ATTORNEY GENERAL WILLIAM BARR, THE MUELLER REPORT, AND THE PROBLEM OF TRUTH

Joel Levin*

When we set out to assess the American judicial system, we typically do it piecemeal, decision by decision, aiming our focus first at individual judges, then courts, then the role of judges in our system generally. If we could only fix any one particularly problematic thing, we could rest easy. Yet almost all the usual nostrums and platitudes, the varieties of political slogans, and commonplace wisdom about American judges and the American judicial system turn out to be problematic. Not only are they not fixes, but they are also often demonstrably bad and give us little clue as to how we could do better. We are told we must halt what we are doing but are provided no roadmap as to how to proceed anew. Consider a few examples: We think that judges' powers should be limited because they are unelected, but we notice elected judges in the thirty-nine states that elect judges do no better in carrying out the common will and often do worse than those who are unelected. We think judges should stop making law, but instead umpire mechanically to oversee that the rules are obeyed (presumably calling balls and strikes, to use Chief Justice Roberts' terminology).[1] In fact, we know much of the common law and a great deal of constitutional law and statutory interpretations is traditionally judge-made or judge-glossed. But it is no worse than legislatively-enacted law. Statutes are often written in a confusing, ambiguous, and convoluted matter and consequently offer a poor system for merely calling balls and strikes, instead requiring that judges decide whether we are in a football or baseball game, or maybe at the school dance.

We grumble that judges should just follow the rules and not create their own rules or standards, but the scope and extent of rules is often ambiguous.

* Professor Levin teaches law and philosophy at Case Western Reserve University.

1. *Chief Justice Roberts Statement — Nomination Process*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process [https://perma.cc/ZA4H-PPT2].

Many rules from the past linger beyond any reasonable due date.[2] For example, rules governing the burning of witches lasted on the law books in the United Kingdom until the twentieth century,[3] if admittedly disregarded, and practices that were the outgrowth of the slavery law lingered as well, including the rounding up of vagrants to serve as forced labor during harvest season in the South.[4] We think the rulings of judges are often anti-democratic—and they often are—whether democracy is meant to derive from the will of the legislature or the will of the people. But democracy and individual rights can diverge. The wisdom of Chief Justice Stone in saying that some discrete and insular groups will never achieve a majority and not even have a seat at the table gives ample reason why individual rights might at times trump democracy,[5] and judges should respect those rights. We think judges should pay heed to the old and sacred text of the sage founders. However, that founding wisdom enslaved blacks, murdered the indigenous, and disenfranchised women. Moreover, it has often provided inscrutable or pernicious guidance. For example, what counted as acceptable punishment in 1800 (stocks, dunking, widespread whipping, ubiquitous hangings), horrifies us today when looking at the Eighth Amendment language on the cruel and unusual.[6]

All in all, we often do not know what to make of judges or how to make them better. We are ambivalent as to whether we want them more in touch with the purity and erudition of the ivory towers or the practicality and grim

2. It is rare that courts recognize, let alone acknowledge, the obsolescence of long-standing rules and practices. One exception, however, is Judge Benjamin Cardozo. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 391 (1916). In *MacPherson*, Cardozo writes: "Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be." *Id.*

3. Fraudulent Mediums Act 1951, 15 Geo. 6 c. 33 (Eng.).

4. The convict release or peonage laws, slavery by a different name, allowed mainly African Americans (often freed slaves) to be arrested and convicted for vagrancy in time to be released to landowners for free labor at harvest time. This practice was legal until 1914. *See* United States v. Reynolds, 235 U.S. 133 (1914).

5. The concept was introduced in Justice Stone's famous opinion in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), but revitalized in *Jones v. City of Opelika*, 316 U.S. 584 (1942) (Stone, C.J., dissenting), and again in *Jones v. City of Opelika*, 319 U.S. 103 (1943) (per curiam).

6. Holy writ, religious or constitutional, rarely arrives with an instruction manual, and the interpretive spin on the one hand and meta-principles of interpretation on the other are controversial but required. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). See the evolving moral positions in the nineteenth century behind these reforms as outlined in KWAME ANTHONY APPIAH, THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN (2010).

realities of the working masses; whether they should credit what appears important today or what counts as historical wisdom; whether they ought to be chosen by the democratic but uninformed populace or by a better informed but perhaps elitist and biased executive; whether awarding life tenure where they will be unbothered by and unresponsive to popular opinion or holding limited terms where they are cognizant of, and even beholden to, the popular consensus. Moreover, we are aware of what Lon Fuller calls the "limits of adjudication,"[7] which include matters courts should prudently avoid, such as political questions, acts of war, voting, prerogatives of the Executive or Congress, or private matters like those in *Griswold v. Connecticut*.[8]

Worse than all that is the uncomfortable but not uncommon fact that too many who serve on the bench are ill-equipped, ill-informed, inexperienced, and unwise in their judgments, driven by comfort and sloth, ambition and bias, indifferent to others while expecting deference.[9] They sit on elevated benches, wear clerical costumes passing as exalted uniforms, stand ready to silence or sanction any who dare criticize them, keep personal and arbitrary schedules, make rulings without immediate dissent, and have the authority to treat all before them with an impervious tone. Despite President Donald Trump's attacks on judges for their ethnic heritage, political bias, or alleged corruption—attacks which were unmoored, baseless, and mean-spirited—criticisms of judges or attempts to challenge how they do their jobs, may not only warranted, but overdue.[10]

Is that the real problem? Courts of men and women with ordinary, even mediocre, judgments and limited imagination, wisdom, or creativity will

7. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

8. Griswold v. Connecticut, 381 U.S. 479 (1965).

9. Assessing judges is a difficult, partisan, and problematic task, as one examines particular judges, courts, jurisdictions, legal arenas, and policy considerations. Certainly, individual criticisms are rampant, although often for exactly the wrong reasons, as personified by President Trump's attack on judges for their ethnicity. The failure to protect rights, the central role of the US Supreme Court, has been detailed by Professor Erwin Chemerinsky. *See* Caitlin Mitchell, *Recapping Dean Erwin Cherminsky's Civil Updates from the U.S. Supreme Court's 2021 Term*, AM BAR ASS'N (Feb. 4, 2022), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2022/winter/recapping-dean-erwin-chemerinskys-civil-updates-from-scotus-2020-term/ (last visited Apr. 19, 2022). A few of the reasons for judicial failure are discussed in JOEL LEVIN, TORT WARS 212–28 (2008).

10. The Brennan Center has collected Trump's attacks on various judges and courts and has used Trump's own words to condemn him. *See In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (Feb. 14, 2020), https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts [https://perma.cc/9H2K-G4BV].

always disappoint. Yet they still manage to do something quite spectacular most of the time: get things right. Courts are often a bastion of good sense, reason, objectivity, and calm in a world where those qualities are dissipating. How does that happen? It is because of a single, overarching principle that sets judges and courts apart. It gives them a place of inestimable value in a society, value no civilized society—or at least a society that seeks a modicum of justice, equality, and peace in any significant measure—could be without. That principle is the search for truth.

