ESSAY

JUDICIAL SINCERITY

*Micah Schwartzman**

INTRODUCTION

DO judges have a duty to believe the reasons they give in their legal opinions? A strong presumption against lying applies to most of our interactions with other people. The same presumption

* Associate Professor of Law, University of Virginia School of Law. For comments, I would like to thank Rachel Brewster, Michael Doran, Charles Fischette, Kent Greenawalt, Leslie Kendrick, Greg Klass, Jody Kraus, Matt Krueger, Chip Lupu, Dan Markel, Jonathan Quong, Seana Shiffrin, Dale Smith, Mark Spottswood, Martin Totaro, Shlomit Wallerstein, Steven Walt, and members of the Georgetown Law Faculty Workshop and the UCLA Legal Theory Workshop.

would seem to hold in the context of judicial decisionmaking. Since it is usually wrong to deceive others, judges should be truthful about the reasons for their decisions. At the very least, and barring exceptional circumstances, they should not knowingly make statements they think are false or seriously misleading. Indeed, this principle seems so straightforward that it may be hard to believe that anyone seriously doubts it.[1]

Despite its presumptive appeal, however, the idea that judges must adhere to a principle of sincerity is surprisingly controversial. Some judges and legal theorists reject the notion that judges must believe what they say in their opinions. Although this view is probably a minority position in the academy and on the bench, it has been advanced explicitly with increasing force in recent years.[2]

Those who oppose a strong presumption in favor of judicial sincerity raise a diversity of objections to it. They argue that sincerity and candor must often be sacrificed to maintain the perceived legitimacy of the judiciary;[3] to obtain public compliance with controversial judgments;[4] to secure preferred outcomes through strategic action on multimember courts;[5] to promote the clarity, coherence, and continuity of legal doctrine;[6] to avoid the destructive consequences of openly recognizing "tragic choices" between conflicting

[1] See David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 731 (1987).

[2] See Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 Tex. L. Rev. 1307 (1995); Richard A. Posner, Law, Pragmatism, and Democracy 343, 350–52 (2003); Martin Shapiro, Judges as Liars, 17 Harv. J.L. & Pub. Pol'y 155, 156 (1994); Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 Geo. L.J. 353, 359 (1989). Systematic criticism of judicial candor is a fairly recent phenomenon. But see Robert A. Leflar, Honest Judicial Opinions, 74 Nw. U. L. Rev. 721, 721–23 (1979) (citing earlier examples); Shapiro, supra note 1, at 731 n.4 (same).

[3] Book Note, Democracy and Dishonesty, 106 Harv. L. Rev. 792, 794–96 (1993); Idleman, supra note 2, at 1388.

[4] Meir Dan-Cohen, Harmful Thoughts: Essays on Law, Self, and Morality 13, 28–32 (2002); Alan Hirsch, Candor and Prudence in Constitutional Adjudication, 61 Geo. Wash. L. Rev. 858, 863–66 (1993) (book review).

[5] See Evan H. Caminker, Sincere and Strategic Voting Norms on Multimember Courts, 97 Mich. L. Rev. 2297, 2312–33, 2347–50 (1999); Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 Cal. L. Rev. 1, 54–55 (1993).

[6] Jan G. Deutsch, Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science, 20 Stan. L. Rev. 169, 238–40 (1968); Grant Gilmore, Law, Logic and Experience, 3 How. L.J. 26, 37–38 (1957); Idleman, supra note 2, at 1392–94.

moral values;[7] to preserve collegiality and civility in the courts;[8] and to prevent the unnecessary proliferation of separate opinions.[9] More generally, critics argue that a "purist" emphasis on the need for honesty in judicial decisionmaking ignores the myriad institutional considerations that judges must continuously balance in performing the "prudential" functions assigned to them.[10] To argue for rigid adherence to a norm of sincerity or candor is said to be naïve, foolhardy, and even dangerously utopian.

With all of these institutional objections arrayed against conventional wisdom, it may be difficult to see the initial normative appeal of a strong principle of judicial sincerity. There are two ways of recovering this principle from its prudentialist or pragmatist critics. The first is to marshal sufficient reasons of legal and political expediency to generate a strong presumption supporting adherence to a norm of sincerity. Accordingly, proponents of greater candor in the courts have argued that transparent decisionmaking constrains the exercise of judicial power,[11] makes judges more accountable to the law,[12] provides better guidance to lower courts and litigants,[13] promotes trust and reduces public cynicism,[14] and strengthens the institutional legitimacy of the courts.[15] Like the arguments mentioned above, these claims rest on complicated and speculative empirical judgments, but they are the sort of arguments

[7] Guido Calabresi, A Common Law for the Age of Statutes 172–74, 178 (1982); Guido Calabresi & Philip Bobbitt, Tragic Choices 24–26, 195–97 (1978); Guido Calabresi, *Bakke* as Pseudo-Tragedy, 28 Cath. U. L. Rev. 427, 429–32 (1979).

[8] Idleman, supra note 2, at 1391–92.

[9] Posner, supra note 2, at 343; Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. Chi. L. Rev. 1371, 1374 (1995); see also Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash. L. Rev. 133, 142–43, 149 (1990).

[10] See Hirsch, supra note 4, at 863–70 (noting contrast between "purists" and "prudentialists"); Idleman, supra note 2, at 1313–14; see also Stephen Ellmann, The Rule of Law and the Achievement of Unanimity in *Brown*, 49 N.Y.L. Sch. L. Rev. 741, 742 (2004) (defending "in broad terms the proposition that it is *not* always the obligation of the judge to vote for, and express, all and only the propositions of law and fact that he or she believes").

[11] Shapiro, supra note 1, at 737.

[12] Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 667 (1983); see also Idleman, supra note 2, at 1337 n.90 (collecting citations).

[13] Kathleen Waits, Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction, 1983 U. Ill. L. Rev. 917, 934 (1983).

[14] Shapiro, supra note 1, at 737–38.

[15] Gewirtz, supra note 12, at 671.

that pragmatists must take seriously. If following a general rule favoring sincerity or candor produces the most prudential or pragmatic outcomes—whatever those happen to be—then following the rule is probably justified.[16]

The problem with this kind of prudential response is that it fails to explain the normative force behind the conventional wisdom that judges should not lie or deliberately mislead in their opinions. In our ordinary moral thinking, duties of truth-telling are not justified merely because they produce good outcomes. Rather, the duty to speak truthfully and openly is thought to be an independent constraint on our actions.[17] This suggests a second way to defend a principle of judicial sincerity, namely, by explaining its appeal without relying solely on prudential considerations.[18] My aim in what follows is to provide such an account. Although consequentialist claims will have an important role to play in this account, as we shall see, they will be subordinate in an argument motivated primarily by moral and political values central to the process of adjudication.

Here, then, is a sketch of the argument I have in mind for defending a principle of judicial sincerity: judges are charged with the responsibility of adjudicating legal disagreements between citizens. As such, their decisions are backed with the collective and coercive force of political society, the exercise of which requires justification. It must be defended in a way that those who are subject to it can, at least in principle, understand and accept. To determine whether a given justification satisfies this requirement, judges must make public the legal grounds for their decisions. Those who fail to

[16] Shapiro, supra note 1, at 738 ("Perhaps I am arguing for nothing more than a species of rule-utilitarianism that attaches heavy weight to considerations that might not be evident in a particular instance but that derive force from their cumulative effect.").

[17] There are obviously deep issues lurking here concerning long-standing debates about the relative merits of consequentialist and deontological ethics. But such matters are unavoidable in arguments about the value of sincerity and candor. See Sissela Bok, Lying: Moral Choice in Public and Private Life chs. 3–4 (1978); Larry Alexander & Emily Sherwin, Deception in Morality and Law, 22 Law & Phil. 393, 395–404 (2003); Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633, 643 n.26 (1995).

[18] See, e.g., Ronald Dworkin, Introduction *to* A Badly Flawed Election: Debating *Bush v. Gore*, the Supreme Court, and American Democracy 1, 54–55 (Ronald Dworkin ed., 2002) (claiming that judicial legitimacy requires sincerity and transparency).

give sincere legal justifications violate this condition of legitimacy. They act against the demands of the adjudicative role assigned to them. In extraordinary cases, judges may be justified in reaching beyond the limits of their authority. But this possibility defines a very narrow exception. Under ordinary circumstances, judges have a general duty to comply with a principle of sincerity in their decisionmaking.

In developing this argument for judicial *sincerity*, I will have something to say about broader requirements of disclosure and transparency in judicial decisionmaking, requirements often linked with the idea of *candor*. But, as I will argue in Part I, sincerity and candor are conceptually distinct. A duty of sincerity denotes a more limited constraint on judicial behavior. If that constraint can be defended, then perhaps an argument can be made for a broader duty of judicial candor. My strategy is to begin with the narrower duty and move toward consideration of the more demanding one.

To clarify and defend a principle of judicial sincerity, we need to know what it means to be sincere. The purpose of Part I is to fix ideas about the concept of sincerity. Once we have an idea of what sincerity requires, we then need to ask why it is important that judges act accordingly. Part II will begin the argument for judicial sincerity by defending the claim that judges must justify their legal decisions. I will then argue, in Part III, that legal justifications are subject to a condition of actual publicity. That is, judges must not only justify their decisions, they must make the reasons for their decisions publicly available. The actual publicity of legal justifications is valuable because it demonstrates respect for the moral capacity to be responsive to reasons and because it improves the quality of the reasons given. These values are interrelated, and, in Part IV, I will argue that adherence to a principle of sincerity serves to maintain them both, protecting the integrity of the public process by which legal justifications are developed, challenged, and modified over time. Unless judges are sincere, the grounds for their decisions cannot be scrutinized in the public domain. And without such scrutiny, those subject to adjudication cannot determine whether the reasons given to them are sound. Whether or not citizens agree with the reasons given for a particular outcome, they must have the opportunity to understand and evaluate those reasons. Part V will anticipate two kinds of objections to the principle

of judicial sincerity. Part VI will discuss the limits of that principle.[19]

I. CONCEPTS OF SINCERITY AND CANDOR

A. The Concept of Sincerity

The first step in defending a principle of judicial sincerity is to define the concept of sincerity, which is often associated with the idea of veracity or truth-telling. The reason for this association is that when speakers are sincere, their statements are intended to convey the truth of what they believe. Sincerity, on this view, requires correspondence between what people say, what they intend to say, and what they believe.[20] The conditions of correspondence and intentionality are captured in the following definition of sincerity:

> (S1): If *A* says that *p*, *A* is sincere if and only if (*i*) *A* intends to say that *p* and (*ii*) *A* believes that *p*.[21]

[19] To be clear, this Essay does not consider whether, and to what extent, judges conform to a principle of sincerity. Judges are sometimes accused of being disingenuous. See, e.g., Paul Butler, When Judges Lie (and When They Should), 91 Minn. L. Rev. 1785, 1794–1800 (2007); Anthony D'Amato, Self-Regulation of Judicial Misconduct Could Be Mis-Regulation, 89 Mich. L. Rev. 609, 619–23 (1990); Idleman, supra note 2, at 1314 n.20 (collecting citations); Laura E. Little, Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions, 46 UCLA L. Rev. 75, 85–86 (1998); Shapiro, supra note 2, at 155–56. Some of these criticisms may be well-founded and some not, but I make no accusations here. The question at issue is not whether particular judges or opinions are candid or sincere but whether judges have a duty to give sincere justifications for their decisions.

