

## Trump's Inducement of America's Banality of Evil

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### ABSTRACT

When political philosopher Hannah Arendt introduced the concept of 'banality of evil' she did so in reference to the actions of Germans who appropriated the doctrines of National Socialism "thoughtlessly" and without obvious intentions to do evil. But, Arendt's description of this phenomenon entails that such banality can be found even in a democracy such as the USA. The relation of law and morality must therefore be unambiguous to defend the rule of law against the rule of men. However, a legal philosophy other than positivism is essential to safeguard the Republic against the overreach of executive power. And, where the psychopathology of Donald Trump is at the core of America's electoral discontent in 2020, as mental health professionals have argued, there is all the more reason to take Arendt's counsel especially seriously today. It is in this context that it is argued here that the American public must beware Trump's inducement of America's banality of evil.

Keywords: Trump; Arendt; banality of evil; philosophy of law; psychopathology

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When political philosopher Hannah Arendt introduced the concept of 'banality of evil' she did so in reference to the actions of Germans who appropriated the doctrines of National Socialism "thoughtlessly" and without obvious intentions to do evil. But, Arendt's description of this phenomenon entails that such banality can be found even in a democracy such as the USA. The relation of law and morality must therefore be unambiguous to defend the rule of law against the rule of men. However, a legal philosophy other than positivism is essential to safeguard the Republic against the overreach of executive power. And, where the psychopathology of Donald Trump is at the core of America's electoral discontent in 2020, as mental health professionals have argued, there is all the more reason to take Arendt's counsel especially seriously today. It is in this context that it is argued here that the American public must beware Trump's inducement of America's banality of evil.

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We live in and by the law. It makes us what we are...And we *argue* about what it has decreed...We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.

--Ronald Dworkin, *Law's Empire* (1986)

### **At the Precipice of Deformation**

Since the national election of 2016 and at the end of Donald Trump's presidency in 2021, it has been unclear that the American republic is secure in the core of its being, that it is not faced with an existential threat. Two events especially attest to this disquiet: (1) the unprecedented assault on the US Capitol building on 06 January 2021 by Trump's "white-nationalist" and "right-wing" supporters, during a joint session of Congress held to certify the Electoral College vote of Joseph Biden as 46<sup>th</sup> President of the United States of America,<sup>1</sup> and (2) the resolve of the US House of Representatives to hold Trump accountable for "incitement to insurrection," hence

the unprecedented second impeachment of Trump by a prevailing House vote of 232-197 on 13 January 2021. Despite the USA's political culture and structure defined by its Constitution, the Trump administration abuse of "the rule of law" has been amply documented such that a merely positivist philosophy of law is inadequate in the face of demagoguery such as Trump inflicted on long-honored traditions and institutions of governance. For, such a legal philosophy can be manipulated easily to permit installation of laws not merely representative of distinctly partisan interests, but laws that in fact undermine the foundations of the constitutional order itself.

Since his election to the presidency of the United States, Donald Trump and his administration have diminished time-honored commitments in both domestic and foreign policies to international and domestic justice long championed in its institutional structures. The ideological slogan, 'Make America Great Again', heralds an "America-first" agenda that is strikingly isolationist, to the detriment of bilateral and multilateral political and economic relations, especially with European allies. Further, at the domestic level of electoral politics, the issues of racism and associated social and economic injustice have come to the fore of heightened public scrutiny once again. This is so despite federal legislation and efforts of civil society, since the Civil Rights movement of the 1960s, to correct the course of the American ship of state and achieve equality of persons envisioned by the Founding Fathers of the republic.

During the Congressional debates about Trump's impeachment in 2019, and then at the end of Trump's four years in office, and as the ideological rhetoric of the 2020 national election has made starkly clear, the "White-Black" racial divide of the American public remains entirely problematic. The domestic order is in peril, even as the long-honored constitutional "balance of powers" among the branches of

government is no guarantee of justice for all. Trump's mendacity, manifested in his incessant patently false utterances in public speeches, is alarming for the fact that he recognizes no legitimate limits to presidential power. Through his presidential overreach and assumed prerogatives of a high-autocratic executive power, Trump has continued to push the American democracy to the test of institutional responses normally undertaken to safeguard the rule of law.

