

NOTES

JUDICIAL CANDOR AND EXTRALEGAL REASONING: WHY EXTRALEGAL REASONS REQUIRE LEGAL JUSTIFICATIONS (AND NO MORE)

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INTRODUCTION

Chief Justice John Roberts's opinion in *National Federation of Independent Business v. Sebelius*¹ and his vote to uphold the Affordable Care Act's individual mandate² generated much criticism. Some accounts suggest that Chief Justice Roberts voted as he did out of concern for his and the Court's legacies, regardless of the governing law.³ These accounts impute extralegal motives on Chief Justice Roberts, sometimes as indictment⁴ and sometimes as

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1 132 S. Ct. 2566 (2012).

2 26 U.S.C. § 5000(a) (2012).

3 See, e.g., Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/> ("Roberts pays attention to media coverage. As chief justice, he is keenly aware of his leadership role on the court, and he also is sensitive to how the court is perceived by the public."); see also Brett LoGiurato, *Report: John Roberts Switched His Obamacare Vote at the Last Minute*, BUSINESS INSIDER (July 2, 2012, 1:02 PM), <http://www.businessinsider.com/john-roberts-switched-affordable-health-care-vote-2012-7> ("Crawford's sources portray Roberts as a Chief Justice that was worried about the court's perception and his own legacy.").

4 See, e.g., Ted Nugent, *Opinion, Turncoat Roberts*, WASH. TIMES (July 5, 2012), <http://www.washingtontimes.com/news/2012/jul/5/turncoat-roberts/> (lamenting the Chief Justice's "traitor vote" to avoid "[s]triking down un-American, Constitution-violating Obamacare"); see also Congressman Jack Kingston (@JackKingston), TWITTER (June 28, 2012, 8:05 AM), <http://ow.ly/SZINl> ("With #Obamacare ruling, I feel like I just lost two great friends: America and Justice Roberts.").

praise.⁵ Either way, *NFIB* revived two important questions: When, if ever, may a judge decide a case based on extralegal considerations? And if he does, must he disclose his extralegal considerations in his written opinion?

This Note is concerned with the second question. It resolves that question by arguing that when a judge makes a decision based on an extralegal factor, she should omit discussion of her reliance on that factor and justify her decision with legal reasoning.

This Note is thus concerned with the Chief Justice's decision not to disclose any extralegal reasons in *NFIB*. It assumes that he voted as he did for extralegal reasons, namely, to preserve the Court's legitimacy. Of course, it is plausible—maybe more plausible than not—that Chief Justice Roberts believes that the individual mandate is a constitutional exercise of Congress's taxing power.⁶ Or, Chief Justice Roberts's decision may have been a product of judicial restraint, permitted or required by law—an act of wisdom in the face of the other two federal branches' foolishness.⁷ The sole questions with which this Note is concerned are whether the Chief Justice was right to omit from his opinion any discussion of those legitimacy concerns and to justify his decision with legal reasoning.

This Note will say little about what precisely constitutes extralegal reasoning, as opposed to legal reasoning. The question of the legitimacy of judicial reasoning is well-explored.⁸ Some would argue that the preservation of the judiciary's legitimacy is a legal consideration. Others would argue that moral considerations are legal justifications for outcomes or that the law can be altered to accommodate a judge's conceptions of morality. This Note leaves it to the reader and the jurist to draw that line.

Relatedly, this Note will take a subjective view of judicial candor. The assertion that an actor should disclose what *he believes* the reasons for his actions were is a subjective prescription for candor, where the assertion that he should disclose what the reasons *actually were* is an objective one. In a similar context, Professor Idleman has noted that the subjective view simplifies discussions on candor and is likely the view readers already have in mind.⁹

5 See, e.g., Michael Knox Beran, *Why Roberts Was Right*, NAT'L REV. ONLINE (June 29, 2012, 12:00 PM), <http://www.nationalreview.com/article/304428/why-roberts-was-right-michael-knox-beran> (arguing that Chief Justice Roberts's "wisdom and restraint contrast starkly with the folly of President Obama and former speaker Pelosi").

6 See *NFIB*, 132 S. Ct. at 2601 ("Section 5000A is therefore constitutional, because it can reasonably be read as a tax.").

7 See, e.g., Beran, *supra* note 5; see also Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 84 (2012) ("[I]t is hard not to see Chief Justice Roberts's opinion in *NFIB* as a consummate act of institutional diplomacy.").

8 See generally, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

9 Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1321 (1995). For a discussion on the merits of subjective and objective formulations of judicial candor, see *id.* at 1317–21.