[20] I had initially formulated the definition of sincerity in terms of intentional consistency between belief and utterance. But I am now persuaded that correspondence more accurately describes the proper relation between belief and utterance. I thank Lucas Swaine and Mark Spottswood for pressing this point. See also Mark Spottswood, Falsity, Insincerity and Freedom of Expression, 16 Wm. & Mary Bill of Rts. J. 1203.

[21] On this definition, if *A* says that *p*, her statement is either sincere, insincere, or, if lacking intentionality, then neither sincere nor insincere. These possible outcomes can be represented as follows:

	believes that *p*	does not believe that *p*
intends to say that *p*	(1) sincere	(2) insincere
does not intend to say that *p*	(3) neither sincere nor insincere	(4) neither sincere nor insincere

To prevent confusion, it is important to distinguish this concept of sincerity, which is based on intentional correspondence between belief and utterance,[22] from what has been called *sincerity as single-mindedness*, which concerns whether a person genuinely holds some belief. Stuart Hampshire describes this ideal of sincerity as "undividedness or singleness of mind."[23] A person is sincere only if he or she believes something without any reservation, confusion, or internal conflict. On this view, to determine whether one has a sincere belief requires extensive introspection and continuous "self-watching" to guard against inconsistencies in thoughts, attitudes, and dispositions.[24] As I have argued elsewhere, some radical or skeptical versions of this idea of sincerity are open to serious objec-

Statements that fall within category (1) are paradigm cases of sincere statements because, as the saying goes, *A* says what she means and means what she says. Statements in (2) are insincere because *A* intends to, and does, say something she does not believe. Notice, however, that *A* may speak without being sincere or insincere. In (4), *A* says what she does not believe without being insincere. Suppose *A* believes that "Justice X is always right in her decisions" and that "Justice Y is always wrong." In the midst of a heated argument, *A* gets her X's and Y's mixed up and accidentally says, "Justice X is always wrong." *A*'s statement is not sincere because *A* does not believe the content of her statement. But neither is *A*'s statement insincere. The reason is that *A* did not *intend* to misrepresent her belief that X is always right. *A* is neither sincere nor insincere; she is simply mistaken in what she has said. Similarly, just as a person can say something she does not believe without being insincere, a person can say something that she *does* believe without being sincere—a possibility captured in (3). The reason is the same. If *A* says something she believes but without intending to, her statement is neither sincere nor insincere. She has simply misspoken. In what follows, I focus on statements in categories (1) and (2). But the possibility of type (3) and (4) statements is significant because it demonstrates that intentionality is central to evaluating the sincerity of a speaker's utterances. Sincerity and insincerity are possible only if the speaker intends to say what he or she actually says.

[22] In setting out (S1), I have simplified matters somewhat. It is probably more accurate to say that *A* is sincere if, in saying and intending to say that *p*, *A* believes that she believes that *p*. Suppose *A* is mistaken about what she "really" believes. She thinks she believes *p*, but, perhaps subconsciously, she really believes ~ *p*. If she says that she believes *p*, we would not say that she is insincere, even though she does not "really" believe what she says. Conversely, if *A* thinks she believes *p* but says ~ *p*, she is insincere, even if she "really" but unknowingly believes ~ *p*. In both examples, *A*'s sincerity (or lack thereof) turns on whether she intentionally represents or misrepresents what she thinks she believes. See Michael Ridge, Sincerity and Expressivism, 131 Phil. Stud. 487, 507–08 (2006). In what follows, I shall leave aside this additional complexity by assuming that what people believe is the same as what they really believe. I do not think anything here turns on that distinction.

[23] Stuart Hampshire, Sincerity and Single-Mindedness, *in* Freedom of Mind and Other Essays 245 (1971).

[24] Id. at 246.

tions.[25] But rather than rehearse those arguments here, I merely want to emphasize that *sincerity as single-mindedness* turns on the level of certainty we have in our beliefs rather than on the intentional correspondence between our beliefs and utterances. In the judicial context, a focus on the certainty of belief may lead to questions about whether judges are sufficiently introspective in forming their views about what the law requires.[26] But we can bracket for now the difficult question of what level of certainty is required for judges to have sincere beliefs. However we resolve that issue, the question remains whether judges have a duty to be sincere or candid in stating their beliefs.

B. The Concept of Candor

Since most discussions about whether judges should convey their "real" reasons are conducted in terms of judicial candor, the focus up to this point on defining a concept of sincerity may seem somewhat pedantic. It is important, however, to distinguish between ideas of sincerity and candor. As I argue below, candor is an ambiguous concept that can be broken down into requirements of sincerity and disclosure. These more basic concepts provide better tools for analyzing the moral duties incumbent upon judges.

Although sincerity and candor are related as virtues of truth-telling, they remain conceptually distinct. The difference between them is roughly this: a person might make sincere statements, according to (S1), without necessarily being candid. Even a speaker who means what she says may not say everything necessary for her to be considered candid. Whereas sincerity merely requires inten-

[25] See Micah Schwartzman, The Sincerity of Public Reason 14–17 (Nov. 2007) (unpublished manuscript, on file with the Virginia Law Review Association); see also Bok, supra note 17, at 12–13 (arguing against skepticism about truth-telling).

[26] See Scott Altman, Beyond Candor, 89 Mich. L. Rev. 296 (1990). Altman argues that judges should not be introspective about how they make legal decisions because their inaccurate beliefs about the legal process promote judicial restraint. Judges may have self-fulfilling beliefs in the determinacy of legal rules. If they are disabused of those beliefs through introspection, they will be less restrained in their decisionmaking and produce worse decisions. Altman suggests that this argument is consistent with a duty of judicial candor. Even if judges should not be introspective, they may still be required to give the actual reasons for their decisions. Id. at 297. For criticism of Altman's argument, see Gail Heriot, Way Beyond Candor, 89 Mich. L. Rev. 1945, 1947 (1991).

tional correspondence between belief and utterance, candor demands a certain measure of affirmative public disclosure on the part of the speaker. The kind of disclosure required by the concept of candor is, however, a matter of some contention. Consider the following example:

> Suppose judge *J* sits on a three-member court of appeals, along with judges *K* and *L*. All three judges agree on the disposition of the case before them, but they disagree about the reasons for their collective decision. Judge *J* believes that the disposition is justified by two independently sufficient legal reasons: R_1 and R_2. He believes that each of these reasons standing alone would be an adequate ground for reaching the same outcome. Now suppose *J* is assigned to write the court's opinion. He would prefer to decide the case based on R_1. Although he believes R_2 is independently sufficient, R_1 extends the law in ways that *J* finds desirable. Unfortunately, judges *K* and *L* disagree. They prefer R_2, and they reject R_1 as legally incorrect. For the sake of expediency, or perhaps collegiality, *J* decides to write a unanimous opinion based on R_2. He leaves out any mention of the reason he finds most compelling.

It would be accurate to describe *J*'s opinion as sincere, as defined by (S1). He believes R_2 is a sufficient reason to justify the outcome of the case. It might be argued, however, that *J* is not candid, or at least not fully so. He has not disclosed his preference for deciding the case on an alternative ground. Since he believes R_1 is relevant to deciding the case, and since he has omitted that information, he is not completely forthcoming. For that reason, *J*'s opinion can be described as sincere but not fully candid.

One might disagree with this description of *J*'s opinion by arguing that a lack of candor requires either insincerity or an omission designed to mislead others about what one believes. For example, David Shapiro writes that "it is not deceptive for a majority to adopt a rationale that does not go as far as some of its members are willing to go. . . . The problem of candor . . . arises only when the individual judge writes or supports a statement he does not believe to be so."[27] Since a judge might lead others to believe he supports a

[27] Shapiro, supra note 1, at 736.

statement by failing to reveal information, nondisclosure may create problems of candor on this view. In the case described above, however, *J* has not said anything he does not believe. And his omission does not mislead the public about the reason for the court's judgment. If candor requires only the lack of intent to deceive, then *J* is acquitted of the charge of not being candid.

A problem with this objection, and perhaps also with my description of the initial example, is that it trades on an ambiguity in the meaning of the word candor. Sometimes candor is meant as a synonym for honesty. This is how Shapiro uses the term. But it may also imply openness, frankness, or the willingness to speak one's mind.[28] These different meanings can be represented by two definitions of judicial candor, both of which are represented in the literature. According to the first definition, which tracks Shapiro's view:

> (C1): Judge *J* is candid if and only if *J* gives sufficient information such that *J* does not knowingly mislead others about a legal decision.[29]

This definition of candor requires judges to make whatever disclosures they believe are necessary to prevent deception. A second and broader definition captures the notion of candor as a form of openness or transparency. On this view:

> (C2): Judge *J* is candid if and only if *J* discloses all information that *J* believes is relevant to a legal decision.[30]

The two definitions—one based on honesty, the other on transparency—come apart in the example above. According to (C1), *J* is both sincere and candid. He is sincere because he says only what he believes. He is candid because his opinion did not mislead anyone about the basis of the court's judgment.[31] Evaluated from the per-

[28] The OED includes five entries for the term "candor," the last of which is most relevant here. Candor is defined as: "Freedom from reserve in one's statements; openness, frankness, ingenuousness, outspokenness." 2 Oxford English Dictionary 828 (2d ed. 1989).

