they sincerely believe.[5] Similarly, when settling disputes or determining the optimal legal rule to address a specific issue, judges are expected to believe what they say in their opinions.[6] Likewise, administrators who decide whether a citizen is entitled to social security disability benefits or to a liquor license are legally required to give sincere reasons for their determinations.[7] Legislators too, when called upon to justify a piece of legislation, are expected to truthfully report the motives that prompted them to legislate.[8]

This conventional picture, however, may be mistaken. Within the law itself, reason-giving devoid of sincerity is more prevalent than might seem apparent. In a variety of legal contexts, the lack of sincere reasons is no obstacle to the legal validity of a decision. For instance,

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3. On our expectations of sincerity in political discourse and deliberation, see generally ELIZABETH MARKOVITS, THE POLITICS OF SINCERITY: PLATO, FRANK SPEECH AND DEMOCRATIC JUDGMENT (2008).

4. On the recent polemic concerning the Bush Administration's efforts to withhold information from public access, see Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL'Y 671, 671 (2003); Gregg Sangillo, *Incarceration of Information?*, NAT'L. J., Oct. 23, 2004, at 3227–28. *But see* Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of the Executive Privilege*, 60 MD. L. REV. 205, 205–07 (2001) (showing that secrecy was already a mark of the Clinton presidency).

5. On the emergence of openness and disclosure as key concepts of governance in the past decade, see Thomas Blanton, *The World's Right to Know*, FOREIGN POL'Y, July 2002, at 50.

6. On judges' legal duty to give candid and honest reasons, see generally David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (arguing that candor "is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another").

7. The iconic statement of the position according to which administrators must give transparent reasons is found in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The *Overton* Court noted that "'*post hoc*' rationalizations . . . have traditionally been found to be an inadequate basis for review." *Id.* at 419. The Court continued,

> [S]ince the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard. The court may require the administrative officials who participated in the decision to give testimony explaining their action.

Id. at 420.

8. On the problem of legislative motivation, see Paul Brest's seminal article, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

save in special constitutional contexts,[9] the legislature need not give any reasons at all for its actions, and when it volunteers reasons, we know that those reasons are artificial constructions attributed to a metaphorical "it" that is really a "they."[10] Similarly, courts routinely uphold decisions by legislators or lower courts which were originally accompanied by false or seriously misleading statements on grounds other than those stated.[11] In these scenarios, the underlying premise is that if the decision below is correct, it must be affirmed, even though the public official gave a wrong or insincere reason. Another illustration is that police officers making arrests need not necessarily believe that the considerations they cite show probable cause.[12] In short, many decision-making environments eschew sincerity in reason-giving.

These examples show that despite its presumptive appeal, the idea that public officials must adhere to a norm of sincerity is not universally conceded. For instance, does the sincerity of a prosecutor's rea-

9. *See* J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978) (arguing that when equal protection or "fundamental rights" such as freedom of speech are involved, courts should decide whether a certain law is constitutional by examining the legislative motivation behind the enactment).

10. *See generally* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (arguing that the notion of a supposedly single legislative intent that is shared by all legislators is inconsistent and self-contradictory).

11. On legislation, see U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980). On judicial decisions, see Helvering v. Gowran, 302 U.S. 238, 245 (1937). *See generally* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 23 n.7 (D.C. Cir. 1999) (comparing cases on appeal from a district court, where the reviewing court is supposed to review "judgments, not opinions," and administrative law cases, where the reviewing court does "not sustain a 'right-result, wrong-reason' decision of an agency"; in the latter, but not the former case, the reviewing court must "send the case back to the agency so that it may fix its reasoning or change its result."). This is not the case for administrative decisions: in administrative decision making, the Supreme Court's position is that when an agency gives the wrong reason for a decision of policy or law, the reviewing court must send the case back for reconsideration, even though the court might have upheld the order if a different reason had been assigned. *See* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 206.

12. For an example of a case in which the Supreme Court declared that the discrepancy between the real and the avowed reasons for arrest is not legally relevant, see Devenpeck v. Alford, 543 U.S. 146, 153 (2004). In that case, the police, concerned that the defendant was impersonating a police officer, pulled him over. *Id.* at 148–49. They searched his car and found a tape recorder that was recording the traffic stop. *Id.* at 149. They later argued that the defendant had made an illegal recording of a private conversation—a violation, they said, of Washington state's Privacy Act. *Id.* The Court found that the facts clearly established that no reasonable officer could believe that the defendant violated the Privacy Act. *Id.* at 154. But in a unanimous opinion delivered by Justice Antonin Scalia, the Court held that the police had probable cause to arrest the defendant for impersonating a police officer, despite the fact that the officer's reasons for doing so were not closely related to the Privacy Act offense that the police identified during the arrest. *Id.* at 155. "An arresting officer's state of mind, except for facts he knows, is irrelevant to probable cause." *Id.*

son for striking prospective jurors from a jury panel bear on the legality of such a strike?[13] Consider the following exchange, which occurred a few years ago in an American Court of Appeals for the Armed Forces, between a military judge, a defense counsel, and a trial counsel.[14] After the trial counsel had exercised his peremptory challenge against Captain Cherielynne Moore, the only female member of the panel, the following discussion ensued:[15]

> TC: My reason is her profession, not her gender.
> MJ: What is her profession?
> TC: She's a nurse with the medical group, sir.
> MJ: I find that that's a non-gender specific reason. So, the peremptory is granted. Peremptory by the defense?
> DC: Yes, Your Honor. And maybe for purposes of the record, maybe it needs to be stated that I'm still concerned that that's a pretext. But that's for the record purposes only.
> MJ: I happen to know that—and I'm not agreeing with him—but trial counsels—not these particular trial counsels—as a whole tend

13. The Court of Appeals for the Eighth Circuit has answered this question in the affirmative, while reviewing a trial court's decision to overrule a prosecutor's use of peremptory challenges to strike two black men from a jury panel when the prosecutor claimed that the strikes were motivated by the prospective jurors' hairdos and facial hair. *See* Purkett v. Elem, 514 U.S. 765 (1995). The Eighth Circuit declared,

> [W]here the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race neutral reason for believing that those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, "I don't like the way [he] look[s], with the way the hair is cut. . . . And the mustache[ ] and the beard[ ] look suspicious to me," do not constitute such legitimate race neutral reasons for striking juror 22.

Id. at 767 (quoting Purkett v. Elem, 25 F.3d 679, 683 (8th Cir. 1994)). The Eighth Circuit concluded that the "prosecution's explanation for striking juror 22 . . . was pretextual," and that the state trial court had "clearly erred" in finding that striking juror number 22 had not been intentional discrimination. *Id.* at 767. The Supreme Court reversed, albeit noting that at some stage of the analysis "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* at 768. In *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987), the Supreme Court of Missouri, referring to the second stage of the three-step *Batson* analysis, had stated,

> We do not believe, however, that *Batson* is satisfied by "neutral explanations" which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, *Batson* would be meaningless. It would take little effort for prosecutors who are of such a mind to adopt rote "neutral explanations" which bear facial legitimacy but conceal a discriminatory motive. We do not believe the Supreme Court intended a charade when it announced *Batson*.

14. I use the example of a trial counsel's reasons for peremptory challenge because according to the military justice personnel rules and procedures, trial counsels exercise the prosecutorial function. Trial counsels in the Court of Appeals for the Armed Forces are therefore functional equivalents of prosecutors in ordinary courts. *See* 10 U.S.C. § 838 (2006).

15. *See* United States v. Chaney, 53 M.J. 383 (C.A.A.F. 2000).

> to exercise peremptories against med group folks. But it's specifically nurses, not male or female.

This dialogue suggests that the question of "why" a prosecutor strikes a juror may have different meanings. Does the legal system care about the actual motive that caused the prosecutor to strike or does it only want to verify that the prosecutor can articulate, as a matter of legal justification, a non-discriminatory reason for the strike? In other words, is law after sincerity understood as the giving of one's motivating reasons or is it after sincerity understood as the capacity to state at least one neutral, lawful reason? As Justice Thurgood Marshall observed in his famous *Batson* concurrence, "[A]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."[16] This assertion seems to suggest that the law should be interested in motives rather than in justifications because of the easiness of fabricating post-hoc rationalizations that appear neutral and lawful but are in fact insincere.

This ambiguity brings to the fore the function of legal justification. Public reason-giving has long been thought of as an essential duty of democracies.[17] The giving of reasons, it is often said, ought to promote better public decision making by keeping the government's discretionary powers in check.[18] However, this aim is compromised by the possibility that decision makers may disclose insincere and misleading justifications as a means of preventing, rather than facilitating,

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16. Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring).

17. Plato's attack on the use of rhetoric in the public sphere can be interpreted as one of the first expressions of this ideal. For instance, Socrates points out that "the rhetorician is a maker of beliefs in his auditors' souls." *See* PLATO, GORGIAS 15 (E.M. Cope trans., 1864). The concern is that rhetoric does not appeal to reason but instead leads us to experience emotions vicariously and to become captive to them. By contrast, according to Socrates, any discourse aiming at truth should be seeking not to produce emotions, but to give reasons. The Greeks called this demand to make oneself intelligible *logon didomai*. *See, e.g.*, PLATO, THE REPUBLIC 240 (Tom Griffith trans., G.R.F. Ferrari ed., 2000). Legal discourse, just like any other discourse, should be regulated by the demand to *logon didonai*, that is, to give an account to yourself or others of what you are saying.

18. The reason-giving requirement is a staple of the exercise of administrative functions in modern bureaucratic states. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 557(c)(3) (2000) ("[Decisions] shall include a statement of . . . findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record."). For a theoretical discussion of the duty to give reasons as a check on public officials' discretion, see David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, *in* COMMON LAW THEORY 134, 138–40 (Douglas E. Edlin ed., 2007); Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 182.

accountability.[19] Legal scholars have focused on the question of judicial candor and paid little attention to the fact that state actors' insincerity at every level of government might undermine the duty to give reasons and, therefore, the government's accountability. This Article argues, in contrast, that an examination of judicial sincerity in isolation, as is typically done, is too narrow. The issue of sincerity raises concerns that go far beyond merely determining what judges should or should not write in their opinions. We need to be able to hold all state actors—not only judges—accountable for what they say. If sincerity is indeed necessary to monitor public decisions, it should be discussed in a context that is broader than that of judicial decision making.

By looking at non-judicial as well as judicial sincerity, this Article begins to fill the gap, for there currently exists in the literature no general, systematic treatment of sincerity in legal decision making. It will proceed by considering various arguments that articulate how sincerity is necessary in the practice of legal reason-giving. By and large, the scholarship to date has concentrated exclusively on specific subcategories of the sincerity debate, usually by focusing on only one branch of government. There is no literature that addresses the problem of sincerity across the three branches of government and that takes into account the similarities and differences of sincere reason-giving in these diverse settings. While existing works provide excellent insights into the question of judicial sincerity, none attempts to provide the broad and comprehensive analysis undertaken in this Article.

Another problem with the currently dominant approach to sincerity is that it does not consider the immense complexity of reason-giving practices. By contrast, my approach takes into account the contextual nature of public decision making. It acknowledges the fact that much legal justification is attached to a specific and unique situation. In the past twenty years, a significant body of literature has been built around the usual assumption—which has dominated the discussion on judicial candor—that there are only two normative positions available to sincerity theorists: advocating full candor and justifying circumstantial lying. Quite the opposite, this Article suggests a more nuanced framework that allows for at least three standards for assessing sincerity that are based on the extent to which actual motives should be

19. For example, David Shapiro, who focuses on judicial reason-giving, characterizes candor as "the sine qua non of all other restraints on abuse of judicial power." Shapiro, *supra* note 6, at 737.

disclosed.[20] This evaluation of sincerity is then further nuanced by introducing the relevance of institutional context.[21]

In its common employment, the concept of sincerity refers primarily to a correspondence between one's avowal and one's actual feelings.[22] By extension, in the legal setting, the conventional wisdom is to define sincere reason-giving as the congruence between a decision maker's avowed reasons for a given decision and his actual beliefs, views, or preferences on the matter. However, I claim that there are at least two different ways to understand this notion of congruence, depending on what the reason-giving requirement is interpreted to actually require. In my view, such a requirement can take at least two forms. If the requirement is that decision makers give justificatory reasons that are also their motivating reasons, then sincerity describes the situation in which the reasons one presents are also one's motives.[23] In this view, a decision maker is insincere whenever there is a discrepancy between his avowal of reasons and what actually motivated him. The reason-giving requirement encompasses a motivation requirement in the sense that it demands that governmental agents' justificatory reasons for their actions coincide with their motivating reasons. I propose to call this the "internalist" reading of the reason-giving requirement. By contrast, according to what I describe as a strong "externalist" reading, the requirement is merely one to give justificatory reasons, regardless of decision makers' motives. Here, a decision maker is sincere when she gives reasons that she thinks really justify the outcomes. She does not need, in addition, to be moved by those reasons. It is sufficient that she believes that the reasons she puts for-

20. *See infra* Part III.D.

21. *See infra* Part IV.

22. For a historical and literary account of the concept of sincerity, see LIONEL TRILLING, SINCERITY AND AUTHENTICITY 27 (1972) (distinguishing between sincerity and authenticity and arguing that sincerity requires one to act and be the way one presents oneself to others, while authenticity involves finding "who we are" and recognizes the fact that certain actions express the way in which "we really are").

23. 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's famous article, *Internal and External Reasons*. *See* BERNARD WILLIAMS, *Internal and External Reasons*, *in* MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, at 101 (1981). 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, for example, Stephen Darwall, *Internalism and Agency*, 6 PHIL. PERSP. 155 (1992); Susan Hurley, *Reason and Motivation: The Wrong Distinction?*, 61 ANALYSIS 151 (2001); Derek Parfit, *Reasons and Motivation*, 77 PROC. ARISTOTELIAN SOC'Y 99 (Supp. 1997); Simon Robertson, *Reasons and Motivation—Not a Wrong Distinction*, 106 PROC. ARISTOTELIAN SOC'Y 391 (2006); John J. Tilley, *Justifying Reasons, Motivating Reasons, and Agent Relativism in Ethics*, 118 PHIL. STUD. 373 (2004).

ward are good reasons for the outcome. In this view, the calculation of the degree of congruence between one's motives and the official reasons one presents is not pertinent to the determination of sincerity. In this externalist approach, law is after justificatory reasons, not after motivating reasons: what is relevant is only whether officials have provided what they believe to be good reasons to justify their decisions.

