Identifying "Truth" in American Public Discourse

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IDENTIFYING “TRUTH” IN AMERICAN PUBLIC DISCOURSE

Alina Ng Boyte

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I. INTRODUCTION

My paper for this symposium deals with the decline of honest and open dialogue in American public discourse. My goal in this paper is to offer some ideas of how we could possibly find “truth” in all the rhetoric being thrown out there to find common ground, engender honest conversation about national and global concerns, and dispel fear of the “other.” To begin honest and open dialogue among people and constituencies with conflicting views, where fear and distrust take center stage, propositions that correspond to verifiable facts must be presented as propositions of truth, so that discussions of national and international significance will take their natural course without stalling because of fear and distrust. The political crisis in America today is so profound because parties situated in each side of a divided spectrum believe so sincerely in their point of view and how that point of view represents most accurately the constitutional democracy they, and those before them, fought so hard to attain.

The dilemma we face in public discourse today can be portrayed with a felicitous analogy. A wise shop owner in a small town once taught his son that the most difficult problem with operating a cash register, ringing up the purchases, taking the money from the customer, and handing them the change was less about deceptive customers who are dishonest about how much they handed the cashier.
The real problem and the more difficult to resolve is when the customer honestly believed that they gave the cashier $20 while the cashier honestly believed with equal sincerity that the customer only handed them $10.1 This political crisis presents a similar conundrum, where parties to the political divide sincerely believe that they are fighting to uphold core American values that the other side is trying to rob them of. This is a very difficult problem to work out satisfactorily.

But with the store owner example, there is a single and actual amount that was exchanged between customer and cashier. That amount exists as the indisputable “truth” despite each party’s sincerely held belief of how much was exchanged. The real amount that was exchanged could be either $10 or $20 (or perhaps even another amount), and if the parties could identify that amount, the matter might be resolved amicably. Identifying that amount to the satisfaction of both parties may, however, be extremely difficult because both parties would have their own way of arriving at the right amount that was exchanged. The customer could say how much she had to begin with and how much she is left with after the exchange. Or the cashier could count what was in his cash register before and after the exchange. But neither one of these solutions to arrive at the “truth” of the matter would satisfy the other party that what was presented as true from one party’s perspective is indeed in fact true. In this situation, moreover, the cashier’s “truth” might differ considerably from the customer’s without any irrefutable way to resolve the problem. Letting the parties present their own “truth of the matter” would cause them to end up where they started. To deal with the problem more effectively, we would have to look to objective and unquestionable facts, such as eye witnesses or surveillance videos, which would provide verifiable and indisputable facts that would serve as truth to both the cashier and the customer. Such factual evidence is irrefutable and when presented to the parties, offers a decisive solution to the problem by demonstrating that some sincerely held beliefs can sometimes be distorted by one’s own idiosyncratic perception of actual facts and may have to be set aside to make way for an actual resolution.

In American public discourse, the pursuit and identification of truth is crucial at a time when political polarization has led to ideological silos and political gridlock. The Pew Research Center, for

example, noted that 41% of Democrats see the Republican Party as a threat to the nation’s well-being and that 45% of Republicans view the Democratic Party as posing a similar threat to the country.² More than half of Democrats (55%) say that the Republican Party makes them feel “afraid,” while 49% of Republicans feel the same fear about the Democratic Party. Among members of these parties who are highly engaged with politics (i.e., partisans who vote regularly and who either volunteer for or donate to their party’s political campaigns), “70% of Democrats and 62% of Republicans say they are afraid of the other party.”³ Healing these partisan divisions to allow for honest dialogue depends crucially on finding a common objective “truth” that might reveal how some sincerely held beliefs about the “other” and their agenda, moral values, social and economic life, and equality more generally may be distorted by personal biases and heuristics. For genuine discussion and compromise to occur, fear of political outgroups must be addressed and idiosyncratic perceptions of the facts set aside.

Seeing the “other”⁴ as being a threat to the nation’s well-being and being afraid of the “other” is significant because fear goes beyond mere distrust or exasperation of the “other.” Fear conjures up trepidation, anxiety, and alarm. Fear leads to a shutdown of open dialogue and tolerance of the other. From an evolutionary viewpoint, for our primate ancestors, fear kept them alive from predators—at least for as long as they could to reproduce and pass on their genes.⁵ For our primate ancestors, fear served a purpose by ensuring their survivability in a physically dangerous environment. But fear in society today—when modern man is no longer pursued as food by sabre tooth tigers, venomous snakes, large constrictors, or animals of that sort—is debilitating. In political discourse in modern society, fear of the “other” leads to polarization. As there are no social norms or sanctions that discourage overt disapproval