More troublesome in the recent political scene of partisan contention is the insidious shift in public sentiment that bodes ill for the future of the American republic as a sustainable representative democracy. For all too many, a patriot is a patriot if and only if partisan in relation to the two principal political parties. Trump's repeated ideological appeals have bordered on the precipice of authoritarian and autocratic governance, pushing the boundaries of legitimate executive power out of place as measured by reasonably normative standards. Thus, it is not surprising that, during Trump's impeachment, members of Congress highlighted the "legend" of old, that Benjamin Franklin had uttered something of a warning at the time of the Constitutional Convention in 1787. To the question, "Doctor, what have we got? A republic or a monarchy?", Franklin is represented to have answered: "A republic, if you can keep it."<sup>2</sup>

Whether the story is true as a matter of historical record does not matter. What matters is its import for the fact of the contingency of the form of government that the Founding Fathers installed. The mere fact of a foundational Constitution and extant federal, state, and municipal public laws are not a sufficient guarantee that, as Lincoln hoped in his famous Gettysburg Address, the American democracy would *endure* and *not perish* as a government of the people, by the people, for the people. Despite the popular vote and the legally established function of the Electoral College

to select the President-elect, Trump has betrayed all precedent with his appalling challenge to the validity of the presidential election of 2020. Along with his repudiation of tradition to concede the election, this is itself ominous in view of the large number of Republican Party voters who believe Trump's otherwise baseless allegations of massive voter fraud, despite all official certifications to the contrary.<sup>3</sup>

That Republican members of Congress likewise refrained from acknowledging Trump's electoral loss speaks ill of the party's readiness to defend the norms of electoral process in the face of Trump's domineering demeanor.<sup>4</sup> Notwithstanding state certifications of the vote and numerous losses in both state and federal courts, and despite US Attorney General William P. Barr's rejection of claims of massive voter fraud,<sup>5</sup> Trump continued to insist the presidential election was an unprecedented national "catastrophe," even as he sought to have state legislatures overturn the popular vote and choose slates of electors who would ensure his win in the Electoral College vote.<sup>6</sup>

Most alarming are Republican partisan calls for Trump to suspend the Constitution, to order (partial) martial law, and ensure a military-supervised presidential election all over again.<sup>7</sup> Of course, there is some assurance that the military will not accommodate such drastic action, given pre-election remarks from the Chairman of the Joint Chiefs of Staff, General Mark Milley.<sup>8</sup> But, ideological appeals such as Trump utters are designed to move the emotions of his Republican base of supporters. Such appeals have the political efficacy of sophistical rhetoric that surreptitiously advances "the weaker argument," thus dismissing the truth in favor of its semblance. Wherever there is such semblance carrying its political efficacy among a public easily deceived by misinformation, one will find *thoughtlessness* precisely of the sort political philosopher Hannah Arendt<sup>9</sup>

characterized in relation to the onset of National Socialism in post-Weimar Germany. And, it is from such thoughtlessness that otherwise “normal” people, including Americans, are moved to commit evil acts and take them to be politically, even legally, warranted despite reasonably grounded moral objection.

### **Challenges to “the Rule of Law”**

Centrally at issue in the USA, in the immediate period of a post-Trump presidency, is the relation of law and morality, of how the rule of law is to be conceived, and how public conscience is to be guided thereby in the interest of sustained democratic governance. In particular, what is to be challenged is a *positivist* conception of law that, while having its reputed advocates such as H.L.A. Hart,<sup>10</sup> is not a sufficient bar to preempt the sort of political sophistry the Trump Administration has pursued merely in the interest of Trump himself. Years ago, the Israeli legal, moral, and political philosopher Joseph Raz commented that,

H.L.A. Hart is heir and torch-bearer of a great tradition in the philosophy of law which is realist and unromantic in outlook. It regards the existence and content of the law as a matter of social fact whose connection with moral or any other values is contingent and precarious...[Hart] was anxious to dispel the philosophical mist which he found in both legal culture and legal theory....