This Note's first Part explores two landmark Supreme Court cases, *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁰ and *NFIB*, that may have been decided based on extralegal considerations. Part II describes three prominent theories of judicial candor with an eye to the results they might yield with respect to extralegal reasoning. Part III offers and defends a new, partial theory of judicial candor. This theory is that a judge who employs extralegal reasoning should omit discussion of her reliance on that reasoning and justify her decision with legal reasoning.

The first two Parts will demonstrate that there is a strong presumption for judicial disclosure and an even stronger one against insincerity. This Note accepts those presumptions, but only where the reasoning in question is legal. Thus, a judge should omit discussion of his reliance on extralegal considerations because: (a) the alternative asks too much of the judge; (b) disclosing extralegal reasoning risks leading other judges to believe that engaging in extralegal reasoning is normal and proper; (c) such disclosure is defiant and disrespectful to litigants and to the public; (d) disclosing extralegal reasoning risks legalizing that reasoning; and (e) such disclosure harms the judiciary's legitimacy. Instead of disclosing his reliance on extralegal reasoning, the judge should justify his decisions with legal reasoning. This Note also discusses and defends against the criticisms that by omitting and justifying extralegal reasons, judges violate their own moral duties, the rights of litigants, and the rights of the public as a whole.

As the above discussion regarding *NFIB* demonstrates, this Note operates under several assumptions about judicial decisionmaking processes surrounding important, controversial cases, without attempting to empirically prove those assumptions' truth or validity. In particular, the cases this Note discusses in Part I appear throughout the whole Note in gratuitously stylized forms. This Note will make its assumptions clear, but its applicability to those particular cases is limited. The cases are nothing more than familiar occasions on which to discuss abstract ideas.

I. THE SUPREME COURT'S JUSTIFICATION OF EXTRALEGAL REASONING

This Part considers two Supreme Court cases that present opposite methods of justifying extralegal reasoning. *Planned Parenthood of Southeastern Pennsylvania v. Casey* discloses a line of reasoning many consider extralegal. In contrast, *NFIB v. Sebelius* does not disclose such reasoning. For the reasons discussed in Part III, this Note prefers *NFIB*'s nondisclosure.

The extralegal motives these cases may represent are essentially attempts to preserve the Supreme Court's institutional legitimacy. However, the problem of judicial candor is relevant elsewhere. Arguments about judicial can-

10 505 U.S. 833 (1992).

dor are important to the question when to issue concurring opinions¹¹ and to the scope of stare decisis.¹²

This Note assumes that *Casey* and *NFIB* were decided to preserve the Court's legitimacy and that legitimacy concerns are extralegal. The reader is asked to bracket concerns over these assumptions, as proving or disproving either would be tangential.

A. Disclosure

In *Casey*, the Supreme Court revealed a rationale some may consider extralegal. The history of *Casey* is well-known. Almost twenty years after *Roe v. Wade*,¹³ and a year after President George H.W. Bush replaced two Democrat-appointed Justices,¹⁴ the Court faced the question whether to preserve the constitutional right to an abortion and reaffirm *Roe's* trimester framework. It chose to do so in part.¹⁵

The *Casey* Court disclosed that its decision was motivated by a desire to preserve its own legitimacy. The breakdown of written opinions was complicated; all in all, five Justices voted to reaffirm parts of *Roe* on the basis of stare decisis.¹⁶ Joined by two concurring Justices, the plurality wrote that “[t]he Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to deter-

11 See Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1012–19 (2008).

12 See Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 224–25 (2014). Professor Kozel argues that in addressing precedents, courts should describe both their reasons for adhering to precedents and the normative premises that motivate their adherence. *Id.* at 224. Presumably, most judges would consider those premises to be perfectly legal considerations.

13 410 U.S. 113 (1973).

14 David Souter replaced William Brennan in 1990, and Clarence Thomas replaced Thurgood Marshall in 1991. *David H. Souter*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/s/david_h_souter/index.html (last visited Nov. 6, 2015); *Clarence Thomas*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/t/clarence_thomas/index.html (last visited Nov. 6, 2015).

15 *Casey*, 505 U.S. at 846.

16 Justices O’Connor, Kennedy, and Souter wrote the lead opinion, in which Justices Stevens and Blackmun concurred in part. *Id.* at 843–901; *id.* at 911–22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922–43 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justices Stevens and Blackmun agreed with Justices O’Connor, Kennedy, and Souter that *Roe v. Wade's* essential holding should be retained. *Id.* at 845–46 (opinion of the Court); *id.* at 912 (Stevens, J., concurring in part and dissenting in part) (referring to *Roe's* “central holding”); *id.* at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Chief Justice Rehnquist and Justices Scalia, White, and Thomas joined the Court in upholding three aspects of the state statute in dispute, and they dissented to the section of the Court’s opinion that reaffirmed *Roe*. *Id.* at 944–79 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 979–1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

mine what the Nation's law means and to declare what it demands."¹⁷ The plurality continued,

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.¹⁸

It then discussed two instances in which it would come under especially heavy scrutiny for overruling cases: excessively frequent overruling and overruling cases that have resolved divisive controversies.¹⁹ The plurality found itself in an instance of the second type and famously asserted that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."²⁰ It concluded that it was thus important to adhere to *Roe*.²¹ Regardless of whether it was proper to express such a strong concern with its own legitimacy, the plurality invoked a principle that some would consider outside the law's boundaries.²² It did so clearly, candidly, and over strong objection.