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³. Id.
⁴. In psychology, the “other” is considered to be the “wide and wild world” that lies beyond our individual selves and “[o]utside our own ego-driven borders,” which is “too great, too vast, unpredictable, and messy for us to feel safe.” David M. Goodman & Mark Freeman, Introduction: Why The Other?, in PSYCHOLOGY AND THE OTHER 1, 1 (David M. Goodman & Mark Freeman eds., 2015). For the purposes of this paper, the “other” refers to individuals and groups who are different from us in viewpoint, beliefs, and ideals.
and discrimination of political opponents, partisans have a tendency to openly discriminate against opposing partisans. Much of this intolerance toward opposing political and ideological affiliation is attributable to hostility and animosity directed at the "other" rather than favoritism turned inward toward their own political party. This tendency for open discrimination is based on false biases and partisan affects geared toward co-partisans and against political opponents, while each partisan's truth about policy positions, national expectations, and ideological ideals remain obscured under these incorrect assumptions about the "other."

Participants in public discourse must be aware of such biases and heuristics because they cause cognitive errors and obscure the truth about contemporary economic, social, and political issues, such that honest and open dialogues cannot take place, and answers to hard questions remain elusive in public spaces. This paper argues that "truth" can only be discoverable when we, like the customer and cashier in the shop owner example, are willing to set aside our sincerely held beliefs for the pursuit of objective and verifiable facts. Part II of this paper suggests that normative ethics can offer the analytical lenses through which philosophical "truths"—such as the fact that justice is an essential characteristic of any well-thriving and robust society, as well as a "fundamental moral virtue that extends beyond the individual to regulate proper conduct within a political community"—can be identified and verified or supported through the natural sciences. Part III suggests that while actual truth can be identified through normative ethics and verified through the natural sciences, truth about human nature and the essentials of certain virtues in a political economy is often obscured

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6. Shanto Iyengar & Sean J. Westwood, Fear Loathing Across Party Lines: New Evidence on Group Polarization, 59 Am. J. Pol. Sci. 690, 690 (2015) (stating that "[u]nlike race, gender, and other social divides where group-related attitudes and behaviors are constrained by social norms, there are no corresponding pressures to temper disapproval of political opponents... Partisans therefore feel free to express animus and engage in discriminatory behavior toward opposing partisans") (internal citations omitted).
7. Id. at 691.
8. Id. at 704.
9. Id. at 704-05.
11. This is not to say that philosophical knowledge of basic human truths and moral norms are to be deduced, inferred, or derived from the natural sciences or from facts about human nature. See ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 85 (1999). Factual findings about human nature from the cognitive and neurosciences or biology, however, can support what moral philosophers have identified as human "truths" without committing G.E. Moore's naturalistic fallacy. See G.E. MOORE, PRINCIPIA ETHICA 38-39 (Dover Publications, Inc., 2004) (1903) (arguing that just because we find something to have "good" qualities does not necessarily make that thing good in itself).
by cognitive errors, which prevent us from accessing and knowing truth through our cognitive mechanisms. Part IV presents arguments that legal institutions and government intervention are necessary to correct these cognitive errors and establish common ground where truth may exist to dispel fear and distrust of the other and for fruitful dialogue to occur among opposing parties to public discourses in civil society.

II. IDENTIFYING “TRUTH” THROUGH NORMATIVE ETHICS AND FINDING SUPPORT THROUGH THE NATURAL SCIENCES

The “truth” of a matter, in a practical sense, can be thought to be the epistemic justification for a known belief—possessing the factual knowledge that would prove an accepted proposition to be true and justify its acceptance by its believer. Propositions that are true can be divided into philosophical truths, which are identified by accessing human knowledge of God or by accessing human reason and distinguishing the practically reasonable from the practically unreasonable, and scientific or physical truths. For instance, water is a product of two hydrogen molecules and a single oxygen molecule, and the Statue of Liberty is in Liberty Island in New York Harbor—facts which are identified through empirical work, tests, and observations. For political and civil discourse in contemporary public life to make headway without the distrust and fear that has hindered the honest exchange of views and prevented opportunities for collaboration, objective verifiable propositions that are true must be presented to participants in this dialogue. Parties to the dialogue should be able to explain or justify their values, principles, or political positions by presenting evidence that supports their point of view as true. In practice, that which is true to ourselves is often a matter of theoretical and axiomatic principles that we adopt and which we cannot detach from philosophy. As Harvard’s political philosopher Michael J. Sandel states in the preface to his book *Democracy’s Discontent: America in Search of a Public Philosophy*:

