

LAW AND NONLEGAL NORMS IN GOVERNMENT LAWYERS' ETHICS: DISCRETION MEETS LEGITIMACY

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INTRODUCTION

This Essay is about the role of unwritten norms in the ethical decision-making of government lawyers. Because the ethical obligations of lawyers, including government lawyers, are closely tied to the legal rights and obligations of clients,¹ this analysis necessarily depends on understanding the relationship between written law and unwritten norms.² As we all know, however, written law leaves gaps, ambiguities, and zones of unregulated discretion. Prosecutors in the United States, for example, have virtually unreviewable discretion to decide who to investigate and charge, what charges to bring, and whether to offer immunity in exchange for cooperation. No one has a legal entitlement not to be prosecuted, nor does anyone else—official or private citizen—have the power to compel a prosecutor to bring charges.³ The president possesses nearly unconstrained discretion to grant clemency to people convicted of criminal offenses.⁴ The impeachment

* Professor of Law, Cornell Law School. The author gratefully acknowledges the research funding provided by the Judge Albert Conway Memorial Fund for Legal Research, established by the William C. and Joyce C. O'Neil Charitable Trust. This Essay was prepared for the Colloquium entitled *The Varied Roles, Regulation, and Professional Responsibilities of Government Lawyers*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 12, 2018, at Fordham University School of Law. For an overview of the Colloquium, see Bruce A. Green, *Lawyers in Government Service—a Foreword*, 87 *FORDHAM L. REV.* 1791 (2019).

1. I have argued this elsewhere and will not reargue it here. *See generally* W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010); W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 *HASTINGS L.J.* 275 (2017). However, readers who believe that the government lawyer's ethical role ought to have something to do with the public interest, justice, or the common good—not just the entitlements allocated to citizens by positive law—may wish to rely on unwritten norms of democratic governance to support their view. My hope is that this Essay has something new to contribute to that discussion.

2. *See, e.g.*, Mitchell N. Berman, *Our Principled Constitution*, 166 *U. PA. L. REV.* 1325 (2018); Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 *U. ILL. L. REV.* 1797.

3. *See, e.g.*, *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

4. The U.S. Supreme Court has stated on many occasions that the president's power to grant pardons, conferred by Article II, section 2, clause 1 of the Constitution, is not subject to review or modification by Congress. *See, e.g.*, *Schick v. Reed*, 419 U.S. 256, 267 (1974); *Ex parte Grossman*, 267 U.S. 87, 120 (1925); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380

power of Congress is constrained only by the Constitution's requirement that the president be charged with certain enumerated offenses, including the open-ended phrase "high Crimes and Misdemeanors."⁵ In other areas, a government official may possess the legal authority to do something but may nevertheless be criticized for exercising that authority contrary to standards that are not reducible to positive law. For example, Jack Goldsmith argues that Trump's revocation of the security clearance of former CIA Director John Brennan was "within the president's power but also was an abuse of power."⁶ That criticism implies that there are extralegal norms that government officials should consider even when they act within an area of clearly authorized discretion.

The question is, what standards, norms, or ethical values, if any, constrain the actions of lawyers advising government officials who exercise their power within discretionary unwritten areas of the law? In other words, is there a type of official discretion that is distinguishable from the exercise of raw power or whimsical decision-making, despite being unconstrained by positive law? If so, what is its relationship to positive law and its claim to legitimate authority? This question is a jurisprudential one rather than a consideration of official discretion from the point of view of the history of constitutional law. The claim to be defended in this Essay is that the value of legality—that is, a political ideal aimed at safeguarding against abuses of power, which emphasizes a relationship of mutual respect between citizens and those who govern—informs the exercise of discretion in the spaces left unregulated by positive law.⁷ It is offered in a time in which the president

(1866); *United States v. Wilson*, 32 U.S. (1 Pet.) 150, 160 (1833). See generally JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009); P. E. DIGESER, *POLITICAL FORGIVENESS* (2001); KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); Robert L. Ehrlich, *Pardons and Commutations: Observations from the Front Lines*, 9 U. ST. THOMAS L.J. 669 (2013); Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561 (2001); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991); Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665 (2001); Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000); Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501 (2000); Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361 (1993); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85 (2002).

5. U.S. CONST. art. II, § 4.

6. Jack Goldsmith, *The Dangers in the Trump-Brennan Confrontation*, LAWFARE (Aug. 20, 2018, 9:01 AM), <https://www.lawfareblog.com/dangers-trump-brennan-confrontation> [<https://perma.cc/D3T6-AWDH>].

7. This argument is influenced by Jeremy Waldron's thinking about the rule of law, although to my knowledge Waldron has not expressed a view regarding legality in the absence of positive law. See generally Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008) [hereinafter Waldron, *Concept*]; Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in GETTING TO THE RULE OF LAW 3 (James E. Fleming ed., 2011) [hereinafter Waldron, *Procedure*]; Jeremy Waldron, *Thoughtfulness and the Rule of Law*, 18 BRIT. ACAD. REV. 1, 7 (2011).

and his allies are keen to collapse any distinction between law and power.⁸ It is an appeal to government lawyers to understand, as a matter of professional ethics, that they have a duty to contribute to the fair and reasonable administration of state power.