In an impassioned dissent, Justice Scalia asserted that "to portray *Roe* as the statesmanlike 'settlement' of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian."²³ He continued,

I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced . . . by the substantial and continuing public opposition the decision has generated. . . . In my history book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford* . . .

. . . [W]hether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening.²⁴

While the plurality felt obligated to engage the question of legitimacy, Justice Scalia found its adherence to legitimacy concerns "of almost czarist

17 *Id.* at 865 (plurality opinion).

18 *Id.* at 865–66.

19 *Id.* at 866.

20 *Id.* at 867.

21 *Id.* at 869.

22 For a more thorough discussion on the *Casey* Court's motives, see Fallon, *supra* note 8, at 1839–42.

23 *Casey*, 505 U.S. at 995 (Scalia, J., concurring in the judgment in part and dissenting in part).

24 *Id.* at 998 (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV).

arrogance.”²⁵ Part III of this Note will suggest that if Justice Scalia was right, it was just as arrogant for the plurality to *disclose* an extralegal rationale.

B. *Nondisclosure*

The alternative to *Casey* is nondisclosure of extralegal reasoning. It is much harder to prove and discuss nondisclosure. This Note’s Introduction discussed the speculation that surrounded Chief Justice Roberts’s vote in *NFIB*, and this Section will not reiterate. To illustrate an instance of nondisclosure, let us assume that Chief Justice Roberts’s vote to uphold the Affordable Care Act’s individual mandate was motivated by extralegal factors.

II. THEORIES OF CANDOR AND SINCERITY

This Part will discuss existing theories of judicial candor advanced by Professors David Shapiro,²⁶ Scott Idleman,²⁷ and Micah Schwartzman.²⁸ This Part demonstrates that this Note’s thesis aligns with parts of their theories. While some may perceive arguing for limits on candor to be “Grinch-like,”²⁹ it is not too far off the beaten path to propose that extralegal reasons should be justified with legal ones.

The three authors devote due space to defining candor and sincerity. This Part discusses each professor’s definitions and distinctions, but it ultimately takes Professor Schwartzman’s approach to the issue, that sincerity is honesty and candor is some combination of sincerity and disclosure.³⁰ Professor Schwartzman writes that sincerity “requires correspondence between what people say, what they intend to say, and what they believe.”³¹ So a speaker is sincere if the message he conveys is one he intends to convey and believes.³² Judicial sincerity requires the judge to disclose a single reason he finds sufficient to justify his decision.³³ Candor, then, is sincerity *plus* the disclosure of *all* relevant reasoning.³⁴

25 *Id.* at 999.

26 David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

27 Idleman, *supra* note 9.

28 Schwartzman, *supra* note 11. This Part discusses the articles in chronological order because the latter two frequently refer to the preceding articles.

29 Shapiro, *supra* note 26, at 738.

30 See Schwartzman, *supra* note 11, at 994 (“[C]andor is an ambiguous concept that can be broken down into requirements of sincerity and disclosure.”).

31 *Id.* at 992.

32 See *id.* (“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*.”). Professor Schwartzman distinguishes this formulation from what others have called “sincerity as single-mindedness,” which focuses on how genuinely the speaker holds her belief. *Id.* at 993. Like Professor Schwartzman’s article, this Note will put aside the question how certain a judge must be about his beliefs to hold them sincerely. See *id.* at 994.

33 *Id.* at 1017.

34 See *id.* at 996. Professor Schwartzman’s view lets us carefully consider questions about the kinds of disclosures judges must make and whether those disclosures must be sincere. Cf. *id.* at 997.