These two interpretations suggest that whether decision makers are "sincere" about their reasons often depends on whether they are held to an externalist or to an internalist requirement. The same statement of reasons may appear sincere if one has in mind an externalist requirement, but insincere if one is anticipating an internalist requirement. By and large, one should not expect the same kind of reasons to equally satisfy both requirements. To make sense of sincerity in the law, one must therefore analyze in more detail what it is exactly that legal systems do when they announce a duty to give reasons. This Article thus addresses two types of questions. The first is descriptive: I ask whether the requirement to give reasons is usually intended by the legal system as an externalist or an internalist requirement. The second is normative: I discuss the merits and demerits of these two readings of the requirement.

It should be noted that the question at issue is not that of determining whether legal propositions have truth-value, that is, whether they can be qualified as true or false, but whether there is truthfulness in legal decision making and justificatory discourse.[24] I discuss sincerity *in* the legal process and not the truth of law. The focal point of this Article is whether public 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 that public officials put forward can be qualified as sincere or insincere. The goal is neither to articulate a theory of legal justification as sincere 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 variations in the way in which sincerity can be interpreted and therefore implemented as a legal requirement.

This Article is structured in four parts. In Part II, I begin by spelling out the importance of sincerity in legal discourse. Part III exam-

24. I will not address the question of whether law can be described in terms of truth and falsehood. This is a wholly different question, which has been analyzed, for instance, by DENNIS PATTERSON, LAW AND TRUTH (1996), and ANNA PINTORE, LAW WITHOUT TRUTH (2000).

ines in greater detail arguments for and against imposing on institutional players a requirement to give sincere reasons for their decisions. In Part IV, I clarify the idea of sincere reason-giving by rendering more explicit what the legal community ordinarily expects from the requirement to give reasons. Part V considers the differing applicability of the analysis to different public institutions by pointing out the importance of context in assessing sincerity. Finally, Part VI draws on all preceding Parts to sketch out the contextual nature of the duty to give sincere reasons, which has been largely overlooked in existing discussions. Contrary to what is generally assumed, reason-giving is a practice that is highly dependent upon context. In this sense, normative and empirical questions pertaining to the sincerity requirement are often intertwined. The determination of whether reasons should be sincere and how sincere they should be is dependent upon the circumstances of their formulation. I therefore conclude by laying out the elements of a theory of contextual sincerity.

II. THE IMPORTANCE OF SINCERITY IN THE LAW

A. *Sincerity in Law and Politics*

Most people would agree that courts and other law-creating or law-applying institutions are not meant to deliberately mislead the public. Legal institutions are increasingly criticized for their lack of sincerity.[25] 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.[26]

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 least since Plato's argument on the noble lie.[27]

25. In a provocative article that is famous in legal academia, Martin Shapiro 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." *See* Martin Shapiro, *Judges As Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994).

26. To be sure, the broadly defined topic of transparency, lying, and secrecy in political life has become somewhat fashionable in the disciplines of legal and political theory. *See, e.g.*, SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978); LIONEL CLIFFE & MAUREEN RAMSAY, THE POLITICS OF LYING (2000); HARRY FRANKFURT, ON BULLSHIT (2005); HARRY FRANKFURT, ON TRUTH (2006); THE RIGHT TO KNOW (Ann Florini ed., 2007); GOVERNMENT SECRECY IN DEMOCRACIES (Itzhak Galnoor ed., 1977); Elizabeth Markovits, *The Trouble with Being Earnest: Deliberative Democracy and the Sincerity Norm*, 14 J. POL. PHIL. 249 (2006).

27. *See* HANNA ARENDT, *Truth and Politics*, *in* BETWEEN PAST AND FUTURE 227 (1993); PLATO, THE REPUBLIC, *supra* note 17, at 107.

Machiavelli is famous for having urged upon the prince the way of the fox.[28] Politicians have always been tempted to massage the truth in order to win an election, to justify their own actions, or to discredit opponents. Arendt concludes that 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.

By contrast, in the legal context, there is a strong presumption that decision makers should be sincere.[29] Sincerity 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.[30] Sincerity is arguably a defining feature of democratic legal systems: the ideal of the rule of law has traditionally been understood as comprising, among its most important requirements, the principle of publicity, which requires some form of sincerity.[31] The publicity principle mandates not only disclosure but also *sincere* disclosure. Making the law public exposes it to public deliberation and censure: publicity is inseparable from some degree of sincerity 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 because of their frequent use of formal procedures aimed at furthering the requirement of sincerity, such as taking oaths, calling witnesses, convening expert panels, producing evidence, securing cross-examinations, and so on.

Assuming that sincerity 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

28. *See* NICCOLO MACHIAVELLI, THE PRINCE 68 (W.K. Marriott trans., Forgotten Books 2008) (1532) (arguing that a prince, "being compelled knowingly to adopt the beast, ought to choose the fox and the lion; because the lion cannot defend himself against snares and the fox cannot defend himself against wolves. Therefore, it is necessary to be a fox to discover the snares and a lion to terrify the wolves.").

29. *But see* John M. Kang, *The Case for Insincerity*, *in* 29 STUDIES IN LAW, POLITICS AND THE RATIONALIZATION OF SOCIETY 143–64 (Austin Sarat & Patricia Ewick eds., 2003) (discussing sincerity as applied to the question of whether religious arguments may be used in liberal democracies, and arguing that sincerity is irrelevant and perhaps even harmful in fostering agreement and mutual respect between religionists and secularists).

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

31. *See, e.g.*, LON L. FULLER, MORALITY OF LAW (rev. ed. 1969).

case in contemporary jurisprudence, the current academic discussion on sincerity in the law is judge-centric. Legal scholars have mostly focused on what has come to be known as "judicial candor."[32] They concentrate on the fact that judges might hold certain assumptions, motivations, and theories that 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 constitutions, statutes, precedents, or even the intent of framers or legislators—commentators often suspect that the "real reasons" underlying a decision rest on political, economic, moral, philosophical, or religious preferences.[33]

Much legal scholarship on judicial sincerity has been built around an opposition between those who favor judicial candor and those who criticize it. Two camps have emerged. Although most legal scholars insist that it is an inherent requirement of the judicial function to give candid reasons,[34] more recently, some writers have urged that judges may sometimes be justified in misrepresenting their reasons.[35] The

32. For a recent presentation and discussion of the legal scholarship on judicial candor, see Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008) (distinguishing between the concepts of candor and sincerity, with candor being an ambiguous concept encompassing both a requirement of sincerity and of full transparency—meaning that judges are candid when they disclose *all* the information that they believe to be relevant to a legal decision—while sincerity imposes a lesser requirement because it merely demands intentional consistency between belief and utterance).

33. 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 (1930) (equating the law with decisions in actual cases and predictions of decisions, rather than rules, and pointing out that although judges may talk about basing their decisions "on the law"—statutes, precedents, etc.—such talk is only "window dressing" for decisions that are actually based on the judge's biases and policy preferences); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (arguing that U.S. Supreme Court justices decide cases based on their political viewpoint rather than on the law); Allan C. Hutchison & Patrick J. Monahan, *Law, Politics and the Critical Legal Scholar: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984) (emphasizing the Critical Legal Studies thesis that "[l]egal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes").

34. For arguments in favor of judicial candor, see, for example, Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983); Schwartzman, *supra* note 32; David L. Shapiro, *supra* note 6.

35. For criticism of judicial candor, see, for example, RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY 350–52 (2003); Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785 (2007) (arguing that judicial lying is justified when necessary to avoid extreme injustice); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995) (arguing that judges, subject to prudential considerations, may enjoy substantial discre-

dispute over the vices and virtues of candor, however, can be traced back to older discussions about legal reasoning, such as the debate between legal realists and advocates of reasoned elaboration.[36] 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.[37] By contrast, partisans of

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tion as to candor); Robert A. Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. REV. 721 (1979) (analyzing famous conceptions of adjudication and judicial opinions, and pointing out that less than candid reasons do not automatically make for bad judicial opinions); Shapiro, *supra* note 25, at 156 (claiming that "[c]ourts and judges always lie. Lying is the nature of the judicial activity."); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989) (arguing that judicial candor in statutory interpretation poses legitimacy concerns and calls into question judges' checking function).

36. For the most important discussions of "reasoned elaboration" views, see HERBERT M. HART & A.M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (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); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (arguing that the "essence" of adjudication lies in the mode of participation it accords the affected party, that is, the presentation of proof and reasoned arguments); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978) (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 their decisions and the decisions supporting them will better promote the development of the law); Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15–16 (1959) (implying that judges should be required to support their choices through a "type of reasoned explanation," which involves reaching judgment based on neutral principles and reasons that transcend the immediate result); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) (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 a jurisprudence that would guarantee against totalitarianism). For realist arguments demythologizing so-called reasons, see Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929) (arguing that the rules are merely means by which judges justify a result they had previously reached on the basis of intuitive "hunches"); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J.L. & EDUC. 518 (1986) (arguing that judges are essentially pursuing political agendas when adjudicating cases and that the reasons provided in support for their decisions mainly serve to disguise their manipulations of the "law" in order to justify the outcomes that they like); Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 CAL. L. REV. 831, 832 (1961) (arguing that opinions fail to fulfill their three functions: (1) they fail to state the law because judges make the laws they like; (2) they fail to mollify litigants because courts often decide issues that were not argued at all by the litigants, or the courts do not decide issues that were presented by litigants; and (3) they fail to "make the judges think"); Max Radin, *The Requirement of Written Opinions*, 18 CAL. L. REV. 486 (1930) (criticizing the requirement of written opinions from a time management point of view because it is inconvenient for judges, who lose time preparing opinions; for lawyers, who lose time reading them; and for litigants, who see an increasing delay in the final disposition of cases).

37. *See, e.g.*, Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 653 (1932) (arguing that "[o]pinions . . . disclose but little of how judges come to their conclusions. The opinions are often ex post facto; they are censored expositions.") (emphasis omitted).

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

B. Legal Contexts in Which the Problem of Sincerity Arises

Before further analyzing the various situations in which the problem of sincerity arises, we must ask whether the law recognizes a requirement to give sincere reasons in the first place. My claim is that the requirement of sincerity, where it exists, is usually implicit in the duty to give reasons. To be sure, legal systems rarely present us with a formula to the extent that decision makers must disclose "*sincere* reasons" for their action because sincerity is generally assumed. Sincerity works as a default rule for legal justification. In this regard, legal discourse does not differ from ordinary rules of communication: just as daily conversations are regulated by an implicit norm of sincerity, legal justifications provided by state actors are expected to be sincere.[38] In everyday interactions, sincerity works as a guarantor of communicative validity in that the sheer possibility of communication with others relies on such transparency. Where participants in an exchange are deemed uncooperative and distrustful, a group is unable to continue a conversation. This implicit norm of sincerity is so deeply rooted in our cultural practices and expectations that it is rarely mentioned explicitly. In light of this, it should come as no surprise that the same norm of sincerity seems to underlie legal discourse in general and reason-giving in particular.

In fact, the problem of sincerity arises in a variety of legal contexts. Sincerity in legal reason-giving may raise specific concerns for the three branches of government. As suggested above, citizens anticipate that members of the Executive[39]—be they top-level executives such as secretaries of state or street-level bureaucrats such as police

38. According to Searle's speech-act theory of sincerity, a speech-act is sincere only when the speaker has the state of mind expressed by the speech-act. As Searle puts it, "[T]he sincerity condition tells us what the speaker expresses in the performance of the act." JOHN SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 65 (1969). But as Micah Schwartzman points out, it must be possible for a speaker to be sincere even if her speech-act did not reflect her "state of mind," provided *she believed* that it expressed her state of mind, even if it really did not. *See* Schwartzman, *supra* note 32, at 993.

39. The key case here is *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), in which the Supreme Court developed its motive doctrine. In *Arlington Heights*, the Court considered whether racial considerations motivated a local zoning board's refusal to rezone land for higher-density housing. *Id.* at 254.

officers[40]—will give sincere reasons when called to account for their actions. Members of the Judiciary, whether deciding as single judges or as part of multimember panels, should be honest with the public about how they arrive at their decisions.[41] Although legislators are in principle under no duty to explain and justify their decision to legislate, in certain areas of law, they can be called upon to give a reason for a given statute, and reviewing courts will occasionally verify the sincerity of that reason.[42]

Sincerity usually matters to the law whenever a rule prohibits public officials from acting based on certain considerations, such as discriminatory or otherwise illicit purposes.[43] If the requirement of sincerity is to have meaning, it must be based on more than a vague and unen-

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40. In spite of the Supreme Court's assurances to the contrary in *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that "[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis"), Fourth Amendment jurisprudence arguably imposes a duty on police officers to give sincere reasons, inasmuch as it calls for an analysis of the reasons why a search or a seizure was undertaken. *See* Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072 (2007). The constitutionality of arrest under the Equal Protection Clause depends on the motives of officials. *See* United States v. Frazier, 408 F.3d 1102, 1108 (8th Cir. 2005), *cert. denied*, 546 U.S. 1151 (2006) (finding insufficient evidence of a racial motive by police officers); Johnson v. Crooks, 326 F.3d 995, 999–1000 (8th Cir. 2003).

41. *See supra* notes 31–34 and accompanying text.

42. The acknowledgment that legislators' reasons may matter to the constitutionality of legislation dates back at least to *McCulloch v. Maryland*, 17 U.S. 316 (1819). The Court stated,

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Id. at 423. For more recent applications, see, for example, United States v. Morrison, 529 U.S. 598 (2000); Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218 (1964). *See also* Clark, *supra* note 9 (arguing that legislative motivation should be central in upholding statutes not only in equal protection analysis but also more generally in the analysis of "fundamental rights").