In particular [Hart’s approach to law] concerns the question whether it is ever the case that a rule is a rule of law because it is morally binding, and whether a rule can ever fail to be legally binding on the ground that it is morally unacceptable.<sup>11</sup>

In a challenge to Hart’s legal positivism, German law professor Robert Alexy argued for a “necessary relation” between law and morality, in light of the fact that “individual legal norms and decisions as well as whole legal systems necessarily

make a claim to correctness,” in which case law is essentially connected to “a procedural universalistic morality.”<sup>12</sup> In the context of an international political order with diverse nation-states, all appealing to the principle of sovereignty and the authority of national law despite allowances for municipal effect of international law,<sup>13</sup> claims of a universalistic morality are met with ready critique. In fact, it is commonplace among philosophers of law to recognize a tradition of argument according to which there is a conflict between law and morality that is perhaps irremediable and insurmountable, even as both moral philosophers and legal philosophers seek to embody the requisites of justice in either morality or law.<sup>14</sup>

In the case of the USA specifically, reputed jurisprudence scholar Robert P. George has argued, “Most modern commentators agree that the American founders were firm believers in natural law and sought to craft a constitution that would conform to its requirements, as they understood them, and embody its basic principles for the design of a just political order.”<sup>15</sup> Further, he opined, “The framers of the Constitution sought to create institutions and procedures that would afford respect and protection to those basic rights (“natural rights”) that people possess, not as privileges or opportunities granted by the state, but as principles of natural law which it is a moral duty of the state to respect and protect.”<sup>16</sup>

On this view, then, a positivist account of law is reasonably to be subordinated to a legal-philosophical account of the rule of natural law, of natural rights, in the event of a conflict about the authority of law, this as a matter of fulfilling the requisites of moral duty. The *practical* problem, however, is whether jurists would in fact appeal to natural law when adjudicating matters of fact in relation to “unwritten” law, when otherwise statutory law normally governs judicial deliberation and

judgment. Ronald Dworkin's account of law as "integrity,"<sup>17</sup> perhaps, provides an alternative approach to settling procedural difficulties.

"How can the law command," Dworkin asks, "when the law books are silent or unclear or ambiguous?"<sup>18</sup> He answers that, "legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be." Hence, the concept of constructive interpretation privileges a practice rather than a theory at the base of jurisprudence, that practice in which and consequent to which there is presented "the best justification" within a narrative taken to be practicable in that sense. Accordingly, Dworkin has argued against the philosophy of legal positivism, speaking of the "gravitational force" that prior judicial decision has and that is more weighty than mere "judicial discretion."<sup>19</sup> On the constructive model, the task is "to identify the program of justice that best accommodates the community's common convictions, for example, with no claim to a description of an objective moral universe."<sup>20</sup>

Dworkin is aware, of course, that, consistent with the doctrine of legal positivism, some philosophers "reject the idea that citizens have rights apart from what the law happens to give them," even as "politicians...appeal to the rights of the people to justify a great part of what they want to do."<sup>21</sup> One may ask, in this context, what a *government's* view should be in that case, that view, for example, represented in judicial decision. Dworkin opines that in the American context there is dispute about "what *particular* rights citizens have," observing that, in practice "the Government will have the last word on what an individual's rights are, because its police will do what its officials and courts say." Even so, he adds, "that does not mean that the Government's view is necessarily the correct view;" and, he remarks



further, “anyone who thinks it does must believe that men and women have only such moral rights as Government chooses to grant, which means that they have no moral rights at all.”<sup>22</sup>

Most important in the context of juridical deliberation and decision is the fact, as Dworkin reminds that, “All this is sometimes obscured in the United States by the constitutional system.” Indeed, whether evaluated positively or negatively in the relation of law and morality, Dworkin comments, “The Constitution fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects the inherent equality of all men.”<sup>23</sup> But, of course, the essential point is that both law and morality are interpreted constructively to declare such equality, possessed inherently and not merely as a matter of the fact that the Government in fact expresses itself in recognition of those rights.