A. *Professor Shapiro: In Defense of Judicial Candor*

In an essay written for the *Harvard Law Review's* centennial issue, David Shapiro argues for a strong presumption in favor of judicial candor.³⁵ *In Defense of Judicial Candor* argues that candor is necessary to treat litigants and participants in the judicial process with respect.³⁶ “[L]ack of candor,” Professor Shapiro writes, “often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker.”³⁷ Professor Shapiro finds the need for trust in communication especially strong in the judicial process, and he argues that judicial candor constrains the judiciary’s power.³⁸

Professor Shapiro defines candor as honesty; on his view, a speaker is candid when she gives enough information not to mislead her audience.³⁹ He generally pits candor against dishonesty and implies that the inverse of candor is deception.⁴⁰

After defining candor and offering a brief affirmative argument in its favor, Professor Shapiro spends the bulk of the essay addressing five objections to judicial candor. The first objection is continuity. Professor Shapiro rebuts the alteration of opinions to maintain continuity of our legal system on the ground that there is less need for such devices “and more awareness of their flimsiness” than in past generations.⁴¹ The second objection is the need for collegiality and majority building in a multi-member court. Here, Professor Shapiro views the outer limit of judicial compromise as writing or joining statements that misrepresent the judge’s views.⁴² The third objection is that honesty may harm the audience. In such fear, Professor Shapiro finds paternalism and elitism.⁴³ Fourth, there is the “tragic choice.” Professor Shapiro argues that dishonesty is unnecessary to avoid dilemmas on critical choices and suggests that its use will perpetuate the tragic choice.⁴⁴ Finally, Professor Shapiro addresses conflicts between law and morality and concludes that such conflicts might compel a judge to lie.⁴⁵ Disagreement with

35 Shapiro, *supra* note 26, at 738.

36 *Id.* at 736–38.

37 *Id.* at 736–37.

38 *Id.* at 737 (“A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary’s exercise of power.”).

39 Schwartzman, *supra* note 11, at 996 (discussing Shapiro’s formulation of candor).

40 Shapiro, *supra* note 27, at 738–39 (“[W]ho, after all, would be Grinch-like enough to argue for lack of candor? I would surely be hard-put to identify anyone who advocates deception across the board . . .”).

41 *Id.* at 740.

42 *Id.* at 743.

43 *Id.* at 745–46 (“[W]e, as scholars, understand what is at stake and can stand in the glare of truth without flinching, but we fear that ordinary people, even judges, would wilt if they were exposed to the light.”).

44 *Id.* at 748.

45 *Id.* at 749.

the rule to be applied is not enough to merit dishonesty, though, and moral conflicts come about rarely and should be considered carefully.⁴⁶

In short, Professor Shapiro asserts that “candor is to the judicial process what notice is to fair procedure,” as the public can measure the judge’s fidelity to the law only if he believes what he writes.⁴⁷ The only exceptions to the duty of candor are for moral conflicts and emergency circumstances.⁴⁸

B. *Professor Idleman: A Prudential Theory of Judicial Candor*

Professor Idleman bills his article, *A Prudential Theory of Judicial Candor*, as an attempt to encourage scholars and professionals to ask why candor is virtuous. He rejects Professor Shapiro’s presumption in favor of candor and instead advances a theory that affords judges discretion in their disclosures.⁴⁹

Professor Idleman first examines nine rationales in favor of judicial candor: that candor keeps judges accountable to other actors; that it restrains their power; that it makes for better written opinions; that more candor leads to more authoritative decisions; that candor justifies outcomes to litigants; that it provides guidance to other parties with interests in the judicial process; that it is a method of catharsis for judges; that it fosters development of the law; and finally, that candor is a general moral obligation.⁵⁰

In addition to the nine rationales in favor of candor, Professor Idleman proposes six constraints on candid disclosure. Three of these constraints—limited foresight, relative inefficacy, and consensus-building—are “practical,”⁵¹ and the other three—moral exigency, institutional legitimacy, and the need for legal phraseology—are “normative.”⁵²

Professor Idleman proposes a three-stage process for determining whether to disclose particular lines of reasoning. He characterizes this theory as “grounded in prudentialism—the view that judicial decisionmaking may properly rest on political and institutional considerations.”⁵³ In Professor Idleman’s first stage, the judge asks whether any of the nine pro-candor rationales applies to the case at bar. Assuming that some do, stage two asks whether any practical or normative restraints on candor should apply. Once the judge chooses the appropriate “level” of candor, he asks in stage three whether prudential considerations favor disclosure “within the realm of discretion created by the logical limitations” of stage one.⁵⁴

46 *Id.* at 749–50.

47 *Id.* at 750.

48 *Id.* at 749–50.

49 Idleman, *supra* note 9, at 1307.

50 *Id.* at 1335–76.

51 *Id.* at 1382–85.

52 *Id.* at 1386–95.

53 *Id.* at 1310.