One may be tempted to say that if positive law does not regulate the exercise of official discretion, then this power is outside the constraints of the rule of law. Gerald Ford famously defined an impeachable offense as nothing more than whatever a two-thirds majority of the House of Representatives says it is.⁹ That is too much of a concession to legal realism. The argument in this Essay is, instead, that government officials and the lawyers who advise them may have substantial law-conferred discretion to include nonlegal considerations among the grounds for their decisions. In those incompletely law-governed domains, official decision makers must nevertheless respect the cluster of values associated with the rule of law. The rule of law restricts the type of considerations that can be taken into account and the way they are weighed and balanced in deliberation. To put it informally, not just any reasons can justify a decision. Grants of executive clemency customarily state that they are based on “good and sufficient reasons.”¹⁰ This formulation implies that an exercise of the pardon power may be abusive if it was not based on good and sufficient reason. For example, I believe that many share the intuition that there is a difference between the well-exercised prerogative of executive clemency to grant a reduction in sentence to prisoners serving lengthy prison terms for drug possession offenses and the corruption of that power, as critics asserted concerning President Bill Clinton’s pardon of financier (and campaign contributor, through his ex-wife) Marc Rich.¹¹ The

8. As was the case during the aftermath of the September 11 attacks, when the George W. Bush administration aggressively asserted unchecked executive power, critics of the Trump administration are once again citing Carl Schmitt’s conception of unreviewable sovereignty. See, e.g., Quinta Jurecic, *Donald Trump’s Pardon Power and the State of Exception*, LAWFARE (June 11, 2018, 7:30 AM), <https://www.lawfareblog.com/donald-trumps-pardon-power-and-state-exception> [<https://perma.cc/WA9Z-BBU8>]. For discussion of Schmittian themes in the Bush (43) years, see, for example, Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006); and David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT’L L. 457 (2010).

9. See Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 348–49 (2010).

10. Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 281 (1993). Similarly, in a discussion of draft evasion, Ronald Dworkin wrote that prosecutorial discretion “is not license—we expect prosecutors to have good reasons for exercising it.” RONALD DWORKIN, *Civil Disobedience*, in TAKING RIGHTS SERIOUSLY 206, 207 (1977).

11. See, e.g., Richard L. Berke, *The Clinton Pardons: The Democrats; This Time, Clintons Find Their Support Buckling from Weight of New Woes*, N.Y. TIMES (Feb. 23, 2001), <https://www.nytimes.com/2001/02/23/us/clinton-pardons-democrats-this-time-clintons-find-their-support-buckling-weight.html> [<https://perma.cc/F2K5-8WD5>]; Timothy M. Phelps, *Justice Department Plans for Wave of Crack-Cocaine Clemency Requests*, L.A. TIMES (Apr. 21, 2014, 9:36 AM), <https://www.latimes.com/nation/nationnow/la-na-nn-holder-clemency-petitions-20140421-story.html> [<https://perma.cc/6M9W-SCXM>] (describing Justice Department clemency guidelines intended to aid prisoners sentenced before 2010, when new sentencing guidelines came into effect that reduced disparities in sentences for possession of

former exercise of the pardon power is backed by a good and sufficient reason, albeit one not grounded in positive law, while the latter is not. Similarly, one might contend that revoking the security clearance of a political opponent who is exercising his First Amendment right to criticize the president is not an action based on a good and sufficient reason, even though the president otherwise has the right to revoke security clearances.¹²

That is the right way to think about the norms and values that inform the role of government lawyers but, of course, a great deal rides on how “good and sufficient reason” is defined. One might contend, in line with natural law theorists, that legal officials are necessarily charged with an obligation of care for the common good of the community.¹³ Under this conception of legal authority, an official decision that is contrary to the common good is an abuse of the discretion afforded by law. One very influential strand of thinking about the value of lawyer professionalism emphasizes the social role of lawyers in mediating between the interests of individual clients and the common good.¹⁴ Some scholars continue to maintain that lawyers have a responsibility to identify and promote the public interest in the course of their representation of clients, whether public or private.¹⁵ On this account, a good and sufficient reason for the exercise of legally conferred discretion would be one that promotes the public interest. In the pardon example, reducing excessive sentences imposed on (partially and to some extent unconsciously)

crack and powder cocaine). Rich’s company, a commodities trading firm based in Switzerland, was investigated for tax evasion and obstruction of justice beginning in the early 1980s. See Susan F. Jennison, Comment, *The Crime or Fraud Exception to the Attorney-Client Privilege: Marc Rich and the Second Circuit*, 51 BROOK. L. REV. 913, 920–29 (1985). Controversy over Clinton’s pardon decision was renewed during the 2016 presidential election campaign when the FBI released a number of documents related to the pardon of Rich, who had died in 2013, a few days after then-FBI Director James Comey announced that the FBI was investigating new emails possibly related to Hillary Clinton’s private server, which she employed while serving as Secretary of State. See Jessica Taylor, *More Surprises: FBI Releases Files on Bill Clinton’s Pardon of Marc Rich*, NPR (Nov. 1, 2016, 8:55 PM), <https://www.npr.org/2016/11/01/500297580/more-surprises-fbi-releases-files-on-bill-clintons-pardon-of-marc-rich> [<https://perma.cc/XB2V-LM4T>].

12. See Julie Hirschfeld Davis & Michael D. Shear, *Trump Revokes Ex-C.I.A. Director John Brennan’s Security Clearance*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/us/politics/john-brennan-security-clearance.html> [<https://perma.cc/EW6R-RBCV>].

13. See generally THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS (William P. Baumgarth & Richard J. Regan, eds., Richard J. Regan trans., 2d ed. 2002); CICERO, ON DUTIES (Walter Miller trans., 1913); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154–56 (1980); MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 85–90 (2006).

14. See, e.g., Rebecca Roiphe, *A History of Professionalism: Julius Henry Cohen and the Professions as a Route to Citizenship*, 40 FORDHAM URB. L.J. 33, 45–46 (2012) (describing the position of Durkheim and Parsons on the relationship between professionals, clients, and the common good).

15. See generally Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339 (2006). In later work with Eli Wald, Pearce has advocated for a “relational” approach to law practice, in which lawyers advise clients to take account of the well-being of others. See generally Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601 (2016).

racially discriminatory grounds would plausibly be in furtherance of the public good, while pardoning one's wealthy crony and benefactor would not.