[29] See Shapiro, supra note 1, at 733.

[30] See Idleman, supra note 2, at 1316.

[31] Note that even if we accept (C1), a person could still be sincere and not candid. If *J* said only what he believes but not enough to prevent others from being misled, then he would be sincere without being candid. Consider the following story: "St Athanasius was rowing on a river when the persecutors came rowing in the opposite direc-

spective of (C2), however, *J* is sincere but not candid. He is honest but he does not disclose everything relevant to him about the case. He is not open or frank about the various reasons for his agreement with the court's opinion. If candor requires transparency in decisionmaking, then *J* has not been candid. Of course, this does not mean that *J* has acted inappropriately. He may have no obligation to reveal all of his reasons. Perhaps, as (C1) suggests, he is only obligated to reveal what he believes is enough information to prevent others from being misled.

It may be that our ordinary intuitions about the idea of candor are not sufficiently strong to decide between the definitions proposed in (C1) and (C2). Perhaps the concept of candor is being asked to do too much work here in sorting our reactions to a rather specialized situation concerning judicial decisionmaking.[32] But once the ambiguity in the concept is understood, the problem of definition becomes less pressing. What matters is that judges are to be evaluated for their sincerity and for their willingness to disclose certain information. Putting things in terms of sincerity and disclosure allows us to formulate more precise sorts of questions. Rather than asking whether judges must be candid, we can ask, first, what sorts of disclosures judges must make about their cases, and, second, whether their disclosures must be sincere. To answer these questions, we need to know more about the role of judges in the adjudicative process. We do not, however, need a complete theory of the judicial role or a full account of the nature of adjudication. As I argue below, a partial statement of the necessary conditions of adjudication—one which avoids central controversies about its forms and limits—is sufficient to ground a principle of judicial sincerity.

tion: 'Where is the traitor Athanasius?' 'Not far away,' the Saint gaily replied, and rowed past them unsuspected." Bernard Williams, Truth and Truthfulness: An Essay in Genealogy 102 (2002) (quoting Peter Geach, The Virtues: The Stanton Lectures 1973–4, at 114 (1977)); see also Alasdair MacIntyre, Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?, 16 Tanner Lectures on Human Values 307, 336 (1995). The Saint is sincere, at least according to (S1), because he has not asserted anything he believes is false. But he lacks candor, on both (C1) and (C2), because he knowingly misleads others by omitting relevant information.

[32] I am grateful to Charles Fischette for helping me to see this point more clearly.

II. THE VALUE OF LEGAL JUSTIFICATION

Arguments for and against judicial candor usually begin with an account of what role judges play in society. This may seem like a perilous place to start an argument about the ethical duties of judges. After all, there is so much disagreement about the nature and goals of adjudication that any argument based on a theory of the judicial role is bound to be controversial. Those who have different views of what it means to be a judge may reject the implications of arguments based on competing accounts. Indeed, the possibility of reasonable disagreement about theories of adjudication raises an important question about how to justify principles of judicial ethics, including those of sincerity and candor. Given deeply entrenched and persistent disputes about how judges should decide cases, or, more generally, about the purposes of judging,[33] how can we expect agreement on the role-based obligations of judges? The answer, I think, is that such duties can be derived from elements of a general concept of adjudication. Many long-standing disputes about the proper functions of the judiciary can be avoided in this way.

A. The Principle of Legal Justification

It would be desirable if claims about judicial ethics, such as whether judges ought to be sincere, did not depend on controversial theories of adjudication. Otherwise, proponents of different theories would have to provide independent justifications for the professional obligations of judges. Instead of developing a unified understanding of what duties judges must fulfill, there would be a fragmentation of views based on conflicting claims about the proper aims and methods of judicial decisionmaking. One way to avoid this result is by appealing to a general concept of adjudication that is *robust* with regard to more specific conceptions of it.[34] Following Gerald Gaus, we can say that "theory T_1 is robust vis-à-vis T_2 to the extent that changes in T_2—including the total rejection

[33] See Chad M. Oldfather, Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide, 94 Geo. L.J. 121, 139–55 (2005) (surveying competing theories of adjudication).

[34] See John Rawls, A Theory of Justice 5–6 (1971) (distinguishing between *concepts* and *conceptions*); H.L.A. Hart, The Concept of Law 159 (2d ed. 1994) (same).

of T_2 in favor of some competing theory T_2'—do not weaken the justification of T_1."[35] Some theories will be robust with regard to others because they are related as concepts and conceptions. For example, if the concept of justice is that "all equals should be treated equally," it will be robust in relation to various theories of equality. Such theories will specify what justice means, but they will not undermine the justification of that concept of justice. Similarly, we can identify a concept of adjudication, or at least part of that concept, that is robust vis-à-vis a diversity of competing conceptions of adjudication. That concept may then serve as a unified basis for claims about the role obligations of judges.

A full account of a general concept of adjudication would describe necessary and sufficient conditions for legitimate judicial decisionmaking.[36] Here, I want to focus on only one necessary condition, which can be called the *principle of legal justification*. According to this principle:

> (LJ): Adjudication is legitimate only if judges have sufficient reasons to justify their legal decisions.[37]

This principle needs to be clarified in a number of important ways. It also needs to be justified. Some reason, or set of reasons, must be given to show that the principle establishes a necessary condition of legitimate adjudication.

Before considering how the principle of legal justification might be justified, however, it is important to have a better sense of what it does and does not require:

First, the principle does not specify what counts as a *reason*. A reason can be defined in mundane terms as any consideration that supports a decision.[38] This obviously raises the question of what

[35] Gerald Gaus, Justificatory Liberalism: An Essay on Epistemology and Political Theory 6 (1996).

[36] See, e.g., Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 364 (1978); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 664–69 (tent. ed. 1958).

[37] This principle obviously bears some resemblance to the idea of "reasoned elaboration" in the theory of legal process developed by Fuller, Hart and Sacks, Wechsler, and others. See generally G. Edward White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 Va. L. Rev. 279 (1973); Neil Duxbury, Patterns of American Jurisprudence ch. 4 (1995).

[38] See Joshua Cohen, Democracy and Liberty, *in* Deliberative Democracy 185, 194 (Jon Elster ed., 1998).

kinds of things count as supportive considerations. But a concept of adjudication can leave this question open. By developing answers to it, we formulate different conceptions of adjudication.

Second, the principle does not limit judges to *legal* reasons. Even if criteria of legality remain unspecified, this added constraint on the principle would unnecessarily exclude theories of adjudication that permit judges discretion to invoke non-legal reasons where legal sources are thought to be indeterminate.[39]

Third, whatever reasons judges appeal to, those reasons must be *sufficient* to justify their decisions. Judges are not required to have the best possible reasons, but the considerations they appeal to must be capable of establishing that their decision is correct.[40] In some cases, judges may have more than one sufficient reason for their decision. A given holding or ruling may be over-determined by independent reasons, each of which is sufficient to justify the outcome in question. Under these conditions the principle is easily satisfied. But when judges cannot muster considerations powerful enough to support their decisions, they fail to meet the demand for justification.

Fourth, and finally, to say that judges must *have* reasons means that they must at least be able to offer considerations in support of their decisions. This principle does not require that judges make their reasons public. An additional step in the argument (considered below) is required to reach the conclusion that reasons must be given publicly. But even if judges do not state their reasons, the principle requires that judges possess them. For example, trial judges who make rulings on evidentiary objections may not state the reasons for their decisions.[41] They may simply tell the parties that their objections are sustained or overruled. But such decisions must be justifiable. A judge must not rule on objections arbitrarily.

[39] The discretion to make law does not relieve judges of the duty to justify their decisions. See Hart, supra note 34, at 273 ("[T]here will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers. But he must not do this arbitrarily: that is he must always have some general reasons justifying his decision . . . ."). Id at 273.

[40] See Gerald F. Gaus, The Rational, the Reasonable and Justification, 3 J. Pol. Phil. 234, 252–54 (1995) (defending sufficiency as the appropriate standard for political justification).

[41] See Schauer, supra note 17, at 637.

To act without justification is to violate a necessary condition of legitimate adjudication.

The principle of legal justification is robust in relation to all but the most radical theories of adjudication. Because it leaves open what counts as a reason in the context of judicial decisionmaking, it is compatible with a wide diversity of theories. The principle could be endorsed by formalists, legal realists, textualists, purposivists, process theorists, pragmatists, and so on. Every normative theory of adjudication specifies what kinds of considerations matter when judges make decisions. Even theories that rebel against the idea of "Reason," in some grand sense of that word, can accept that judges must be able to explain why their decisions are legitimate. Judges may have reasons that are acceptable only to those with idiosyncratic views about what counts as a reason, but nothing in the principle of legal justification prevents a theory of adjudication from offering an account of "reasons" that is relative to particular, or even peculiar, moral or conventional sources. There may be good reason to reject theories of adjudication that recommend appeals to considerations that are not widely shared. But that is a criterion for selecting among conceptions of adjudication that need not be incorporated as a necessary condition of the general concept.

Although the principle of legal justification is compatible with diverse conceptions of adjudication, it is not entirely empty. The principle requires that judges evaluate the claims made before them and, at the very least, have a considered view about how those claims should be resolved. The demand for justification places judges under a duty to articulate, even if only to themselves, grounds for their decisions. It requires them to refrain from acting arbitrarily, at least from the point of view of a given theory of adjudication.