43. Such rules exist in the three branches of government. For instance, the First Amendment bars the government from firing employees because they have exercised their protected speech rights. *See* Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977) (concerning the non-renewal of a untenured teacher's contract by a school board because of the teacher's call to a radio station that criticized the school's proposed dress code, and addressing the question of whether the school board's retaliatory motive was the "cause" of the teacher's injury). The First Amendment also prohibits legislators from passing a statute that is motivated by the goal of restricting an unpopular religion. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 254–55 (1982) (challenging a Minnesota statute as discriminatory because it provided that only those religious organizations that receive more than half of their total contributions from members or affiliated organizations are exempt from the registration and reporting requirements of the statute). As for the judiciary, this prohibition is generally channeled through ethics rules such as the canons of the Model Code of Judicial Conduct (2007). Canon 2, entitled "A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently," speaks particularly to a judge's duty to refrain from deciding cases based on her illicit motives. On judges' ethical re-

forceable obligation to be sincere. Without some form of monitoring by a supervising agency or through judicial review, the sincerity requirement could be ignored with impunity. So far, the key legal tool to monitor public decision making and to enforce these types of prohibitions has been to establish an *ex ante* or *ex post* duty to give reasons,[44] that is, to require that decision makers justify their decisions upon making them or, alternatively, to be prepared to provide reasons at a later time if asked to do so.[45] Reasons assist the reviewing agencies or the courts in performing their supervisory function, which is often based on criteria such as whether public officials took account of relevant considerations or acted for improper purposes, and these criteria are much easier to apply if the decision makers' reasons are stated explicitly. It would be extremely difficult to establish whether a public body really did act for improper purposes or on irrelevant considerations unless one can have access to the reasons that prompted the decision. The duty to give reasons thus enables supervising officers to check whether decisions have been based on lawful reasons. However, this aim is compromised if the reasons provided by a public official do not track the actual reasons for the decision. The concern is that decision makers may solely disclose insincere and misleading justifications as a means of preventing accountability. This is why it is plausible to claim that there is an implicit sincerity requirement built into the duty to give reasons: if there were no such requirement, reason-giving would become a self-defeating activity.

What is the effect of non-compliance with a requirement to give sincere reasons? The difficulty is that the failure to give sincere reasons does not usually make a decision automatically invalid and unenforceable.[46] Reviewing agencies or courts can of course undertake to investigate the validity of the reasons, but as long as the reasons are

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sponsibilities when it comes to writing opinions, see generally Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237 (2008).

44. *See, e.g.*, Robert L. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 86 (1976) (arguing that "[t]he formality of having to provide a detailed written statement of reasons is itself likely to deter some, although admittedly not all, bad faith dealings").

45. For a discussion of the distinction between an automatic obligation to give reasons and an obligation that arises only upon request, see H.L. Kushner, *The Right to Reasons in Administrative Law*, 24 ALTA. L. REV. 305, 324–25 (1986).

46. The main question here is whether the failure to state sincere reasons should be analyzed from the perspective of either a substantive or procedural requirement that has not been complied with. In the former case, the underlying decision would be invalid, but in the latter case, the effect of a breach upon the status of a decision is somewhat unclear because non-compliance with a procedural or formal requirement does not automatically render a decision invalid. *See* Shapiro, *supra* note 18, at 197–98.

lawful, little can be done. A decision justified by insincere reasons can only be challenged if it can be proved that the motivating factor was an unlawful one. But the problem is that such proof is extremely difficult to establish.[47] Those affected by the decision, be they private individuals or the public at large, may undertake to prove that the reason given on the face of the decision was not the real reason that moved decision makers if they can satisfy the very heavy onus of proof applicable to what is in effect an allegation of fraud.[48] Extrinsic evidence of the reasons for a decision may be hard to find and may be unreliable.[49] Of course, reviewing agencies or courts are not completely powerless to review the reasons for the decision because they may be able to infer what the real reasons are from the circumstances or the impact of the decision.[50]

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47. John Hart Ely has termed this the "ascertainability problem." John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212 (1970).

48. Some scholars, however, have argued that legislative intent can be proved using a "but for" standard. The idea is that we can attribute a certain intent to a legislature if, but for a certain minimum number of legislators sharing this intent, a statute would not have been passed. *See, e.g.*, Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879 (1985).

49. On the difficulty of finding circumstantial evidence for proving legislative motive, see Brest, *supra* note 8, at 120–23.

50. This inferential approach is particularly obvious in the *Batson* analysis, which aims at resolving allegations regarding the discriminatory use of peremptory challenges in jury selection with a three-step framework. In *Batson*, the Court explained that a party can make out a prima facie case (step one) "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson v. Kentucky, 476 U.S. 79, 93–94 (1986). Relevant evidence for this purpose might include (1) statistical or circumstantial evidence that jurors are being systematically excluded from jury service on account of race or sex; (2) the pattern of strikes used by the challenged party; or (3) the fact that the strike was exercised against a member of a protected class. *Id.* at 96–97. Once the defendant makes a prima facie showing, the burden shifts to the prosecutor to offer a neutral explanation for striking the juror (step two). *Id.* at 97. If the prosecutor offers a permissible, race-and-sex-neutral justification for the strike, the trial court proceeds to decide, on the basis of the totality of the facts and evidence, whether the neutral reason provided by the challenged party was sincere (step three). *Id.* at 98. Even though the *Batson* Court did not explicitly use the language of "sincerity," but rather that of "pretextuality," the issue at step three is whether the neutral reason offered by the prosecutor is sincere. The burden-shifting framework works as a sincerity device in that it aims at uncovering whether there is a neutral reason for the strike and whether that reason is pretextual (or insincere). For instance, the Court in *Purkett v. Elem*, 514 U.S. 765, 768 (1995), stressed that although facially neutral explanations satisfy the step two burden, "implausible or fantastic explanations may (and probably will) be found to be pretexts for purposeful discrimination." See also *Owens v. State*, 531 So.2d 22, 24 (Ala. Crim. App. 1987), an Alabama Court of Criminal Appeals case in which a prosecutor's purportedly neutral reasons for using fifteen of his twenty-three strikes against African-Americans were rejected based on his admission that the fact that the juror "was the same race as the defendant was a factor in his decision to strike." But see Howard v. Sendowki, 986 F.2d 24 (2d Cir. 1993), for a different outcome despite similar facts. The *Howard* court nonetheless recognized that the central question in a pretext case is whether the facially neutral reason offered by the challenged party was the real reason for the strike. *Id.* at 27.

To make things even more difficult, public decisions, whether made by a group or an individual, are often made for multiple reasons. Where two reasons are stated and one is bad and the other good, then the decision will usually be valid, provided that the reasons are independent, not cumulative, and can be severed from each other.[51] In other words, where a decision is based on alternative reasons, it will not be invalid if only one of the reasons is improper.[52] This has led the Supreme Court to develop, in some areas of law, the so-called mixed-motive analysis.[53] In certain situations, public officials who have provided illicit reasons may be allowed to subsequently amend the statement of reasons contained in their previous decisions. Subtracting from the original statement of reasons or substituting new reasons is a common legislative practice, and as I will argue below, it should perhaps be generalized to other state actors.[54] In the next Section, I will frame my contribution within the ongoing debate concerning judicial candor and spell out the novelty of my approach to thinking about legal sincerity.

C. *The Sincerity Problem: Not Circumscribed to Courts*

My project is broader than what has been discussed earlier in the sense that I am not only interested in judges but also, more generally, 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

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51. This is the mixed-motive test developed in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In *Arlington Heights*, the plaintiffs sought a zoning variance from the defendant in order to construct public housing projects for minorities. 429 U.S. at 254. The plaintiffs' application was denied, and they brought an equal protection challenge that was supported by evidence that several zoning board members had been motivated by racial bias. *Id.* The Court explained that the evidence, taken alone, could not be the basis for overturning the board's decision:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

Id. at 271 n.21.

52. For a discussion of this problem in the case of legislatures, see Richard L. Hansen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843.

53. Mixed-motive analysis originated in two landmark cases, *Mount Healthy City Board of Education*, 429 U.S. at 274, and *Village of Arlington Heights.*, 429 U.S. at 252. *See generally* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279 (2006) (arguing that mixed-motive cases can be analogized to multiple causation cases in that two concurrent forces—a lawful motive and an illicit motive—both cause an actor to embrace a given course of action).

54. *See infra* Part IV.D.

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, not only courts but also administrative agencies are required to give reasons to substantiate their decisions.[55] Legislators and members of the Executive increasingly tend to put forward reasons in support of their actions.[56] Even public or semi-public institutions such as hospitals, law-enforcement agencies, schools and universities, and banks and other financial institutions are compelled to justify their actions to a greater extent than in the past.[57]

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. To be sure, there are clearly substantial differences between judges and other governmental agents: judges are generally expected to write detailed opinions while political officials, for example, are allowed to speak in more casual ways and without the controls of precedent or

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55. For example, in the United States, the Administrative Procedures Act requires reasons for certain administrative decisions. *See* 5 U.S.C. § 553(c) (1988). In France, the July 11, 1979 statute established a duty for all administrative agencies to justify unfavorable individual decisions. *See* Law No. 79-587 of July 11, 1979, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 12, 1979, p. 1711–12. In England, the Tribunal and Inquiries Act 1958 created an obligation for tribunals to give reasons. *See* Tribunals and Inquiries Act of 1958, 6 & 7 Eliz. 2, c. 66, § 12 (Eng.); Tribunals and Inquiries Act, 1992, 39 & 40 Eliz. 2, c. 53, § 10 (Eng.). For a comparative analysis of the reason-giving requirement in American and European law, see Shapiro, *supra* note 18, at 179–221.

56. Of course, legislators are generally not required by law to give any reason for their decisions, that is, 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, that is, the Council and the Commission, are now duty-bound to give reasons for their decisions. 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.

Treaty Establishing the European Community, art. 253, Dec. 29, 2006, 2006 O.J. (C 321).

57. Michael Power has analyzed this phenomenon, arguing that contemporary democracies are faced with an "audit explosion," affecting an ever-increasing range of institutions. *See* MICHAEL POWER, THE AUDIT SOCIETY: RITUALS OF VERIFICATION (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. ONORA O'NEILL, A QUESTION OF TRUST 49–52 (2002).

even statutory implication.[58] The kinds of speech are entirely different, so the rules for telling the truth are probably different as well. Public officials are asked to give their reasons in very different ways, and we expect more of a judge than a politician in this regard. Politicians lie. We worry more when judges lie.

That being said, I believe that the question of sincerity 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.[59] In practice, the reason-giving 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."[60] 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.[61] 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 that public institutions should not enjoy arbitrary power.[62] The practice of public institutions—and sometimes their duty—to give reasons is in place so that citizens may view public

58. I discuss in more detail the differences that separate legal decision makers *infra* Part IV.A.

59. For a comparative description of this ever-growing phenomenon, see, for example, HERKE KRANENBORG & WIM VOERMANS, ACCESS TO INFORMATION IN THE EUROPEAN UNION: A COMPARATIVE ANALYSIS OF EC AND MEMBER STATE LEGISLATION (2005); Symposium, *Transparence et Secret*, 97 POUVOIR (2001). On the American debate about transparency, see ARCHON FUNG, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (2007); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006).

60. For instance, the French parliamentary debate concerning the July 11, 1979 statute that (partially) extended the duty to give reasons to administrative agencies turned on the idea that reasons would not only promote an ideal of transparency but would also introduce democratic practices that are often lacking in the traditionally secretive and sometimes seemingly arbitrary French administration. For a synthesized discussion of the French debate, see BRUNO LASSERRE ET AL., LA TRANSPARENCE ADMINISTRATIVE (1987).

61. This view is particularly popular among deliberative democratic theorists. *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996).

62. For example, the French reason-giving requirement, which can be traced back to the August 16 and 24, 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. The French citation is "loi des 16/24 août 1790 relative à l'organisation judiciaire, titre V, article 15," which in English would read: "August 16 and 24, 1790 Statute on Judicial Organization, Title V, Article 15."

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. Unsurprisingly, this conception relies on an oversimplification. Before analyzing this difficulty in further detail, however, it is worth pausing for an instant to consider a number of arguments that have been developed for and against requiring sincere reason-giving.

III. ARGUING FOR AND AGAINST SINCERITY IN THE LAW

This Part reviews the current state of the debate on legal sincerity. More specifically, it provides a systematic overview of the different normative positions that scholars have endorsed concerning the evaluation of sincerity in the law. As the discussion below demonstrates, the idea that legal decision makers should adhere to a principle of sincerity—and the nature of such a principle—is highly disputed. I will begin by recounting arguments in favor of imposing a duty to give sincere reasons on state actors, before turning to arguments critiquing the appeal to sincerity.

A. Arguments in Favor of Giving Sincere Reasons

What is the point of sincerity in public reason-giving after all? 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 because it harms people's autonomy.[63] Misrepresenting one's reasons is a way of disrespecting those who are affected by the decision in the sense that harming autonomy is a form of disrespect. 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, I develop a pragmatic discussion of sincerity. 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 sincere reasons. Much scholarship on judicial candor unfolds not by setting forth the values fostered by sincerity but rather

63. 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.*, IMMANUEL KANT, *On a Supposed Right to Tell Lies from Benevolent Motives*, *in* KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS (T.K. Abbott ed. & trans., London: Longmans, Green 1898) (1797).

by calling attention to the harms resulting from misrepresentations.[64] 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 as a whole. It is not that deceptive reasons are intrinsically bad; they are to be avoided insofar as they produce bad results. To put it 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 the guidance of citizens.[65] 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.

1. Sincere Reasons Foster Trust

Insincere reasons harm relationships by undermining trust. This is the case regardless of what the content of the speech-act is meant to be, that is, regardless of whether a decision maker is claiming to present his motivating or his justificatory reasons for a given decision. 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 sincerity any more than other human associations.[66] 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 sincerity is more powerful than deceit because a society whose members are unable to distin-

64. A typical example of this way of presenting the issue can be found in Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 LAW & PHIL. 393 (2003).

65. This idea has been long expressed in Bentham's utilitarian philosophy. *See* JEREMY BENTHAM, POLITICAL TACTICS 29–34 (Michael James et al. eds., 1999) (arguing that publicity enables closer relations between citizens and the state by securing the trust of the governed in the legislature and by creating a more informed electorate).