This Essay offers an alternative version of the public-interest criterion for judging the sufficiency of reasons for official action in the exercise of discretion. Building on H. L. A. Hart's recently rediscovered essay on discretion,¹⁶ this Essay will argue that positive law is not the only source of constraint for government lawyers. However, this additional guidance is not provided by *substantive* conceptions of the public interest, but by a more formal, procedural value of legality. This contention sounds like a paradoxical claim—the ideal of the rule of law informs the role of lawyers even when there are gaps or ambiguities in positive law—but it is not paradoxical when understood as a claim within the political ethics of the lawyer's role rather than a thesis about the nature of law.¹⁷ A government lawyer, in particular, occupies a social role that is directly connected with the task of ruling the members of a political community pursuant to a claim of legitimate authority.¹⁸

The idea of legitimacy is very important here. As Hart emphasizes, the discretion exercised by government officials is not the same as unconstrained, unregulated choice.¹⁹ Discretion is choice in terms of considerations that bear on what is appropriate to be done. It is, in principle,

16. See generally H. L. A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013); Geoffrey C. Shaw, *H. L. A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666 (2013). Shaw's paper situates Hart's "Discretion" essay within the intellectual context of the then quite influential legal process school associated with Henry Hart (no relation), Albert Sacks, and Lon Fuller. As mentioned above, I have argued for a conception of legal ethics that is closely tied to the rights and obligations assigned by positive law to the lawyer's client. See *supra* note 1. Engagement with (mostly sympathetic) critics of my position has forced a reckoning with the source of guidance for lawyers where there are gaps or ambiguities in positive law. The legal process school has proven to be full of insights for dealing with this issue, and I have written papers of various lengths trying to incorporate legal process thinking into positivist legal ethics. See generally W. Bradley Wendel, *The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations*, 30 CANADIAN J.L. & JURIS. 443 (2017); W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. REV. 107 (2019).

17. See Jeremy Waldron, *Positivism and Legality: Hart's Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1137 (2008) (noting the reluctance of legal philosophers to consider Fuller's critique of Hart on its own terms because to do so would "open the boundaries between legal and political philosophy and complicate our sense of the separability of law and morality"). The use of Hart here is an intentional bit of irony, since he is generally taken as the poster child for legal positivism. Reliance on the "Discretion" essay is meant to show that some of Hart's views are not far from one of his rivals in jurisprudence, Lon Fuller.

18. See JOHN RAWLS, *Reply to Habermas*, in POLITICAL LIBERALISM 372, 427–28 (1993); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 71–80 (1986). I am using the concept of legitimacy throughout this Essay and not the closely related notions of authority and obligation. The focus of the Essay is what considerations bear on decisions of government officials in areas of legally conferred discretion. In some cases, the officials purport to impose obligations on citizens, but the core instances of official discretion, such as pardoning and decisions by prosecutors to bring charges, involve not the demand for obedience but the application or removal of coercive state power. Thus, it seems more natural to talk in terms of legitimacy as the rightful application (or withdrawal) of coercive force. See generally Richard Dagger, *Authority, Legitimacy, and the Obligation to Obey the Law*, 24 LEGAL THEORY 77 (2018).

19. Hart, *supra* note 16, at 656 (distinguishing discretion from "choice (*tout court*)").

possible to justify an exercise of discretion and conclude that it was sound.²⁰ So why not call upon government lawyers to justify their choices with reference to beliefs about what would serve the public interest? The fear expressed by many critics of appeals to unwritten law—which would apply here to the appeal to unwritten norms of good governance—is that nothing will prevent officials from making decisions on the basis of mere preferences, unconstrained by any reliable disciplining methodology.²¹ The discretion exercised by government officials, and the lawyers who advise them, must be justified in terms of principles that bear the appropriate relationship with the ascription of legitimacy, which is to say the right to issue directives that carry an obligation of obedience.

I. LEGITIMACY AND THE PUBLIC GOOD

The idea that the lawyer's role is to act in the public interest when there is room for the exercise of discretion tacitly relies upon a conception of legal legitimacy with an ancient lineage. This is the assumption that "there is a good for humankind that can be realized only in a society ruled by those who know what that good is and how to pursue it."²² Stating that assumption goes a long way toward refuting the public interest view of the lawyer's role. Lawyers in general do not have privileged access to knowledge of the common good and how to pursue it, even if a few "lawyer-statesmen" with long experience in government and private practice may have acquired considerable practical wisdom concerning "the public good" and "the limitations of human beings and their political arrangements."²³ In general, however, lawyers in government service today do not see themselves as having particular expertise in human affairs beyond their technical competence in legal analysis. Most observers would agree that the nineteenth-century ideal of the legal profession mediating between the interests of individuals and the common good has long since given way to a more technocratic vision of lawyers as market actors who provide legal services as desired by clients.²⁴ One might therefore argue that in an area of

20. *Id.* at 657 (giving the excruciatingly middle-class English example of choice as between having a martini or a sherry, but acknowledging that discretion might be involved if it appealed to rational standards, for example, "I have found from experience that I get on better when I drink [a martini] rather than sherry, I don't talk so much").

21. See, e.g., Michael S. Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1389 (2014). See generally Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

22. See Richard E. Flathman, *Legitimacy*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 678, 678 (Robert E. Goodin et al. eds., 2d ed. 2012).

23. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 12 (1993).

24. See generally Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649 (2016). Russ Pearce and others seeking to revitalize civic republicanism as an alternative to what they take as an excessively individual-centered, adversarial legal ethics of political liberalism often talk in terms of the common good of the political community. See, e.g., Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992); see also STEPHEN MULHALL & ADAM SWIFT, *LIBERALS &*

legally conferred discretion, the lawyer's role is simply to acquiesce in whatever the relevant government officials wish to do as a matter of policy, politics, or even personal preference. But this assumes that the political-ethical role of government lawyer carries only responsibilities with respect to positive law, not to governance more generally.²⁵ Where the law confers discretion, the ideal of the rule of law may impose additional ethical requirements upon government lawyers.