B. Legal Justification and Legitimacy

With these clarifications in place, we can now ask why judges ought to comply with the principle of legal justification. Even if the principle is accepted as a necessary condition of legitimate adjudication, it is important to understand why judges must adhere to it. As before, we should look for reasons that can command wide assent. No justification will be entirely without controversy, but some arguments will be more robust than others with regard to compet-

ing theories of the judicial role. Here, then, are four reasons supporting the principle of legal justification:

First, some parties voluntarily submit their grievances to public adjudication for the purpose of obtaining impartial review. The parties to a case or controversy present reasoned arguments for their claims on the expectation that judges will be responsive to the strength of the reasons provided. Thus, a traditional argument for the principle of legal justification is that litigants are entitled to a reasoned assessment of their claims.[42] If for whatever reason the parties preferred an arbitrary solution, adjudication would not be necessary. They could simply select a random decision procedure to resolve their dispute.[43] When parties offer reasons for their claims in the form of legal arguments, however, they can reasonably expect that judges will weigh those reasons and provide a decision based on an evaluation of them.[44] Decisions reached without regard to reasons are not responsive to the underlying conflict between the parties.[45] The parties can therefore complain that the purpose of the adjudicative process has been corrupted or ignored. The reasons they presented were not given proper consideration in resolving the conflict between them. The winning party may be pleased with the outcome. But even the winner may realize that the decision was reached incorrectly or, worse yet, illegitimately.

Second, the parties to adjudication will often not have consented to adjudication in any meaningful way. The involuntariness of their participation does not, however, diminish the requirement that judges justify their decisions. On the contrary, the fact that litigants have no choice but to submit to adjudication greatly strengthens the demand for justification. As unwilling participants, they have

[42] See Idleman, supra note 2, at 1357 n.154 (collecting citations).

[43] See Neil Duxbury, Random Justice: On Lotteries and Legal Decision-Making ch. 5 (1999) (discussing the use of lotteries in legal decisionmaking).

[44] Interestingly, as a judge on the Court of Appeals, Ruth Bader Ginsburg reported that the D.C. Circuit had a rule promising an immediate decision in exchange for the parties' willingness to forgo a judicial opinion. Ginsburg explained that "[i]n [her] nearly five years on the court, not a single litigant has ever invoked the 'prompt decision but no opinion' prescription. The parties to an appeal, particularly the losers, want to know the reason why." Ruth Bader Ginsburg, The Obligation to Reason Why, 37 U. Fla. L. Rev. 205, 221 (1985).

[45] See Melvin Aron Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 Harv. L. Rev. 410, 412–14 (1978) (discussing the norm of strong responsiveness); Fuller, supra note 36, at 367.

even more reason to complain when they are treated arbitrarily.[46] When the parties have not chosen to settle their dispute by adjudication, the imposition of a decision without reason is a form of oppression. This claim may seem overstated. In the legal domain, however, the orders and judgments that follow from adjudicative proceedings are backed by the coercive power of the state. The threat of brute force conveyed by judicial decisions is perhaps most apparent in the domain of criminal law.[47] But it is present all the same on every occasion in which judges invoke their legal authority.[48]

Third, in many cases, judges make decisions that reach beyond disputes between particular litigants. In common law systems, cases or controversies arising from the same or similar circumstances are often governed by precedent. For that reason, the demand for justification can be issued not only by present litigants but also by any future parties whose claims will be controlled by a court's prior decisions. Furthermore, as proponents of structural litigation have emphasized, it is a mistake to conceive of adjudication solely as a mechanism for resolving disputes between individuals with private ends.[49] The judicial process is used, sometime to great effect, for the purpose of challenging large-scale social and political institutions. In such cases, judges are called upon to elucidate and apply public norms to correct systemic injustices. Indeed, if courts find breaches of constitutional values, they may exercise their equitable powers to order remedies with far-reaching consequences for the basic

[46] See David Lyons, Justification and Judicial Responsibility, 72 Cal. L. Rev. 178, 192–93 (1984).

[47] See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984), *reprinted in* Harmful Thoughts: Essays on Law, Self, and Morality, supra note 4, at 74 ("[T]he law does not just evaluate behavior, but typically uses its evaluations to justify killing, maiming, beating, or locking up the evaluated individual. The suppression of this all-important fact leads to a certain understatement of the moral awesomeness of the legal decision and to an unduly placid and benign picture of the law.").

[48] See Grant Lamond, The Coerciveness of Law, 20 Oxford J. Legal Stud. 39 (2000).

[49] See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979). Whether Fuller or anyone else actually made this mistake is a separate question. See Robert C. Bone, Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation, 75 B.U. L. Rev. 1273, 1301–20 (1995).

structure of society.[50] By altering the patterns of opportunities and entitlements available to people, courts may have profound effects on life chances. Those influenced by such decisions have a strong interest in demanding justifications for them.

Fourth, and perhaps most fundamentally, the principle of legal justification is based on the idea that legal and political authorities act legitimately only if they have reasons that those subject to them can, in principle, understand and accept.[51] This principle of political legitimacy permits a range of argument about what kinds of reasons might be accepted for the purpose of justifying the exercise of political power. But however we specify those reasons, adherence to the underlying principle expresses a commitment to treating citizens as capable of understanding and responding to the reasons that justify the rules by which they are governed. When legal and political officials lack sufficient reasons for their decisions, they fail to respect the rational capacities of those subject to their authority.[52] They show disrespect for the fundamental interest that citizens have in being governed according to reasons and principles to which they can give their considered assent. This interest, which resonates with the idea that government should be based on consent, is at the core of liberal democratic conceptions of political legitimacy. Indeed, a basic commitment of liberal political thought is, as Jeremy Waldron has written, that "intelligible justifications in social and political life must be available in principle for everyone . . . . [T]he basis of social obligation must be made out to each individual, for once the mantle of mystery has been lifted, *everybody* is going to want an answer."[53] Of course, not everyone will be

[50] See Owen M. Fiss, The Law as It Could Be 49–55 (2003).

[51] Different interpretations of this idea have been defended at length in recent years. See, e.g., Gaus, supra note 35, at 165; John Rawls, Political Liberalism 137, 217 (expanded ed. 2005); George Klosko, Democratic Procedures and Liberal Consensus 1–41 (2000); Stephen Macedo, Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism 39–77 (1990); Thomas Nagel, Equality and Partiality ch. 4 (1991).

[52] See Charles Larmore, The Morals of Modernity 137 (1996) ("For the distinctive feature of persons is that they are beings capable of thinking and acting on the basis of reasons. If we try to bring about conformity to a political principle simply by threat, we will be treating people solely as means, as objects of coercion. We will not also be treating them as ends, engaging directly their distinctive capacity as persons.").

[53] Jeremy Waldron, Theoretical Foundations of Liberalism, 37 Phil. Q. 127 (1987), *reprinted in* Liberal Rights: Collected Papers, 1981–1991, at 44 (1993).

happy with all of the answers all of the time. But the fact of reasonable disagreement[54] does not excuse political officials, including judges, from their responsibility to justify their decisions. The losing party may often be dissatisfied with the reasons for judgment. That does not, however, make the obligation to produce a reasoned outcome any less significant.[55] The exercise of legal authority must be justified especially to those whose interests are adversely affected. As rational and reasonable agents, they are owed a justification for the way they are treated under the law.

III. THE VALUE OF PUBLIC JUSTIFICATION

The principle of legal justification requires that judges have sufficient reasons to justify their legal decisions. It does not place judges under a duty to make their reasons public. The argument for the value of legal justification, however, supports taking this additional step. Not only must judges *have* reasons, they must *give* their reasons publicly. Otherwise, the parties to a case, and all others whose interests might be affected by its outcome, cannot know why the law has been applied in one way rather than another. Unless reasons are publicized, there can be no opportunity to evaluate, scrutinize, and possibly assent to the reasons for a decision. If the parties are to be treated with due respect, as people capable of responding to reasons, then judges must comply with a principle of legal justification suitably modified to take into consideration the demand for publicity. In this Part, I describe that principle and show how it promotes values associated with reason-giving.

A. The Publicity Condition

The principle of legal justification can be modified by incorporating into it an independent principle of publicity, or what is

[54] See Rawls, supra note 51, at 55–56 (discussing the idea of reasonable disagreement).

[55] See Martin P. Golding, Legal Reasoning 8 (1984) ("Reasoned decisions . . . can be viewed as attempts at *rational persuasion*; and by means of such decisions, losing parties may be brought to accept the result as a legitimate exercise of authority.").

sometimes called a "publicity condition."[56] That condition can, in turn, be formulated in various ways.[57] Elsewhere, I have suggested the outline of a general publicity condition, according to which:

(GPC): *S* is acceptable only if it is made public to *P*.

A conception of this condition is given by specifying the *subject*, *audience*, and *type* of publicity.[58] *First*, the *subject* of publicity, represented by *S*, is whatever must be made public. Since the focus here is on sufficient reasons for judicial decisions, we can let reason *R* be the subject of a properly stated publicity condition.

Second, the *audience* of publicity, represented by *P* in the general condition, defines those to whom *R* must be made public. Since we are concerned with justifying legal decisions, the relevant audience ought to include at least those whose interests are implicated by the application of *R*.[59] A more expansive interpretation of the publicity condition might also include within its scope anyone over whom the state exercises its authority. Moreover, in a democratic society, where the subjects of authority are also its ultimate source, the scope of publicity is extended to the people at large. The public audience encompasses the entire polity. In principle, no one is excluded from knowing about *R*.

Third, the *type* of publicity describes the sense in which *R* must be made public. There are two main types of publicity: *hypothetical* and *actual*. *R* satisfies a test of *hypothetical publicity* when it can be made public without leading to its own rejection. The most well-known hypothetical publicity condition is Kant's "*transcendental formula* of public right," according to which: "All actions relating to the rights of others are wrong if their maxim is incompatible

[56] See Rawls, supra note 34, at 133, 453–54; John Rawls, Justice as Fairness: A Restatement 120–22 (Erin Kelly ed., 2001); John Rawls, Kantian Constructivism in Moral Theory, *in* Collected Papers 303, 324–25 (Samuel Freeman ed., 1999).

[57] See Amy Gutmann & Dennis Thompson, Democracy and Disagreement ch. 3 (1996); David Luban, The Publicity Principle, *in* The Theory of Institutional Design 154 (Robert E. Goodin ed., 1996); Axel Gosseries, Publicity, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2005), http://plato.stanford.edu/archives/win2005/entries/publicity/.

[58] See Schwartzman, supra note 25 (manuscript at 7–10).