66. In Plato's *Republic*, Socrates asks Thrasymachus, who claims that justice can be defined as the advantage of the mightier, the following questions:

> [W]ould 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.

guish sincere messages from deceptive ones would ultimately collapse. If citizens expect public officials to mislead them, they will become wary of arguments offered in public discourse. This explains why requiring sincere reasons is often presented as necessary to building 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 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.[67]

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.[68] Coordination problems may appear if it is likely that decision makers will give dishonest reasons. Game-like considerations develop, giving rise to game-theory calculations about securing assurances. Decisions about whether to disclose genuine reasons may have a structure similar to a prisoner's 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 strategic and game-like calculations from arising.

2. *Only Sincere Reasons Provide Guidance*

Another consequentialist argument in favor of sincere reasons emphasizes 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 behavior of

67. GEOFFREY J. WARNOCK, THE OBJECT OF MORALITY 84 (1971).

68. ERVING GOFFMAN, STRATEGIC INTERACTION (1969).

its addressees. It must at least be the case that legal professionals and ordinary citizens can find out what the law is and obey it.[69] 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.[70] 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 the Anglo-American tradition, 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 judicial judgment.[71] 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 interpreting statutes, judges often support their own preferred interpretation by referring to the reasons legislators have developed 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. In deciding future courses of conduct, for-profit and not-for-profit enterprises, as well as private individuals, may also

69. 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." JOSEPH RAZ, THE AUTHORITY OF LAW 213–14 (1979) (emphasis omitted).

70. *See, e.g.*, KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26 (1960) (stressing that the "opinion has one if not its major office to show how like cases are properly to be decided in the future").

71. *See generally* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994).

need to rely on previous justifications that were 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 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 that 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 because they confer a disproportionate power upon public officials. By the same token, they frustrate the democratic rationale for extending reason-giving requirements.[72]

According to liberal democratic theory, public institutions' practices—and sometimes duty—of reason-giving is required so that each individual may view the state as reasonable and therefore legitimate.[73] Reasons provide grounds 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.[74] The main problem with insincere reasons is that they alter citizens' choices at different levels. A 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. For example, this is the case in the hypothetical scenario in which a landowner is falsely told that her construction permit for a well has been denied on the ground that the well would contaminate groundwater. Had the landowner known that the real basis for the rejection was the aesthetic impact of the well, she might have envisaged the possibility of constructing a different type of well or of choosing a different location for construction. The deceitful reason deprived her of this opportunity.

The claim that sincere reasons are superior from a democratic point of view enjoys a certain initial plausibility, but there is a significant

72. On the democratic function of reason-giving, see generally GERALD F. GAUS, AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY: JUSTIFICATORY LIBERALISM (1996); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004).

73. *See* GAUS, *supra* note 72, at 130–58.

74. This argument is developed in Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268 (2001).

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, thereby accomplishing equally important democratic ends.

B. Arguments Against Giving Sincere Reasons

There are a variety of arguments in the literature against sincerity.[75] 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, for example, when lying is morally justified.[76] Other writers point out that too much insistence on sincerity can occasionally harm democracy.[77] 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.

1. Pragmatic Reasons Against Giving Sincere Reasons

A requirement to give sincere 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 clients and have discretion over the allocation of public benefits or sanctions,

75. For an overview, see ALEX RUBNER, THE MENDACIOUS COLOURS OF DEMOCRACY: THE ANATOMY OF BENEVOLENT LYING (2006).

76. *See, e.g.*, DAVID NYBERG, THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE (1993).

77. For instance, Elizabeth Markovits argues, from the standpoint of nonideal deliberative democratic theory, that the candor requirement poses dangers to democratic communication. Her argument is that, given that public officials are not sincere and, further, that they cater to the demand for sincerity by trying to appear sincere (straight talking and so forth), it harms democracy if citizens are too trusting. *See* Markovits, *supra* note 26, at 255–57. Interestingly, a number of scholars have also questioned the consequentialist justifications of candor principles and other transparency-related mechanisms by arguing that the empirical claims about transparency's positive consequences remain unproven. *See, e.g.*, Neal D. Finkelstein, *Introduction: Transparency in Public Policy*, *in* TRANSPARENCY IN PUBLIC POLICY 1, 1 (Neal D. Finkelstein ed., 2000).

must decide cases on a mass basis.[78] 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 service workers typically face choices and competing demands that compromise sincerity.[79]

Major impediments to sincere reason-giving lie in time limitations and in an endemic lack of resources, both of which prohibit individualized service. These constraints restrict the amount of information that is released and, assuming that sincerity often requires more extensive disclosures of information than insincerity, may compromise sincerity.[80] 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 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 short-cuts to resolve broadly defined types of situations.[81] 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 because governmental agents' performances are increasingly measured and weighed against established standards such as per-

78. *See generally* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3 (1980) (defining street-level bureaucrats as "workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work").

79. In this context, insincerity can serve to insulate bureaucracies from control, thereby enabling them to pursue their interests without restraint from other governmental agencies and organizations. This idea was already present in Weber's contention that bureaucracies operate "to increase the superiority of the professionally informed by keeping their knowledge and intentions secret." MAX WEBER, *Bureaucracy*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 233 (Hans H. Gerth & C. Wright Mills eds., 1946).

80. For example, in the United States, discourse requirements related to Freedom of Information Act (FOIA) requests have proven very expensive, and increasingly so, for American taxpayers. "In Fiscal Year 2007, the total cost of all FOIA related activities for all federal departments and agencies, as reported in their annual FOIA reports, was an estimated $369,431,500.55." Office of Information & Privacy, U.S. Dept. of Justice, Summary of Annual FOIA Reports for Fiscal Year 2007, http://www.usdoj.gov/oip/foiapost/2008foiapost23.htm (last visited Mar. 7, 2010).

81. This is even more true in an age of ever-increasing use of information and communication technology. *See generally* Mark Bovens & Stavros Zouridis, *From Street-Level to System-Level Bureaucracies: How Information and Communication Technology Is Transforming Administrative Discretion and Constitutional Control*, 62 PUB. ADMIN. REV. 174 (2002).

formance indicators.[82] Police officers are typically expected to make a certain number of arrests. Administrators are often obliged to retain a threshold level of intakes and case-closing rates. Researchers are required to publish a minimum number of articles in academic journals, which are in turn ranked periodically. Again, this form of expedited decision making does not prevent sincerity in and of itself, but it does so indirectly by limiting the amount of information that can realistically be disclosed.

These various obstacles to transparent 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.[83] Default clauses, jargon, and ready-made explanations act as barriers to understanding how to operate effectively within the system, especially for underinformed and underprivileged clients who require individualized attention and explanations. At times, fewer reasons and incomplete reasons might be preferable to candid but convoluted reasons, provided the curtailed reasons are more pedagogical and widely accessible.

2. *Strategic Reasons Against Sincere Reasons: The Case for Secrecy*

In democratic regimes, should citizens be informed about all the decisions governmental agents make and about all the reasons for those decisions? American citizens do not seem to enjoy such an unqualified legal right to be informed by governmental organizations.[84]

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82. On this trend, see generally TED GAEBLER & DAVID OSBORNE, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992) (claiming that nearly every aspect of government could be entrusted to the private sector and arguing that when government is in charge of implementation, waste and inefficiency occur). For a critical evaluation of this trend, see, for example, Christopher Hood, *The "New Public Management" in the 1980s: Variation on a Theme*, 2 ACCT. ORG. & SOC'Y 93 (1995); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

83. For a critical analysis of the concept of transparency as applied to government and corporations, see Fenster, *supra* note 59, at 893 (suggesting that we need to complicate our understanding of transparency, which is too often viewed as an unmitigated good, while also arguing that government is frequently too secret).

84. The U.S. Constitution does not provide an individual right of access to government information. *See* Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978). Federal open-government statutes require open meetings and disclosure of federal records (with exceptions). *See, e.g.*, Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006) (requiring that each federal agency make information available to the public upon request, subject to a series of exceptions); Government in the Sunshine Act, 5 U.S.C. § 552(b) (2006) (providing, with ten specified exemptions, that every portion of every meeting of an agency shall be open to public observation).

Another way of arguing in favor of selective disclosure is to identify certain public decisions that, because of their importance for citizens' security or welfare, should be exempted from the requirement that they be accompanied by sincere reasons.[85] Here, disingenuous reasons are justified with reference to the public interest. Secrecy is sometimes necessary for reasons of efficacy. The underlying idea is that we cannot expect a government to give sincere reasons on certain strategic matters, especially matters that involve military interests and foreign affairs and even matters related to economic interests such as plans for devaluation, which cannot be disclosed without harm to 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.[86] 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."[87] In virtue of the executive privilege doctrine, the President of the United States is allowed to withhold certain information from Congress, the courts, and virtually

85. For an account of the federal government's resistance to disclosure whenever national security is at stake, see Thomas S. Blanton, *National Security and Open Government in the United States: Beyond the Balancing Test*, *in* NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 33 (2003). For an example of governmental agents arguing that openness would be a burden, see Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 922–23 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004) (arguing that the government has met its burden of showing that the disclosure of information about the identity of certain detainees would harm ongoing law enforcement efforts and national security).

86. At least since Machiavelli. *See* MACHIAVELLI, *supra* note 28. For a discussion of the connection between politics and secrecy, see Carl J. Friedrich, *Introduction* to GOVERNMENT SECRECY IN DEMOCRACIES (Itzhak Galnoor ed., 1977).

87. 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 the separation of powers doctrine 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. *See* United States v. Nixon, 418 U.S. 683 (1974) (reviewing President Nixon's claims of executive privilege as a defense to the release of documents and tapes related to Watergate). On the existence and extent of the privilege, see generally MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY AND ACCOUNTABILITY (2002) (recognizing the executive privilege as qualified by compromise between Congress and the President, subject to courts' interpretations). *But see* RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974) (claiming that the judiciary should be *a priori* skeptical of executive secrecy by virtue of Congress's "senior" status over the Executive Branch).

any other public institution or private citizen.[88] President George W. Bush has claimed this privilege recently to justify withholding information when its release would, in his view, put the country's security at risk or impair his ability to make informed and effective decisions.[89] It should be noted that freedom from a duty to provide information is not *ipso facto* freedom to be insincere, but as a matter of fact, the former often yields the latter.

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.[90] In recent years, for example, the 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.[91] To be sure, courts have declared that other members of the Executive Branch cannot invoke the executive privilege in the strict sense.[92] However, many federal statutes allow or sometimes even require executive agencies to withhold information from the public.[93] 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 negatively justified by the desire to prevent harm. In what follows, selective disclosure is defended on the ground that it positively benefits the public.

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88. On the inter-branch informational dispute, see, for example, William P. Marshall, *The Limits on Congress' Authority to Investigate the President*, 2004 U. ILL. L. REV. 781 (discussing the inter-branch informational dispute).

89. President George W. Bush 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 when withholding subpoenaed documents concerning the White House and Justice Department's deliberations over the firing of nine U.S. attorneys. On the controversy surrounding allegations concerning the Bush Administration's efforts to control the flow of information from the Executive Branch, see generally JOHN W. DEAN, WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH (2004).

90. *See, e.g.*, Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95 (2004).

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

92. Neither Congress nor Executive Branch agencies are permitted to regulate private citizens' behavior through rules the citizens do not or cannot know about. *See, e.g.*, Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980) (noting that the Freedom of Information Act does not permit keeping secret "final statements of policy or final actions of agencies, which have the force of law or which explain actions the agency has already taken" or "communications that promulgate or implement an established policy of an agency").

93. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(b) (2006).

3. *Sincere Reasons May Harm Citizens: Protecting the Public*

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 of 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."[94] 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 the theory were kept secret because most people are not able to use it properly as a decision-making procedure.[95] From this, Sidgwick concluded that the utilitarian calculus—the object of which is to maximize utility—is more suitable for policy makers than for private individuals.[96] 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.[97]

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94. Bernard Williams argues for the necessity of consequentialism in politics, while acknowledging that the wrongness of the actions involved is not cancelled by their good consequences. *See* Bernard Williams, *Politics and Moral Character*, *in* PUBLIC AND PRIVATE MORALITY 55 (Stuart Hampshire ed., 1978).

95. HENRY SIDGWICK, THE METHODS OF ETHICS 475–95 (Hackett Pub. Co., 1981) (1874). This view has been criticized by Bernard Williams. *See* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 138–40 (1973). It has also been discussed by Robert E. Goodin. *See* ROBERT E. GOODIN, UTILITARIANISM AS A PUBLIC PHILOSOPHY 60–77 (1995); Larry Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315 (1985) (arguing that John Stuart Mill's articulation between utilitarianism and libertarianism—which John Gray presents as indirect utilitarianism—comes down to "pursuing the good indirectly" and pointing out the troublesome consequences of such an argumentative structure).

96. Meir Dan-Cohen 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. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984).

97. One can find a contemporary illustration of this attitude in the French judiciary. As Mitchel Lasser has shown, the French judicial system is characterized by a "radical bifurcation" between an official and an unofficial portrait of its practices. *See* MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 60–61 (2004). Officially, the French judicial opinion is presented as a syllogism, which represents the mechanical application of statutes to particular cases. The French legal elite, however—which is essentially composed of judges, law professors, and high-ranking civil servants—knows that things are somewhat more complex in reality. Only they have access to a "hidden" discourse. By reading the Advocates General's reports or by having discussions with judges, they are able to perceive the policy choices that constantly underlie decisions despite official justifications to the contrary. *See id.*

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.

To summarize, many arguments that justify insincerity claim benevolence and concern for the deceived. Insincere reasons seem appealing because they are perceived as being without bias and as being 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."[98] 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. And here again we arrive at the problem of determining whether sincerity is about disclosing justificatory or motivating reasons for a decision. Before going any further, therefore, we must clarify what it means for a decision maker to be sincere about his reasons.[99]

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98. Alvin I. Goldman, *Epistemic Paternalism: Communication Control in Law and Society*, 88 J. PHIL. 113, 119 (1991) (defining epistemic paternalism in the following way: "I shall think of communication controllers as exercising epistemic paternalism whenever they interpose their own judgment rather than allow the audience to exercise theirs . . .").

99. As Micah Schwartzman has pointed out, the debate about judicial candor is too often obscured by the use of confused and undefined concepts. While Schwartzman undertakes to advance the discussion by distinguishing the concept of sincerity from that of candor, my contribution focuses on sincerity and shows that this single notion is liable for very different interpretations. *See* Schwartzman, *supra* note 32.