To better understand the problem, one might follow Hart in asking why a legal system should tolerate discretion at all. Hart's answer is, quite bluntly, "*we are men not gods.*"²⁶ Any method of governing a community must contend with certain limitations connected with the bounded rationality of human beings; these are the "Relative Ignorance of Fact" and the "Relative Indeterminacy of Aim."²⁷ The first factor, that we cannot know in advance all the circumstances in which the application of a rule would arise, is a familiar reason for the open-endedness of legal standards.²⁸ There will always be borderline cases we could not have anticipated. It may be possible

COMMUNITARIANS 220–21 (2d ed. 1996) (identifying classical republicanism with a conception of the good of a political community that emphasizes the active participation of citizens possessed of civic virtue). In jurisprudence, the common good is generally encountered in connection with the natural law thesis that "the law's reason-giving power flows from the common good of the political community." MURPHY, *supra* note 13, at 61.

25. I have argued that the primary ethical obligation of lawyers, whether representing clients in the private sector or serving as legal advisors to government officials, is to promote the legal entitlements of clients, as opposed to furthering their prelegal interests. *See generally* WENDEL, *supra* note 1. Exhibiting fidelity to law in the representation of clients is a bedrock duty of lawyers. However, I did not mean to deny that lawyers may have other responsibilities under some circumstances.

26. Hart, *supra* note 16, at 661.

27. *See id.* at 661–63. Hart's two examples of the way in which humans are not gods bears striking resemblance to Rawls's burdens of judgment (i.e., the sources of disagreement among reasonable persons). *See* RAWLS, *supra* note 18, at 55–58. Hart's discussion of the dinner party hostess example refers to a number of factors distinguishing her exercise of discretion from a mere choice; many of these factors overlap with the burdens of judgment, including the lack of a clear principle to determine the ranking or relative importance of constitutive values and the inability to define the aim specifically enough to prescribe necessary means for achieving it. *See* Hart, *supra* note 16, at 659–60. Rawls introduces the ideas of public reason and an overlapping consensus among reasonable comprehensive doctrines in the course of analyzing the legitimacy of the basic structure of society. There is a proceduralist strand of Rawls's later views, discussed in his debate with Habermas, which connects the burdens of judgment with the need for legitimate procedures: "A legitimate procedure is one that all may reasonably accept as free and equal when collective decisions must be made and agreement is normally lacking. The burdens of judgment lead to that even with reason and good will on all sides." RAWLS, *supra* note 18, at 428–29. Rawls acknowledges that procedures may be "purely procedural with respect to legitimacy" but if laws are too unjust, they are not legitimate. *Id.* at 429.

28. Hart, *supra* note 16, at 662. Hart later developed these arguments in chapter seven of *The Concept of Law*, where he explained why the open texture of legal language made legal formalism impossible. *See* H. L. A. HART, *THE CONCEPT OF LAW* ch. VII (2d ed. 1994). An important observation from this later work is that formalism seeks to minimize or disguise the need for discretion. *Id.* at 129. But Hart warns against the attitude of rule-skepticism, which is the antithesis of mechanical jurisprudence; the area of open texture is circumscribed, and while there is some uncertainty at the margin of the application of rules, every rule also has a core of settled meaning. *See id.* at 138, 145–47.

to find common factors running through diverse situations and to formulate a rule in advance based on the anticipated facts, but experience shows that these rules often collide with novel facts that could not have been anticipated *ex ante*.²⁹ Regarding the second factor, to say a decision calls for discretion is to presuppose that it involves a situation in which there is no clearly definable aim, no clear standards of right and wrong. And while there may be constitutive values or elements that bear on the decision, there is no higher-order principle determining how these values are to be ranked or harmonized if they conflict.³⁰ Thus, it is a conceptual impossibility that our lawmakers and law-apppliers can serve as platonic guardians who know what is good for society and how to pursue it.

To illustrate this point, consider a hypothetical example of a relatively senior career agency lawyer—not a political appointee—working in the Antitrust Division of the Department of Justice. Two grocery store chains in the northeastern United States have proposed a merger. However, the hypothetical current president ran as a populist and an enemy of concentrated corporate power, corruption, and monopolies. During her campaign she was fond of quoting Theodore Roosevelt: “The great corporations . . . are the creatures of the State, and the State not only has the right to control them, but it is duty bound to control them wherever the need of such control is shown.”³¹ She recently gave an interview in which she objected to the merger on the ground that it would harm local businesses. “Bigger is not always better when it comes to business,” the president said. The lawyer is horrified. He is a staunch believer in the economic approach to antitrust law that aims at protecting competition, not competitors. Judge Learned Hand once wrote, “It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.”³² In the lawyer’s judgment, however, Hand’s approach is outmoded and the wrong way to understand the goals of antitrust law. After extensive reading and reflection, he has been persuaded by the arguments of then-Professor Robert Bork:

Hand’s notion, moreover, is dubious, and indeed radical, social policy. It would be hard to demonstrate that the independent druggist or groceryman is any more solid and virtuous a citizen than the local manager of a chain operation. The notion that such persons are entitled to special consideration by the state is an ugly demand for class privilege. It hardly seems suited to the United States, whose dominant ideal, though doubtless too often flouted in legislative practice, has been that each business should survive only by serving consumers as they want to be served.³³

29. See Hart, *supra* note 16, at 663–64.

30. *Id.* at 659.

31. See Theodore Roosevelt, Speech at Providence, Rhode Island (August 23, 1902), in 1 PRESIDENTIAL ADDRESSES AND STATE PAPERS 98, 103 (1910).

32. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945).

33. Robert H. Bork, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 370 (1965).

The question is, put simply, what the lawyer should do with his views about economic policy. Suppose the lawyer is highly experienced and knowledgeable about antitrust law and the government's enforcement practices. The lawyer reasonably believes that an unequivocal statement in support of the merger by senior agency lawyers would take some of the wind out of the president's opposition to it. The lawyer also is a savvy enough operator to understand available strategies of resistance—not full-blown, open disobedience,³⁴ but bureaucratic techniques like papering the file to death, placing the matter on a low-priority schedule, or leaking details about internal opposition to friendly journalists.