54 *Id.*

C. *Professor Schwartzman: Judicial Sincerity*

In *Judicial Sincerity*, Professor Schwartzman defends a presumption in favor of judicial candor, but only insofar as it requires honesty.⁵⁵ He confronts Professor Idleman's and others'⁵⁶ objections, claiming that the problem with a prudential theory of candor is that it dismisses the normative force behind prescriptions for candor.⁵⁷ Professor Schwartzman's argument focuses on legitimacy and suggests that judges may be insincere only when there is a serious conflict between the judge's role and litigants' moral rights.⁵⁸ Such a conflict requires a judge to balance the value of legitimacy with other moral considerations.⁵⁹

Professor Schwartzman's argument boils down to the following:

[J]udges 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 . . . 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 give sincere legal justifications violate this condition of legitimacy.⁶⁰

Professor Schwartzman wrestles with various philosophical formulations of judicial sincerity, and he ultimately suggests that the most useful one requires a judge to disclose at least one reason for her decision that she believes is sufficient to justify the decision, and offer *only* reasons she believes are sufficient to justify the decision.⁶¹ In other words, she *must* disclose *at least one* sufficient reason, and she *cannot* rely on reasons she believes are insufficient.

Professor Schwartzman asserts that judges are required to fulfill the requirements of sincerity, only half of the candor equation.⁶² The other half entails the judge's duty to disclose *all* the reasons sufficient to her decision, and Professor Schwartzman asserts that she has properly fulfilled her judicial

55 Schwartzman, *supra* note 11, at 988.

56 Professor Schwartzman responds to theories advanced by Judge Posner, Professor Martin Shapiro, and Professor Zeppos. See *id.* at 988 (citing 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)).

57 *Id.* at 990.

58 *Id.*

59 *Id.*

60 *Id.* at 990–91.

61 *Id.* at 1016 (“(PJS’) [modified principle of judicial sincerity]: 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*.”).

62 *Id.* at 1016–19; see also *id.* at 1016 (“The duty of sincere public justification is therefore more constrained than a general duty of candor.”).

role when she discloses *one* sufficient reason.⁶³ Furthermore, he argues that judges who overdisclose can provoke hostility and unnecessary conflict.⁶⁴

He then describes and responds to two potential objections to his theory. The first is that it requires too much judicial sincerity. In part, Professor Schwartzman responds to claims that sincerity would lead to the proliferation of separate opinions and would thus weaken the judiciary by creating weak precedents and obscuring other legal opinions.⁶⁵ He points to the commonplace use of seriatim opinions in stable countries and suggests that more sincere opinions might increase stability by providing more information about judges.⁶⁶ Professor Schwartzman also responds to Professor Idleman's assertion that unanimity breeds legitimacy, arguing that concern over the lack of unanimity is speculative, especially when applied to appellate panels whose decisions are generally not subject to much public scrutiny.⁶⁷ The second objection to Professor Schwartzman's proposal is that it does not require enough disclosure. The objection is that judges should give the *best* possible justifications for their conclusions and that giving suboptimal reasons is a product of politics rather than legal principle.⁶⁸ Professor Schwartzman concedes that there is value in letting litigants and the public debate the best reasons for judicial decisions but observes that this objection might destroy the possibility of principled compromise.⁶⁹ He concludes that disclosing the best reasons available is commendable but not obligatory.⁷⁰

III. JUDICIAL CANDOR AND EXTRALEGAL REASONING

The three authors whose work is discussed in Part II agree, at least in part, that judicial writing carries the same presumption against *lying* that applies to most human discourse.⁷¹ The presumption against *omission*, however, is not quite as strong. This Part will argue that the presumption against omission is overcome when the choice is between disclosing and withholding a judge's reliance on extralegal reasoning. It will also suggest that the presumption against insincerity is overcome when extralegal reasoning is in play, at least insofar as extralegal reasoning should be justified by legal reasons.

Section III.A will offer an affirmative argument for the proposition that a judge who employs reasoning he considers extralegal should omit discussion of his reliance on the extralegal consideration and justify his decision with reasoning he considers legal. Section III.B will briefly address and respond

63 *Id.*

64 *Id.* at 1018.

65 *Id.* at 1022.

66 *Id.* (citing, inter alia, Shapiro, *supra* note 26, at 743).

67 *Id.* at 1023.

68 *Id.*

69 *Id.* at 1025.

70 *Id.*

71 *See, e.g., id.* at 987–88 (“A strong presumption against lying applies to most of our interactions with other people. The same presumption would seem to hold in the context of judicial decisionmaking.”).

to a possible counterargument, based on judges' moral duties, litigants' rights, and the rights of the public as a whole.

A. *Omission and Justification*

A judge may, from time to time, decide an issue of law based on a factor that he believes is outside the bounds of the law. It could be as simple as distaste for a particular attorney and as complex as concern for the impact of a sure-to-be-unpopular decision on his court's political capital. This Note provides a theory of how to justify such a decision. At this point the reader is again asked to bracket her thoughts on the propriety of using extralegal considerations. Most would agree that a judge should not base his legally binding decisions on the color of counsel's necktie or on the parties' socioeconomic statuses. The question is more difficult when it comes to institutional legitimacy and moral conflict. Regardless of how judges should solve those problems, this Note is concerned with how they *tell* us they solve them.