IV. TRACING THE CONTOURS OF THE REQUIREMENT OF SINCERITY

The goal of this Part is normative. Drawing on the existing literature concerning the merits and demerits of sincerity, I undertake to trace the contours of what the sincerity requirement should be in a democratic legal system. What does it mean to give sincere reasons to justify a decision in a legal setting? Much legal scholarship of the past twenty years has been built around the usual assumption, which has informed the discussions on judicial candor, that there are two possible normative stances: advocating candor and justifying lying.

This Article, in contrast, suggests a more nuanced approach that accounts for a whole range of intermediary positions. I proceed by presenting two main readings of sincerity—the "internalist" and the "externalist"—which can be further refined by distinguishing between three levels of "motivational" sincerity. Next, I further spell out my proposal by introducing the relevance of the institutional context for assessing sincerity. My purpose in this Part is therefore to discuss the extent to which the requirement to give reasons should be understood as externalist or internalist. In what follows, I assess the respective advantages and disadvantages of adopting either one of these analyses to the exclusion of the other.

A. Two Readings of the Sincerity Requirement

A sincerity requirement in the law could presumably take one of two forms: on a strong or internalist reading, it would require a congruence between actual motives and stated reasons, whereas on a less demanding, externalist reading, it would only require an articulation of sufficient stated reasons. At first, when reflecting on the requirement to give reasons in the public domain, it seems obvious that the internalist reading prevails: what is demanded of state actors is that they give the reasons that actually motivated them when making a decision, in the sense that they must state the reasons that 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 are also their motivating reasons for picking a particular solution. The legal duty to give reasons is often, as a matter of positive law, an internalist duty to give reasons.

Let us step back and illustrate the problem. 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 Pro-

fessor 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.[100] Consequently, Ramadan resigned from his position at Notre Dame. The following year, he reapplied on several occasions for a visa to enter the United States for short periods of time in order to attend academic events. For months, no decision was made on Ramadan's visa application. As a result, on January 25, 2006, Professor Ramadan filed a lawsuit challenging his ongoing exclusion from the United States with the assistance of several American organizations, including the American Academy of Religion, the American Association of University Professors, and the PEN American Center.[101]

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:[102]

> 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

100. The only reason the government gave for its denial of Professor Ramadan's visa is the unofficial one that was reported in the *Los Angeles Times* and given 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." *See* Associated Press, *Muslim Scheduled to Teach at Notre Dame Has Visa Revoked*, L.A. TIMES, Aug. 25, 2004, at A23. Spokesman Knocke further declared that the basis of the revocation was a provision of the PATRIOT Act, which permits the United States to exclude foreigners who use a "position of prominence within any country to endorse or espouse a terrorist activity." *Id.* On the Ramadan case generally, see also *U.S.-Barred Muslim Scholar Joins Key British Task Force*, REUTERS, Sept. 1, 2005. For Ramadan's own opinion about the affair, see Tariq Ramadan, *Information Items: Straight from the Source*, Sept. 12, 2005, http://www.tariqramadan.com/article.php3?id_article=0424&var_recherche=task+force (last visited Mar. 7, 2010).

101. In *American Academy of Religion v. Chertoff*, 463 F. Supp. 2d 400 (S.D.N.Y. 2006), the court ordered the government to issue a formal decision on Ramadan's pending visa application within ninety days. Judge Paul A. 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.

Id. at 419.

102. American Academy of Religion v. Chertoff, No. 06CV-588 (PAC), 2007 WL 4527504, at *3 (S.D.N.Y. Dec. 20, 2007).

> 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).
>
> 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.[103] 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 between 1998 and 2002, when Ramadan made his donations. 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, the plaintiffs argued that the government had failed to demonstrate that Ramadan "knew," in the sense required by the law, that he was supporting terrorism 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 differ from the actual reasons underlying the decision. If it should, 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 hypothesis, the requirement for public officials to give reasons would be disconnected from

103. 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, 753 (1972). It requires that when a consular official denies a visa, which implicates a U.S. citizen's First Amendment rights, he must have a facially legitimate and bona fide reason for doing so. *Id.* at 770.

the question of whether or not they have any acceptable motivation for their decisions.

As the Ramadan case illustrates, the nature and the extent of the disclosure triggered by the requirement is unclear in practice. In the Ramadan case, is the reason-giving requirement an externalist requirement? That is, is it a requirement for consular officers to give the reasons for or against a given decision, independently of whether or not they are motivated by these reasons? If so, the Bern consular officer was sincere—provided that he believed the reason he gave in his letter. Or is it an internalist requirement, that is, a requirement for decision makers to give the reasons that both exist *and* motivate them? If so, the consular officer was insincere because he was (presumably) not motivated by the reason he gave. Allowing State Department officers to present grounds for denying visas that differ from the actual reasons underlying their determinations amounts to adopting an externalist requirement. According to this understanding, the rule is that deciders must state the justificatory reasons that exist in favor of their proposed solutions, rather than recounting the reasons that motivated or justified their decision. The presumption is that when public officials give reasons, they state the reasons that they think there are in favor of the outcome. The assumption is not that they state what *their* actual reasons were in favor of the decisions. Hence decision makers are not necessarily lying when stating justificatory reasons that do not, in fact, motivate them.

In sum, the "facially legitimate and bona fide" standard raised in the Ramadan case, by including the requirement that the reasons disclosed be "bona fide," seems to say that the government cannot lie about its motivations. But the mere fact that the reasons supplied are not the reasons that motivated the decision does not in and of itself mean that they are not good reasons or undermine their capacity to justify.[104] 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

104. Richard Wasserstrom famously argues that it would be pointless to criticize a judicial opinion based on its failure to provide an adequate description of the decision-making process because the purpose of a legal justification is not to reveal the way in which the decision was reached, but is instead to demonstrate that a decision is valid in light of existing authority. *See* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 28–29 (1961).

if this were the 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.[105] 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, that Ramadan did provide financial support to a terrorist group, then why bother about what the decision makers really thought?

The internalist understanding is problematic for several reasons. First, this interpretation of the standard overlooks the fact that sincere speech is speech that reflects the speaker's beliefs, but not necessarily all of them. A question that decision makers need to resolve is the following: of all of the things they could say to justify a given decision, what *should* they say? When it comes to institutions, these issues are particularly complicated because what institutional actors say is often determined by what they are required to say. And they are usually not required to tell the whole truth, in the sense of disclosing all of their beliefs, views, or preferences on the matter.

Institutionalized reason-giving is very similar to familiar social interactions that are governed by rituals and codes of politeness. These are situations in which the usual assumptions we make about the connection between what people say and what they believe or feel are suspended. Certain questions, for example, are not real questions. You are not supposed to reply to a neighbor's, "How are you?" in the elevator, with an endless account of your psyche. Similarly, certain answers do not pretend to be real answers. They are exempted from truth-value. When you politely reply to your neighbor's inquiry, "I am fine. How are you?," you are not making any promise that what you say is true, or even that you think it is true. Your neighbor is not expecting you to do so either. Truth is irrelevant here. As a result, you are not being insincere even if in fact you are feeling awfully poorly.

Institutions often function on the same principle; much institutional legal reason-giving is intended to have symbolic value, rather than true-value. For the purposes of the argument, I only want to suggest that whether a public official's statement of reasons is sincere is often a matter of particular institutional design. As a result, there is no sincerity problem if a given institution makes it clear that its official statements should not be subjected to the same truth-value standards

105. 8 U.S.C. § 1182(a)(3)(B) (2006).

as regular speech. If the public knows what kind of reasons to expect, they will not be misled.

For instance, to go back to the Ramadan case, whether the consular officer states the motivating reason for his decision to deny Ramadan's application, or rather, a justificatory reason to bar Ramadan, depends on what he has a duty to say. If the duty is a duty to disclose motives, then he is insincere if the reason he gave was not his motivating reason. If the duty is a duty to state reasons that justify the decision, then he is only insincere if he does not believe that the reasons he gave justify the decision.

Second, the internalist reading of the bona fide clause suggests 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. Yet it is often very difficult, if not impossible, to ascertain whether governmental agents are telling the truth or lying when they are their justifying decisions. Part of the problem is that individuals' actual motivations are often contradictory or at least confused, so they can hardly be used alone to construct what it means for reasons to be sincere.[106] Furthermore, it is a major question in contemporary philosophy of mind how exactly one can access one's own mental states and those of others, such as beliefs, memories, desires, motivations, and so on.[107] Individuals seem to have privileged epistemic access to their own mental states, but not to other people's mental states.[108] If this appearance is correct, it is unlikely that public officials' justificatory reasons can be monitored based on their inaccessible motives. How is possible to verify whether their avowed reasons accurately re-

106. As Nicholas Zeppos puts it in the context of examining judicial reason-giving,

> [T]he complexity of the process may also belie the notion that the judge can separate out the "false" reasons for a decision . . . from the "real" reasons. . . . As much as any other product of human decisionmaking, the judge's work is subject to the complex ways in which the human mind orders, explains and processes information.

Zeppos, *supra* note 35, at 407.

107. On this debate, see generally Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977) (arguing that there may not even be direct introspective access to our own higher-order cognitive processes, let alone to that of others). *See also* NED BLOCK ET AL., THE NATURE OF CONSCIOUSNESS: PHILOSOPHICAL DEBATES (1997); DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED (1991); William Alston, *Varieties of Privileged Access*, 8 AM. PHIL. Q. 223 (1971); Tyler Burge, *Individualism and Self-Knowledge*, 85 J. PHIL. 649 (1988); Alison Gopnik, *How Do We Know Our Minds: The Illusion of First-Person Knowledge of Intentionality*, 16 BEHAV. & BRAIN SCI. 1 (1993).

108. Of course, this view could be challenged on the ground that mental states are physical states of some sort, like neurophysiologic states of the brain. As such, they would be publicly accessible. In this hypothesis, one could know a host of things about other people's mental states, just like one can know things about their hair color, their height, their weight, and so on.

flect their underlying motivations? The most promising ground for determining their subjective motives is their own testimony. However, this seems a very weak basis.

This accessibility issue, however, does not necessarily present a problem, for it can be argued that the epistemological difficulty of accessing public officials' beliefs is irrelevant 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 it is impossible to access other human beings' mental states, lying is morally permissible. The point here is that it is necessary to give an account of reason-giving within the legal process that clarifies the relationship between the normative requirement to give sincere reasons and the epistemological question of ascertaining what those reasons are. At this juncture, I will make no attempt to work out these complex epistemological issues, which would take us too far afield. Rather, and as a means of further introducing the ensuing analysis, I will now consider in more detail the different forms that the sincerity requirement can take in the law.

B. The "Internalist" View: Sincerity Requires a Correspondence Between Reasons and Motives

The externalist proposal enjoys some initial plausibility, but some readers may be unconvinced by the idea that the law should treat normative reasons as entirely independent of whether a decider is motivated by them. According to the internalist, the externalist mistakenly allows decision makers to display some degree of negligence with respect to what the public ultimately believes.[109] She objects that in the externalist analysis, there is nothing to prevent public institutions from misrepresenting their reasons for a decision and, therefore, from operating with indifference as to whether the public is deceived.

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109. In this regard, the internalist might object—mistakenly in my view—that the externalist account does not rule out "bullshit," in Harry Frankfurt's terms. According to Frankfurt, bullshitting involves not the intent to get others to believe something one knows is false, but rather indifference to the truth-value of our statements. *See* FRANKFURT, ON BULLSHIT, *supra* note 26, at 54–56. In other words, the only intent behind misrepresentations is an intent to neither report the truth faithfully nor to conceal it. *See id.* But the internalist would be incorrect in claiming that externalism fails to rule out bullshitting because to meet external sincerity a decision maker must provide what she believes is a sufficient justificatory reason. The decision maker is making a truth claim about that reason, namely, that it is sufficient to justify the outcome. The decision maker is not—and could not be—indifferent, at least not with respect to that truth anyway.

To illustrate, one could think of cases in which failure to disclose one of the relevant reasons may 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, for example, by making the objective seem unattainable or no longer desirable. For instance, in most countries, consular officers routinely deny visas on the basis that applicants have not presented proof of sufficient funding to support their residency. This explanation, however, is not always exhaustive, in the sense that officers may abstain from disclosing other operative reasons for denial, such as diplomatic or security-based considerations. The trouble is that those undisclosed factors will lead to the future visa denials in case of re-application. 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 resources, they might have acted differently, for example, by applying for a different visa or by modifying their travel plans altogether.

An externalist might object to this description of the situation. He could point out that the correct way of depicting the case is to say that there were in fact two independent justificatory reasons for the visa denial and that the officer chose to disclose only one.[110] This is why the applicants did not realize that they might not obtain their visa even if they re-applied after having met the requirements. According to the externalist, the problem stems not from externalism, but from the absence of a comprehensive requirement to give reasons, that is, of a requirement to give *all* the justificatory reasons applicable to any given case. Such a requirement would be perfectly compatible with externalism.

The internalist reply is that when decision makers offer a reason for their decision, that reason must be offered from within their own epistemic and moral perspective. But what is such a perspective? An internalist would answer that they should "believe" the reason or be committed to it in some way. It is unclear though what she means by "believing a reason" or "being committed to a reason." In my opinion, the best way to understand the phrase is to take it to mean that decision makers should be committed to the view that the reasons

110. This situation is analogous to that which has been described in the literature as the "mixed motive" analysis in judicial review of legislation. *See supra* notes 51–53 and accompanying text.

they are giving are truly justifying reasons. But once again this interpretation is entirely compatible with externalism.

By contrast, it sometimes seems as if internalists take the phrase to mean—mistakenly in my view—that a decision maker acknowledges that a 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, that is, 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 does not "believe" it, or is not committed to it, in the required sense.

Suppose once again that an administrator denies a construction permit to a landowner for a well on the basis that the well would result in groundwater contamination.[111] This reason is deceptive if the administrator really decided against the permit based solely on aesthetic impact. The administrator picked contamination as a reason 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. The question I ask to the internalist, then, is whether there must be a certain intentional correspondence between what one believes and what one says one believes, that is, between our conscious commitments and our stated reasons.