The “White-Black” racial divide in the USA, which has been of heightened visibility during the Trump Administration, elicits the difficult problem of interpretation of law in a context where appeals to positive law and natural law are in conflict. Civil rights stipulated in statutory law presuppose natural “inalienable” rights, yet the opposition of “liberal” and “conservative” politics threaten commitment to such rights. The political movement of “Black Lives Matter,” undertaken in the face of explicit “far right” “White” prejudice and in protest of repressive actions undertaken by law enforcement in numerous municipalities, calls into question any legitimate appeal to merely positivist law *per se*. But, it is this racial divide, as enabled by Trump himself, that illustrates what is problematic politically when the rule of law is so readily dismissed by the executive branch and otherwise not disputed by Republican representatives of Congress who insist on partisan politics.

Indeed, it is remarkable that, as a matter of judicial philosophy, Dworkin can imagine a situation in which the US Supreme Court might not guarantee the individual rights of citizens, even though, as he puts it, a Supreme Court decision, *qua* legal decision, “must take into account precedent and institutional considerations like relations between the Court and Congress, as well as morality.”<sup>24</sup> Importantly, in the setting of political demagoguery such as witnessed during the Trump Administration, one may consider Dworkin’s remarks: “So, though the constitutional system adds something to the protection of moral rights against the Government, it falls short of guaranteeing these rights, or even establishing what they are.” In that case, a President, acting in what many would interpret to be executive overreach, may nonetheless claim that s/he may have “the last word” in matters of contention. Trump certainly has positioned himself in this way vis-à-vis both the Congress and the courts.

In the final count of the popular vote it is clear that President-Elect Joseph Biden received a historic number of votes from registered voters, many of whom were motivated to assure Trump’s defeat. But, the very fact that some 74 million Americans cast their vote for Trump, many supporting an “alt-right” “white nationalist” political agenda, points to a dilemma for the American public at large and for the American judicial system that is analogous to the transition of the Weimar Republic to that of National Socialism. When “armed, rightwing, Trump-supporting militias” bring “fear and violence to cities across the country in the wake of anti-racism protests,”<sup>25</sup> in the absence of Trump as president unambiguously objecting to such violence, there is ample cause for trepidation. These protests have been undertaken according to recognized fundamental rights to life, freedom of speech and peaceful assembly. The concern is that some political quarters are prepared to

advance an undeniably racist agenda—even if it means, in consequence, that America moves away from its traditional democratic governance by rule of law to “the rule of men” such as Trump is keen to assert. In this case we would have the sort of political arrogance<sup>26</sup> that would insidiously install the rule of men, specifically “the rule of Trump,” as if this were entirely consistent with the Constitution and federal statutory law, let alone appeals to natural law. Throughout his presidency Trump has provided ample evidence of his will to thwart what he takes to be an uncooperative Congress, through “increased use of executive orders and other presidential directives,” a disposition that in the practice of the executive branch has had its precedent,<sup>27</sup> but not to the extent Trump has chosen to do so.

Trump’s attention to conservative judicial appointments likewise has presumed the courts will favor partisan political interests, even as some argue that the Supreme Court itself has promoted “independent presidential power” (especially in foreign affairs) when otherwise it might refrain from doing so, given that a president may abuse that power in assuming the same plenary and exclusive power is to be exercised in domestic affairs.<sup>28</sup> Within the community of legal scholars there are, of course, those who hold an expansive view of executive power that would enable a president such as Trump to move closer to an autocratic style of governance, and this includes constitutional scholar John Yoo<sup>29</sup> and recently appointed US Supreme Court associate justice Brett M. Kavanaugh.<sup>30</sup>

### **Arendt’s Relevance to 2020 America**

It should be a matter of moral inquietude that some such as Yoo and Kavanaugh are prepared to provide a legal, even constitutional, basis for expansion of presidential power. Why so? There is in present context a lesson to be garnered from political philosopher Hannah Arendt. Consider that, when she wrote her reputed *Eichmann in*

*Jerusalem: A Report on the Banality of Evil*, Arendt commented that the audience for the trial was “supposed to consist of Israelis...to show them what it meant to live among non-Jews, to convince them that only in Israel could a Jew be safe and live an honorable life.”<sup>31</sup> Yet, those who witnessed the trial, Arendt opined, “knew by heart all that there was to know, and who were in no mood to learn any lessons and certainly did not need this trial to draw their own conclusions.” After all, in this “theater” of a trial, there before them, for all to see, was “the monster” responsible for Nazi genocide. “Was Eichmann, like all other Nazis, not a monster? Surely he was.” Such was the expected refrain from the observer of this scene in which justice was to be done. “For,” so the question was to be posed, “how could such unprecedented evil be perpetrated without monstrosity?” But, Arendt concluded otherwise, speaking instead of “the banality of evil.”