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But if political philosophy is unrealizable in one sense, it is unavoidable in another. This is the sense in which philosophy inhibits the world from the start; our practices and institutions are embodiments of theory. We could hardly describe our political life, much less engage in it without recourse to a language laden with theory – of rights and obligations, citizenship and freedom, democracy and law. Political institutions are not simply instruments that implement ideas independently conceived; they are themselves embodiment of ideas. For all we may resist such ultimate questions as the meaning of justice and the nature of the good life, what we cannot escape is that we live some answer to these questions – we live some theory – all the time.\textsuperscript{14}

Thus, because of the philosophical underpinnings of political life and civic engagement, one good way to begin to identify common objective “truths” for civil political discourse is to engage in philosophical inquiries about what is morally true and right. Moral questions that deal with standards of right and wrong, good and bad habits, and individual rights and duties central to normative ethics could provide analytical tools to help us determine whether particular beliefs and ideas are morally right and how an individual’s sincerely held beliefs measure against these moral “truths.” The analytical approach to identifying moral truths engages what moral philosophers call “prescriptive” or “normative” questions\textsuperscript{15} to find answers as to what may be morally correct or “true” against an objective standard and in an absolute way while acknowledging that what may be morally right or wrong may be socially, historically, and culturally contingent.\textsuperscript{16} These philosophical questions require us to engage with what might be the truth of a given situation regardless of the moral beliefs that an individual or community may have normalized. In most cases, these “truths” are considered self-evident truths in that they present various values, virtues, and

\textsuperscript{14} MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY, at ix (1998).

\textsuperscript{15} In this paper, I draw a distinction between normative and prescriptive analyses, even though “normative” and “prescriptive” are sometimes used interchangeably. Normative analysis proposes standards of what ought to be without necessarily referencing empirical facts (e.g., murder should be illegal because there is value to human life), whereas prescriptive analysis draws from empirical facts about what one should do in a particular situation (e.g., one needs to do x, y, and z to achieve a particular result because that is standard protocol).

\textsuperscript{16} JOHN W. COOK, MORALITY AND CULTURAL DIFFERENCES 8 (1999) (explaining that anthropologists have shown that there are “different moralities among the world’s various cultures”).
goods which are inherently good, such as knowledge, and which should be pursued—not as an instrument to an end, but as an end in itself.\(^\text{17}\)

So, for example, one of the questions about moral truths that moral philosophy and normative ethics might help answer in America today is the question about immigration and whether allowing foreign citizens into the country would strengthen the country’s economy and help the country grow. Whether a country like the United States should allow or restrict the inflow of immigrants might depend on identifying hard and difficult moral truths about the individual’s rights and a society’s collective right to flourish and grow and figuring out where the issue of immigration fits in this analysis. Moral philosophy and normative ethics might contribute to this analysis by offering rational arguments that might inform us of how a fully flourishing society should be or ought to be, whether there are certain inviolable moral laws to respect the dignity and well-being of fellow human beings, or if the decision to allow immigrants into the country will have beneficial consequences or outcomes that outweigh any potential costs. Thus, by asserting that a fully flourishing society depends on having diverse talents of individuals living in that society, a philosopher could make a normative proposition that immigration is a good thing that should be encouraged because the inflow of talent from other countries contributes to the betterment of that society and outweighs the cost of increased immigrants into the country.\(^\text{18}\) Moral philosophy’s quest for normativity is an excellent way to dispel claims that moral values and the ideals of justice and equity are subjective beliefs and therefore incapable of exhibiting any level of truth if objective standards for truth, such as the self-evident truth that all men are created equal and endowed with certain inalienable rights,\(^\text{19}\) can be identified and accepted as a basis for political discourse.

Normative analyses, however, depend on lines of philosophical argumentation to support moral claims as truths. These philosophical argumentations are not normally empirically supported. A normative analysis may propose a hypothesis or assume an axiom for rational engagement but does not necessarily refer to empirical facts in its identification of “truth” because of the philosopher’s be-

\(^\text{19}\) THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
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Belief that moral norms, ends, are truths not reducible to nor vindicated by descriptive or empirical facts. Ethics and morality, however, are concerned with "saying what contributes to the well-being of humans, human groups, and human individuals in particular natural and social environments" and have linkages to how we as human beings think and behave in these environments. But naturalized moral inquiries cannot and should not be confined to only the study of human ecology. Because of advances in the study of the human brain and mind in relation to moral judgment and behavior, cognitive science has shown that moral judgments and decisions are deeply affected by our cognitive functions. For example, psychopathy and antisocial personality disorder (APD) are mental and personality disorders that manifest as a lack of empathy or kindness toward situations that would normally cause a person to feel distress (e.g., when looking at a picture of a crying child). The person with psychopathy and APD is often perceived to be an unkind or, even worse, an immoral person who has no compassion for human suffering. Such disorders are believed to arise because of a biological dysfunction of the amygdala and ventromedial prefrontal cortex (VMPFC) in the brain, which causes abnormal responses to morally salient stimuli. Studies of various neural structures in neuroscience suggests that it would one day be possible to understand how the human brain makes moral decisions as it encodes and manipulates the content of thoughts, and a naturalized study of morality and ethics should then be a study of individual human biology, neurology, and psychology as much as it is a study of human ecology.