Robert Audi's theory illustrates the internalist point of view on sincerity. In the context of discussing the separation of church and state, he argues for an internalist requirement of sincerity: to be sincere, he claims, the reasons that a representative of the state gives must be motivational.[112] Imagine a judge who personally opposes abortion because she "believes that zygotes are ensouled by God at the moment of conception and believes so on ecclesiastical authority."[113] However, she justifies her support of legally restricting abortion based not on this controversial belief but on secular arguments related to the value of human life and the protection of the innocent. The reason she puts forward seems perfectly capable of justifying her position, but is it sincere? The reason does not motivate her. Accord-

111. *See supra* note 73 and accompanying text.

112. *See* ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000); Robert Audi, *Religious Commitment and Secular Reason: A Reply to Professor Weithman*, 20 PHIL. & PUB. AFF. 66 (1991).

113. I borrow this example from Paul J. Weithman, *The Separation of Church and State: Some Questions for Professor Audi*, 20 PHIL. & PUB. AFF. 52, 59 (1991).

ing to Audi, it is therefore an insincere reason. In his view, a reason is sincere if and only if one is motivated by it. In the example just mentioned, the judge's decision is motivated by a religious belief, but it is rationalizable by appeal to secular reasons.

Audi defends his internalist vision of sincerity on a moral basis. He argues that there is something disrespectful in trying to move others by what does not motivate oneself: "[T]here is a certain lack of respect implied in seeking my agreement to a policy by offering reasons by which one is not oneself moved."[114] In putting forward reasons that one does not find adequate but that one supposes others will accept, one assumes that others have lower standards. This moral justification of internalist reason-giving is certainly appealing, but I doubt that sincerity can be understood on such demanding lines in the legal setting where reasons are highly institutionalized. As I said before, the reasons we are dealing with in the law are formalized reasons in the sense that they are embedded within the legal system. They are socially and institutionally constructed reasons. Legal reasons should not be held to the same standards as the reasons people give each other outside of any such institutionalized context. Suffice it to say, for the purposes of the present argument, that when public institutions give reasons that are not fully motivational, it does not automatically mean that they are disrespecting the citizenry. On the contrary, the very fact of giving reasons, even if the reasons are less than candid reasons, may be conceived of as a symbolic act of respect in many socio-legal contexts. For the sake of the present discussion, I will therefore leave aside the moral justification of reason-giving and focus on the conceptual analysis of what should count as a sincere reason in the law.

The internalist account of sincere reason-giving may be criticized on the ground that it is impracticable in the law. According to the internalist perspective, to be qualified as sincere, a statement of reasons must represent full disclosure of the decision maker's motivational set. Justificatory reasons ought not only to reflect one's underlying motivation; they must also do so exhaustively. To put it somewhat differently, according to this view, a decision maker is sincere if and only if she discloses all of the considerations that, she believes, explain the decision. As such, sincerity involves the duty to reveal all of one's reasons, in the sense of making public all the considerations, motivational and justificatory, that bear on the decision.

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114. *See* Robert Audi, *The Separation of Church and State and the Obligation of Citizenship*, 18 PHIL. & PUB. AFF. 259, 283 (1989).

This approach calls for an enterprise that is both impossible and undesirable. It is impossible because virtually all of the things that comprise an agent's motivational set—such as beliefs, commitments, desires, memories, goals, and so on—influence to some extent any decision she makes. If the thought that sincerity requires full disclosure is taken seriously, decision makers would be obligated to meticulously recite 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 tedious. Imagine having to read or to 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.

Audi's argument is appealing, but it is too stringent for the legal setting. It fails to account for cases in which the reason-giver states a reason that partially motivates her in the sense that she also has another, undisclosed motive for the decision. In such contexts, the decision maker may consider that a given normative reason is adequate to justify her decision, yet she makes the decision at least partly for another motivating reason. She might accept the reason she gives abstractly and offer it out of a sense of commitment to the ideal of public justification, but her specific reason for making the decision is different.

In the light of this, let us reconsider the externalist proposal and assess whether it better accounts for the need of sincerity in legal justification.

C. The "Externalist" View: Only Justificatory Reasons Are Relevant

One way of defending the externalist proposal consists in pointing out that being motivated by a consideration is not what makes it a good reason: reasons obtain independently of motivation. Law is concerned with good, justificatory reasons, not with policing actual motivations.[115] What matters is that decision makers can justify their decisions based on good reasons that are acceptable by the public at

115. In making that statement, I am endorsing a broadly positivistic understanding of the law as not necessarily connected with morality. One of the defining features of the legal positivist understanding of law is the insistence on the separation of law and morality. In other words, state or private action may be legal, yet immoral, and vice versa, depending on the extent to which it is based on legal rules that are recognized as valid within the particular legal system in question. On this debate, see generally RAZ, *supra* note 69; Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

large. Law is not in the business of regimenting mental states. Conformity to law is an external matter, not an internal matter, in the sense that abiding citizens' intentions are immaterial from the legal standpoint: so long as they obey the law, their underlying motivations for doing so are not a matter of concern. From this perspective, sincerity, understood as the correspondence between one's justificatory and one's motivating reasons, is beside the point for a legal analysis of reason-giving.

According to the externalist, what makes a difference in the law are the reasons that are actually given, not the motivating reasons that were purportedly held by the decision makers at the time when they made the decision. In the long run, the externalist argues, citizens are left with the justificatory reasons that are officially given, not with the motivations that actually moved decision makers, because only the former are overtly announced and make it into the public record. Ordinary citizens are usually not admitted to the non-public debates occurring among governmental agents prior to the pronouncement of their decisions. One cannot read into the minds of the decision makers. As a result, the quest for discrepancies between justifying and motivating reasons seems to be most often doomed to failure. It would come down to alleging uncertain and hypothetical divergences that can never be firmly established.

This predicament does not only affect ordinary, lay citizens. Habitually, governmental agents themselves rely on justificatory reasons that are officially recorded rather than on an insider's perspective on their colleagues' motivating reasons. The kind of institutional design commonly found in democratic regimes explains this reliance. Life tenures are rare, despite notorious exceptions like the United States Supreme Court.[116] Rotating tenures, limited terms of office, periodic reelection, and other similar mechanisms mean that public institutions' personnel are renewed regularly. At any given period of time, public officials serving at a public institution will solely have access to the past justificatory reasons for most of that organization's decisions, not to past motivations. Decision makers' knowledge of their colleagues' motives is limited because they were not—and are not always—present behind the scenes when each and every decision is made. In short, not unlike laypersons, public officials ultimately have

116. *See, e.g.*, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 770, 772 (2005) (calling for a change to the life tenure rule for Supreme Court justices and advocating instead the institution of a system of staggered, eighteen-year term limits for justices).

guaranteed access to officially publicized public decisions, not to motivating reasons for those decisions.

This externalist approach has the advantage of doing away with the problem of uncovering decision makers' motivations. If the externalist is right, we need not worry about motivating reasons. By contrast, the internalist view—according to which the requirement to give reasons is a requirement for decision makers to provide justifying reasons that are also their motivating reasons—runs into an enforceability problem. It is hard to fathom what enforcement mechanism could be used in practice to ensure compliance with the internalist demand. To verify that decision makers have provided sincere reasons for their decisions, we would need to be able to compare the reasons they gave with their motivational state at the time when they made their decision. And here we once again encounter the issue of gaining access to decision makers' mental states.[117] In an attempt to avoid the problem, internalists may concede that we lack *direct* access to public officials' motivations, but they maintain that there are *indirect* methods of discovering people's motives. The internalist could argue that there are reliable ways of ascertaining motivations, for example, by engaging in private conversations or interviews with decision makers, by regularly reading their work if they happen to publish, by closely reading all of their public and official statements to acquire a better picture of their way of thinking, and so on.

An externalist could object that even if such indirect inquiries may occasionally shed some useful light on the decision-making process, their results are far too unpredictable and unreliable to constitute the proper basis for an efficient enforcement mechanism. Moreover, he could point out that, even supposing that we could gain sufficient access to motivations, it does not follow that documenting the alleged discrepancy between motivating reasons and justificatory reasons can do any useful work. In the end, the only reasons that have precedential value are those that are publicly and officially given. Only these reasons are published and read by the legal community and by the public at large. Most importantly, only those reasons have binding authority over other public institutions, present and future. Public institutions are dynamic, evolving entities; as such, they have a history, and future members will presumably only have access to official reasons of past members, not to undisclosed motivations. To some extent, it is therefore irrelevant whether the decision makers in charge

117. *See supra* note 107 and accompanying text.

had a hidden agenda behind their overt justification because the only reasons that become part of the law are the ones officially given.

To sum up, in these hypotheses, a decision maker has given a justificatory reason that also motivates him, but not fully. Is the reason *ipso facto* insincere? I do not think so. My view is that the given reason should not count as insincere so long as the reason-giver regards it as adequately supporting the decision. Conversely, if the reason-giver does not regard the given reason as supporting the decision in any way, then the presentation of it as a justificatory reason seems manipulative. In what follows, I further develop this approach and begin the process of formulating an account of the kind of motivational requirement that the law should tie to the reason-giving requirement.

D. What Kinds of Motivational Requirements for Sincerity?

The preceding discussion comes down to this simple question: are motives relevant to sincerity? The importance we ought to accord to motivation in evaluations of sincerity in the law remains to be determined. It is still unclear, in other words, whether the assessment of a decision maker's sincerity should be connected to that person's motivational set. Irrespective of one's answer to that question, however, one may speculate about the desirability of implementing several versions of a motivational component into the reason-giving requirement, in the sense of requiring some degree of correspondence between one's avowed reasons and one's motives. This motivational requirement can be understood in different ways, depending on two factors, which are exhaustivity and plausibility (in the sense of justificatory status).

In what follows, I propose that we distinguish between three levels of what I call "motivational sincerity" in reason-giving. The three levels can be used to describe different motivational requirements—from the most demanding to the most lenient—that legal systems may choose to implement. In differentiating these standards, I am following a typology that David Reidy has developed in the context of discussing Rawls's ideal of public reason and its potential conflict with sincerity.[118] The following table illustrates three possible dimensions:

118. *See* David A. Reidy, *Rawls's Wide View of Public Reason: Not Wide Enough*, 6 RES PUBLICA 49, 61 (2000).

TABLE 1
THREE LEVELS OF MOTIVATIONAL SINCERITY

Exhaustive Motivational Sincerity	**Partial Motivational Sincerity**	**Counterfactual Motivational Sincerity**
The justificatory reasons must track *all* the underlying motives.	The justificatory reasons must track *at least one* of the underlying motives.	The justificatory reasons must be such that they *could be* a motive for the decision.

Exhaustive Motivational Sincerity. For decision makers to be considered sincere, the strictest motivation requirement demands that they be motivated by the very justificatory reasons they give. There must be a perfect correspondence between their justificatory and their motivating reasons. In this perspective, a given proposition is a sincere reason only when the decider believes that proposition to be true, endorses its adequacy as a reason for making the decision, and is committed to responding in appropriate ways if the proposition in question proves to be an inadequate reason.

Partial Motivational Sincerity. For decision makers to be deemed sincere, a less rigorous standard demands that they be motivated by at least some of the reasons they give. Here, there must be only a partial overlap between their justificatory and motivating reasons. Thus, the reasons public officials put forward need not reflect all of their underlying motives. According to this standard, sincere statements of reasons allow for non-disclosure of some of the considerations that motivated the decision. A statement of reasons may be sincere but incomplete.

Counterfactual Motivational Sincerity. The weakest motivational requirement is counterfactual: it demands that decision makers be capable of imagining that they could be motivated by the reasons they give. Public officials need not be actually motivated by the justificatory reasons they put forward; potential motivation suffices. Here, the only correspondence required between public officials' justificatory and motivating reasons is a counterfactual one. The justificatory reasons must be such that at least in one possible world decision makers could have been motivated by them. In short, to be sincere, reasons must only pass a counterfactual motivational test. The discrepancy between the justifying and the motivating reasons is not aimed at deluding the public. To satisfy the weak sincerity requirement, it is suffi-

cient for a statement of reasons to disclose just enough information so as to prevent others from being misled.[119]

Which of these three standards provides the best normative model for the requirement to give reasons in the law? Certainly, whenever there can be perfect correspondence between justificatory and normative reasons, it is better than not. In other words, ideally, most instances of legal reason-giving should comply with the strictest requirement. But the next question is which relationship should be preferred when a perfect correspondence between justifying and motivating reasons is not guaranteed. I think that the weakest form of the requirement sufficiently accounts for sincere reason-giving in the law. In democratic regimes, the requirement to give reasons is best understood as demanding that decision makers justify decisions based on justificatory reasons that they sincerely believe to be good and sufficient reasons for picking the outcome. There is nothing insincere, in this view, about offering a justifying reason one believes to be sufficient while being motivated by another reason, for example, a reason less likely to be accepted by others because it relies on controversial beliefs. The weak requirement solely supposes, as David Reidy puts it, that decision makers can at least imagine being motivated to act from the justifying reason they give.[120]

Compared to the externalist analysis of reason-giving, this counterfactual requirement presents the advantage of not giving up altogether on incorporating a motivational component into the reason-giving requirement. At the same time, it is sufficiently broad to account for many cases in which we want to say that decision makers are being sincere despite the fact that their justifying reasons and their motivating reasons diverge. My conclusion so far is that the legal requirement to give reasons is best understood as including a minimal motivational requirement. For public officials to fulfill the motivational component of the reason-giving requirement, they need only sincerely believe that their decisions are justified by some normative reason that they have in fact identified and that is in fact motivating—actually or potentially.

This conclusion, however, should be nuanced. Thus far I have proceeded mainly as if sincerity in the law could be evaluated across the board, without paying attention to the specific features of different decision-making contexts. In practice, however, the issue of sincerity

119. In this sense, the weak requirement endorses Bernard Williams's idea that sincerity consists of a disposition to make sure that one's assertion expresses what one actually believes. *See* BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 96–100 (2002).

120. *See* Reidy, *supra* note 118, at 57.

calls for consideration of certain features of context such as the institution's function within a given legal system or its decision-making procedure. This allows for the possibility that different contexts set different sincerity standards. For the rest of the Article, I hope to remedy this oversimplification by singling out several important contextual factors that are liable to modify my assessment of sincerity.