To answer this question, consider the values and obligations on both sides. On the side of supporting the merger (that is, opposing the president) are not just the lawyer's "personal" beliefs and commitments. There is an unfortunate tendency when talking about ethics to assert the lawyer's position regarding ethical obligations as a matter of personal subjective beliefs about the common good. The lawyer in the hypothetical, however, believes that the common good *would in fact* be furthered by interpreting antitrust statutes to promote competition rather than to protect competitors. On the other side, however, is the president's position about what would be in the public interest.³⁵ The seeming impasse between the two positions is resolved, however, by the existence of procedures for determining, at least for present purposes, the content of the public interest. The tiebreaker, so to speak, is the legitimacy of the decision.³⁶

Hart's argument, that discretion is inevitable because of normative pluralism and bounded rationality, is not the only explanation for creating legally sanctioned zones of discretion. Picking up on the distinction between rules and standards in legal reasoning,³⁷ one might contend instead that

34. See Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 609 (2013).

35. See Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 86 (1998) ("One person's political bias is another person's democratically sanctioned policy change.").

36. See Miller, *supra* note 21, at 1294 ("[A]n agency attorney acts unethically when she substitutes her individual moral judgment for that of a political process which is generally accepted as legitimate."). The author of the astonishing anonymous op-ed published in the *New York Times* makes this mistake in part. See Opinion, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> [<https://perma.cc/CPH6-WLNR>]. He or she claims that "many of the senior officials in [Trump's] own administration are working diligently from within to frustrate parts of his agenda and his worst inclinations." *Id.* One problem, according to the author, is that "the president shows little affinity for ideals long espoused by conservatives: free minds, free markets and free people." *Id.* But Trump ran as a populist, not a doctrinaire free-market conservative; it should not be surprising that some of his policy positions are contrary to those of the Republican establishment. The anonymous official is not justified in covertly subverting the president's efforts to impose tariffs on imported aluminum, for example.

37. See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy,

discretion is intended to shift power from the judiciary to government officials in the executive branch. There is a vast scholarly literature on political-branch interpretation of the constitution and statutory law.³⁸ Significantly, the debate pertains to the identity of the institutional actor who should be charged with responsibility for reaching a conclusion about the proper interpretation of the law. Descriptively speaking, it may be the case that the president's power has increased as effective checks have eroded, either from the judiciary or from intrabranched sources of constraint.³⁹ Bruce Ackerman's 2010 book on presidential power,⁴⁰ dismissed by some as alarmist,⁴¹ now seems prescient in the Trump years. Ackerman made these arresting predictions:

I predict that: (1) the evolving system of presidential nominations will lead to the election of an increasing number of charismatic outsider types who gain office by mobilizing activist support for extremist programs of the left or the right; (2) all presidents, whether extremist or mainstream, will rely on media consultants to design streams of sound bites aimed at narrowly segmented micropublics, generating a politics of unreason that will often dominate public debate; (3) they will increasingly govern through their White House staff of superloyalists, issuing executive orders that their staffers will impose on the federal bureaucracy even when they conflict with congressional mandates; (4) they will engage with an increasingly politicized military in ways that may greatly expand their effective power to put their executive orders into force throughout the nation; (5) they will legitimate their unilateral actions through an expansive use of emergency powers, and (6) assert "mandates from the People" to evade or ignore congressional statutes when public opinion polls support

Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

38. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Christopher L. Eisgruber, *The Most Contentious Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373 (1994); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Polycentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993).

39. See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1112–14 (2013) (describing the positions of scholars who contend that the law does very little to constrain the powers of the president).

40. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

41. See generally Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (reviewing Ackerman's book).

decisive action; (7) they will rely on elite lawyers in the executive branch to write up learned opinions that vindicate the constitutionality of their most blatant power grabs.⁴²

The seventh prediction is the aspect of this dystopian vision—arguably being played out daily—that concerns lawyers, legal ethics, and jurisprudence. And the concern of this paper in particular is what distinguishes a “blatant power grab[]” from the rightful exercise of power.

II. LEGITIMACY AS REASON-GIVING

Power exercised without respect for the principle of legality lacks legitimacy and authority.⁴³ The president may be able to *do* something, but that alone does not mean it is a rightful exercise of power. In *The Concept of Law*, Hart famously distinguished the command of a gunman—“hand over your money or I’ll shoot”—from an utterance that creates a genuine obligation.⁴⁴ The *rightful* (that is, legitimate) exercise of power is justified by reasons that its subjects can endorse from their perspective as free and equal. That is the significance of the passage quoted above, which connects the dignity of people who live under the law with the requirement that lawful authority be backed by reasons that are not reducible to a threat of punishment. Hart went on to give an elaborate theoretical account of one way in which lawful authority can be exercised—namely, through a system of primary and secondary rules in which there is a rule of recognition, accepted as a standard by legal officials, specifying criteria of legal validity.⁴⁵ This is, of course, a paradigm case of a theory of legal positivism.⁴⁶ But it would be a mistake to view Hart’s focus on positive law as the only way to connect the moral conception of people as free and equal bearers of dignity with the political ideal that official power should be exercised in ways that

42. ACKERMAN, *supra* note 40, at 9. The one feature of Trump’s assertion of unchecked power that Ackerman failed to predict is his ceaseless efforts to delegitimize the press by referring to journalists as “enemies of the people.” See, e.g., Rebecca Morin, *Trump Labels Media “The Opposition Party” as Newspapers Push Back En Masse*, POLITICO (Aug. 16, 2018, 10:29 AM), <https://www.politico.com/story/2018/08/16/trump-calls-media-fake-news-as-newspapers-push-back-against-claim-779555> [<https://perma.cc/V85A-QJQB>]; Amber Philips, *The Fix: Sarah Sanders Presents the Official White House Policy: The Media Is the Enemy of the People*, WASH. POST (Aug. 2, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/08/02/sarah-sanders-presents-the-official-white-house-policy-the-media-is-the-enemy-of-the-people/> [<https://perma.cc/E93Z-6UGM>] (reporting that, four times in two days, the White House Press Secretary refused to state that Trump does not consider the press the enemy of the people).