Truth itself is a problematic concept. It is difficult to locate, more difficult to define, and occasionally banished as nonsensical, turned into "absolute truth," (whatever that means), and then, in the skeptical spirit of discarding absolutes, truth is discarded as well.[11] Such conceptual difficulties can safely be put aside in the context of the United States Department of Justice (DOJ) and its premise that safeguarding justice under the rule of law—*Qui Pro Domina Justitia Sequitur*—for, however the definitional and semantic controversies are sorted out, a Justice Department unconcerned with truth takes on the Kafkaesque world of The Trial at best and the Moscow show trials with Stalin as impresario at worst.[12] That is, truth is not enough to guarantee justice, but its neglect is sufficient to make justice impossible.

Of course, we might think otherwise, suggesting the entire problem as, citing President Trump, *transactional*.[13] We could adjust the system for any idiosyncratic design or flavor, with any specified powers or prerogatives, and with the ability to assign any particular or idiosyncratic set of rights and duties. We could have any decision mechanism we want, including simply

11. While it is not part of this Essay, there is a literature that differs on theories of truth—correspondence, coherence, or pragmatic—but agrees that skepticism of its reality is misplaced. Taking Tarski's view, roughly, we might think color and design to be attributes or predicates of animals' skins ("Zebras have stripes") and truth to be an attribute or predicate of sentences (e.g., the sentence "Zebras have stripes" is true). *See* ALFRED TARSKI, LOGIC, SEMANTICS, METAMATHEMATICS 153–278 (J.H. Woodger trans., 1956). We might then think truth demands bivalence (something is true, or it is not) and we use language with that commitment. *See* MICHAEL DUMMETT, TRUTH AND OTHER ENIGMAS 1–24 (1978).

12. It is precisely the unreality, the isolation from truth, that Kafka portrays in *The Trial* as a week of complete imagination and that fifteen years later Arthur Koestler describes as reality in his novel reflecting the Soviet Union reality. *See* FRANZ KAFKA, THE TRIAL (1925); ARTHUR KOESTLER, DARKNESS AT NOON (1940).

13. Upon inspection, many view President Trump's transactional stance to merely be a cover for corruption. *See e.g.*, Andrea Bernstein, *Where Trump Learned the Art of the Quid Pro Quo*, ATLANTIC (Jan. 20, 2020), https://www.theatlantic.com/ideas/archive/2020/01/trumps-brand-of-transactional-politics/604978/ [https://perma.cc/7GKH-U2W5].

feeding data into a computer through a source code that uses the idiosyncratic set of parameters we decide ahead of time and yields decisions with certainty and clarity. What that code aims to achieve hardly requires truth, only consistency.[14] To some extent, this is what we have come to anyway. What does it matter who might be the decision-maker—John Marshall, either John Harlan, Oliver Wendell Holmes, or Benjamin Cardozo on one (admirable) side; Roger Taney, Samuel Chase, or James McReynolds on the other—in the sense of being well-suited to be the best judge or justice? What does it matter whether the rules about equal treatment, just punishment, due process rights, or free expression come out one way or another? In that sense, we simply view law through a political lens, perhaps because it does not generally yield greater civil peace, have lower administrative or transactional costs, or achieve any other efficient or orderly process oblivious to ethical goals, except that certain systems might be more efficient. All of that could be adequate if truth does not serve as an anchor. What we have at best, then, is an efficient and stable consistency, no more and no less.

Truth is more than accuracy, more than the intent to be accurate, and more even than achieving the goals of reason and rationality. All of these are necessary but not sufficient for truth. There is more. It is what the Enlightenment thinkers—Spinoza, Newton, Kant, Locke, Diderot, and Wollstonecraft—took to be required: a basic moral imperative.[15] Truth serves two mistresses: reason and ethics, and Attorney General William Barr's contempt for truth upon his receipt of the Mueller Report demonstrates his scorn for both mistresses. That scorn is in some ways more profound and more damaging than his and his predecessors' many individual injustices, as the structure of justice, the apex of the moral virtues, is thrown into doubt.

We begin with a great deal of evidence from diverse sources that the Russian government attempted to interfere in the 2016 Presidential election

14. At least since Gödel, we have learned to be modest in expecting more. For the non-mathematical understanding of that reason for modesty, see ERNEST NAGEL & JAMES R. NEWMAN, GÖDEL'S PROOF (1958).

15. *See* BENEDICT OF SPINOZA, A THEOLOGICAL-POLITICAL TREATISE [PART 1] (Project Gutenberg 1997) (1670) (ebook) (linking truth and morality); STEVEN NADLER, A BOOK FORGED IN HELL: SPINOZA'S SCANDALOUS TREATISE AND THE BIRTH OF THE SECULAR AGE (2011) (exploring the devasting implications of linking truth and morality).

between Hilary Clinton and Donald Trump.[16] There was further evidence the Trump campaign, in various ways, acted in concert with the Russian government, or with its not-so-secret operatives, to further that interference for Trump's benefit.[17] All of that would be illegal under federal law. The natural investigator into such potential crimes would be Trump's Department of Justice. Because that Department was rife with conflict at the top, on May 17, 2017, the Acting Attorney General, Rod Rosenstein, appointed as Special Counsel Robert Mueller "to ensure a full and thorough investigation of the Russian government's efforts to interfere in the 2016 presidential campaign" and to investigate "any links and or coordination between the Russian government and individuals associated with a campaign of President Donald Trump."[18] Almost two years later, on March 22, 2019, having concluded his investigation, Mueller presented his report to Attorney General William Barr. There the trail of truth was blockaded.

William Barr—in a series of letters, speeches, redactions, and testimony—fundamentally lied about what was contained in the Mueller Report, what it examined, what it found, and what it concluded. This is by now old news, readily located and easily criticized. The cascade of misinformation, misdirection, and lies is set out in a scathing United States District Court decision ruling on the appeal of a denial of a Freedom of Information Act (FOIA) request, *Electronic Privacy Information Center v. U.S. Department of Justice*.[19] There, Judge Reggie Walton wrote that he "has grave concerns about the objectivity of the process that preceded the public release of the redacted version of the Mueller Report and its impact on the Department's subsequent justifications that its redactions of the Mueller Report are authorized by the FOIA."[20] The Court was also concerned about "whether Attorney General Barr's intent was to create a one-sided narrative about the Mueller Report—a narrative that is clearly in

16. The web of conspiracy and intrigue and the accumulation of evidence that it occurred is large and complex. *See* S. REP. NO. 116-290 (2020).

17. Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election: Volume II of II*, U.S. DEP'T OF JUST. (Mar. 2019), https://www.documentcloud.org/documents/5955118-The-Mueller-Report.

18. *Appointment of Special Counsel*, U.S. DEP'T OF JUST. (May 17, 2017), https://www.justice.gov/opa/pr/appointment-special-counsel [https://perma.cc/3XNP-DG74].