V. THE CONTEXTUAL NATURE OF SINCERITY

The existing literature on legal sincerity has failed to systematically address the importance of institutional differences in assessing the need for a sincerity requirement.[121] This Part argues, however, that an analysis of sincerity requires much greater attention to context. I claim that institutions and their specific features should be considered as contextual determinants of sincerity in the law. Not all decision makers and public institutions should be expected to comply with the same identical standard of sincerity. Rather, I identify different mechanisms by which institutions may or may not promote distinctive patterns of behavior that lead to sincere reason-giving. Sincerity varies across the board, based on different factors, such as the function performed by an institution—be it judicial, executive, legislative, political, or administrative—and the internal functioning of the institution (for example, whether decisions are made by individual or by collective decision makers). I will say a few words about these two sets of factors so as to suggest how different contexts can be relevant to understanding the requirement to give sincere reasons.

A. Contextual Sincerity Based on the Type of Institution

There is a world of difference between merely speaking on one's own and being asked to speak on behalf of a given institution. In the latter situation, a great deal surely depends on how the question is asked and by whom. If the State Department is asked, "Is this the reason why you denied Ramadan's visa?," this is a different matter than asking someone randomly, *in abstracto*, "What reasons can you give for denying Ramadan's visa?" The preceding analysis allows for the creation of a general outline of the differing ways in which the sincerity requirement might vary in its institutional applications.

121. There is one notable exception: while discussing judicial candor, Scott Idleman is highly sensitive to the variable and contextual aspect of the concept. He points out that "[c]andor is by nature a contextual, multivariable phenomenon, the value of which is primarily instrumental and the propriety of which cannot be reduced to abstractions or absolutes." Idleman, *supra* note 35, at 1399.

There are important differences between judicial, executive, and legislative speech, and they call for a fine-grained analysis of sincerity. In some contexts, the sincerity standards are very high. In others, the requirements are comparatively low. To illustrate, legal systems treat the necessity and the importance of sincere reason-giving in judicial dispute resolution much more seriously than in the enactment of statutes by legislatures or in policy making at the executive level.[122] Much American legal theory has thus proceeded on the assumption that public officials performing adjudicative functions should be held to a stricter requirement of sincerity than other governmental agents.[123] Theorists like Lon Fuller have focused on the role of reasons in distinguishing appropriate judicial creativity from other forms of social orderings.[124] Fuller thus declares,

> Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. . . . We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting.[125]

Considering that judicial decisions are reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments, these theorists have argued that judges ought to abide by a strict sincerity requirement. Sincere reason-giving is considered critical in the judicial setting for yet another reason. While governmental decisions, such as legislative and executive measures, are subject to citizen control at the ballot box, the legitimacy of judges' pronouncements is conditioned upon their ability to justify their law-creating power.[126] In the judicial context, a sincerity requirement works as a guarantee

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122. *See, e.g.*, Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121 (2005). *But see* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 20 (2001) (arguing that reason-giving is more important in administrative law than in judicial disputes). Mashaw further notes that "[a]dministrators must not only give reasons, they must give complete ones. We insist that they be authentic by demanding that they be both transparent and contemporaneous." *Id.* at 26.

123. *See, e.g.*, Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807 (2000).

124. *See, e.g.*, Fuller, *supra* note 36.

125. *Id.* at 366–67.

126. *See* Thomas W. Merrill, *Judicial Opinions As Binding Law and As Explanation for Judgments*, 15 CARDOZO L. REV. 43, 44–45 (1993) (arguing that the practice of giving reasons legitimizes the role of judges relative to other branches of government). *But see* Earl M. Malz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395 (2000) (arguing that the legitimating function of Supreme Court opinions has been overstated).

against the arbitrary.[127] If judges do not give sincere reasons for their verdicts, it is much harder to determine whether they are acting properly, within the limits of their authority. This heightened expectation explains why judges often give many reasons, sometimes without priority attached. The typical appellate court decision engages in a parataxis of reasons to legitimize the judicial function.[128]

A similar point can be made concerning the difference between reason-giving in an administrative law-making context and in a legislative law-making context.[129] In most contemporary democratic legal systems, administrative agencies are subject to relatively strict sincerity requirements.[130] By contrast, legislatures are not held to any sincerity requirement[131] because they are traditionally under no obligation to

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127. As Judge Posner puts it, giving reasons filters out arbitrariness insofar as some decisions simply "won't write" because the process of drafting an opinion reveals insuperable flaws in reasoning. *See* Richard Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447 (1995) ("Reasoning that seemed sound when 'in the head' may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written will be wondering how an audience would react."). For a critical discussion of the common view that writing, as an act of committing reasons to paper, makes for better decisions, see Chad M. Oldfather, *Writing, Cognition and the Nature of the Judicial Function*, 96 GEO. L.J. 1283 (2008) (applying recent psychological studies on the relationship between verbalization, writing, thought, and decision making to the judicial context, and arguing that writing opinions is not always an unqualified way of increasing the quality of judicial decisions).

128. *See generally* Joel Levin, *The Concept of the Judicial Decision*, 33 CASE W. RES. L. REV. 208 (1983).

129. *See* Mashaw, *supra* note 122, at 19–26 (describing contrasts among the role of reasons in judicial review of agency action, legislation, and judicial decisions).

130. On the administrative duty to give reasons, see generally Paul P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 CAMBRIDGE L.J. 282, 283–84 (1994) (considering, from a comparative law perspective, recent developments in the common law in relation to the duty of public authorities to provide reasons); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (examining how the evolution of judicial review of agency decisions has reflected changing political values in American government). The most prominent statutorily defined reason-giving requirement in law is undoubtedly the American Administrative Procedure Act's requirement that informal rules be accompanied by a "concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1988). For a general analysis of the reason-giving requirement in American administrative law, see MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988); MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION (2002); Jerry L. Mashaw, *Reasoned Administration*, 76 GEO. WASH. L. REV. 99, 105–12 (2007); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983); Shapiro, *supra* note 18.

131. There is arguably an important qualification to this exemption in American constitutional law, which often relies on motive analysis. In certain areas of constitutional adjudication such as equal protection and substantive due process, legislation can be struck down by courts on the ground that legislators have enacted a given statute based on illegitimate motives. For scholarship on motive analysis in constitutional law, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 136–45 (1980); Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978); Brest, *supra* note 8; Theodore Eisenberg, *Disproportionate Im-*

give any reason at all to justify legislation.[132] American administrators must not only give reasons, they must also give authentic ones. The established rule, formulated in *SEC v. Chenery*, is that a reviewing court may uphold an agency's action only on the grounds upon which the agency relied when it acted.[133] American courts thus routinely refuse to consider agencies' "post-hoc rationalizations"[134] or attempts to rely on implicit agency expertise[135] as adequate, sincere reason-giving.

By contrast, the U.S. Supreme Court regularly upholds legislation on grounds other than those stated by Congress or the relevant states' legislatures.[136] Under the "rational basis" test, which is the default standard governing the review of legislative acts,[137] the constitutional question is simply whether some state of affairs might be imagined

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pact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. REV. 36 (1977); Ely, *supra* note 47, at 1207–12; Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1105–06 (1989). For a recent examination of motive analysis, see Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191 (2008).

132. For a detailed analysis of this contrast in the United States, see Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952 (2007). Stacks points out that "[a]dministrative agencies may act with the force of law, but their obligations to give reasons for their decisions are very different from those that apply to Congress or the federal courts." *Id.* at 955. For a classic statement of the legislative prerogative, see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3–4 (Liberty Fund, 1982) (1885). *See also* Philip B. Kurkland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 29 (1969) (characterizing the legislative prerogative as the power to "create rules without the need for justifying them").

133. *See* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (establishing the principle that a court may uphold an agency's action only for the reasons the agency expressly relied upon when it acted); Konan v. Attorney Gen. of the U.S., 432 F.3d 497, 501 (3d Cir. 2005) (reaffirming in the immigration context the bedrock principle of administrative law that judicial review of an agency's decision is limited to the rationale that the agency provides, and concluding that a reviewing court is powerless to decide in the first instance issues that an agency did not reach). *See generally* SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) (providing the classic formulation for this principle: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained"). "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Id.* at 87.

134. The iconic statement of this position is found in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419–20 (1971). For a contextual analysis of *Overton*, see, for example, PETER L. STRAUSS, Citizens to Preserve Overton Park v. Volpe—*Of Politics and Law, Young Lawyers and the Highway Goliath*, *in* ADMINISTRATIVE LAW STORIES 258 (2006).

135. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 383 (D.C. Cir. 1973).

136. One can find a paradigmatic formulation of the American constitutional rule according to which Congress is not required to give reasons in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980).

137. Of course, the "rational basis" standard is only the default test—not the only test —that governs review of legislative acts. A whole range of legislative provisions are examined under stricter scrutiny.

under which a state regulation would be a rational means to carry out a certain goal.[138] A statute is unconstitutional only in those exceedingly rare cases in which no rational argument can be constructed to justify the result.[139] For example, in *McGowan v. Maryland*, the Court upheld a Maryland statute that prohibited the sale of most merchandise on Sundays, yet at the same time, permitted the sale of certain items, such as tobacco, alcoholic beverages, newspapers, gasoline, and medicine, as well as souvenirs, flowers, and toilet goods, declaring that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[140] It is hard to imagine a reason more minimal than that.[141]

In sum, statutes are subject only to the constraint of hypothetical reason, that is, to counterfactual analysis. This example and the previous ones demonstrate that depending on the institution under consideration, the motivational requirement associated with the practice of reason-giving is more or less rigorous. But while the U.S. Supreme Court merely subjects federal and state statutes to a weak, counterfactual motivational requirement, it imposes a stronger constraint on administrative regulations.

This contextual analysis could be pursued much further. The need for sincerity might also vary within each branch of government based on the specific institution under consideration, depending on such factors as the institution's place within the branch's hierarchy or its prestige and legitimacy during a certain historical moment. We must indeed acknowledge that each branch of government is not a homogeneous entity, but rather consists of many bodies with a variety of functions, purposes, and customs. To illustrate, within the Judiciary, the nature and extent of the duty to give sincere reasons may be influenced by inferior-superior court relationships.[142] The form and content of judicial justifications depend on where a court finds itself within a judicial hierarchy: a trial court versus an intermediate appel-

138. The "rational basis" standard of review was first used by Justice Harlan Fiske Stone in two 1938 opinions to characterize a new judicial deference to legislative decision making. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938); S.C. State Highway Dep't v. Barnwell Brothers, Inc., 303 U.S. 177 (1938).

139. *See, e.g.*, ERWIN CHEREMINSKY, CONSTITUTIONAL LAW 540 (3d ed. 2006) ("Under the rational basis test . . . the law will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose.").

140. McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

141. Courts *usually* look only to the question of whether there is a satisfactory justification and do not examine legislative motives. However, scholars have recently argued that courts are increasingly willing to look at legislative purpose as well. *See* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008).

142. On the importance of such distinctions, see, for example, Oldfather, *supra* note 122.

late court, and an appellate court versus a court of last resort. Higher courts have jurisdiction to control the legality of the decisions of the courts below them. Reason-giving is an efficient tool for supervision within the judicial hierarchy. Accordingly, higher courts set the parameters for acceptable justificatory practices of lower courts. The argument could therefore be made that higher courts should be subject to a heightened sincerity requirement, precisely by virtue of their privileged position in terms of guidance, setting precedents, and exposure to the public. For one thing, superior courts, such as the U.S. Supreme Court, despite being differently situated in various political systems, retain an exemplary character as "deliberative institutions" whose bases of legitimacy have to be established in reasons.[143] Within each type of court, further distinctions can be drawn depending on the type of case under consideration: is the case a simple private dispute over private rights or rather a "public law" type of dispute that potentially impacts a large group of non-parties?[144]

The demand for sincerity within an institution might also vary across time because of that institution's idiosyncratic evolution in terms of prestige and legitimacy. A canonical example is that of the U.S. Supreme Court's change of attitude towards collective opinion writing.[145] The story is well-known: originally, Supreme Court justices each wrote their own individual opinions, following the English practice of seriatim opinions. Chief Justice John Marshall put an end to this custom and imposed a per curiam opinion policy,[146] in part because he believed that individual candor through sincere seriatim opinions would undermine rather than further the Court's authority.[147] However, since the mid-1940s, there has been a dramatic in-

143. *See* JOHN RAWLS, POLITICAL LIBERALISM 231–40 (1993) (describing courts, and specifically supreme courts, as exemplary deliberative institutions in which public reasons and justifications are both expected and offered).

144. On the diverging functions of litigation as being either a medium for resolving "private" disputes between private parties about private rights or, instead, a forum for the vindication of "public" interests such as constitutional or statutory policies, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 25–27 (1979).

145. On this evolution, see generally John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137 (1999); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1989); Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959) (reviewing the history of separate opinions).

146. On per curiam opinions, see Laura Krugman Ray, *The Road to* Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517 (2000); Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29 (1992).

147. The first unanimous decision was *Talbot v. Seeman*, 5 U.S. 1 (1801). During the next four years after *Talbot*, the Court rendered forty-six unanimous decisions. On John Marshall's con-

crease in concurring and dissenting opinions, and occasionally the Court has almost reverted back to the days of seriatim opinions.[148] One explanation for this return is the fact that the Court is nowadays so well-established and authoritative that it can allow itself not to speak in one voice, thereby giving way to more sincerity and more focus on Justices' full reasons.[149]

B. Contextual Sincerity Based on the Number of Decision Makers

The sincerity requirement varies based upon yet another parameter: the number of public officials involved in the decision making.[150] Sincerity raises different issues at both the individual and the collective level. Roughly speaking, one should expect to see stricter sincerity requirements for public officials who make decisions individually than for those who decide as part of multimember panels. This means that within the same institution, decisions may be subject to different sincerity requirements, depending on the number of decision makers involved.[151]

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ception of the Court, see JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 293 (1996).

148. On this evolution, see T.M. Henderson, *from Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283.

149. For a similar comparative law analysis, see John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004) (showing that since the mid-1970s, European constitutional courts have questioned the model of the unanimous unsigned opinion and discussed the possibility of allowing concurring and dissenting opinions in light of their increasing popularity and legitimacy).