43. See EVAN FOX-DECENT, SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY 3 (2011).

44. HART, *supra* note 28, at 82–91 (using the phrase “is obliged” to refer to the effect of the gunman’s threat).

45. *Id.* at 116.

46. The core claim of legal positivism is often stated as the Sources Thesis (following Joseph Raz): the existence and content of law can be determined by social facts alone, without resort to any evaluative (including moral) argument. See Joseph Raz, *Authority, Law, and Morality*, in ETHICS IN THE PUBLIC DOMAIN 210, 211 (1995); see also Jules Coleman, *Negative and Positive Positivism*, in MARKETS, MORALS, AND THE LAW 3, 5 (2002) (proposing the separability thesis, that “there exists at least one conceivable rule of recognition . . . that does not specify truth as a moral principle among the truth conditions for any proposition of law”).

respect the dignity of citizens.⁴⁷ Indeed, as Hart himself well understood, to say something is a law according to the criteria of validity of a legal system's rule of recognition is *not yet* to give a reason that the law ought to be obeyed.⁴⁸ In his debate with Lon Fuller, Hart faulted German lawyers during the Nazi era for failing to observe the distinction between legal validity and authority.⁴⁹

The rule of law depends not only on positive law to establish a substantive position, in the name of society as a whole, regarding public policy issues. The law also presents itself to its subjects as a rational basis for establishing order, as opposed to the arbitrary commands of a ruler, and as a means of facilitating participation and democratic self-government.⁵⁰ To insist upon the reasonableness of law and its administration is to acknowledge the rational agency and dignity of the citizens of a political community:

[L]aw has a dignitarian aspect: it conceives of the people who live under it as bearers of reason and intelligence. They are thinkers who can grasp and grapple with the rationale of the way they are governed and relate it in complex but intelligible ways to their own view of the relation between *their* actions and purposes and the actions and purposes of the state.⁵¹

The central insight here is that the law's function for its subjects, as free and equal, reasonable agents, is to promote their flourishing—one aspect of which is a mutually beneficial social order.⁵² As John Finnis puts it, the question for the subjects of law is, what is the significance, from the point of view of practical reasonableness, of the fact that a political authority has stated that something shall be done? The answer turns on the “importance of law as a specific way of realizing a fundamental element of the common good, viz. a fair, predictable, positively collaborative, and flexibly stable order of human interrelationships.”⁵³

47. See, e.g., Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO 'THE CONCEPT OF LAW' 311, 350–52 (Jules Coleman ed., 2001) (noting that Raz, also a legal positivist, offers a normative explanatory account of law that emphasizes its claim of authority, which gives its subjects reasons for action).

48. See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617–18 (1957).

49. *Id.* at 618 (“[E]verything that [German legal theorist Gustav Radbruch] says is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: ‘Ought this rule of law to be obeyed?’”).

50. See Waldron, *Procedure*, *supra* note 7, at 18–19.

51. *Id.* at 19.

52. See George Duke, *Finnis on the Authority of Law and the Common Good*, 19 LEGAL THEORY 44, 51–53 (2013).

53. FINNIS, *supra* note 13, at 335. Lon Fuller is well known for his claim that a system of governance deserves to be called a *legal* system only if the directives of a ruler satisfy formal criteria such as generality, prospectivity, publicity, and clarity; confusingly, he referred to these standards as a kind of morality. Lon L. Fuller, *Positivism and Fidelity to Law—a Reply to Professor Hart*, 71 HARV. L. REV. 630, 644–45 (1958); see also LON L. FULLER, *THE MORALITY OF LAW* 33–42 (1964). Finnis's use of Fuller-type criteria shows that these criteria are best understood not as necessary or sufficient conditions for calling some norm an instance of “law,” but instead are related to considerations of practical reasonableness that support the authority of a legal system. See FINNIS, *supra* note 13, at 335.

Again, it is worth emphasizing Hart's awareness that the criteria for the *existence* of a legal system (general obedience of valid law plus acceptance, from the internal point of view, of the rule of recognition by officials)⁵⁴ are one thing, and the conditions for legal *legitimacy* are another. Hart acknowledges that the allegiance of citizens to a legal system may have diverse grounds, including considerations of long-term self-interest, altruism, conformity, or unthinking adherence to tradition.⁵⁵ A society characterized by "deplorably sheeplike" attitudes on the part of its members may nevertheless have valid law.⁵⁶ From this, however, it does not follow that people subject to the requirements of valid law have a moral obligation of obedience.⁵⁷ The rightful exercise of power, and a corresponding obligation on the part of its subjects, requires something beyond the existence of a legal system. Being clear on what this "something else" is can therefore shed needed light on the nature of the ethical obligations of government officials and their legal advisors.

The political ideal of the rule of law informs the obligation of both lawyers and the government officials with whom they interact. The lawyer in our antitrust hypothetical does have a reasoned basis for supporting the merger and opposing the president. The problem is simply that the president has a different reasoned basis, and in our constitutional structure, the president's view is entitled to prevail. That is a relatively easy case. The more difficult ethical issue arises in a situation in which the president, or another high-ranking government official, directs a lawyer to assist in doing something that is within the official's discretion. For example, suppose the president directs an investigation or prosecution of a political opponent⁵⁸ or grants a

54. HART, *supra* note 28, at 116–17.

55. *Id.* at 203.

56. *Id.* at 117.