19. Elec. Priv. Info. Ctr. v. United States Dep't of Just., 442 F. Supp. 3d 37 (D.D.C. 2020).

20. *Id.* at 48.

some respects substantially at odds with the redacted version of the Mueller Report."[21]

> [Specifically], the Court cannot reconcile certain public representations made by Attorney General Barr with the findings in the Mueller Report. The inconsistencies between Attorney General Barr's statements, made at a time when the public did not have access to the redacted version of the Mueller Report to assess the veracity of the statements, and portions of the redacted version of the Mueller Report that conflict with these statements cause the court to seriously question whether Attorney General Barr made a calculated attempt to influence public discourse about the Mueller Report in favor of President Trump despite certain findings in the redacted version of the Mueller Report to the contrary.[22]

The Court, perhaps constrained by judicial demeanor, set forth in understated language the misconduct of Barr: being in possession of an analysis of the attempt to sabotage a free and fair election, with saboteurs who were closely connected to and almost certainly included candidate Trump; and having lied, hid, prevaricated, misled, omitted, and altered the truth.[23] All bad, though one might suggest not a crime, this misconduct was soon show to be sideshow in the greater tangle of criminal activity involving fraud, money-laundering, identity theft, obstruction of justice, and the web of conspiracies to overthrow the American democracy.[24] Why worry about a lack of candor, a few well-placed omissions and deletions, a bit of misdirection, and lies that were not only not crimes, but were the ordinary detritus of Washington politicians? The answer, echoing back from the Enlightenment, is that truth is an essential and necessary condition of justice, and those charged with doing justice—beginning with a department carrying its name—must revere truth. This is not about, for example, lying in a coverup, but about truth in moral considerations generally.

---

21. *Id.* at 49.
22. *Id.* at 50–51.
23. *Id.* at 49–51.
24. For one condemnation of the activity of President Trump, and the labeling of his conduct as criminal, see the opinion of Judge David Carter of the U.S. District Court, Central District of California, in *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, 2022 WL 894256 (S.D. Cal. Mar. 28, 2022).

One might concede truth to be important in such concrete matters as science and economics, perhaps in the factual aspects of jury trials, and even in understanding precedent and legislative intent as well. But consider that any talk of justice itself, as susceptible to moral truth, has no direct place in our concerns. The issue of moral relevancy, an odious and destructive concept, while a diversion largely outside the scope of this paper (although a matter we will turn to later briefly), is a diversion unnecessary in understanding the implications of what Attorney General Barr did and why it matters.

If we had to prove the truth of moral statements in the world—a proof perhaps easier than we might think, as neither the requirement of empirical evidence (consider math) nor verification (consider history) nor lack of controversy (consider paleoanthropology or string theory) rule out our commitment to believe statements in those fields to be true or false—we might be reluctant to proceed.[25] The issue for the DOJ is far less daunting. The tangled thicket of intent is routinely analyzed. Take, for example, the many occasions when the DOJ needs to decide whether there was fraud or simply mistakes in filings, or in making its analysis when seeking punishment to accord with a defendant's just deserts. Both rest on truth. These are everyday activities, which are worthy of belief, not just of feelings or preferences, but, to use language of logical positivism, of emotive conduct, too.[26]

Moreover, legal truths are something brooding, variously present, and perhaps without discernible location, despite Justice Holmes being troubled by the "brooding omnipresence in the sky."[27] The common law and legal reasoning find or discover things to be true in law not previously envisioned, whether executive contracts in the seventeenth century, negotiable paper in the eighteenth, substantive due process in the nineteenth, privacy in the twentieth, or gay matrimony in the twenty-first. In fact, some things once

25. Not only are fields that we think of as having facts and allowing for truth often controversial, but they even suggest that there is no solution in the median term horizon. The origins of humans—whether out of Africa or from Savannah land—is just that in paleoanthropology and in string theory. *See* MADELAINE BÖHME ET AL., ANCIENT BONES: UNEARTHING THE ASTONISHING NEW STORY OF HOW WE BECAME HUMAN (Jane Billinghurst trans., 2020); JOSEPH CONLON, WHY STRING THEORY? (2016).

26. A. J. AYER, LANGUAGE, TRUTH, & LOGIC (1936).

27. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

envisioned, privity and separate-but-equal for instance, have even been known to disappear.[28]

That does not necessarily show truth to be required in legal statements rooted to moral concepts, only that it is possible. We need first to examine the connection in moral theory, then the further connection inherent in any argument that any recent Republican DOJ Attorney General, including Jeff Sessions and William Barr, would have found inescapable and compelling. Based on these, it is clear the entire structure of the DOJ is fundamentally undermined by a disregard for truth, perhaps even more so than sloth, corruption, bias, and indifference—traditional markers of Department failures.

Truth may be, for Barr, for the DOJ, and more generally, an operating glue which is central to communications and efficiency, but little more. If it works, fine; otherwise, so what? We might believe moral condemnations are part of a subjective, even imaginary, ethical world, fine to teach our children, like manners and shoelace tying, but of no moment in the adult world. Aren't morals relativistic (whatever works) and subjective (whoever it works for)? Moreover, how do we proceed in moral investigation? That is, how do Attorney General Barr or his critics make the moral case? If truth is no more than a moral issue, then perhaps it does not matter.

There may be strong and experienced methods of proceeding and arriving at moral truth. This is not just because moral relativism and moral subjectivism are incoherent—asserting moral statements, which we all do, implies that there might be a fact of the matter worth asserting[29]—but because viable ethical theories lead us to more justifiably humanistic and socially rational results. In fact, they are central to, and run in tandem with, our legal theories.[30] These theories use autonomy to start, reason to proceed, truth to judge, coherence to adjust, and empiricism to correct. They are central to assessing Barr's conduct.

Moral theory, then, if briefly. The western tradition, largely driven by the Enlightenment, crystallized ethics around four different, but often entangled, theories: deontology (right and wrong), consequentialism (good

28. Privity dissipated dramatically in tort law with *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916), while the same vanishing occurred for separate but equal in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

29. This requires a much larger argument, of course. For an introduction to that argument, see BERNARD WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS (1972).

30. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

and bad), virtue theory (virtue and vice), and social contract analysis (consent and assumed duties). None of these make sense absent a robust notion of truth. Each implicate the concept of autonomy, the fundamental thing justice protects.

Deontology is a theory that one acts rationally only by treating everyone with dignity, as autonomous, and never as a means to an end, but rather an end in and of itself.[31] All acts must be universalizable, with no place for special pleading for persons or groups. As Immanuel Kant wrote, "Act in such a way as to treat humanity, whether in your own person or in that of anyone else, always as an end and never merely as a means."[32] A lie is forbidden as contradicting universalizability. We cannot always lie to each other or to ourselves. If allowed, nothing could be said, and autonomy would fail. We can only make sense of the world and ascertain how to treat others—that is, do justice—if we take seriously what they say.