[59] See Golding, supra note 55, at 8 ("A [judicial] justification is offered in order to *justify to* someone the decision or conclusion; a justification is directed to an audience. Perhaps the first person to whom the justification is directed is the losing litigant; and to this may be added all other people whose interests might be adversely affected by the result.").

with publicity."[60] As Kant explained, a necessary but not sufficient condition for moral action is that a person act from a maxim, or principle,[61] that *could be* made public without making the relevant action self-defeating.[62] For example, a judge who decides cases on the principle "criminal defendants always lose" could not make this principle public without defeating the purpose of issuing guilty verdicts in all criminal cases. Once revealed, the judge's principle would create such resistance that he or she could no longer act upon it.[63] This example is an easy case. More difficult ones might be developed to press the meaning of "incompatibility" in Kant's formulation. Just how much external opposition would one have to imagine to conclude that a principle would be undermined by making it public? This question raises serious, if not insurmountable, difficulties for specifying the content of a hypothetical publicity condition.[64]

The problem of determining the conditions of self-defeat does not, however, present any difficulty for a test of *actual publicity*. *R* meets a condition of actual publicity only if it is, in fact, made known to the relevant public. This test avoids the problems of hypothetical publicity because it does not turn on the anticipated reaction of an imagined audience. But an actual publicity condition has its own ambiguities. What exactly does it mean to say that *R* is "made known" to the public? This phrase is compatible with different levels of public knowledge. A weak form of actual publicity requires only the *public availability* of *R*. For example, when courts

[60] Immanuel Kant, Toward Perpetual Peace, *in* Practical Philosophy 311, 347 (Mary J. Gregor ed. & trans., 1996).

[61] See Immanuel Kant, Groundwork of the Metaphysics of Morals, *in* Practical Philosophy 41, 56 (Mary J. Gregor, ed. & trans., 1996) (defining a "maxim" as "the subjective principle of volition").

[62] Kant, supra note 60, at 347 ("For a maxim that I cannot *divulge* without thereby defeating my own purpose, one that absolutely must *be kept secret* if it is to succeed and that I cannot *publicly acknowledge* without unavoidably arousing everyone's opposition to my project, can derive this necessary and universal, hence a priori foreseeable, resistance of everyone to me only from the injustice with which it threatens everyone.").

[63] Cf. Richard A. Posner, The Federal Courts: Crisis and Reform 205 (1985) ("I suggest the following practical, though only partial, test for distinguishing a principled from a result-oriented decision: a decision is principled if and only if the ground of decision can be stated truthfully in a form the judge *could* publicly avow without inviting virtually universal condemnation by professional opinion.") (emphasis added).

[64] See Luban, supra note 57, at 172–76; Gosseries, supra note 57, § 1.1.

publish their opinions, they are made available for public consumption. The reasons for decisions are "made known" in the sense that anyone who cares to learn about them has the opportunity to do so. Stronger forms of actual publicity are possible. The state might have a duty to promote public awareness or even, in some circumstances, to ensure that citizens acquire knowledge of certain subjects. The level of actual publicity required will depend on the subject of publicity and on the importance of people knowing about it.

Given these observations, we can now state a version of the principle of legal justification that incorporates the main elements of a publicity condition. Call this the principle of public legal justification:

> (PLJ): Adjudication is legitimate only if (i) judge *J* has sufficient reason *R* to justify legal decision *D*, and (ii) makes *R* known to those governed by *D*.

This principle requires the public justification of legal decisions to those over whom the state claims authority. Interpreted to include a weak form of actual publicity, it places judges under a duty to make publicly available the reasons that they believe justify their decisions. It is not enough that a decision meet a test of hypothetical publicity. Although judges may use a hypothetical test to evaluate the sufficiency of their reasons, they must disclose what they believe are adequate grounds to justify their exercise of legal authority.

B. The Value(s) of Publicity

The actual publicity condition incorporated into the principle stated above is justified because adhering to it (i) demonstrates respect for the rational capacities of citizens, and (ii) creates conditions for improving the quality of judicial decisionmaking.[65] These two justifications are intimately connected. As we saw earlier, the first requires that judges treat citizens with respect by articulating

[65] There are, of course, other reasons for valuing actual publicity. In addition to promoting the legitimacy and quality of judicial decisionmaking, written opinions provide notice, increase predictability, and assign accountability and responsibility to individual judges. See William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 Cornell L. Rev. 273, 282–84 (1996).

justifications for the use of coercive power. But the reasons that judges give may not be adequate to support their judgments. As Hart put it, judicial decisions may be final, but they are not infallible.[66] Even if judges arrive at the correct disposition of a case, however fortuitously, they may make mistakes in the reasoning used to reach the proper conclusion. By giving their reasons, judges make it possible for others to test the validity and soundness of their claims. This is an essential part of the process of justifying the exercise of authority. Those subject to judicial power are owed reasons that they can, in principle, understand and accept. If the reasons given to them are inadequate, then the demand for justification has not been met. The only way to fulfill that demand is to show that the reasons given can withstand public criticism. Moreover, open deliberation about proffered justifications may improve judicial reasoning, which, in turn, enables judges to do a better of job of satisfying the requirement of giving sufficient reasons for their decisions. In short, what we might call the *epistemic argument* for publicity promotes the value of legitimacy, which requires giving citizens reasons for the exercise of coercive power.

Consider, again, the argument that actual publicity is required by the value of treating citizens as reasonable and rational actors. I argued above that judges have a duty, based on an ideal of political legitimacy, to give those governed by their decisions sufficient reasons for them. A judge who attempts to fulfill this duty will formulate reasons that she thinks adequately support her legal judgment. Notice, however, that even a conscientious judge can only give reasons that she *believes* are sufficient. She cannot step outside herself to determine according to some objective standard whether her reasons are actually sufficient. Unless she claims infallibility, all that she can say is that she has acted diligently and with good faith in providing a reasonable justification. A judge who acts accordingly may be praiseworthy, but that does not mean her reasoning is sound. When a judge attempts unsuccessfully to satisfy the principle of legal justification—that is, when she seeks sufficient reasons but fails, perhaps unknowingly, to provide them—the judge has not met the burden of justifying her exercise of authority. She has not provided those governed by her decision with good reasons for

[66] Hart, supra note 34, at 144.

obeying it. Nevertheless, she has given them an opportunity to evaluate her arguments and, if necessary, to challenge or appeal them. In making her reasons publicly available, the judge acknowledges the force of reason-giving and demonstrates respect for those to whom justifications are owed.

A second, and related, reason for valuing actual publicity is that, even in its weak form, it establishes conditions for deliberation that are conducive to improving judicial decisionmaking. The first step in the argument for this claim is relatively straightforward. Unless judges make their reasons public, it is difficult, if not impossible, to scrutinize them. Litigants, citizens, and scholars may guess at why judges have made certain decisions. They may impute reasons where none are given. But while this may sometimes be necessary, it is not an adequate substitute for evaluating the actual grounds of a decision, which may not have anything to do with the speculations and projections offered to explain or justify that decision. By publicizing their reasons, judges enable others to engage in direct deliberation about them.

The second step in the argument for the epistemic value of actual publicity is the claim that public deliberation improves the quality of decisionmaking. There are four reasons for anticipating this effect. *First*, and foremost, judges who make their reasons public have greater incentives to take seriously the issues that confront them in a given case or controversy.[67] To fend off the prospect of criticism, which may originate from within the court or outside it, they are likely to invest more time and energy in understanding and applying the relevant law. The process of writing may also lead judges to clarify their views, sort through possible mistakes in legal reasoning, and make more explicit their underlying commitments

[67] See Penelope Pether, Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts, 56 Stan. L. Rev. 1435, 1485 (2004) ("Depublication strips the judicial process of the quality of reasoning that the discipline of opinion writing should, at its best, produce."); Richman & Reynolds, supra note 65, at 284 ("It is not difficult to understand why unpublished opinions are dreadful in quality. The primary cause lies in the absence of accountability and responsibility; their absence breeds sloth and indifference. Moreover, a judge's mastery of the case is reduced when she does not publish. . . . Writing out an opinion helps the author to understand the problem, to see things she otherwise would not see."). See generally William L. Reynolds & William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573 (1981) (evaluating the quality of unpublished opinions).

so as to prevent others from misinterpreting them.[68] *Second*, although public deliberation may not produce anything remotely resembling a rational consensus, it can nevertheless work to correct obvious displays of mistaken reasoning or prejudice.[69] If the anticipation of opposition is not sufficient to filter out the worst forms of argumentation, the disclosure of unjust or badly argued decisions at least makes it possible to focus critical attention in the right direction. *Third*, discussion of the reasons given by judges can help to ameliorate what Alvin Goldman has called an "epistemological division of labor."[70] This condition exists when there are widespread asymmetries of private information, as will often be the case with judges who have limited resources for researching the matters presented to them. For the most part, they must rely on the facts and arguments offered by the parties to litigation. When judges disclose the reasons for their decisions, they may prompt others to share information relevant to the case. The evening out of privately held information increases the dissemination of knowledge, reduces cognitive bias,[71] and diminishes the risks of cascading effects.[72] *Fourth*, arguments developed in response to the disclosure of the reasons for judicial decisions may lead to direct and indirect improvements in the law. Criticisms of stated justifications may be taken up on appeal or in subsequent litigation. Alternatively, they may find their way into the law gradually through later developments. As with competing interpretations of the law presented in dissenting opinions, such arguments may await more sympathetic audiences at some point in the future.[73]

To summarize the argument so far, actual publicity is an important, if not necessary, aspect of adjudication because it promotes

[68] See Ginsburg, supra note 9, at 139; Wald, supra note 9, at 1374–75; cf. Idleman, supra note 2, at 1350–52 & n.131 (collecting citations but criticizing the underlying argument).

[69] See Thomas Christiano, The Significance of Public Deliberation, *in* Deliberative Democracy: Essays on Reason and Politics 243, 249 (James Bohman & William Rehg eds., 1997).

[70] Alvin I. Goldman, Argumentation and Social Epistemology, 91 J. Phil. 27, 29–30 (1994).

[71] See Gaus, supra note 35, at 148; James D. Fearon, Deliberation as Discussion, *in* Deliberative Democracy 44, 49–52 (Jon Elster ed., 1998).

[72] See Cass R. Sunstein, Why Societies Need Dissent 59–60, 168 (2003).