It behooves all Americans today to consider the lesson of the banality of evil that Arendt has expounded, for the perpetration of widespread injustices does not need monstrous men with evil motives. Laws grounded in a positivist account of lawful authority can well conduce to immoral conduct such as Arendt describes to occur as the banality of evil. Consider that in relation to the question as to why the Jews did not revolt when led to the death camps—as if the victim rather than the Nazis were to be held to account for the crimes of genocide and crimes against humanity—Arendt cited the view of David Rousset, who had been imprisoned at Buchenwald:

The triumph of the S.S. demands that the tortured victim allow himself to be led to the noose without protesting, *that he renounce and abandon himself to the point of ceasing to affirm his identity*. And it is not for nothing. It is not gratuitously, out of sheer sadism, that the S.S. men desire his defeat. They

know that the system which succeeds in destroying its victim before he mounts the scaffold ... is incomparably the best for keeping a whole people in slavery. In submission. Nothing is more terrible than these processions of human beings going like dummies to their deaths.<sup>32</sup>

In the absence of an answer to the question about Jewish resistance raised in Eichmann's trial, Arendt reminded, "There exist many things considerably worse than death, and the S.S. saw to it that none of them was ever very far from their victims' minds and imagination."

But, precisely thereby, if what transpired in the Nazi genocide of the Jews was not a monstrosity but a banality, what did Arendt mean? The concept 'banality of evil' has had its ample discourse since Arendt pronounced it in her report on the Eichmann trial.<sup>33</sup> But she herself described the phenomenon clearly (taking it here as phenomenological "description" rather than as a scientific "explanation"):

...when I speak of the banality of evil, I do so only on the strictly factual level, pointing to a phenomenon which stared one in the face at the trial. Eichmann was not Iago<sup>34</sup> and not Macbeth,<sup>35</sup> and nothing would have been farther from his mind than to determine with Richard III "to prove a villain." Except for an extraordinary diligence in looking out for his personal advancement, he had no motives at all. And this diligence in itself was in no way criminal; he certainly would never have murdered his superior in order to inherit his post. *He merely, to put the matter colloquially, never realized what he was doing...* He was not stupid. *It was sheer thoughtlessness*—something by no means identical with stupidity—that predisposed him to become one of the greatest criminals of that period. And if this is "banal" and even funny, if with the best will in the world one cannot extract any diabolical or demonic profundity from

Eichmann, that is still far from calling it commonplace. It surely cannot be so common that a man facing death, and moreover, standing beneath the gallows, should be able to think of nothing but what he has heard at funerals all his life, and that these “lofty words” should completely becloud the reality—of his own death. *That such remoteness from reality and such thoughtlessness can wreak more havoc than all the evil instincts taken together which, perhaps, are inherent in man—that was in fact the lesson one could learn in Jerusalem.*<sup>36</sup>

Thoughtlessness, a manifest remoteness from reality, to be seen as “fearsome, word-and-thought-defying”—such banality was at the root of the evil such as Eichmann and other Nazis committed.

Engaging Arendt’s concept, philosopher Judith Butler commented, “Arendt wondered whether a new kind of historical subject had become possible with national socialism, one in which humans implemented policy, but no longer had ‘intentions’ in any usual sense...[She] feared that what had become ‘banal’ was non-thinking itself. This fact was not banal at all, but unprecedented, shocking, and wrong.”<sup>37</sup> Indeed, Butler continued, “So if a crime against humanity had become in some sense ‘banal’ it was precisely because it was committed in a daily way, systematically, without being adequately named and opposed...[The crime] had become for the criminals accepted, routinized, and implemented without moral revulsion and political indignation and resistance.” It is when a political leader such as Trump can utter literally thousands of patently false statements that banality enters the scene of American politics to its detriment. And, accordingly, to cite Butler’s words in this context, there is need for “a broader reflection on the historically specific challenges of moral responsibility under dictatorship,” especially in the period of its onset.