Virtue theory reaches the same conclusion but by a different route. Honesty is both a virtue itself and fundamental to the end of virtue theory: leading a life worth living, a life of human flourishing (eudaimonia).[33] To be virtuous, one must value truth and truth telling, and value truth as knowledge which informs the choice of virtue over vice, of control over, rather than succumbing to, our appetites. Virtue is achieved by cultivated knowledge steeped in truth. Virtue is achieved not only as a one-time act, but as a practiced, ingrained, learned, tamed-by-reason, and constant disposition. Then, and only then, can we flourish.

Barr stands condemned by these moral traditions. Take his statements at his April 18 press conference that Trump "fully cooperated" with the Special Counsel and that Mueller cleared President Trump of "collusion" with the Russians.[34] Both statements are each false in their own way. Trump failed to cooperate, demonstrated by his series of poor responses to interrogatories, his consistent delay and then reluctance to produce

31. *See generally* J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 149–68 (1977).

32. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS (Jonathan Bennett trans., 2017) (1785).

33. The centrality of the concept of flourishing is an ancient one, deeply embedded in Catholic theology and natural law. Its appearance in conservative legal circles and discourse can be firmly dated to John Finnis. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

34. *Attorney General William P. Barr Delivers Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election*, U.S. DEP'T OF JUST. (Apr. 18, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian [https://perma.cc/Q6CG-TH89].

documents, and his refusal to give a deposition or provide an interview. As for those surrounding him who did speak, at his direction (although this is not fully known to this day) or at least out of respect for his often-expressed wishes, the Mueller Report states: "[T]he investigation established that several individuals affiliated with the Trump Campaign lied to the Office, and to Congress, about their interactions with Russian-affiliated individuals and related matters. Those lies materially impaired investigation of Russian election interference."[35]

Fundamental lies in a department concerned with justice defeat the possibility of justice, as the requirements of fair and neutral treatment, one further governed by the moral imperative of universalizability or virtuous conduct, place truth at their foundation. What then about the other two ethical traditions? First, consequentialism is seen in its only still existing descendant, utilitarianism. It is a view that aims at achieving the greatest good or most happiness or highest welfare or largest number of individual preferences as the goal in shaping our actions.[36] As Jeremy Bentham put it, we should aim for the greatest good for the greatest number.[37] Achieving that often involves victims or sacrifices, as we see in times of economic policy tightening, pandemic restrictions, natural disaster responses, and war. We give up things for the common welfare, per Bentham, and per his utilitarian acolytes now populating the finance sector. These include the ubiquitous economic policy makers, public health eternal pessimists, corporate restructurers, and those who do public policy planning.[38] Tough decisions must be unsentimental and not too careful about political rights or personal autonomy, so long as the population, taken as a whole, is advantaged, or per Rousseau's (and arguably Lenin's) vision of the General Will, the population believes it is advantaged.[39] Justice is then just another

35. Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, U.S. DEP'T OF JUST. (Mar. 2019), https://www.documentcloud.org/documents/5955118-The-Mueller-Report.

36. *See generally* MACKIE, *supra* note 31, at 125–48.

37. The slogan was not originally his—the authorship usually is attributed to Francis Hutcheson—but it was Bentham who made it famous. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 8 (1789).

38. Examples abound, but two broad based works are RICHARD POSNER, THE ECONOMICS OF JUSTICE (1981), and CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT (2002). The limitations of utility theory in the law and public planning are discussed in JOEL LEVIN, TORT WARS 72–87 (2008).

39. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Jonathan Bennett trans., 2017) (1762); VLADIMIR LENIN, THE STATE AND REVOLUTION (Jonathan Bennett trans., 2017) (1917).

factor, along with prosperity, health, education, safety, and whatever works. Perhaps this is what is meant by the never fully explained term "transactional" in the Trump Administration.

The problem here is that all of this is wrong. The core of utilitarianism is a freedom to choose, the action in the transaction so to speak, the deal, the trade, the getting what one wants by giving up something someone else wants more.[40] It centers on contract, which we originally celebrated as the method of exercising one's freedom, then later because it achieves the greater good utilitarians desire, allowing markets to create efficiency and prosperity.[41] The latter reason has come under severe attack and today is hardly held in its vintage (Becker and Friedman) Chicago School of Economics form, even by those at Chicago,[42] but the freedom story of contract is still persuasive. How so? It can only work when there is no deception or misrepresentation in the deal, when the goods or services or securities or other property tendered are (within reason) honestly described and delivered, when knowledge of the entire matter is possessed on all sides, where candor is unnecessary but veracity is, and where remedies for failure to meet these expectations are robust and disincentivizing, even occasionally punitive. None of that should give comfort to Barr, as lies in the market, perhaps not uncommon, arrive with potentially grave litigation penalties.[43]

There is a deeper problem with attempting to use utilitarian theory to vindicate deception that takes shelter under the umbrella of the transactional. Utilitarianism without universalizability, as Richard Hare

40. See JOHN STUART MILL, *What Utilitarianism Is*, *in* UTILITARIANISM (1863).

41. Part of the economic tradition of Adam Smith, David Ricardo, and John Stuart Mill is the idea that market efficiency is used to create a universal prosperity which then leads to individual happiness. The severe form of it broke off with the Austrian School of Economics, transported by its most famous adherent, Friedrich Hayek, from The University of Vienna to the University of Chicago and the Chicago School through, among others, Gary Becker and Milton Friedman. *See* FRIEDRICH HAYEK, THE ROAD TO SERFDOM (1944); GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION (2d ed. 1964); MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

42. Chicago has displayed a marked irreverence to the neo-liberal gospel. *See generally* STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING (2005); RICHARD THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS (2016).

43. We can see this in regulated areas such as banking, insurance, drugs and securities, draconian civil penalties; and in criminal law involving various flavors of fraud and duplicity, fines, and prison. *See, e.g.*, 18 U.S.C. § 1344 (bank fraud) or 18 U.S.C. § 1348 (securities and commodities fraud).

showed a half century ago, is not a moral theory at all.[44] Consider an argument for social welfare absent universalizability. We might examine the taking (economically but not socially or as a matter of survival) of underused Native American land in the nineteenth century and repurposing it for a higher and better use. In doing so, we can compare how cotton fields in the South created enormous efficiencies and wealth by, but not for, slave laborers, with Native Americans and African slaves being assigned a degraded weight in the hedonistic calculus of utility.[45] Whatever this is and whether it can be fairly labeled "utilitarianism," it is not a moral theory. One can always weigh consequences, but ethics requires a respect for autonomy. That includes treating the listener with respect by not lying to him or her, as their understanding and concomitant actions are central.

This leaves us with that peculiarly Enlightenment ethical theory: the social contract. The social contract, as described by Hobbes, Locke, and Kant, was an imaginary or implied bargain between the state and its inhabitants.[46] Roughly speaking, in exchange for safety and certain basic rights, power would be ceded to governments, who would maintain a monopoly on violence.[47] The results are not ethical by their nature or description, but by their pedigree. Because the result is a fair, uncoerced, and knowing bargain, we must respect that result as just.[48] The social contract bargain is problematic in a number of well-known ways—from its imaginary nature to its ability to bind future generations to its lack of real choice to its eternal nature—but it draws its force from the exercise of one's freedom and autonomy to be the determinate of what should happen.