[73] See William J. Brennan, Jr., In Defense of Dissents, 37 Hastings L.J. 427, 430–32 (1986).

two interrelated values. The first is the value of legitimacy. Judges must justify the ways in which they apply the power of the state. They must not only have reasons for their decisions, but they must announce those reasons publicly so that those governed by them can come to an understanding of, and perhaps even a reconciliation with, the workings of the law. If judges were infallible, then public justification might not be necessary. But that is obviously not the case. Judges are subject to severe constraints on the information available to them. And even if they had access to all relevant information, they could not possibly process all of it. Because of the pervasive condition of "epistemic scarcity,"[74] they must make their reasons available for public scrutiny. They cannot know that they have adequately justified their decisions unless they provide others with the opportunity to challenge and criticize their reasoning. Public deliberation about the justifications of judicial decisions may not yield consensus. It may, however, improve the quality of legal decisionmaking. In this way, the epistemic value of actual publicity promotes the value of legitimacy. We can be confident that legal authority is properly exercised only if those who wield it give justifications for their decisions.

IV. THE PRINCIPLE OF JUDICIAL SINCERITY

The main elements of the argument for a principle of judicial sincerity are now in place. We have seen that judges have a duty to comply with a principle of public legal justification. They must *have* sufficient reasons for their decisions and they must *give* those reasons in public. Judges who comply with this principle may also seem to satisfy the definition of sincerity given above. Recall that a person is sincere if and only if she says what she believes and intends to say it. A judge who believes that reason *R* is sufficient to justify her decision, and who states *R* as her public justification, is, by definition, sincere. It looks like the principle of public legal justification *is* a principle of judicial sincerity. This raises two questions. First, if sincerity is built into the principle of public legal justification, how did it get there and what role is it playing in support of that principle? And second, if the principle of public legal justification just *is* the principle of judicial sincerity, is this the principle

[74] Gaus, supra note 35, at 230, 246.

that we have been looking for? Does it match up with or help to explain conventional wisdom about the duty of judicial candor? And if the principle is critical of the conventional wisdom, or otherwise revisionist, is it adequately supported? This second set of questions will bring us back to the distinction between candor as honesty and candor as full disclosure. As promised, I shall argue that while the former is required, the argument for judicial sincerity also provides support for a more expansive duty of full disclosure.

A. Sincerity, Publicity, and Justification

The principle of public legal justification appears to have a built-in sincerity requirement. Judges must give sufficient reasons for their legal decisions. When this demand is satisfied, there seems to be no space for insincerity. Since the value of sincerity was not explicitly defended as part of the argument presented above, this may come as something of a surprise. Why is sincerity a necessary feature of public legal justification? This question can lead to the following sort of objection. As I noted earlier, judges can only offer what they believe are sufficient reasons. Their perspectives are subjective in the sense that they may think their reasons provide sound justifications, even if that is, in fact, not the case.[75] A judge who sincerely believes that reason *R* justifies disposition *D* may have drawn the wrong inference from *R* or may have missed some competing reason that makes the inference from *R* to *D* defeasible. The fact that a judge sincerely believes something does not make that belief correct. Furthermore, the argument goes, if what we are really worried about is justifying legal decisions, then sincerity is a red herring. As Martin Golding writes, "[I]t would be unfortunate if . . . the judge did not sincerely hold the reasons he explicitly gives. But in an important respect this fact, whenever it is a fact, is irrelevant to the justifiability of the decision. The justifiability of the decision depends on how well the decision is reasoned."[76]

The objection, then, is that sincerity is beside the point. The principle of legal justification requires that judges give sufficient

[75] Cf. Goldman, supra note 70, at 34 (discussing subjective and objective duties of argumentation).

[76] Golding, supra note 55, at 8.

reasons. It does not matter whether they really believe them. If this objection holds, then the principle of public legal justification is not a principle of judicial sincerity. Since judges may give reasons that are sufficient without believing them, sincerity is not required for the purpose of providing legal justification.

This objection shows that there is indeed logical space between the principle of public legal justification (PLJ) and a principle of judicial sincerity (PJS). We can see this by placing the two principles side by side. Compare:

> (PLJ): Adjudication is legitimate only if (i) judge *J* has sufficient reason *R* to justify legal decision *D*, and (ii) makes *R* known to those governed by *D*.

with,

> (PJS): Adjudication is legitimate only if (i) *J* believes that *R* is sufficient to justify *D*, and (ii) makes *R* known to those governed by *D*.

These two principles do not collapse into each other for two reasons. First, if a judge can be said to *have* a sufficient reason without believing it to be sufficient, then a judge can give that reason without being sincere. Since a judge can fulfill (PLJ) without believing the reasons that the judge makes publicly available, (PLJ) is not necessarily a principle of judicial sincerity. Second, and perhaps more important, a judge can satisfy (PJS) without meeting the first part of (PLJ). This is because, as we have already seen, a judge may believe that a reason is sufficient even if, in fact, it is not. The principle of judicial sincerity is compatible with a failure to give sufficient reasons. Thus, there are at least two ways the principles can come apart. A judge may lack sincerity but nevertheless succeed in justifying a decision, or a judge may be sincere but fail to provide adequate justification.

Although the two principles are distinct, the value of providing citizens with sufficient reasons strongly supports a principle of judicial sincerity. The reasons for adopting (PLJ) are also reasons to accept (PJS). The best way for judges to approximate the demand for justification is by satisfying the principle of sincerity. Judges are more likely to give sufficient reasons when they believe that the reasons they give are sufficient. Otherwise, they would be offering

as sufficient reasons considerations that they do not believe justify their decision. All things equal, such considerations are less likely to provide justification than reasons that a judge believes are sufficient. For that reason, the duty imposed by a principle of judicial sincerity can be understood as a "subjective correlative" to the duty imposed by the principle of legal justification. When judges fulfill their subjective duty they are more likely to meet the duty to provide reasons that are actually or objectively sufficient.[77]

Another reason to support a principle of judicial sincerity is based on the epistemic value of actual publicity. As we have seen, unless judges state what they believe are sufficient reasons, they do not provide others with an opportunity to challenge or support the justifications given for their decisions. The failure to offer sincere public justifications diminishes, and may even eliminate, the possibility of public deliberation about the actual grounds for legal judgments. This reduces the overall quality of judicial decisionmaking, and, for that reason, has deleterious effects on the development of adequate justifications for legal decisions. The principle of judicial sincerity preserves the epistemic benefits of actual publicity. It promotes the aim of providing justifications, which serve as the basis for the legitimate exercise of legal authority. Sincerity is therefore necessary in maintaining the integrity of the justificatory process.

B. Principles of Sincerity and Candor

1. From Sincere Public Justification to Judicial Sincerity

As stated, the principle of judicial sincerity is deficient in at least one important respect. Judges are required to give at least one reason, *R*, that they believe is sufficient to justify their decision. Hence, the principle can be described as demanding sincere public justification. Formally speaking, however, the principle permits judges to assert reasons that they do not believe. Provided judges give at least one reason they believe is sufficient, they may then state additional reasons that are insincere. Nothing in (PJS) prevents judges from couching or submerging their sincere reasons within an opinion filled with insincere ones. Since the principle of

[77] Goldman, supra note 70, at 34–35.

judicial sincerity is justified by the value of giving justifications to those affected by a decision, it must take into account the need to prevent disclosures that are calculated to mislead others about the proper grounds of a decision.[78] The value of public justification supports a more general duty of sincerity. The principle of judicial sincerity ought therefore to include a restrictive clause, such that:

> (PJS′): Adjudication is legitimate only if (i) *J* believes that *R* is sufficient to justify *D*, (ii) makes *R* known to those governed by *D*, and (iii) publicly asserts only those reasons that *J* believes are sufficient to justify *D*.

This principle requires disclosure of at least one (subjectively) sufficient reason and the assertion of only those reasons that are (subjectively) sufficient. It prohibits judges from offering reasons that they do not believe justify their decisions. Judges may, of course, discuss reasons that they do not believe sufficient, but they may not assert such reasons or offer them as their own. To be sincere in what they make known to the public, judges must distinguish the reasons they believe sufficient from those they do not.

2. From Judicial Sincerity to Judicial Candor

With this significant modification, the principle of judicial sincerity covers some, but not all, of the ground usually occupied by conventional understandings of judicial candor. Judges who comply with (PJS′) are required to disclose what they believe are sufficient reasons, but they are not required to disclose *all* their subjectively sufficient reasons, or even all the information relevant to their decisions. The duty of sincere public justification is therefore more constrained than a general duty of candor. To see this, consider again the example of judge *J* who writes a unanimous opinion announcing that the disposition, *D*, of a case is justified by R_1. Recall that *J* believes that R_1 is sufficient to justify *D*, but he prefers R_2 because it would extend the law in ways he finds desirable. Judges *K* and *L* reject R_2, and they accept R_1 as sufficient. To keep everyone on board, *J* makes no mention of his preference for R_2 and writes an opinion based on R_1. Has *J* been candid? Earlier, I argued that our naked intuitions are probably not much use in answering that

[78] See Shapiro, supra note 1, at 732–33.

question. If we think candor means something like "full disclosure of all relevant information," then *J* is not candid. If candor means giving an honest opinion, then perhaps *J* is candid. Furthermore, if we adopt the "full disclosure" definition of candor, then we may also want to ask whether *J* has a duty to be candid in that sense of the word. Rather than pursue these questions, I argued that what we need to know is whether *J* has a duty to disclose R_2, and, if he does, whether he must be sincere about it.

The principle of judicial sincerity only requires judges to offer what they believe is a sufficient reason to justify a decision. This principle is justified because judges have an obligation to give reasons to those subject to their authority. That obligation is fulfilled when judges give sincere justifications for their actions. Since there is no direct path to objectively sufficient reasons, all that we can ask of judges is that they provide considerations that they believe are adequate. When they have met their obligation, a necessary condition of legitimate adjudication has been satisfied. Thus, when *J* offers R_1 as a sufficient reason, *J* has performed the proper function of an adjudicator. *J* has given the parties to the case, and all those governed by it, a reason that *J* thinks is adequate to justify the outcome. No one can complain that *J* has failed to meet his obligation. The judge believes the reason given and believes that the litigants can reasonably be expected to accept it. When these conditions are met, there is no reason to criticize the court for failing to disclose any additional information. The judges have carried out their duties to the parties and to everyone else affected by their decision.