The identification of truth through normative ethics and moral philosophy for the purposes of public discourse should be supported with empirical findings in the natural and biological sciences to validate propositions presented as true. In the shopkeeper's example,

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22. Id. (stating that "[i]f ethics is like any science or is part of any science, it is part of human ecology, concerned with saying what contributes to the well-being of humans, human groups, and human individuals in particular natural and social environments").


24. Id. at 1014-15.

25. Id. at 1019.
Identifying Truth

objectively verifiable and unquestionable facts, such as eye witnesses and surveillance videos, provide provable and indisputable facts about the actual cash exchange to serve as indisputable “truth” to disagreeing parties who believe so sincerely in their point of view that the possibility of error on their part becomes marginal. More and more philosophers and ethicists are drawing lessons from cognitive psychology, brain science, and evolutionary biology to address philosophical questions today despite opposition from more traditional philosophers;\textsuperscript{26} if empirical science can support (or discredit) moral claims about what is normatively right or wrong, we would be able to, in a practical sense, discern whether a point of view advanced by a participant in the discourse is acceptable as a premise for engagement in civic discourse. Some sincerely held moral beliefs that contribute to today’s political crisis, for example, may be a result of complex evolutionary processes taking place over a long period of time and that has nothing to do with whether that particular act is morally right or wrong. The moral norm against having sexual relations with members of one’s own family may stem from an evolutionary need to have offspring that are strong and healthy and is not necessarily a normative standard that should be used to help us determine the moral value of a particular conduct or point of view.\textsuperscript{27} Empirical evidence from these studies in evolutionary biology dilute moral assertions—even if they were sincerely held for a long time—about the wrongness of particularly non-socially conforming ideas or beliefs. When sincerely-held viewpoints are discredited by empirical science, they need be set aside to make way for more accurate beliefs that are consistent with factual knowledge if civil public discourse is to advance.

Other studies suggest that some moral qualities may be common to humanity. Empirical findings produced by these studies, such as studies in neuroscience that show that a child’s moral development follows a “universal sequence of stages” and is not idiosyncratic to the particular child,\textsuperscript{28} suggest that moral sensibility in human beings is universal. Two-year-old children who are put in a room and

\begin{footnotesize}
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\item \textsuperscript{26} Walter Sinnott-Armstrong, \textit{Introduction}, in \textsc{1 Moral Psychology: The Evolution of Morality: Adaptations and Innateness} xiii, xiii-xiv (Walter Sinnott-Armstrong ed., 2008).
\item \textsuperscript{27} For example, the moral stance against incest has less to do with propriety than with the biological need to produce children without congenital, physical, and intellectual malformation. See Debra Lieberman, \textit{Moral Sentiments Relating to Incest: Discerning Adaptation from By-Products}, in \textsc{1 Moral Psychology: The Evolution of Morality: Adaptations and Innateness} 165, 165-69 (Walter Sinnott-Armstrong ed., 2008).
\end{enumerate}
\end{footnotesize}
presented with objects that have had their integrity flawed (e.g., a shirt with a button missing or a toy truck without its wheels) instinctively know that there is something wrong about the object when they respond by saying “yukky” or “boo-boo” upon seeing the object. Irrespective of culture, children know that a flawed object that he or she did not break has had its integrity violated by another person or force.\textsuperscript{29} Knowledge of our inherently moral self can support the assertion that respecting the integrity of other people and things in our surroundings is a moral expectation that must be honored. When participants to political discourse disagree about rights to fossil fuel consumption and its greenhouse effects, a moral proposition that we respect our environment and prevent its destruction can be supported by a study that proves the ubiquity of moral sensibilities toward our surroundings as more consistent with “truth”—rather than the moral proposition that there should be an absolute right to economic growth and industrial development. In this sense, studies in neuroscience offer practical ways in which “truth” may be empirically tested to give one moral proposition greater weight over a less “true” moral proposition.