---

44. *See* R.M. Hare, *Freedom and Reason*, 74 MIND 280, 286 (1963); R.M. HARE, ESSAYS IN ETHICAL THEORY (1989).

45. *See generally* SVEN BECKETT, EMPIRE OF COTTON: A GLOBAL HISTORY (2014).

46. Social contract theory, perhaps traceable to Plato, took on its modern form with Hugo Grotius. *Compare* PLATO, THE REPUBLIC, BOOK II (circa 375 B.C.E.), *with* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (1625); *see also* THOMAS HOBBES, LEVIATHAN (1651); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 25–31(1689); KANT, *supra* note 32. This only scratches the surface of such works from the Enlightenment to today.

47. How the mix works—from only the right to live to a dazzling array of rights—is always central and inherently controversial. *See* HOBBES, LEVIATHAN: OR THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL (1651); JOHN RAWLS, A THEORY OF JUSTICE 112 (1971).

48. The fairness of any such bargain is challenged by Ronald Dworkin. *See* Ronald Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500 (1973). Parfit explored it in a more broad-ranging and sympathetic analysis. *See* DEREK PARFIT, ON WHAT MATTERS (2011).

Where, then, does this tour of ethics leave us when faced with lies by government officials? It shows these lies undermine the possibility of an ethical system, moral conduct, and the ability to treat each person as an autonomous individual with the right to terminate their own future. That determination requires knowledge. Knowledge, for the Enlightenment, is based on science, observation, and analysis rooted in the truth. Absent truth is absent knowledge, inevitably followed by a downward spiral of the loss of ethics, freedom, and autonomy. Being told what the answer is when the telling is premised on false or critically missing information, or involves being misled, makes a sham of autonomy. We can notice this in notorious cases of mass killings, which are often rooted in fraudulent information. Take for example, the ethnic-tinged lies by the Porte in Turkey against Armenians and Greeks, the ethnic lies on official Radio Rwanda against the Tutsi, the lies about Jews and Roma by the Nazis, the lies about kulaks and Trotskyists by Stalin, and the present pandemic lies attributing blame by various officials and their allies to Bill Gates, George Soros, and Anthony Fauci. In all such cases, freedom suffers, truth is a structural casualty, and lives are lost. Barr was lying about an effort—joint or in tandem—to undermine American democracy (and, as a side consequence, the more fragile Ukrainian democracy) where determining what happened, how it happened, who was involved, who noticed but looked the other way, what the consequences were, and how to avoid such an attack in the future were compromised.

Looked at from the vantage point of Barr's audience, Barr by his words intended to influence that audience member because his statements were, in the context of any reasonable theory of semantics or linguistic theory, meant to be taken as the case, the representation of reality, the truth. That member would normally form truth-conditional assertions in order to convey semantic meaning, to be able to communicate, and to be able to be understood.[49] If a husband assert to his wife as she is leaving the house a statement, S, "It is raining," and does so as part of the regular communications of their marriage, then, in general, S, and like statements, S_1, S_2, S_3, . . . S_o, need to be truth-conditional, able to be declared true or false, and possess grounds for their utterance.[50] That is, central to a social

49. *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 86–137 (1989).

50. Of course, not all sentences are subject to truth conditions (e.g., questions, orders, rhymes, jokes, and complaints) and not even all statements are readily susceptible to a truth evaluation (e.g.,

relationship locally or society universally, justified true belief lies at the core of language and discourse. When the grounds employed are products of lies, the ability to make sense of, to communicate, and to be part of the social world collapses.

This apocalyptic tone may appear overblown. Individuals lie daily, even under oath, and Barr was not under oath but at his April 18, 2019, press conference. Moreover, we understand even sworn testimony that is odious, unhelpful, evasive, wrongly exculpatory, and false is not unexpected and rarely prosecuted. For example, ask almost any witness at a deposition the following three questions—(1) Did you ever fail to report fully your income on a tax return?, (2) Did you ever secretly cheat on your spouse?, (3) Did you ever take anything of value from your employer?—and perjury will rear its head. Lying, one might think, is no big deal. It might even appear small when measured against other transgressions by several recent Attorneys General: John Mitchell (1969–72) served nineteen months for his criminal conduct in Watergate[51] while Richard Kleindienst (1972–73) pled guilty for hiding corporate favoritism from a Senate hearing.[52] Certainly worse, if not always convicted, was A. Mitchell Palmer (1919–21) and his notorious Palmer Raids, which engaged in mass arrests and then mistreatment of thousands for their political views (or supposed views, as many rounded up

"Chocolate ice cream tastes better than strawberry."). Moreover, one can have a non-bivalent logic (e.g., true, false, indeterminate) that is easily enough reduced to bivalence ("For some statement S, S is either true or it is not."). All that said, a language that does not require most assertions most of the time to be truth conditional is certainly incoherent and probably impossible. The literature is vast, confusing, conflicting, and highly technical. *See generally* J.L. AUSTIN, SENSE AND SENSIBILIA (1962); J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); MICHAEL DUMMETT, FREGE: PHILOSOPHY OF LANGUAGE (2d ed. 1981); TRUTH AND MEANING: ESSAYS IN SEMANTICS (Gareth Evans & John McDowell eds., 1976). Moreover, even as to sentences that are not statements, and not directly susceptible to truth-conditional analysis, they still generally embody an irreducible truth analysis requirement necessary to extract their sense or meaning. Consider Quine's example of a vivid exclamation: "Ouch," which he calls "[a] laconic comment on the passing show." WILLARD VAN ORMAN QUINE, WORD AND OBJECT 5 (1960). The sense of that comment depends on it being true that one was assaulted and that being laconic has a basis in reality. Viewing an outburst of "Ouch," lawyers once categorized it as *res gestae*, words that occur spontaneously and absent deliberation. The terminology is now typically "excited utterance" or "present sense impression." The law takes such exclamations as *prima facie* true. *See* FED. R. EVID. 803(1)–(3).

51. Lawrence Meyer, *John N. Mitchell, Principal in Watergate, Dies at 75*, WASH. POST, Nov. 10, 1988, at A01.

52. Robert L. Jackson, *Richard Kleindienst, Attorney General in Nixon Cabinet, Dies*, L.A. TIMES (Feb. 4, 2000), https://www.latimes.com/archives/la-xpm-2000-feb-04-mn-61045-story.html.

were not even remotely involved in any targeted activity);[53] was Harry Daugherty (1921–24), who was investigated for his role in the Teapot Dome Scandal when the government was for sale;[54] was John Ashcroft (2001–05), who endorsed the mistreatment and torture of Iraqi detainees;[55] was Alberto Gonzales (2005–07), who allowed warrantless searches domestically and enhanced interrogation techniques abroad;[56] and was Jeff Sessions (2017–18), who oversaw a program of first separating from their parents, then caging, and finally misplacing, asylum-seeking children.[57] How does a little lying measure up to all that?