Arendt's view is akin to that of Jewish studies scholar Peter J. Haas, who writes of a "Nazi ethic," strange as the concept is likely to be to those who try to conceive the possibility of a post-Holocaust ethics.<sup>38</sup> Haas is concerned to explain the fact that, in Nazi Germany, "normal, well-adjusted people acted atrociously over a sustained period of time," regularly and as a matter of course: "people very much like you and me were in fact doing evil consistently and apparently in good conscience year after year."<sup>39</sup> But, how was this possible? Haas considered two plausible explanations, one "intentionalist" (according to which individuals and communities chose to do evil) and the other "functionalist." The latter is pertinent in present context of American politics. According to the functionalist explanation, "the Nazis were not demons or essentially evil, but rather that they were normal people who, under [an] unusual constellation of pressures and conditions chose a path of response that resulted in evil." On this latter account, "all people really—are capable of knowing what is right and what is good, but then are fully capable of consciously choosing to act otherwise."<sup>40</sup>

*All people*, Haas contends, not merely Germans who for whatever motivations became converted Nazis. Yet, rather than appropriate either hypothesis, Haas described instead a Nazi ethic according to which partisans of National Socialism could "talk coherently about right and wrong and good and bad," but according to "a linguistic and symbolic culture." This political culture was advanced by party ideologues such as Alfred Rosenberg, Ernst Krieck, and Alfred Bäumler, and appropriated by normal, everyday citizens of the Third Reich, as if all was in order and there was nothing out of the ordinary to be interrogated. To connect this perspective to that of Arendt, it is to be noted that such a political culture can take root anywhere, even in a democracy such as the USA presumes itself to be. And,

when it takes root it grows insidiously, before the majority takes notice and can take requisite action to counter what amounts to an existential threat for a democratic republic.

Arendt suggested, at the time of her writing, that the banality of evil is not a commonplace among men. Yet, there is reason to question that suggestion, even in the so-called democracy of democracies that the USA is presumed to be within the community of nations. Most nation-states today presuppose that, despite the logic of sovereignty and dogma of *Realpolitik* dominant in international relations and American foreign policy, there remains a viable *jus gentium* to guide the behavior of nation-states both at home and abroad. The USA itself is a State Party to the *International Covenant on Civil and Political Rights*, having ratified and acceded to the treaty in 1992, with the declaration that the US Constitution protects fundamental rights (freedom of speech, expression, and association) that are not to be restricted.<sup>41</sup> But, neither federal statutory law nor international treaties can assure the American public of the rule of law if a positivist account of law is used surreptitiously to undermine the Constitution itself, consequent to abuse of power by an emboldened and unprincipled executive such as Trump.

Problematic during the Trump Administration is not merely the policies and executive actions pursued. Rather, the testimony of numerous mental health professionals and criminologists, acting on the grounds of a professional “duty to warn,” is that the election of Trump to the presidency constituted a national emergency, Trump himself a persistent danger to national security in view of his psychopathology and the violence that it engenders as its sequelae.<sup>42</sup> “Mental health,” forensic psychiatrist Bandy Lee observes, “is fundamental to a well-functioning social and political life, but it is something we often take for granted, and we seldom stop to



consider the mental health of our leaders...[The] mental health of the president is an especially important matter that affects everyone in the public domain.”<sup>43</sup>

In an article published in January 2017, *Psychology Today* editor-at-large Hara Estroff Marano posed three incisive questions about the unsettled debate among American mental health professionals concerning “the dangerous case”<sup>44</sup> of Donald Trump serving as President of the United States:

(1) “Can Donald Trump or any public figure be deemed to have mental illness, even based on specific, well-publicized criteria reflecting observable behavior?”

(2) “Is it ethical or appropriate for mental health professionals to venture into public acts of diagnosis?”