The study of babies and how morality is revealed in their interaction with their surroundings provides some evidence that moral foundations in human beings are not learned from social contexts, but are, rather, inherent to human nature. At the Yale Infant Cognition Center,\textsuperscript{30} psychologist Karen Wynn has conducted baby studies showing that babies as young as three months old—an age before their parents or caretakers can influence them as to what is normatively “good” and “bad,” fair, and just—have an innate sense of morality that is not instilled but is “instead [a] product[ ] of biological evolution.”\textsuperscript{31} In one experiment conducted at the center, a one-year-old boy is shown a puppet show in which one puppet played with a ball while interacting with two other puppets. The middle puppet would roll the ball to the puppet on the right, who would pass it back. This was the “nice” puppet. Then, the center puppet would roll the ball to the puppet on the left, who would run away with it. This was the “naughty” puppet. The two puppets on the ends were then brought down from the stage and set before the toddler. Each was placed next to a pile of treats. At this point, the toddler was asked to take a treat away from one puppet. Like most children in this situation, the boy took it from the pile of the “naughty” one. But this punishment wasn’t enough: The baby then

\begin{thebibliography}{99}
\bibitem{29} Id. at 299.
\bibitem{31} Id. at 8, 28-29.
\end{thebibliography}
leaned over and smacked the “naughty” puppet in the head.\textsuperscript{32} Paul Bloom in his interview with CNN had this observation to offer: “Humans are born with a hard-wired morality, a sense of good and evil is bred in the bone.”\textsuperscript{33} But he also goes on to caution: “We are naturally moral beings, but our environments can enhance—or, sadly, degrade—this innate moral sense.”\textsuperscript{34}

Empirical findings that human beings are hardwired with an innate sense of right and wrong on a fundamental level is evidence that can be used to adduce propositional truths to guide political discourse in America. This foundational moral sense of right and wrong that we see in babies is reminiscent of classical natural law theory that man’s desires and emotions must be “governed and moderated by the standards of reason” and good order because that is proper by the law of nature.\textsuperscript{35} The one-year-old baby’s sense of right and wrong when one puppet does a good deed and the other a bad deed serves as the cornerstone for a more matured and nuanced sense of justice, a concept that must be central to the idea of “truth” in public discourse—where many contentious issues revolve around what the most “just” outcome would be in a difficult social or economic problem. In political life, natural law theories have a central role in advancing thinking about the role and limits of government and the proper purpose of law and legal institutions.\textsuperscript{36}

Theoretically, these foundational moral truths about how we should behave, the types of things or goods we should pursue, the ideals we should hold, and what belonging to a good society looks like, which can be empirically demonstrated through the natural sciences, would be accessible through practical reason\textsuperscript{37} as self-evident-truths—truths that require no justification for their acceptance because they are, by nature, true.\textsuperscript{38} In theory, we should be able to know what these “truths” are to guide civil discourse in American public life. However, these “truths” are not always accessible to us through practical reason. The human mind is sometimes

\begin{footnotes}
\footnotetext[32]{Id. at 7.}
\footnotetext[34]{Id.}
\footnotetext[35]{John Finnis, Classical Natural Law Theory, in \textit{The Oxford Handbook of Jurisprudence and Philosophy of Law} 3 (Jules Coleman & Scott Shapiro eds., 2002).}
\footnotetext[36]{Brian H. Bix, Natural Law: The Modern Tradition, in \textit{The Oxford Handbook of Jurisprudence and Philosophy of Law} 61 (Jules Coleman & Scott Shapiro eds., 2002).}
\footnotetext[37]{FINNIS, supra note 13, at 18 (“A sound theory of natural law is one that explicitly . . . undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable[.]”).}
\footnotetext[38]{Id. at 32.}
\end{footnotes}
prone to cognitive errors that are a result of heuristics, which are principles that help “reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”\textsuperscript{39} and biases, “departures from the normative rational theory that served as markers or signatures of the underlying heuristics.”\textsuperscript{40} In reality, heuristics and biases work to direct cognitive processes toward erroneous outcomes in human decision-making and prevent us from identifying moral truths to guide civil discourse toward socially, economically, and politically reasonable conclusions.

III. COGNITIVE ERRORS PREVENT US FROM KNOWING TRUTH

To appreciate the effect of heuristics and biases on cognitive processes, consider this scenario of the “hedonic twins.”\textsuperscript{41} The twins, Albert and Ben, have identical tastes and currently hold identical starting jobs, with little income and little leisure time. The firm in which they work offers them two improved positions—positions A and B—and lets the twins choose whether they would prefer a raise of $10,000 (position A) or an extra day of paid vacation each month (position B). Since Albert and Ben are indifferent about their options from their current position (their reference point), they toss a coin, and Albert gets the $10,000 raise while Ben gets the extra leisure time. After some time passes, both Albert and Ben get accustomed and used to their new positions. The firm now suggests that they both switch positions. Expected utility theory, which predicts that a person, when presented with a choice between two outcomes, will choose the outcome with the highest expected utility,\textsuperscript{42} assumes that the twins will need little or no incentives to switch because both options are equally attractive to both of them. After all, both twins have identical tastes and did not have any preference when the firm initially presented them with positions A and B.