150. The importance of size has been noticed by Robert L. Rabin in *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 78–79 n.68 (1976) (arguing that "it may be useful to distinguish large and small organizations"). For example, in *Bishop v. Wood*, 96 S. Ct. 2074 (1976), a police officer was dismissed from the Marion Police Department, despite the city manager and the police department's failure to provide a reasoned basis for removal at the time of the dismissal; the police department consisted of only seventeen officers. In discussing this case, Rabin explains,

> In such small organizations, a dismissal action frequently embroils the chief official in a personal conflict with the grievant. As a result, it often becomes difficult to sort out proper and improper reasons for the dismissal, making it less likely that the requirement of a reasoned explanation will be honored in good faith rather than in a merely formal sense. In contrast, in a larger police department or other bureaucratic organization the decision to dismiss may have to be cleared through a personnel officer or a chief administrator who has no personal dealings with the grievant.

Rabin, *supra*, at 78–79 n.68.

151. For instance, it has been suggested that judges should be subject to different sincerity requirements depending on whether they are deciding cases on their own or as part of multimember panels. In the latter situation, judges need to accommodate their colleagues' views concerning the case, and a requirement of full sincerity might hinder the decision-making process. *See* Idleman, *supra* note 35, at 1384–85; Shapiro, *supra* note 6, at 742–43. John Leubsdorf goes as far as to argue that

If at the individual level, one can differentiate relatively easily between a decision maker's normative and motivating reasons, the distinction becomes harder to draw when more than one decision maker is involved. When the decision maker consists of a single person, making the decision and providing reasons to justify the decision can appropriately be regarded as separate processes. An important difference is that collective decision makers typically need to satisfy demands for collegiality and majority-building, while individuals do not. When two or more officials make a collective decision, the justifying reasons they agree upon as a group affect the substance of the decision. Because collective bodies must reach a common decision, decision makers must offer up their reasons for discussion so as to reach and secure an agreement.[152] In the case of persistent divergence among members, the justification ultimately endorsed by the institution as a whole is likely to result from negotiations, compromises, and trade-offs, rather than rational agreement. In other words, multimember institutions may adopt a common set of reasons not because they aim for truth, but because they aim for certain non-epistemic goals, such as pleasing their colleagues, advancing their careers, or simply wishing to end the discussion. The resulting "common" reasons rarely reflect faithfully any individual member's actual reasons for or against the decision.

Occasionally, a legal actor will deviate from her personal and sincere views about the law in order to secure the most desirable collective decision possible, given the views held by the other relevant actors who share input into that final collective decision. For example, one member might suppress her sincere view on a given legal issue if she predicts a negative reaction by her colleagues. Alternatively, certain members may not be influenced by the collective discussion but may nevertheless side with the rest of the body in the interest of expediency (or for some less avowable motive). It follows that the resulting decision, as well as its accompanying justification, is rarely that which was initially favored by each individual decision maker.[153] If collective decisions were governed by strict sincerity norms, few of

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> [t]o the extent that an opinion speaks for a number of judges with differing views, one could say that to consider its purported author's sincerity becomes pointless. That author, like a courtroom advocate, speaks on behalf of others, or rather on behalf of a consensus that goes beyond her own view.

See John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 488 (2001).

152. *See, e.g.*, Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1350 (1998) (defending judicial decision making as a principled enterprise and showing that collegiality can lead to mutual influences that are positive).

153. *See* Shepsle, *supra* note 10, at 254.

them would pass an exhaustive motivational or even a partial motivational sincerity test because the public justifications provided can hardly ever track each and every decision maker's motivating reasons. This explains why certain forms of strategic behavior,[154] such as insincere voting to forge a majority coalition, appear to be almost universally accepted and routinely practiced.[155]

The preceding analysis suggests that in a multimember context, because we usually only have access to the collective justification delivered by the institution as a whole,[156] ascertaining the decision makers' motivating reasons becomes difficult if not impossible. For example, as Justice Hugo Black has noted in the famous 1970s desegregation case *Palmer v. Thompson*, which turned upon the question of whether Mississippi legislators' decision to close public swimming pools had been motivated by the goal of avoiding desegregation, it is "extremely difficult," perhaps even impossible, "to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."[157]

One possible result is a mismatch between the actual reasons for each decision maker's view of the matter and the reason publicly provided by the institution. The reasons given by a collective entity can certainly be analyzed as the collective's justificatory reasons, but whether they also reflect the entity's motivating reasons is debatable.[158] We routinely ascribe motives to multimember institutions, but it is controversial whether such bodies really have motives *qua* collective.[159] The reasons an institution publicly discloses may come apart

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154. On strategic tactics on the bench, see generally WALTER MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

155. *See* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999) (arguing that some forms of strategic behavior in multimember courts, such as insincere voting to build a majority, are acceptable, while other forms, such as misrepresenting one's position in a case in order to better advance one's preference or stark vote trading across unrelated cases, are controversial).

156. Of course, courts are a considerable exception inasmuch as judges have the opportunity to voice their disagreement by writing concurring and dissenting opinions.

157. Palmer v. Thompson, 403 U.S. 217, 224–25 (1971).

158. For such an example, and the resulting controversy, see Bush v. Gore, 531 U.S. 98 (2000). For instance, Ronald Dworkin commented on the contentious decision as follows:

> [T]here were two parts to the argument all five conservative justices endorsed. The first part held that the Florida Supreme Court's recount order was unconstitutional because it violated the equal protection clause, and the second that there was no time left for the Florida court to correct its errors. Much of the initial fury that the decision provoked was directed at the *sheer implausibility and, indeed, hubris* of the later part.

Ronald Dworkin, *Introduction* to A BADLY FLAWED ELECTION 7 (Ronald Dworkin ed., 2002) (emphasis added).

159. Legislatures provide an interesting example of this phenomenon. Usually, only a few members of the legislature explicitly state their objective for the enactment of a given statute during the parliamentary debates or in the course of making public statements (for example, to

from the reasons that its members hold individually. Various members may have very different justificatory reasons for their decisions.[160] In other words, members of an organization that has officially given a reason need not themselves endorse that reason. In light of this, the two most demanding versions of the motivational requirement—exhaustive motivational sincerity, which demands that decision makers be motivated either by the very justificatory reasons the institution gives, and partial motivational sincerity, which requires that decision makers be motivated by some of these reasons they put forward as justifications—seem rarely applicable to collective decision makers.[161] In most situations, multimember organizations can only be reasonably expected to abide by a counterfactual motivational requirement in the sense that they could counterfactually be motivated by the reasons the institution gives.

To see more clearly why this is true, we should bear in mind that collectives are curious epistemic subjects. They lack many of the attributes that are considered important in order for individual human beings to be sincere about their decisions. For instance, they do not have their own faculties of perception or memory, at least not in the same sense as individuals have them. The question of whether we should attribute mental or mental-like states, including beliefs and pro-attitudes such as sincerity, to collectivities is an ongoing one in contemporary social epistemology.[162] We need not settle the issue of whether collectives are legitimate bearers of states such as beliefs, but we should at least be aware that the conditions under which an indi-

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the press). The problem is that these statements cannot be properly attributed to other legislators who have not made their views public. As Young notes, "In the cases of legislatures and other large composite actors, the notion of motive as a real mental state of the collective is obviously fictitious, a construct." Young, *supra* note 131, at 202.

160. A classical illustration of such disagreement on reasons can be found in the U.S. Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which for the first time struck down the death penalty under the Cruel and Unusual Punishment Clause of the Eighth Amendment. Although the death penalty was struck down by a vote of five to four, there were five concurring opinions: Justices Stewart, White, Douglas, Brennan, and Marshall each concurred separately. Justices Burger, Blackmun, Powell, and Rehnquist dissented jointly and separately.

161. *See* Shapiro, *supra* note 6, at 742–43.

162. This debate is roughly composed of partisans and opponents of the so-called summative account of group beliefs. Under 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*, 76 PROC. ARISTOTELIAN SOC'Y 1, 17 (1976). Under nonsummative accounts, it is sometimes possible for a group to have beliefs that are not the mere sum of the beliefs held by its members. *See* MARGARET GILBERT, ON SOCIAL FACTS 257–60 (1989) (emphasizing that there are situations in which a group does not believe *p* even though most of the members of the group believe *p*); *see also* RAIMO TUOMELA, THE IMPORTANCE OF US 315–16 (1995) (arguing 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).

vidual person is sincere about his reasons for acting or deciding in a certain way are *not* always identical to those under which collective entities can be considered sincere about their reasons.

As David Reidy has observed, imposing stricter requirements on multimember decision makers would compromise institutional actors' incentives to engage in majority-building processes and strategic behaviors.[163] Individual concessions and position switches are often necessary for multimember organizations to agree on common justificatory reasons for their decisions. This means that a number of decision makers, as members of the collective institution, will occasionally find themselves accountable for justificatory reasons that they did not support and had perhaps even explicitly refused to endorse as their motivating reasons at the decision-making stage. I doubt that we would *ipso facto* want to say that these decision makers are insincere. In other words, it is not necessarily insincere for a multimember institution to adopt a common justificatory reason for a decision, even though that justification does not reflect some of its members' actual motives.

C. A Roadmap For Further Contextualizing Sincerity

To conclude this context-oriented analysis, so far this final Part has shown that discussing sincerity across the branches of government, rather than focusing on judicial sincerity, is a necessary yet insufficient enterprise. It is necessary because sincerity raises issues similar for all state actors in charge of making decisions affecting the public. Yet it is insufficient in that sincerity can at best only be understood superficially at a level of generality, considering that every legal institution might call for a context-specific sincerity requirement.

That said, it would make little sense to focus the analysis too narrowly on a given governmental function, such as adjudication, considering that many of the factors likely to influence the need for sincerity have to do with an institution's history, design, and decision-making procedures. The appropriate scope of sincerity cannot always be predetermined in advance for a set of institutions or even for a single institution because it might vary depending on historical and political factors, as well as on the area of law under consideration. That said, several correlations can be drawn among institutions that are traditionally considered dissimilar. State actors from different branches of government might occasionally find themselves in positions that are more analogous with respect to their duty to give sincere reasons than

163. *See* Reidy, *supra* note 118, at 60.

decision makers working within the same branch of government. For instance, low-level judges or street-level bureaucrats who must adjudicate claims are arguably in a more similar situation than, on the one hand, low-level judges and Supreme Court justices and, on the other hand, street-level bureaucrats and top federal executive officials.

The value of sincerity is largely a function of a series of contextual variables.[164] When evaluating the preferable form of sincerity to be required from state actors, we should take into account different parameters, including at least (1) the outcome of the underlying decision; (2) the actors involved in the decision-making process; and (3) the audience to whom state actors are addressing their explanations. I will now briefly explain how these three different factors may bear on the need for sincere reason-giving.

Whether the outcome of a legal decision is favorable or unfavorable may influence the need for and the extent of sincere reason-giving. Considering the outcomes entails assessing the consequences of a decision and asking questions, such as whether the decision is so trivial that it does not matter if those who affected by it understand its motivational basis. Quite the contrary, if the outcome of the decision is crucial in some way, reason-givers should be held to a higher standard.

The actors involved in the decision-making process matter a great deal as well. Thus, the sincerity requirement should vary based not only on whether the decision is made by multimember panels or by single decision makers but also based on whether it is made by legal professionals or by laypersons, in addition to other differentiating factors. For instance, in a case handled by alternative dispute resolution methods such as arbitration, the arbiter is often chosen for her personal prestige and experience. She may not need to give sincere reasons—or even very superficial ones—precisely because her decision was intended to result from a swift and authoritative appreciation of the data rather than from a sincerely reasoned analysis.

The scope of sincerity may vary with the differing needs and expectations of one's audiences. State actors may give reasons for different audiences, and they often do so for more than one audience at a time. Reasons may be addressed to other public officials (be they immedi-

164. Sincerity does not differ from other forms of legal discourse in that it cannot be understood if solely apprehended in detachment but rather must be analyzed "in context" or situated within a "contingent web of experience and location." *See* Catharine Wells, *Situated Decisionmaking*, *in* PRAGMATISM, LAW AND SOCIETY 275 (Michael Brint & William Weaver eds., 1991). For a theoretical analysis of such a pragmatic approach, see Martha Minow & Elizabeth V. Spelman, *In Context*, *in* PRAGMATISM, LAW AND SOCIETY 247 (Michael Brint & William Weaver eds., 1991).

ate colleagues or members of other institutions or other branches of government), legal professionals (including lawyers, professors, and law students), the public at large, or sometimes the very individuals directly affected by the decision. The need for more or less sincere reasons may differ depending on the characteristics of the recipient. Everyone may not have an equal right to the same degree of sincerity. Certain people, for instance because of the gravity of the situation or because of personal characteristics such as education, language proficiency, and so on, may call for heightened sincere reason-giving.

VI. CONCLUSION

The conclusion of this analysis is that, to a certain extent, whether decision makers are sincere is relative to context. Sincerity is context-dependent in two main ways. First, whether decision makers are sincere depends on the type of reason-giving requirement in place: externalist or internalist. Second, certain features of context, such as the institution's function within a given socio-legal system or its decision-making procedure, shape the standard that public officials must meet in order for their reasons to count as sincere. Proponents of the strong, internalist sincerity requirement require congruence between actual motives and stated reasons. Proponents of the weak, externalist sincerity requirement only demand an articulation of sufficient reasons. Both positions have the advantage of offering clear-cut criteria for assessing state actors' sincerity, but neither adequately reflects the historical, social, and structural contexts that inform public institutions' justificatory practices. This Article recovers this crucial lost context and, in the process, suggests that sincerity can be assessed differently according to a shifting framework, depending on the situation. This Article, however, merely purports to sketch a tentative framework for a contextual and institutional analysis of sincerity in the law. To a large extent, this contribution should be understood as only the beginning and not the end of the critical task of constructing the conceptual framework within which sincerity may be evaluated in the law. More empirical research on actual reason-giving by public institutions which takes into account the theoretical understandings uncovered by this Article would be extremely helpful in further assessing how the sincerity requirement applies to real world instances of reason-giving.