This Note proposes that a judge who has made a decision based on an extralegal consideration should do two things in his written opinion, each of which requires its own explanation and defense. First, he should omit discussion of his reliance on the extralegal consideration. Second, he should justify his decision with legal reasoning. This Section will describe and defend each of these claims in turn.

1. Omission

First, the judge should omit any discussion of his reliance on the consideration he considers extralegal. This prescription has the most impact and is vulnerable to the most criticism when that consideration controlled the decision. So if, in a highly publicized criminal case, a judge rules against the defendant because (a) he believes the defendant is guilty of the crime and (b) there is public pressure to rule against the defendant, and if the judge ultimately finds the public pressure dispositive, the prescription to withhold the second consideration is more impactful than it would be if the judge found the legal reason dispositive. Things get more complicated when the judge does not believe the first consideration is adequate to support his ruling, but this Part will eventually suggest that even if he finds the first consideration insufficient, he should say nothing of the second.

There are at least five compelling reasons a judge should say nothing of an outcome-controlling extralegal consideration. First, the alternative, extending the requirements of candor to extralegal reasoning, simply requires a judge to disclose too much. If we ask a judge to disclose extralegal motives, are we asking her to disclose *all* her motives? To maintain compliance with that vision, must she disclose that the brooch on counsel's lapel played a small part in her decision to deny an evidentiary motion? Perhaps that is a scarecrow opponent—the critic would sooner argue that the judge should merely disclose *controlling* extralegal considerations. This line of reasoning would yield that in the highly publicized case mentioned above, the

judge should disclose both his merits-based and his publicity-based considerations. That is an improvement, but it still fails to account for the reality that judges are capable of irritability, anger, and frustration, as well as sympathy, empathy, and even lust. Should the judge engage in and then publicize a thorough analysis of the psychological reasons that lead her to rule as she does? Should she describe all the experiences in her private life that came to bear on her decision? It is too much to ask a judge to delve into the depths of her psyche each time she writes an opinion. There must be an outward limit on what judges are required to disclose, and it makes sense that the limit is legality.

Second, disclosing extralegal rationales in judicial opinions sends a problematic message to other judges: that *engaging in* extralegal reasoning is normal and proper. That message risks perpetuating or increasing the employment of extralegal reasoning as a means of adjudication. This reason is especially important for appellate judges who set examples for lower courts and bind their actions. Of course, the reader might think there is nothing wrong with certain kinds of extralegal reasoning. Even if the reader accepts extralegal reasoning as the reality of judicial decisionmaking (legitimate or not), he will see that a few institutional considerations counsel against its prolific employment.

The first problem with prolific employment of extralegal reasoning is the question of line drawing—if extralegal reasoning is legitimate, what is not? There must be a line between tie colors and moral or political considerations. Finding that line cannot be easy. Second, what does the use of extralegal reasoning say about the role of the judiciary, especially when the relevant law has been created by some other government actor? At the federal level, it risks reducing the lawmaking capacity of all three branches of the government to the judge's whim. Finally, use of extralegal reasoning may harm the values of predictability and fairness to litigants—extralegal considerations are more likely to be unwritten, unknown, and unpredictable. That is to say we often *know* what the law is, and there is less uncertainty surrounding it than there is surrounding judges' personalities and political or moral calculi. Certainly there are more problems with the deployment of extralegal rationales. Regardless of what those problems are, disclosing extralegal rationale risks leading other judges to indulge extralegal considerations with more force and depth.

Third, disclosing extralegal reasoning is defiant to litigants and to the public. Judges take oaths to uphold the law. Those oaths tell the people whose actions judges will bind that they will uphold the law and apply it justly. In this respect, disclosing extralegal reasoning is not only an admission of failure but also a sign of disrespect to litigants who seek to have their disputes *at law*. It could be argued that in the same way lying to litigants shows them disrespect,⁷² withholding the *real* reasons—or the *best* rea-

72 Cf. *id.* at 990–91 (positing that insincere judges violate a “condition of legitimacy” that the exercise of judicial power must be justified “in a way that those who are subject to it can, at least in principle, understand and accept”).

sons⁷³—for how judges treat litigants is disrespectful. The answer to that concern is that the judge should still disclose the best *legal* reason for his decision. This fulfills the requirement of sincerity, and it is not necessary to rise to the level of extralegal disclosure in order to show respect to litigants.⁷⁴

Fourth, disclosing extralegal rationales in judicial opinions risks legalizing those rationales. Karl Llewellyn wrote that “[w]hen [a court] speaks to the question before it, it announces *law*, and if what it announces is new, it legislates, it *makes* the law.”⁷⁵ This statement is unquestionably true in state common law systems, and even in the federal judiciary, a judge’s decision on how to formulate the Constitution or a statute has drastic impacts on litigants.⁷⁶ A judge who presents an extralegal consideration as having controlled a case’s outcome might signal to another judge that she should use the same consideration to decide similar cases.