The magnitude of the measure is simple: the others hid and downplayed the basis of their wrongs. Barr bragged about them, and, more significantly (and unlike some of the others), did so entirely in his capacity as Attorney General of the United States. He made lying official policy. Hiding wrongdoing is a nod to ethics, at least at the times when consequences are remote, as the act of denying an action is wrong pays tribute to the moral, to what the right thing really is. It is not just the immediate harm that matters here, but the weakening of a foundational pillar of the structure of justice.

Consider for a moment the April 18, 2019, letter Attorney General Barr wrote to the Chairs and Ranking Members of the Judiciary Committees of Congress.[58] Everything about it is wrong. In it, Barr stated but a single possible motive that would cause Trump to obstruct justice, when the Mueller Report listed a number; he stated that Trump was fully cleared,

53. Gregory Delher, *Palmer Raids*, BRITANNICA, https://www.britannica.com/topic/Palmer-Raids [https://perma.cc/QYB6-CNRM].

54. James N. Giglio, *Attorney General Harry M. Daugherty and the United Gas Improvement Company Case , 1914–1924*, 46 PA. HIST. 347, 365 (1979).

55. *See* Richard B. Schmitt & Richard A. Serrano, *Ashcroft Grilled Over Memos About Torture*, L.A. TIMES (June 9, 2004), https://www.latimes.com/archives/la-xpm-2004-jun-09-fg-ashcroft9-story.html.

56. Murray Waas, *What Did Bush Tell Gonzales?*, ATLANTIC (Sept. 2008), https://www.theatlantic.com/magazine/archive/2008/09/what-did-bush-tell-gonzales/307064/ [https://perma.cc/CM8D-W8V2]; Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES (Oct. 4, 2007), https://www.nytimes.com/2007/10/04/washington/04interrogate.html [https://perma.cc/K8AS-PPWY].

57. Michael D. Sheer et al., *'We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html [https://perma.cc/8TH7-KL9S].

58. Letter from William Barr, Attorney General, Dep't of Justice, to Lindsey Graham, Chairman, Committee on the Judiciary, United States Senate, et al. (Apr. 18, 2019) (available at https://www.justice.gov/archives/ag/page/file/1167086/download [https://perma.cc/BL2Y-DAES]).

when in fact Trump was subject to potential indictment upon leaving office; he omitted language from the Mueller Report that twice asserts knowing and complicit conduct between the Russians and the Trump Campaign; he stated that these Special Counsel reports were not to be made public when that was purely a discretionary call by the DOJ; he wrote that the White House fully cooperated with the Mueller Investigation when it did not; and he declared that it was undisputedly he alone who would and should determine if there had been obstruction by Trump,[59] when the Mueller Report squarely states that Congress can make that determination.[60] Democracy is at stake. A textured investigation by Robert Mueller and his experienced team, though hampered by the non-cooperation of the President, made a number of damaging but instructive findings. Barr hid them, excused them, dismissed them, and lied about them, with what can only be viewed as the clear intent to mislead the public and Congress.

Whatever ethical theory one endorses—or even if one employs some hybrid standard, as H.L.A. Hart suggested, when he argued for applying for the maximum criminal punishment a deontological standard and for the minimum a utilitarian one—the Enlightenment perspective puts individuals at the center.[61] States, religions, monarchs, tribes: all were displaced. This was the radical change in perspective, initiated by Spinoza,[62] campaigned for by Diderot, distilled by Locke, Hume, Kant, and Rousseau, spread through Europe and America.[63] Science was at its core, as evidence rather than unwarranted belief (whether religious, superstitious, mythological, or otherwise), determined conduct, and wherever science challenged the beliefs of an engrained and even comforting culture, science won.[64] As Kant

59. "Consequently, I determined that it was incumbent on me to decide, one way or the other, whether the evidence set forth in the Special Counsel's report was sufficient to establish that the President committed an obstruction-of-justice offense." *Id.* at 2–3.

60. The Mueller Report states: "The conclusion that Congress may apply obstruction laws to the President's corrupt exercise of the powers of office accords with our constitutional system of checks and balances and the principle that no person is above the law." Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election: Volume II of II*, U.S. DEP'T OF JUST. at 8 (Mar. 2019), https://www.documentcloud.org/documents/5955118-The-Mueller-Report.

61. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 54–89 (1968). *See* ISRAEL, *infra* note 79 and accompanying text.

62. *See* NADLER, *supra* note 15 (describing the revolution sparked by Spinoza).

63. The literature is voluminous, but the writings of Jonathan Israel are among the best. *See* JONATHAN ISRAEL, RADICAL ENLIGHTENMENT: PHILOSOPHY AND THE MAKING OF MODERNITY 1650–1750 (2001).

64. *See* RITCHIE ROBERTSON, THE ENLIGHTENMENT: THE PURSUIT OF HAPPINESS 1680–1790, 199–350 (2021).

put it, "sapere aude," dare to know.[65] Scientists like Isaac Newton, Antoine Lavoisier, Joseph Priestly, and Antoine van Leeuwenhoek were both essential to, and proof that, the project of empirical knowledge works.[66] We can each individually assess truth by science (and at times indirectly on a personal basis) rather than by government or religion and that was, for Spinoza and Kant, what made us free and guaranteed our autonomy.

But that was not sufficient. We needed to design our institutions and governments to embody the Enlightenment spirit of autonomy, truth, and freedom. The purpose of the political writings of Hobbes, Locke, Montesquieu, Bentham, and Jefferson was to create such institutions and governments. So, the Enlightenment project, focusing on freedom and autonomy, was two-part: (1) rational and informed decisions by individuals, and (2) candid and accurate information on which to base those decisions from institutions.

This Enlightenment history may seem mildly interesting but unconnected to William Barr's lies, misinformation, lack of candor, and hiding of the truth more than two hundred years later. Perhaps all of it has been replaced by the belief that truth is not required of anyone, so long as the lie works,[67] and morality, if not a useless thing, is an irritation to be dispensed with when prudence and self-interest require it. In any case, how can any of this matter to the head of the Department of Justice qua as head of the Department of Justice?

The problem here for Barr is it does matter, as he is intellectually ineligible to make the argument of moral irrelevance, not as a good conservative Republican and not as a long-time Constitutional originalist. That he is precisely and exactly those things was made indisputable in his November 2019 address to the Federalist Society's 2019 National Lawyers Convention. There, he congratulated the Federalist Society for playing "an

65. IMMANUEL KANT, ANSWERING THE QUESTION: WHAT IS ENLIGHTENMENT? (1784).

66. Isaac Newton was the inventor of calculus and the father of modern physics; Antoine Lavoisier was the father of modern chemistry; Joseph Priestly discovered oxygen, the carbon cycle, and a number of gasses; and Antonie van Leeuwenhoek was the father of microbiology and the discoverer of bacteria. *See generally* ISAAC NEWTON, PHILOSOPHIAE NATURALIS PRINCIPIA MATHEMATICA (1687); ANTOINE-LAURENT DE LAVOISIER, OPUSCULES PHYSIQUES ET CHIMIQUES (1774); JOSEPH PRIESTLY, EXPERIMENTS AND OBSERVATIONS ON DIFFERENT KINDS OF AIR, VOL. 6 (1774–86).