57. See Jeremy Waldron, *All We Like Sheep*, 12 CANADIAN J.L. & JURIS. 169, 184–85 (1999) (discussing Hart's views on legal obligation and authority).

58. Trump continues to lead chants of "lock her up" at political rallies, referring to his campaign pledge to appoint a special prosecutor to investigate corruption by Hillary Clinton. See, e.g., Jason Le Miere, *Trump Responds to Hillary Clinton "Lock Her Up" Chants: "Some Things Just Take a Little Bit Longer,"* NEWSWEEK (Aug. 3, 2018, 9:40 AM), <https://www.newsweek.com/trump-lock-her-hillary-clinton-1056282> [<http://perma.cc/4KH5-G92B>]. Former Attorney General Jeff Sessions has also encouraged audiences in the chant. See Julia Jacobs, *Jeff Sessions Laughs and Echoes 'Lock Her Up' Chant with Conservative High Schoolers*, N.Y. TIMES (July 24, 2018), <https://www.nytimes.com/2018/07/24/us/politics/jeff-sessions-lock-her-up-hillary-clinton.html> [<https://perma.cc/8GXC-CPCE>]. Trump has a long-running vendetta against Jeff Bezos, the owner of both Amazon and the *Washington Post*. He has criticized the U.S. Postal Service for what he believes are unfairly low rates charged to Amazon for package delivery and ordered a review of the Postal Service's finances after claiming that the *Washington Post* was a lobbyist for Amazon. See, e.g., Eli Rosenberg, *Trump Said Amazon Cost the USPS "Billions." But the Post Office Has a Different Explanation.*, WASH. POST (May 11, 2018), <https://www.washingtonpost.com/news/business/wp/2018/05/11/trump-said-amazon-cost-the-usps-billions-but-the-post-office-has-a-different-explanation/> [<https://perma.cc/79WN-76VR>]; Michael D. Shear, *Trump, Having Denounced Amazon's Shipping Deal, Orders Review of Postal Service*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/politics/trump-postal-service-amazon.html> [<https://perma.cc/3QUT-JKZB>]. Trump has also retaliated against perceived opponents who were previously high-ranking officials in national security agencies by revoking or threatening

pardon to a campaign contributor or a political ally. For the principle of legality to inform the duties of government officials and lawyers, it must have something to do not only with the making and interpretation of positive law, but with the exercise of power in zones of legally conferred discretion. Apart from the specific requirements of positive law, the dignitarian aspects of the rule of law require that official power be exercised according to reasons that are related to the good of a “fair, predictable, positively collaborative, and flexibly stable order of human interrelationships.”⁵⁹

Lawyers can promote fairness, predictability, and stability indirectly by participating in processes that promote reasoned, nonarbitrary, and hence legitimate decisions by government officials.⁶⁰ As Waldron notes, influential conceptions of the rule of law tend to emphasize certainty, predictability, and the determinacy of public norms.⁶¹ This emphasis comes at the expense of the dialogic or argumentative aspect of the “government treating ordinary citizens with respect as active centers of intelligence.”⁶² Waldron and other scholars, including David Luban and Daniel Markovits, have therefore sought to give pride of place to litigation and adjudicative procedures as a means of manifesting respect for the self-determining agency of free and equal citizens.⁶³ But relatively little has been said about decision-making procedures within organizations generally, and the executive branch of government specifically, and how these procedures relate to democracy and human dignity. Neal Katyal’s celebration of the virtues of bureaucracy offers a suggestion for how this connection can be drawn. He observes that there are two competing sources of legitimacy within the executive branch—political will and expertise.⁶⁴ The president’s exercise of prerogatives such as pardoning and directing prosecutorial resources may be thought of as a manifestation of democratic energy; left unchecked, however, it becomes a source of arbitrary power. Because the president’s prerogatives respond to considerations of democratic legitimacy, they should not be interfered with because of disagreement on policy grounds. That was the point of the

to revoke their security clearances. See Julie Hirschfeld Davis & Michael D. Shear, *Trump Revokes Ex-C.I.A. Director John Brennan’s Security Clearance*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/us/politics/john-brennan-security-clearance.html> [<https://perma.cc/QV5B-YVWU>].

59. FINNIS, *supra* note 13, at 335.

60. See generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297 (2006).

61. Waldron, *Procedure*, *supra* note 7, at 21.

62. *Id.* at 22.

63. *Id.* at 23–24; see also DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, in LEGAL ETHICS AND HUMAN DIGNITY 65, 72–73 (2007) (arguing that respecting dignity requires presuming that litigants have a story to tell in good faith); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 176–77, 180–87 (2008) (seeking to establish a connection between political legitimacy and the agency of citizens by relying on litigation to foster an effective engagement with democratic processes).

64. Katyal, *supra* note 60, at 2317.

antitrust example: the president is entitled to his or her own views about the enforcement of antitrust policy, provided, of course, that they are within the bounds of legally conferred discretion.

The exercise of discretion must be rational in order to be legitimate. As Hart writes in his essay on discretion:

[I]t [is] not too much to say that decisions involving discretion are rational primarily because of the manner in which they are made, but of course the word “manner” here must be understood to include not only narrowly procedural factors and the deliberate exclusion of private interest, prejudice, and the use of experience in the field but also the determined effort to identify what are the various values which have to be considered and subjected in the course of discretion to some form of compromise or subordination.⁶⁵