Fifth and finally, disclosing extralegal considerations reflects arrogance. Justice Scalia saw the *Casey* plurality’s employment of legitimacy concerns as arrogant,⁷⁷ but the more harmful arrogance may lie in the Court disclosing that employment. Had the *Casey* Court reaffirmed *Roe* on its merits and said nothing of caving to public pressure on either side—even if its motivators were the ones it disclosed in real life—the arrogance to which Justice Scalia referred would still be there in fact. But it is not until it is disclosed that it does the most harm, that it changes how litigants, other government actors, and the general public see the Court as an institution. The act of disclosure risks signaling to litigants and the general public that judges do not care to decide a case on its merits. This consideration is especially relevant when the extralegal factor in question is the preservation of the Court’s own legitimacy.

Realists may assert that legitimacy considerations would ultimately inform the Court’s choice regardless of how the opinion in *Casey* was written. They might appreciate being told the best reason or the “real” reason for a court’s decision. In this respect, *Casey*—even in the stylized form this Note presents—might be outside the prescription for nondisclosure. If, as it

73 See *id.* at 1024–25 (“[O]ne might argue that the principle of judicial sincerity is weaker than it needs to be. After all, why should judges refrain from stating the best reasons for their legal decisions?”). Professor Schwartzman writes that this objection to judicial sincerity “foreclose[s] the possibility of principled compromise.” *Id.* at 1025.

74 Cf. *id.* at 1016 (stating that judges who share Professor Schwartzman’s view of sincerity need not disclose all their subjectively sufficient reasoning).

75 K.N. LLEWELLYN, *THE BRAMBLE BUSH* 42 (Oceana Publications 1951) (1930).

76 See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The three-prong *Lemon* test has come under criticism as being particularly detached from the source of law it was meant to enforce, the Establishment Clause of the First Amendment. See, e.g., Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) (“[T]he *Lemon* test . . . is premised on an underlying view of the establishment clause which is both historically unjustified and textually incoherent.”).

77 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

appears,⁷⁸ there was no majority consensus on *Roe*'s merits, and the dispositive consideration for the decision was the preservation of the Court's legitimacy, the principle that judges should disclose only sufficient legal reasons and withhold sufficient extralegal ones does not apply. However, it may have been better for the law or even more respectful to the litigants for the Court to tell us it was reaffirming *Roe* because *Roe* was good law, not because of concerns with how the Court will appear to the public. Litigants to a case that has so much to do with public opinion may appreciate a decidedly, sufficiently *legal* explanation for the decision that binds them. They might think the outcome of an important case should revolve around the rights of the parties instead of how the Court sees its own reputation.

2. Justification

In addition to withholding extralegal reasoning, a judge who makes a decision based on an extralegal consideration should justify his decision with legal reasoning. It may seem silly to defend this proposition separately; if a judge is to justify his decisions at all, and he does not justify them with extralegal reasoning, what remains but legal reasoning? However, the second prong of this Note's thesis may invite its own line of criticism. In asking a judge to cover extralegal considerations with legal ones, do we ask him to *lie* about what the proper formulation and application of the law? The short answer is no, not necessarily. It is clear that given two sufficient reasons for a decision, disclosing one of them is not dishonest.

This is vulnerable to the following criticism. Given two equally strong reasons for a decision, the judge's natural inclination may be to withhold the extralegal one without more thought. The more difficult situation comes when the extralegal reason is substantially stronger than the legal one. The critic may assert that what this Note has actually done, covertly, is argue in favor of wrapping extralegal decisions in legal cellophane, in favor of judicial *lying*.

Of course, the five considerations that support withholding extralegal considerations apply with equal force when the extralegal consideration happens to be the strongest at the judge's disposal. Certainly the burden should be higher if we are to ask a judge to lie. An argument in favor of breaking the presumption in favor of sincerity in this context departs from Professors Shapiro's and Schwartzman's theories⁷⁹ and may be less comfortable to the reader. But it may be better to craft *bad* law than it is to legalize a consideration *outside* the law. This depends on many other factors—how bad the law would be, the institutional legitimacy at stake, and the impact of many other

78 See *id.* at 997 ("Among the five Justices who purportedly adhere to *Roe*, at most three agree upon the *principle* that constitutes adherence . . . and that principle is inconsistent with *Roe*. To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions." (citation omitted)).