67. Perhaps in the arena of international relations and conflict this is clearest, an arena relevant to the issues in the Mueller Report. Fictionalized, the attitude is captured by the Condor character disgusted with that attitude. "Boy, what is it with you people? You think not getting caught in a lie is the same thing as telling the truth." THREE DAYS OF THE CONDOR (Dino De Laurentiis 1975).

historic role in taking originalism 'mainstream'" and explicitly invoked the authority of Locke, Montesquieu, and Jefferson.[68] He then gave recognition to the centrality of Enlightenment thought:

> We are interested in preserving over the long run the proper balance of freedom and order necessary for healthy development of natural civil society [social contract theory] and individual human flourishing [virtue theory] . . . The essence of this standard is to ask what the overall impact on society over the long run if the action we are taking, or [moral] principle we are applying, in a given circumstance was universalized [Hare's utilitarianism]—that is, would it be good for society over the long haul if this was done in all like circumstance [deontology and modern consequentialism].[69]

Barr, as with many conservatives, claims to be a constitutional originalist. That is, he holds the belief that the document must be interpreted based on the words and meanings assigned to it by those who either wrote it or endorsed it.[70] But singular authorship is problematic here.[71] The meaning is fixed forever in time. The varieties of originalism are, as with most general beliefs, varied and a matter of dispute—original intent versus original meaning, interpretation versus construction, textualism versus originalism—but the basic point is clear. It is the Founders' idea of their eighteenth century world that matters when looking at basic concepts—due process, equal protection, reasonable search, executive power, privacy, the right to bear arms—not those of Americans then, since then, or ours today.[72]

---

68. *Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention*, U.S. DEP'T OF JUST. (Nov. 15, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture [https://perma.cc/G95E-QBB7].

69. *Id.*

70. Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONSTITUTION CTR., constitutioncenter.org/interactive-constitution/white-papers/on-originalism-in-constitutional-interpretation [https://perma.cc/2KEE-PWM5].

71. The problem with group intent in the legislative arena is notorious. The best analysis of the problem is by Gerald MacCallum. *See* Gerald C. MacCallum, Jr., *Legislative Intent*, *in* ESSAYS IN LEGAL PHILOSOPHY 237 (Robert Summers ed., 1968).

72. Perhaps the clearest writer in defense of originalism is Randi Barnett. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

Originalism may involve interpretive nightmares (the intent of those whose vote was because of a compromise can in no sense signify actual intent), semantic incoherence (we do not know if the Founders did or did not know concepts changed as societies changed, what John Rawls explains as concepts versus conceptions,[73] and whether they purposely choose such language with the idea that concepts can incorporate evolved conceptions), and a tendency simply to abandon traditional intent altogether when convenient (no one imposes the Eighth Amendment authors' views of cruelty or we would still be hanging children, the cognitively impaired, and horse thieves today). It may even be, as Ronald Dworkin has argued, that originalism is altogether incomprehensible.[74] However, it is in the ascendancy today with conservatives and with William Barr.

Moreover, one, originalist or not, always begins with the language of the Declaration of Independence and the U.S. Constitution to understand the American republic, and to understand the structure of the institutions and principles of government they lay out. But that understanding is an Enlightenment one, as these documents are eighteenth century Enlightenment works. More importantly here, they make Enlightenment moral demands—truth, autonomy, freedom, equality—on the government and on those who operate the government.

Take first the Declaration of Independence, a shining example of the view of an Enlightenment thinker, Thomas Jefferson. Jefferson creates a political vision, one based on traditions and rooted in the Scottish Enlightenment and in the theory of the Englishman in Dutch exile, John Locke.[75] What does the text reveal? The first two sentences endorse science; speak of contract theory, deontology, and utilitarianism; extol justice and equality; look to the individual's knowledge to direct the events of their lives; and, fundamentally, rest all of it on truth—albeit self-evident truth—but truth alone. It reads with these annotations in mind, as follows:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another [social contract], and to assume among the powers of the earth [social contract], the

73. *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

74. RONALD DWORKIN, *Constitutional Cases*, *in* TAKING RIGHTS SERIOUSLY 131–49 (1977).

75. GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE vi–viii (2018).

> separate and equal [equality] station to which the Laws of Nature [science] and Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation [promotion of truth].
>
> We hold these truths [truth] to be self-evident, that all men are created equal [equality], that they are endowed by their Creator with certain unalienable Rights [deontology], that among these are Life, Liberty [freedom] and the pursuit of Happiness [utilitarianism]. That to secure these rights, Governments are instituted among Men [social contract], deriving their just [deontology that emphasizes justice] powers from the consent of the governed [autonomy]. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form [based on knowledge that is connected to truth], as to them [autonomy based in truth] shall seem most likely to effect their Safety and Happiness [utilitarianism].[76]

The Declaration, a thoroughly Enlightenment document, centers power with the individual, authority in knowledge, relationships in equality, and all of it beginning with the foundational concept: truth. Earlier, we touched upon the issue of the truth of moral statements. We might initially be leery of using a word such as "wrong." For example, consider the statements: "'Inflicting cruel punishment as a lesson to children' is wrong," "'2+3=6' is wrong," "'Lincoln was our first President' is wrong," and "'F = 2MA' is wrong." Are these statements all equally susceptible to truth value or to sentential logic analysis? This is an area of controversy, but the Declaration is untroubled. It held moral truths to be self-evidently true, in the reasoning, reasonable, empirical, universalizable manner the age personified. These truths included the existence of basic rights, a deontology of specifics, including life, liberty, and the pursuit of happiness. They are true per the

76. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

laws of nature, Nature's God,[77] without further questions. Attacking these truths—by lying—attacks the heart of the Declaration. That was Barr's sin.

Deciding when "to dissolve the bands," when "to assume the powers"; how to apply the laws of nature; how to be acquainted with "truths" that are "self-evident"; how to parse, understand, judge, and enjoy one's "unalienable rights" require moral reasoning: all are questions that implicate finding moral truth. So is the conclusion that governments are only "instituted among men," because they derive "their just powers from the consent of the governed" and that all this rests on the consent of the governed.[78] But consent is intelligible only if it is informed. If a government's sole justification to continue to operate depends on informed consent, then hiding the truth, lying about what is, obfuscating reality, or allowing or promoting fraudulent representations extinguishes consent and a government's mandate comes to an end.

The United States Constitution was equally an Enlightenment project, if one firmly in the camp of what Jonathan Israel would categorize as belonging to the moderate, not the radical, group.[79] While the distinction is one of degree—with all looking to freedom, science, reason, autonomy, and truth—the radical thinkers were slow, and the moderates quick, to compromise on fundamental notions of democracy, equality, freedom of expression, and the elimination of state religion.[80] In fact, the debate within the Enlightenment itself was echoed to some degree by the debate within the Constitutional Congress, with such matters as the continuation of slavery, limitations on equality, and the curtailing of direct democracy. These matters were victories for the moderates and a limited Executive while the Bill of Rights provided victories for the radicals. To understand what is there and not there, it is worth considering Israel's description of the radical Enlightenment.