\textsuperscript{41} \textbf{DANIEL KAHNEMAN, THINKING, FAST AND SLOW} 291 (2011).

However, prospect theory, developed by psychologists Daniel Kahneman and Amos Tversky,\textsuperscript{43} assumes that both twins will prefer to remain where they currently are because of a preference for the status quo (known as the “status quo bias”) and an aversion against loss (“loss aversion”).\textsuperscript{44} From Albert’s first reference point when he was given a choice between positions A and B, he would have found both alternatives—a raise of $10,000 or twelve extra days of paid vacation—equally attractive because he had neither high income nor high leisure time. After choosing a raise of $10,000 and being in position A for a while, Albert’s reference point would have changed,\textsuperscript{45} and his choice would have a new structure: Stay at position A (there is no gain and no loss), or move to position B (receive twelve extra days of paid vacation but also take a $10,000 salary cut). In this new situation, it is unlikely that Albert will choose to move to position B because a salary cut of $10,000 represents a loss, and there is a general aversion to loss. The same reasoning applies to Ben because giving up twelve days of paid vacation represents a greater loss than the gain of $10,000 in extra income. The hedonic twins example demonstrates that preferences do not remain the same, changing with the reference point as it changes; the costs of a change often outweigh its benefit, as “changes that make things worse (losses) loom larger than improvements or gains,”\textsuperscript{46} thereby “inducing a bias that favors the status quo.”\textsuperscript{47}

Status quo bias and loss aversion represent anomalies to the economic belief that human behavior can be best explained by “assuming that [economic] agents have stable, well-defined preferences and [that they] make rational choices consistent with those preferences in markets that (eventually) clear.”\textsuperscript{48} The anomalies that people tend to prefer the status quo when change involves incurring losses, identified by Kahneman and Tversky as being essential features of the prospect theory, commensurate with and provide support for the endowment effect (the idea that “losses from a reference position are systematically valued far more than commensurate gains” and that “[t]he minimum compensation people demand to


\textsuperscript{44.} \textit{Kahneman, supra} note 41, at 291.

\textsuperscript{45.} Prospect theory assumes that preferences do not remain stable, unlike expected utility theory, which assumes that preferences are stable over time. \textit{Id.}


\textsuperscript{47.} \textit{Kahneman, supra} note 41, at 292.

\textsuperscript{48.} Kahneman, Knetsch & Thaler, \textit{supra} note 46, at 159.
give up a good has been found to be several times larger than the maximum amount they are willing to pay for a commensurate entitlement”\(^49\). The endowment effect, a term coined by Chicago economist Richard Thaler and used to refer to the observation that people would demand much more to give up an object or entitlement than they would be willing to pay to acquire the same object or entitlement, cause people to hold on to objects, rights, or entitlements because of the pain of giving it up (loss aversion). Whereas one who does not have the object, right, or entitlement to begin with is not willing to spend as much to acquire the object, right, or entitlement because the disadvantage of parting with the money (or any other measurement of value) to acquire the object, right, or entitlement outweighs any benefit of acquiring them (the status quo bias). The endowment effect plays out in reality because of our cognitive processes and has got nothing to do with the inherent value of the object, right, or entitlement per se.\(^50\)

Because of how the mind processes information when it is faced with situations that require quick decision-making, the mind uses heuristics to make quick and intuitive judgments that are at times erroneous because of the presence of cognitive biases. Psychologists call the mind’s method of making quick automatic decisions with minimal information and external input “System 1,” which is contrasted with “System 2,” the more deliberate, careful, and slower mental activity that is “often associated with the subjective experience of agency, choice, and concentration.”\(^51\) System 1’s intuitive judgment and quick decision-making process would explain the endowment effect, loss aversion, and status quo bias that Kahneman, Tversky, and Thaler considered anomalies to standard economic behavior. Why else would a wine collector who bought wine at auctions for a maximum amount of $35 be only willing to sell that same bottle of wine for no less than $100, neither buying nor selling the bottle at prices between $35 and $100? The minimum selling price of $100 was significantly higher than the buying price of $35, which is inconsistent with standard economic theory, which assumes that the wine collector would have a single value for the bottle (e.g., $50) and would sell if he receives an offer above the value (more than $50) and be willing to pay up to $50 for the same bottle of wine.\(^52\)

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50. Kahneman, Knetsch & Thaler, *supra* note 46, at 163 (“[T]he main effect of endowment is not to enhance the appeal of the good one owns, only the pain of giving it up.”).

51. *KAHNEMAN, supra* note 41, at 20-22.