Although sincere public justification of judicial decisions is required for the legitimate exercise of legal authority, what I have been calling the epistemic value of publicity provides at least some support for the broader conception of judicial candor as full disclosure of relevant information. When *J* discloses R_2, as he might in a concurring opinion, he not only provides additional justification for the decision; he also contributes to deliberation about the proper basis of the law. He offers an alternative path that the court might have taken. Others may then subject his proposal to scrutiny in determining whether the law is best developed in the direction *J* has suggested. The public disclosure of supplemental reasons can in this way improve our understanding of both the law and the judge's

perspective on it. This is part of the reason why candor-as-full-disclosure is often valued in judicial opinions. It provides insight into the judge's legal reasoning, which is an important source of guidance about how the law may be altered, clarified, and improved.

Even if the full disclosure of relevant information was possible—and there is reason for thinking it is not[79]—complete candor would at most be supererogatory. Judges who reveal everything they believe relevant to a case surpass their duties to justify their decisions. They disclose more than is necessary to fulfill their adjudicative responsibilities. In some cases, this may provide significant benefits to readers of their opinions. But in others, it may provoke needless hostility and incivility. For example, Judge Posner reports that an "increasingly common manifestation of excessive judicial self-assertion is the abuse—often shrill, sometimes nasty—of one's colleagues."[80] Judges may think that harsh or even abusive criticism is relevant because it makes known the intensity or vehemence of their views. If candor requires that judges disclose everything they believe is relevant, then we should not be surprised when judicial opinions are filled with vituperative denunciations. Indeed, critics of judicial candor have argued against a duty of full disclosure for precisely this reason. Building on Judge Posner's observations about the lack of civility in judicial opinions, Scott Idleman argues that "[g]ratuitous deprecations and *ad hominem* remarks . . . are institutionally irresponsible . . . . And yet, all of these comments amount to candor, and all of these expressions of candor are in some way relevant to the case, if only because they may help lawyers understand the dynamics within a court."[81] From this, Idleman concludes that "there is a fundamental normative tension between the demand for candor . . . and the widely recognized importance of maintaining an image of legitimacy."[82] But there is no normative tension here because judges are not under any cognizable duty to

[79] See id. at 732 ("'[F]ull disclosure' may be both unrealistic and unattainable, requiring of the speaker a never-ending series of 'deeper' explanations . . . ."); Elizabeth Markovits, The Trouble with Being Earnest: Deliberative Democracy and the Sincerity Norm, 14 J. Pol. Phil. 249, 259 (2006) ("[F]ull disclosure may be impossible, too lengthy, or may obstruct the point of the discussion.").

[80] Posner, supra note 63, at 232.

[81] Idleman, supra note 2, at 1392; see also Ellmann, supra note 10, at 749.

[82] Idleman, supra note 2, at 1392.

disclose everything they think relevant about a case. A conception of judicial candor that requires such disclosures, no matter how tenuously related to the justification of a court's decision, is a straw man that no proponent of candor has any reason to defend. That judges sometimes decide to criticize each other in disrespectful terms is something to be lamented. It is not, however, required by any plausible account of why sincerity and candor matter in the courts.

V. TWO OBJECTIONS

Because the principle of judicial sincerity occupies a middle ground between not requiring judges to give their actual reasons and requiring them to disclose all that they think relevant to a case, the principle can be criticized in two directions. First, it might be objected that the principle makes it difficult for judges on multi-member courts to compromise in their decisionmaking. If each judge must give a sincere justification for a decision, it will be impossible in many cases to reach agreement. Consequently, judicial sincerity will lead to fractured opinions, diminished collegiality, and weaker institutional legitimacy.[83] Thus, one objection to the principle is that it requires too much sincerity.

A second objection, approaching matters from the other direction, says that the principle does not require enough in the way of sincere disclosure. Judges should be required to give what they think are the best possible reasons for their decisions. They should not be permitted to settle for compromise solutions. It is their duty to say what the law is, which is not the same as expressing their second-best preferences. Judges who are not in agreement about how to decide cases should simply say so. Compromise is a political

[83] To be clear, we should distinguish the concept of "political legitimacy" from that of "institutional legitimacy." As used above in Section II.B, political legitimacy is roughly defined as a moral ideal according to which the exercise of coercive power must be justified to those governed by it. By contrast, "institutional legitimacy" refers to the level of public support for political institutions like the courts. This Weberian concept of legitimacy is defined attitudinally according to people's beliefs about the authority of social and political institutions. See A. John Simmons, Justification and Legitimacy: Essays on Rights and Obligations 132–35 (2001) (discussing Weberian and normative concepts of legitimacy); Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1795–1801 (2005) (distinguishing between "sociological" and "moral" concepts of legitimacy).

art better left to the other branches of government. According to this objection, then, the problem with the principle is that it doesn't require enough sincerity.

In answering these objections, I shall try to show that the principle of judicial sincerity is not naïve or utopian. It may have revisionist, and perhaps even radical, implications for judicial decisionmaking. But it is not beyond the bounds of the feasible. Nor does it compromise the duty to justify the law to those governed by it.

A. Too Much Sincerity

To motivate the first objection, consider the following schematic example. Suppose judge *J* is asked to sign an opinion that includes two reasons, R_3 and R_4, for a disposition *D*. Written by judge *K*, the opinion represents the sincere views of judges *K* and *L*. Suppose *J* strongly agrees with the disposition of the case and thinks that R_3 is sufficient to justify the outcome. But *J* also thinks that R_4 is incorrect.[84] If *J* adheres to the principle of judicial sincerity (PJS′), then *J* cannot sign the opinion as it is currently written. He must ask *K* (and *L*) to revise it, or he must refuse to sign the part of the opinion with which he disagrees. If *K* and *L* refuse to modify their opinion, *J* must break with them and write separately. Adherence to a duty of judicial sincerity leads in this case to a fractured opinion, weakened precedent (in the sense that R_4 will be contested), and possibly a loss of collegiality among the judges.[85] Moreover, insofar

[84] We could imagine other examples. Judge Wald has written that "[i]n a close case, a would-be dissenter may agree to go along with a disfavored result if a disfavored rationale is avoided." Wald, supra note 9, at 1379. A judge may be more attached to a doctrinal justification than any particular result. Following this thought, we could construct an example in which judge *J* disagrees with disposition *D* but disagrees even more strongly with the reason given for it. Instead of dissenting, the judge signs on to the disposition in exchange for the majority dropping the disfavored rationale. I assume that examples of strategic action requiring sacrifices of sincerity could be proliferated. Indeed, in the example offered above, judges *K* and *L* might believe that both R_3 and R_4 are necessary to justify *D*. But they might offer to drop R_4 if *J* joins their opinion. Under these circumstances, *K* and *L* compromise sincerity for unanimity. See Caminker, supra note 5, at 2347–50 (discussing how candor might constrain strategic action in multimember courts).

[85] See Idleman, supra note 2, at 1391–92. Idleman writes, "[f]ull candor may simply be *impossible* due to internal disagreement as to the precise grounds on which the outcome of a decision should rest." Id. at 1384 (emphasis added). Technically, how-

as the court's institutional legitimacy rests on the public perception of unanimity, judges who write separately also undermine the authority of the court.[86]

The first response to this amalgamated objection is that it fails to recognize the value of sincere public justification. It assumes that the only way to justify a duty of judicial sincerity is to show that the benefits of sincere decisionmaking outweigh the institutional costs. Aside from the sheer speculative nature of such claims, it is not at all clear that judges ought to engage in this type of cost-benefit calculation. As we have seen, judges have a moral duty to provide what they believe are sufficient justifications for their actions. They have a role-based responsibility to give reasons for the exercise of coercive power. If they fail to state such reasons, or if they state reasons they do not believe, then they have abdicated that responsibility and sacrificed the underlying ideal of political legitimacy from which it is derived.

To be sure, pragmatic objections to judicial candor can also be met on their own terms.[87] Although my purpose here has been to develop an independent moral argument for judicial sincerity, it is perhaps worth dispelling the notion that such a duty commits us to *fiat iustitia*, *ruat caelum*. In fact, there is no reason to think that collegiality, precedential stability or institutional legitimacy is threatened by judicial sincerity. Taking collegiality first, judges on multimember courts understand and expect that their colleagues will often disagree with them.[88] It would be unfortunate if a court's collegiality was diminished by sincere or good faith disagreement. Indeed, if that were true, there would be reason to doubt the value of collegiality.[89] But critics of candor have yet to make a compelling case for the claim that sincere or candid decisionmaking disrupts relationships on multimember courts. There is some anecdotal evidence that judges act insincerely to promote efficiency in opinion-

ever, this claim is false. Full candor, used here to describe sincere public justification, is always *possible*. Judges may decide to sacrifice sincerity for the perception of unanimity, but they have the option to write separately.

[86] See id. at 1388–91.

[87] See Shapiro, supra note 1, at 738–49.

[88] See Harry T. Edwards, Collegiality and Decision Making on the D.C. Circuit, 84 Va. L. Rev. 1335, 1360 (1998).

[89] See Richman & Reynolds, supra note 65, at 324 (noting potential costs of collegiality).

writing or to secure preferred legal outcomes.[90] But there is little, if any, evidence to suggest that sincere behavior would lead to diminished professionalism or collegiality.

The same criticism applies to the claim that judicial sincerity would undermine the strength of precedent and create confusion about the meaning of majority or plurality opinions. There is simply no evidence to substantiate the argument that an increase in the number of opinions would produce such harmful consequences. First, as Shapiro has noted, the use of seriatim opinions remains common practice in countries where the stability of law is not remotely in question.[91] Second, sincere opinions might well *increase* legal certainty by providing litigants with more information about judges' views.[92] Third, any resulting expansion in the number of judicial opinions would pale in comparison with the number of decisions that will become citable under recent federal proposals involving unpublished opinions.[93] If, as many have argued, rule of law values justify making available for citation tens of thousands of unpublished opinions,[94] then surely those values are important enough to place judges under a duty to include in those opinions only statements of law that are sincere.

Perhaps the most frequent objection to a general duty of judicial candor is that some amount of dissembling is necessary to maintain

[90] See Posner, supra note 2, at 343; Wald, supra note 9, at 1374.