79 Neither Professor Shapiro nor Professor Schwartzman explicitly addresses extralegal reasoning, and it might be that neither author considered the possibility that disclosing an extralegal consideration would not serve the interests sincerity usually serves.

considerations this Note has discussed—but regardless of how those factors apply to real cases, it is plausible that a judge may withhold an extralegal reason from her opinion even when it is the only sufficient one.

B. *Objections and Rebuttals*

This Note's thesis is vulnerable to three general criticisms: those involving the moral duty of judges, the rights of actual litigants, and the judiciary's responsibility to the public. The first criticism is that asking judges to withhold the real reasons for their decisions violates a moral duty to tell the truth. The second is that litigants are harmed when judges refuse to give them the best reasons for the decisions that bind them. The final criticism is that by omitting the real reasons for their decisions, judges abrogate their responsibility to the public at large.

The first criticism, that judges who withhold the real reasons for their decisions violate a moral duty to tell the truth, is simple and intuitive. As the three articles discussed in Part II all acknowledge, however, the presumption in favor of truth-telling at all levels is much more complicated than that, and special considerations apply to speakers whose very speech binds others' rights. More concretely, perhaps the primary reason we feel morally obligated not to lie is that it shows disrespect for our listeners. As such, this line of criticism might fold into the other two, which focus more on the listener than on the speaker.

The second line of criticism, that judges who withhold reasoning disrespect the litigants they bind, is stronger than the first. Litigants appeal to courts to solve important matters, and in the United States, the right to resort to the judiciary for relief from inequities and harms is fundamental. Furthermore, litigants are entitled not just to the resolution of their claims, but to *reasons* for those resolutions. While this criticism makes intuitive sense, it fails to account for the fact that litigants seek resolutions to *legal* problems. It follows that the reasons judges give in support of their decisions should be *legal* reasons.

The argument that omission and justification of legal reasoning abrogates judicial responsibility to the public encounters similar problems. The criticism would be that the public's right to an impartial and active judiciary includes the right to an *honest* judiciary. This holds true in most contexts, especially with respect to potential litigants who value knowing how courts would resolve their disputes. Again, though, this misrepresents the public's rights as well as how to effectuate those rights. United States citizens have the right to be bound by law and not by judicial fiat, and as discussed above, judges harm that right when they disclose their extralegal reasoning.

CONCLUSION

This Note has argued that a judge who makes a decision based on a factor she considers extralegal should do two things in justifying her decision: omit discussion of her reliance on the extralegal consideration and jus-

tify her decision with legal reasoning she finds sufficient to support the decision. Returning to this Note's preliminary discussion of *NFIB*, it is now easier to see why a move like Chief Justice Roberts's—wrapping in legal cellophane a decision that many allege turned on an extralegal consideration—was not only permissible but prudent. While disclosing an extralegal motive may have spurred discussion on the prudence of extralegal reasoning, it also would have harmed the Court's legitimacy and shown disrespect to the litigants. It is the courts' job to decide hard constitutional questions, and it would be irresponsible, imprudent, and disrespectful for the Supreme Court to disclose that it had failed in this duty. Furthermore, disclosing an extralegal motive in such an impactful case would have set a poor example for the lower courts deciding their own serious constitutional issues, leaving constitutional interpretation to judicial fiat. Instead, the Chief Justice's opinion gave the litigants a legal reason for the resolution of their legal claims, showing them respect and signaling to other courts that given similar situations, those courts are bound to do the same. This fulfills the benefits of judicial candor and sincerity the three professors advance, and it carries few of the detriments a lack of sincerity typically entails.

Adopting a widespread nondisclosure policy on extralegal reasoning has pragmatic benefits worthy of further exploration. This Note has discussed only two cases, and many would argue that the Supreme Court's history is fraught with instances of extralegal reasoning, from the founding, through the Civil War and Reconstruction, until the present day. Has case law developed better or worse because of those instances? What are their historical ramifications? How do they impact questions of stare decisis and reliance interests? Case law may develop more predictably and judges may be more restrained if extralegal reasons are simply not legitimate options in adjudication, but it might be that the most important questions the Supreme Court confronts—like the ones in *Casey* and *NFIB*—require the consideration of a broader context than positive law allows.

Wherever these questions lead, there are always strong presumptions in favor of judicial candor and sincerity. But the reasons for these presumptions apply with much less force when it comes to disclosing extralegal reasoning. In the context of extralegal justifications, the presumptions of candor and sincerity are overcome by the need to preserve our courts' institutional legitimacy and to respect those whose actions the courts bind.