77. This is a reference to the impersonal God of Spinoza, heedless of prayer, indifferent to faith, incapable of miracles, without inspired religion, a non-God that is no more than science and human thought, simply Nature dressed up to avoid religious retribution. *See* SPINOZA, *supra* note 15, at 245–56.

78. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

79. JONATHAN ISRAEL, A REVOLUTION OF THE MIND: RADICAL ENLIGHTENMENT AND THE INTELLECTUAL ORIGINS OF MODERN DEMOCRACY (2010).

80. Margaret C. Jacob, *Of Radical and Moderate Enlightenment*, *in* REASSESSING THE RADICAL ENLIGHTENMENT (Steffen Ducheyne ed., 2017).

> Radical Enlightenment is a set of basic principles that can be summed up concisely as: democracy; racial and sexual equality; individual liberty of lifestyle; full freedom of thought, expression, and the press; eradication of religious authority from the legislative process and education; and full separation of church and state. It sees the purpose of the state as being the wholly secular one of promoting the worldly interests of the majority and preventing vested minority interests from capturing control of the legislative process. Its chief maxim is it all men have the same basic needs, rights, and status irrespective of what they believe or what religious, economic, or ethnic group they belong to, and that consequently all ought to be treated alike on the basis of equity, whether black or white, male or female, religious or nonreligious, and that all deserve to have their personal interests and aspirations equally respected by law and government. Its universalism lies in its claim that all men have the same right to pursue happiness in their own way, and think and say whatever they see fit, and no one, including those who convince others they are divinely chosen to be their masters, rulers or spiritual guides, is justified in denying or hindering others in the enjoyment of rights that pertain to all men and women equally.[81]

The debate within and for America, at least America at its best, is still the Enlightenment debate. But that debate never gets started if what the radicals and the moderates—Spinoza and Diderot versus Locke and Montesquieu—agreed upon but argued the details of, freedom and autonomy gained through reason and truth, are blocked.[82] Barr's speech to

81. ISRAEL, *supra* note 79, at vii–viii.

82. Of course, slavery was not part of the Enlightenment bargain, and it is fair to ask in light of the Constitutional founders' Enlightenment pretensions, particularly in the case of James Madison, how slavery could be allowed. To some of the first post-Enlightenment generation, before the hagiography of Constitutional exegesis had set in, many thought the Constitution to be "a covenant with death and an agreement with hell." They held that "[a] repeal of the union between northern liberty and southern slavery is essential to the abolition of the one, and the preservation of the other." William Lloyd Garrison, THE LIBERATOR, May 6, 1842 (available at https://www.digitalcommonwealth.org/book_viewer/commonwealth:8k71qb74s [https://perma.cc/22RJ-NGW3]); *see also* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 1–3 (1995).

the Federalist Society, not unexpectedly, cited only moderates, Locke, Montesquieu, and Jefferson, but these thinkers can only offer cold comfort to one who would have us flee the object of the fundamental Enlightenment method of reason in pursuit of truth.

Consider, then, the Preamble, when annotated, to the United States Constitution:

> We the People [democracy] of the United States, in Order to form a more perfect Union [social contract], establish Justice [deontology and the first requirement of the Union], insure domestic Tranquility, provide for the common defence, promote the general Welfare [utilitarianism], and secure the Blessings of Liberty [freedom] to ourselves and our Posterity [deontology], do ordain [an explicitly secular ordination] and establish this Constitution for the United States of America.[83]

As with the Declaration of Independence, the Constitution's lineage hails from and is embedded in the Enlightenment world. Social contract justification in jettisoning the bands to the mother country, ordaining a foundation absent religious reference, emphasizing freedom, placing justice first among equals, and even referring to the deontological equality of persons of future generations, our posterity: all are seventeenth and eighteenth century principles, part of that debate. But principles sit inert without a method to analyze, to sort, and to weigh them, a method to allow us to act through their employment. That method is reason in search of truth. It allows us to make use of our freedom to understand what counts in reaching a just result or judgment, to respect the autonomy of others through knowledge of them, and to understand ourselves, again through that knowledge. That is what Barr's address to the Federalist Society promised, a Constitutional promise, and it was that promise—along, of course, with his oath of office promising his support of the Constitution, an oath that demands honesty by its very definition—that he breached.

One worries about being smug, even sanctimonious, when viewing the falsehoods of others, particularly in those cases of what the Greeks called

83. U.S CONST. pmbl.

"akrasia," or weakness of the will.[84] We all give in, or fail to overcome, from time to time, our appetites. Shall these cases cause us to stand equally condemned along with Barr? Of course, the answer is no. Barr's transgressions are too deep, too profound, and too destructive to be compared to the day-to-day background noise of the evasions and falsehoods of ordinary social discourse that plague us all. The fabric of our society, its ethical foundation, was at stake, a fabric woven together by a mindset that regards truth as so central that all else fails if it fails. Clearly, Barr knew that. Clearly, Barr disregarded that anyway.

The issues at stake for Barr swirled around a democratic election where the concern was the integrity of that election: was each citizen's vote, within reason, and with a regard for the true facts of the matter, informed and freely chosen? The experiment in democracy only works if those deciding can make intelligent and informed decisions. That was a concern that triggered an investigation, gave rise to Special Counsel Mueller's appointment, motivated the investigative and discovery process, and led to Mueller's Report. It was that concern that Barr trivialized.

We do not give minors or the cognitively impaired the vote,[85] even though they are likely to have a greater stake than the average voter in government policies and budgeting, as their ability to function and even their survival are often tied to contested and at times ephemeral sets of government actions. Nevertheless, we deny them the vote and deny them full autonomy just because (we believe) they cannot fully reason and reach the truth. Barr would extend that denial more broadly, seeing everyone as being disabled from an informed opinion and, in so doing, rejecting their autonomy. That extension strikes at and undermines justice, the rule of law and, it would be no stretch to say, the set of principles that underlies our democracy. For all that, William Barr deserves our unflinching condemnation.

84. *See* ARISTOTLE, NICOMACHEAN ETHICS (340 B.C.E.); *see also* Donald Davidson, *How is Weakness of the Will Possible?*, *in* MORAL CONCEPTS 103 (Joel Feinberg ed., 1969). For Barr, the appetite might be seen as one of wanting power, where its lust triumphs over the reasoning that Barr, in a more contemplative mood when addressing the Federalist Society, recognized should be tamed. Barr fails because of the same type of weakness that causes any appetite to squelch reason. None of that, however, is a defense, legal or moral, even for the Greeks. *Cf.* PLATO, GORGIAS (c. 399–390 B.C.E.).

85. *See* U.S. CONST. amend. XXVI; *Voting and Cognitive Impairments*, AM. BAR ASS'N (Mar. 12, 2021), americanbar.org/groups/law_aging/resources/voting_cognitive_impairments/ .