[91] Shapiro, supra note 1, at 743; see also Ginsburg, supra note 9, at 133–35 (discussing the use of seriatim opinions in the British tradition); cf. John P. Kelsh, The Opinion Delivery Practices of the United States Supreme Court 1790–1945, 77 Wash. U. L.Q. 137, 140–41 (discussing the Supreme Court's use of seriatim opinions in the pre-Marshall era).

[92] See Walter V. Schaefer, Precedent and Policy, 34 U. Chi. L. Rev. 3, 9 (1966) ("The older practice of filing separate opinions helped considerably to eliminate the inherent element of unreliability in judicial decisions. But the working bar does not like multiple opinions. Paradoxically, the dislike seems to be based upon a desire for certainty.").

[93] See generally Symposium, Have We Ceased to Be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions, 62 Wash. & Lee L. Rev. 1429 (2005) (discussing Rule 32.1 of the Federal Rules of Appellate Procedure, which would require federal courts of appeal to permit citation to unpublished opinions); Anne Coyle, Note, A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals, 72 Fordham L. Rev. 2471 (2004).

[94] See Pether, supra note 67, at 1528–35; Richman & Reynolds, supra note 65, at 281–86.

the institutional legitimacy of the courts. As Idleman argues, "[t]he first potential source of institutional legitimacy—or, if absent, a potential source of diminished legitimacy—is unanimity or near unanimity in judicial opinions."[95] Once again, however, this argument is wholly speculative,[96] especially as applied to appellate courts that are not subject to nearly the same level of public scrutiny as the state and federal supreme courts. There is no doubt that past United States Supreme Court justices have gone to great lengths to achieve unanimity in highly controversial cases. *Brown v. Board of Education*[97] and *Cooper v. Aaron*[98] are perhaps the two most cited modern examples in which unanimity was thought to be essential to the Court's legitimacy.[99] It is difficult to know exactly what effect non-unanimity would have had in these cases. But the argument that the Court's unity helped to secure compliance with its decisions in *Brown* and *Cooper* cannot withstand scrutiny in light of all that we know about massive resistance.[100] Whether unanimity has had longer-term benefits is a difficult and murky question best left to historians.[101] More recent examples of highly charged cases suggest, however, that even an extremely divided Supreme Court can maintain broad-based public support. The most obvious example is *Bush v. Gore*.[102] Despite early claims that a polarized Court had caused itself irreparable damage, no legitimation crisis has materi-

[95] Idleman, supra note 2, at 1388.

[96] See Caminker, supra note 5, at 2350. In discussing the possibility that judges might candidly disclose vote-trading, a radical practice by conventional standards, Caminker writes that "the premise that open vote trading would diminish judicial respect, equally speculative as the claim we started with that dissembling would breed disrespect, remains undefended as of yet." Id.

[97] 347 U.S. 483 (1954).

[98] 358 U.S. 1 (1958).

[99] See Idleman, supra note 2, at 1389–90.

[100] See Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 389–408 (2004) (describing massive resistance in the Deep South following the decisions in *Brown* and *Cooper*); see also Gewirtz, supra note 12, at 670 ("But it is hard to believe that the Court's failure to acknowledge the true reasons for 'all deliberate speed' produced less resistance than a candid and careful explanation would have.").

[101] See, e.g., Ellmann, supra note 10, at 770 ("[I]t is hard now, fifty years later, to know whether unanimity really made a great difference to *Brown*.").

[102] 531 U.S. 98 (2000).

alized.[103] This is not to say that *Bush v. Gore* was a candid opinion.[104] I take no position on that question here. The only issue is whether unanimity is required for institutional legitimacy. In the wake of *Bush v. Gore*, it is increasingly difficult to take that argument seriously.

B. Not Enough Sincerity

A second objection to the principle of judicial sincerity approaches the issue from the opposite direction. Instead of claiming that the principle requires too much sincere disclosure, the argument here is that it does not require enough. We have already seen the beginning of this objection in discussing the distinction between judicial sincerity and candor. There, I argued that judicial sincerity does not require judges to write separately for the purpose of disclosing all that they believe is relevant to a decision. This claim is open, however, to the objection that judges ought to give what they believe are the best possible justifications for their legal conclusions. Anything less is the result of compromise based on judicial politics rather than a decision grounded in principle. This objection is supported by two additional points. First, proponents of it would not require candor in the sense of "full disclosure" and would therefore not be subject to the criticism that they demand either the impossible or the absurd.[105] The objection only challenges the "sufficient reason" formulation of the principle of judicial sincerity. It would replace this version of the principle with one based on best possible justifications, or some similar heightened epistemic requirement. Second, as I noted above, the value of actual publicity supports introducing the strongest possible justifications into public deliberation. This enables others to challenge and scrutinize them. For this reason, one might argue that the principle of judicial sin-

[103] See James L. Gibson, The Legitimacy of the U.S. Supreme Court in a Polarized Polity, 4 J. Empirical Legal Stud. 507, 533 (2007) (concluding that *Bush v. Gore* has not undermined public confidence in the Supreme Court); Jeffrey L. Yates & Andrew B. Whitford, The Presidency and the Supreme Court After Bush v. Gore: Implications for Institutional Legitimacy and Effectiveness, 13 Stan. L. & Pol'y Rev. 101, 118 (2002) (arguing that *Bush v. Gore* will not have long-term effects on the Court's institutional legitimacy).

[104] See Dworkin, supra note 18, at 53–55; Posner, supra note 2, at 331–47, 349–51.

[105] See supra Section I.B.

cerity is weaker than it needs to be. After all, why should judges refrain from stating the best reasons for their legal decisions?

Although I am generally sympathetic to this objection, it appears to foreclose the possibility of principled compromise. Judges who are indifferent between two reasons for a decision can state either one. But a judge who believes that one reason is preferable to another, even though either would be sufficient, must announce the better reason, regardless of what other judges believe. Perhaps a thorough-going purist would require the disclosure of the best available justification, but there is room here for compromise without sacrificing the underlying ideal of justifying legal authority to those governed by it. Judges who disagree about what constitutes the best possible justifications might nevertheless converge on a sufficient reason. In reaching such an agreement, they may be able to promote other values of adjudication, including some of those mentioned above. The cost of writing separately may not be high, but, where there is common ground on sufficient reasons, incurring such costs is also unnecessary, and perhaps even wasteful. Once the requirement to give adequate justification is met, there is no reason that other considerations should be excluded from playing a role in judicial decisionmaking.

This reply to the objection helps to explain a piece of conventional wisdom about the duty of judicial candor. Shapiro writes that "the prevailing view of the judicial function (and one I fully accept) would support the judge who, as an individual, does not go as far as he might be willing to go if the case before him does not require it."[106] A judge who goes only as far as the case requires can be understood as having provided a sufficient justification for a decision; whereas, at least on some theories of adjudication, a judge who goes beyond what the case requires might be seen as offering the best possible justification. Although the latter may be commendable, it is not obligatory. And for that reason, there is no failure of sincere justification, or, in Shapiro's terms, no problem of candor.

VI. THE LIMITS OF JUDICIAL SINCERITY

The duty to comply with a principle of judicial sincerity is supported by weighty moral and political values. Because judges wield

[106] Shapiro, supra note 1, at 736.

the power of the state, they must show that their decisions are justified according to the law. When the law is morally illegitimate, however, judges are faced with a conflict between their role-based duties and the moral rights of those subject to their decisions. In such cases, judges must decide whether to apply the law faithfully, openly reject it, resign, or subvert the law by making insincere assertions about what it actually requires.[107] The conditions under which it is morally permissible or obligatory to choose the last of these options represent the limit of the principle of judicial sincerity. To specify that limit would require a more complete account of political legitimacy, including a description of the proper circumstances for civil disobedience.

Even without such an account, however, it is important to recognize that a judge who violates the duty of judicial sincerity undermines the value of legal justification. The judge must weigh that value against the moral right protected by the act of subversion. He or she must come to the conclusion that the parties to adjudication, and all others governed by the decision, are not owed a justification for it. Or if they are owed a justification, one cannot be given because of the profound immorality of the legal and political system to which they are subjected. I would argue that this sort of global condemnation ought to occur rarely in most constitutional democracies.[108] But to evaluate that claim requires appealing to a broader political theory within which the role-based obligations of judges are justified. I have discussed only a limited range of values within such a theory, focusing mainly on an ideal of legitimacy. Although that ideal embodies important values, there are other moral considerations that may weigh against it. To the extent that the limits of judicial sincerity require an all-things-considered moral judgment, what can be said here is that, except under extraordinary circumstances, the values which support the principle should give judges strong reasons not to violate it.

[107] See Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 6 (1975); see also Butler, supra note 19, at 1817–21 (arguing that judges should sometimes lie to avoid extreme injustices); Shapiro, supra note 1, at 749 (same).

[108] See Shapiro, supra note 1, at 750 ("Thus in a society that aspires to be just, the situation in which a judge might reasonably feel compelled to lie should be extremely rare.").

CONCLUSION

The argument for the principle of judicial sincerity is based on the moral value of giving people reasons for the way in which the state treats them. This justification for the principle is grounded in deontological reasoning about the necessary conditions of legitimate adjudication. Such an approach has two important benefits. First, it avoids many of the most intractable controversies over theories of adjudication. Judicial ethics does not require a complete account of how judges should make decisions. It can rest on a more abstract model of the judicial role. Second, and perhaps more important, a moral argument for judicial sincerity helps to correct an imbalance in recent commentary about the duties of judges. Most critics and defenders of judicial candor have framed their arguments in pragmatic or prudential terms. For the most part, I have not tried to engage such arguments, except to show that the principle of judicial sincerity is not infeasible or utopian. Rather, my aim has been to develop an independent argument using the concepts of sincerity, publicity, and justification. That argument incorporates some consequentialist claims about the value of actual publicity in improving the quality of judicial decisionmaking. But those claims serve the more fundamental value of justifying legal authority to those subject to it. That value is one that pragmatists have obscured in their criticisms of the conventional wisdom supporting a duty of judicial candor. They have made it difficult to see why that duty has been considered so important in the process of adjudication. The appropriate response is to provide an account of the duty that clarifies its content and explains its motivation and appeal. If the argument above is successful, it will have done just that.