52. *Id.* at 292-93.
Other studies have shown the same discrepancy between the minimum selling price and maximum buying price.\textsuperscript{53}

Heuristics and cognitive biases do not only explain anomalies in economic behavior. They also explain how moral truths about the right course of action in political life could remain inaccessible to the human mind. The value of moral truths only becomes evident after a person, having “experienced the urge to question, [...] has grasped the connection between question and answer” and realizes that knowledge is a product of “correct answers to particular questions.”\textsuperscript{54} Identifying moral truths for the purposes of political discourse means asking the right questions and getting to the right answers. This process can be interrupted by heuristics and cognitive biases that prevent us from arriving at true knowledge about an issue. Take, for example, the political issue of whether to place limits on the amount of carbon that polluters are allowed to emit to address global climate change. Suppose the federal government proposes to restrict carbon emission by introducing “carbon pricing,” a market-based strategy for lowering global warming emissions by putting a price (an actual monetary value) on carbon emissions so that the costs of climate impacts and the opportunities for low-carbon energy options are better reflected in our production and consumption choices.

The question can be presented in two ways depending on what people believed was the status quo. If people were convinced that climate change was not the status quo, they can be asked for the minimum amount of money they would be willing to accept (WTA) to agree to carbon emission and the possibility of irreversible global warming. One way is to ask how much of a discount consumers would be willing to accept in the price of goods or services produced by companies for every one ton of carbon dioxide that the company releases into the atmosphere. On the other hand, if people were convinced that climate change was already part of the status quo, they can be asked what they would be willing to pay (WTP) to reduce or eliminate the effects of global climate change through a carbon tax imposed on companies, the cost of which would be transferred to consumers in the price of goods or services. Based on previous studies conducted,\textsuperscript{55} the discrepancy between the WTA and WTP responses would be significant with the WTA responses greatly exceeding the WTP. The more extreme WTA responses can

\textsuperscript{53} See Kahneman, Knetsch & Thaler, supra note 46, at 160-70.
\textsuperscript{54} FINNIS, supra note 13, at 63.
\textsuperscript{55} Kahneman, Knetsch & Thaler, supra note 46, at 167-68.
be explained by protests to the acceptance of a new risk, but it is less comprehensible why people would pay less to reduce or eliminate the effects of climate change that is already felt (save for the endowment effect and the general reluctance to spend money to acquire something that they do not yet own). This discrepancy is likely to manifest despite the fact that protecting the environment and creating a sustainable and livable planet for ourselves would be a moral imperative for human flourishing. This moral truth might not be not accessible because the interplay of heuristics and biases in our cognitive processes, such as the status quo bias, loss aversion, and endowment effect, produce anomalies in ordinarily reasonable thinking about morality and truth.

IV. THE ROLE OF LAW AND LEGAL INSTITUTIONS IN IDENTIFYING TRUTH

The law has a unique and important role to play in contemporary political life in America when partisan divides and distrust are perpetuated by the lack of accessibility to the truth because of our cognitive processes. The way we frame and present the issue has significant impact on the outcome of a discourse. For example, framing a price as a “discount” or a “surcharge” will evoke markedly different responses from people because of the aversion to losses. Tversky and Kahneman explain that “[i]t is easier to forgo a discount than to accept a surcharge because the same price difference is valued as a gain in the former case and a loss in the latter.”

Hence, to appease consumers, credit card companies “insist that any price difference between cash and credit purchases should be labeled as a cash discount rather than a credit surcharge.” Framing and presenting an issue for political discourse in a way that is constructive (rather than destructive) is important for American public life, and careful thought must be made so that the speech or language used to frame and present the issue highlights, rather than obscures, the truth.

The late Emory law professor Harold Berman emphasizes the value of language and its capacity to build and destroy communities when he stated in his book *Law and Language: Effective Symbols of Community*:

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56. *Id.* at 168.
58. *Id.*
Language can, indeed, be a most dangerous – the most dangerous – weapon. It can be used to enslave an individual or, indeed, a whole nation. It can be used to whip men into fury against each other. It can be used to break a person down. Yet these destructive uses of language are only possible because of its constructive power – that is, the power of men through speech to reach out to each other, to share each other’s experience, to achieve some sort of meeting of minds and hearts, some sort of agreement. These constructive uses of language are the basis upon which its power to confuse and divide is built.  