The arguments supporting the exercise of discretion must be rational, even if not conclusive.⁶⁶ Therefore, one of the fundamental obligations of a government lawyer serving in an advisory capacity is to identify competing values and subject them to a process of weighing, balancing, and compromise. This process ensures that the resulting decision will not be one with which all observers will agree—otherwise there would be no room for the exercise of discretion—but will be one with respect to which an observer should be able to conclude, “[t]hat was a satisfactory compromise between different values.”⁶⁷ Returning to the example of President Clinton’s pardon of Marc Rich, the pardon was arguably not based on “good and sufficient reasons,” not because of any policy preference revealed by the pardon, but because it did not represent a reasoned choice among the types of considerations that ought to bear on this exercise of discretion. In an op-ed published in the *New York Times*, Clinton defended his decision by noting that others who had structured transactions in the same way had been sued civilly rather than being indicted and that Rich had acted on the advice of prominent tax experts.⁶⁸ But this is a fairly thin reed since enforcement agencies often have the choice to pursue civil or criminal penalties.⁶⁹ Given the allegations of a quid pro quo for Rich’s ex-wife’s campaign contributions, Clinton did not offer a particularly persuasive justification that appealed to the relevant values for his exercise of the pardon power. Those values are generally believed to include moving beyond a time of particular social and political upheaval or controversy (for example, pardoning Vietnam-era draft evaders or President Ford’s pardon of President Nixon after the Watergate crisis to allow the nation to move beyond the controversy), rectifying past

65. Hart, *supra* note 16, at 664.

66. *See id.* at 665.

67. *Id.*

68. William Jefferson Clinton, Opinion, *My Reasons for the Pardons*, N.Y. TIMES (Feb. 18, 2001), <https://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html> [<https://perma.cc/B2H7-W4GC>].

69. *See* U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-27.250 (2018) (“Non-Criminal Alternatives to Prosecution”).

injustices, or recognizing that someone has long since paid his debt to society.⁷⁰ They do not include helping out one's political allies.

The crucial analytical work lies in the specification of which values bear on the exercise of discretion. Consider as an example some of the factors listed in the *Justice Manual* (previously known as the *U.S. Attorneys' Manual*), which pertain to another discretionary decision by government officials, namely, the decision to prosecute. When deciding whether to bring criminal charges, lawyers for the government are directed to take account of factors such as the nature and seriousness of the offense, the deterrent effect of prosecution, the culpability of the defendant, the defendant's criminal history, and the impact of the offense on victims.⁷¹ Government attorneys are specifically prohibited from taking into account their own personal feelings or the defendant's race, gender, ethnicity, national origin, sexual orientation, or political associations, activities, or beliefs.⁷² The *Justice Manual* is for the internal guidance of Justice Department lawyers, so it is not a source of positive law; the point, however, is that the considerations it identifies are values relating closely to the fair administration of a system of criminal justice. The values that should guide discretion in the absence of constraint by positive law are those that would inform the deliberation of a rational decision maker, and what makes them rational is the belief that they would be considerations that could be accepted (or not reasonably rejected) from the point of view of those subject to official power. The values may be political in the sense that they are contested in our society and the competing parties may align differently with respect to these values⁷³—consider, again, the hypothetical of the lawyer who was horrified by the president's populism and would have preferred a Chicago-school law-and-economics approach to antitrust policy. It is essential, however, that these values bear on the exercise of power in the appropriate manner. The analysis of the sufficiency of reasons given for the exercise of discretionary authority must take account of the relationship between the reasons and the purpose for which official power is exercised.

CONCLUSION

I have tried to avoid turning this Essay into yet another call for some political institution to play a stabilizing role while President Trump crashes around like a bull in a china shop. In an ordinary presidency, the nature of the reasons that must be given in support of a presidential pardon, or to justify the decision to commence an investigation or prosecution, would be an interesting jurisprudential puzzle, but of no real urgency. The reason is that

70. See generally Richard A. Saliterman, *Reflections on the Presidential Clemency Power*, 38 OKLA. L. REV. 257 (1985).

71. U.S. DEP'T OF JUSTICE, *supra* note 69, § 9-27.230.

72. *Id.* § 9-27.260.

73. Mark Tushnet puts it nicely, considering Carl Schmitt's theory of sovereignty and the state of exception: "in [a] state[] of exception, law is displaced" by either power or politics. See Mark Tushnet, *Meditations on Carl Schmitt*, 40 GA. L. REV. 877, 882 (2006). I disagree with Tushnet's contention that power and politics are equivalent.

well-functioning institutions incorporate procedures for vetting official decisions, subjecting them to some degree of adversarial testing, and resolving disagreements in good faith. The result will usually be a reasoned decision and, when a discretionary act comes in for criticism, it is often the case that the usual procedures had broken down or were circumvented.⁷⁴ One of the signal characteristics of the Trump administration is the president's unconcern with ordinary vetting processes; Bob Woodward's look inside the White House is only the latest account of decisions made impulsively and often delivered via Twitter, without adequate consideration of alternatives, which inevitably led to frantic scrambling by staffers to contain the damage or reverse the decision.⁷⁵ Government lawyers have a significant role to play in guiding the exercise of official discretion in most presidential administrations. That role is to ensure that the relevant values are given due consideration and the resulting decision represents a reasoned ranking or compromise among relevant factors. In the present administration, however, lawyers may be spending more time doing damage control or trying to restrain the impulses of a president who seems to believe that governing is nothing more than issuing directives.

74. Significantly, the *New York Times* editors appended a note to President Clinton's explanation of his reasons for pardoning Marc Rich. Clinton said he had asked three Republican lawyers, Leonard Garment, William Bradford Reynolds, and Lewis Libby, to review the pardon application. In fact, however, the three lawyers had not reviewed the application. See Clinton, *supra* note 68.

75. See Jill Abramson, *Bob Woodward's Meticulous, Frightening Look Inside the Trump White House*, WASH. POST (Sept. 6, 2018), https://www.washingtonpost.com/outlook/bob-woodwards-meticulous-frightening-look-inside-the-trump-white-house/2018/09/06/b30ebc5e-b1e6-11e8-a20b-5f4f84429666_story.html [<https://perma.cc/TKU5-N9ML>] (reporting on, among other events, Trump's refusal to consider a memo setting out four options regarding military service by transgender people, his tweet proclaiming his decision to ban them, and the subsequent pushback by the Chairman of the Joint Chiefs of Staff and the Secretary of Defense).