Law is a type of language that goes beyond mere legal rules. Law adds ‘rhetorical, ethical, and political meanings to what appears as a merely ‘logical,’ that is, declarative, statement’ and must be morally congruent. When there is evidence that heuristics and biases affect our cognitive processes to prevent us from knowing the truth of an issue, which is theoretically accessible to us through practical reason, laws and legal institutions need to address these cognitive errors to ensure that policy decisions that emerge from political and civil discourse are a result of deliberate, calculated, and careful discussions that are not affected by the quick, intuitive, and often anomalous judgments of the mind’s system. The idea of the law and legal institutions stepping in to correct deviations from accepted norms and standards is not novel. In fact, government and legal institutions have corrected market failures to align imperfect markets, where transfers of rights and entitlements cannot occur due to the presence of externalities, monopolistic practices, or transaction costs, to the economist’s ideal of the perfect market. The doctrine of fair use in copyright law, for example, has been seen as the law’s way to permit uncompensated uses of copyrighted works that cannot be effectuated through the market because of the public good nature of copyrighted works, excessive costs of negotiating the right to use, and the impracticality of enforcing rights
against non-purchasers. Fair use is the law’s way of facilitating transfers of the ability to use copyrighted works where “the possibility of consensual bargain has broken down in some way.” The use of liability rules where the transfer of an initial entitlement to a party who is willing to pay more for it than what it is worth to the owner is another example of the law stepping in to correct market failures.

If the law and legal institutions work to facilitate economically efficient transfers when markets fail to effectuate them because of transaction costs, hold outs, or externalities by assuming the value of the right to the right holder and forcing the transfer of rights as if a hypothetical fair arms-length negotiation occurred on the market, the law and legal institutions can work in the same way to effectuate civil discourses about morally right courses of action through deliberate and careful identification of truths to guide dialogue toward just and fair outcomes regardless of how hard the questions are and how difficult the answers may be. To ask the hard questions and arrive at difficult answers through open and honest dialogue where participants are not fearful and distrusting of the other, heuristics and biases that affect discourse and policy outcomes must be abandoned for the truth of an issue. Participants must acknowledge that living in a healthy and sustainable planet is of utmost importance before they can even discuss whether carbon pricing—and what they would actually be willing to pay if carbon pricing was implemented as a policy—is a viable solution to global climate change.

One way to remove these biases, heuristics, and other cognitive errors to allow open and honest dialogue to take place is to get all participants to the dialogue to agree as a community that they will set aside personal interests and be guided by principles of justice and fairness toward the good of their community or country. Of course, individuals will have their own ideas as to what would constitute justice, fairness, and the “best” moral outcome to the deliberations. And it would also be unrealistic to expect participants to not be influenced by their status quo (the status quo bias) when they deliberate policies that address distributional goals, the economy, and redistribution of rights and entitlements. To this end, it

65. *Id.* at 1108 (“In practice, it is so hard to determine [the property owner’s] true valuation that eminent domain simply gives him what the land is worth ‘objectively,’ in the full knowledge that this may result in over or under compensation.”).
would be useful to deliberate from a hypothetical position that assumes everyone to be ignorant of their status in life so that they will not be influenced by their status quo.

John Rawls's idea of justice central to his book, *A Theory of Justice*, is instructional here in my proposal of how “truth” may be attained for open and honest dialogue. Rawls’s proposal that to attain justice for society is for parties to the political debate to think and discuss issues from an “original position,” where “no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like” or even “their conceptions of the good or their special psychological propensities.” Beginning civil and political discourse from this original position forces participants to shed their biases, heuristics, and beliefs to come to the table without predisposed ideas and expectations, allowing for a more open, honest, and truthful dialogue that is constructive. Without the knowledge of one’s position in life, one would not be influenced by the status quo, be averse to losses, or be influenced by an endowment effect. The truth of an issue, which theoretically is accessible through practical reason, would actually be more accessible from the original position than it would be by sheer will.

V. CONCLUSION

Identifying truth in American public discourse is essential for open and honest dialogue to take place, and it has not been easily accessible because of our innate fear and distrust of the “other” and because of our cognitive biases and psychological make-up. Political dialogue and civil discourse must occur in situations where these biases are abandoned for more deliberate and careful deliberations. Where these deliberations fail because of cognitive errors, the law and legal institutions have to facilitate policy outcomes as if these dialogues occurred in circumstances that were open, honest, and truthful. A decision to abandon carbon pricing, for example, could be due to the fact that consumers were not willing to pay the full price for reducing carbon emissions in the environment despite the harm that such emissions would cause. A court of law in a nuisance case could impose a permanent injunction against a company to prevent the release of carbon dioxide into the atmosphere, but that would require the company to install appliances to prevent

emissions and invest in renewable energy. The cost of these improvements would be transferred to the price of the goods and services, which the consumer ultimately pays for. Here, the court would have made the decision that consumers would have made but for the endowment effect that affects human decisions. The path of identifying truth for honest and open political dialogue is not going to be easy, but it is worthwhile to stay on the path. Ultimately, fair, just, and reasonable political, social, and economic decisions depend on all parties to American public discourse accessing “truth” to guide their deliberations and discussions.