(3) “Is psychology a suitable instrument for addressing issues of governance?”<sup>45</sup>

Marano’s questions were occasioned by a *Facebook* petition posted by psychologist John D. Gartner, who argued for removal of Trump from office because Trump has “a serious mental illness that renders him psychologically incapable of competently discharging the duties of President of the United States.”<sup>46</sup> Over 61,000 mental health professionals signed Gartner’s petition.<sup>47</sup>

Some mental health professionals perceived Gartner’s action as a violation of the American Psychiatric Association’s “Goldwater Rule” (GR), formulated in 1973, that is, Section 7.3 of its Principles of Medical Ethics: “it is unethical for a psychiatrist to offer a professional opinion unless he or she has conducted an examination and has been granted proper authorization for such a statement.”<sup>48</sup> The rule is consistent with the moral principles of non-maleficence and autonomy: a psychiatrist ought not, through his or her public remarks, cause harm to an individual

or disrespect that individual's right of explicit consent to grant exception to otherwise protected confidentiality of medical assessments and associated records. Many rejected Gartner's petition as unethical, but other psychiatrists, clinical psychologists, and psychotherapists supported it.

Gartner asserted: "Donald Trump is dangerously mentally ill and temperamentally incapable of being president. He has 'malignant narcissism,' which is different from narcissistic personality disorder and which is incurable. It's obvious from Trump's behavior that he meets the diagnostic criteria for the disorder, which include anti-social behavior, sadism, aggressiveness, paranoia and grandiosity."<sup>49</sup> Gartner thus states his *observations* of Trump's overt behavior, without offering a *clinical diagnosis* of narcissistic personality disorder as defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V). The claim of "malignant narcissism" is a term for a "hypothetical syndrome," first conceptualized by psychologist Erich Fromm,<sup>50</sup> for whom malignant narcissism is a "severe mental illness"—"the most severe pathology and the root of the most vicious destructiveness and inhumanity." If indeed one is faced with an individual in that category of mental status with manifest correlative behavior, then clearly one is faced with a grave danger. A professional psychiatrist in particular is in a position to recommend appropriate intervention. Gartner does not provide a diagnosis, technically, if a diagnosis refers to the DSM-V taxonomy of mental disorders. Hence, Gartner does not violate the GR *per se*. Insofar as he does identify a syndrome *qua hypothesis*, Gartner believes the available evidence<sup>51</sup> of Trump's overt behavior manifest in extensive public presentations is confirmatory of the hypothesis, to a high degree of probability.

Taking a position that finds Trump dangerous but not providing a diagnosis as specified in DSM-V, Lee presents her concern about the “effects” of Trump’s behavior on public health and safety, hence her focus on the concept of a “duty to warn.”<sup>52</sup> Acknowledging that, “ethics are complex,” for her at issue in the production of the published volume of essays she edited was the question “whether there were overarching ethical principles that overrode the Goldwater rule” in the case of a man perceived to be unashamedly dangerous. The GR, in her assessment, counts as “a lower-level rule” when juxtaposed to the duty to warn the American public. In her sense of applicable rules, then, the *fundamental rule* of duty to warn (out of concern for public health, public welfare, and public interest) superintends a *subsidiary obligation* a professional psychiatrist has to a patient in the clinical setting, where indeed non-maleficence and autonomy are normally operative.

Following the issuance of the “Mueller Report,” Lee and co-authors published a “mental health analysis” of Trump based on the data internal to that report.<sup>53</sup> Speaking of mental capacity, the authors provided “a functional, not a diagnostic, assessment, focused less on the President’s personal mental health than on his capacity to fulfill the duties of his office,” an assessment they made “with uncommonly high confidence.” They opined: “In summary, we believe that the preponderance of evidence overwhelmingly supports the conclusion that this President is incapable of making sound, rational, reality-based decisions free of impulsivity, recklessness, paranoid and other demonstrably false beliefs, with most notably an absorption in self-interest that precludes the consideration of national interest.”<sup>54</sup> Accordingly, they warned of “a profound danger to national and international security in the nuclear age,” indeed of “grave danger to national and international security that can no longer be overlooked.”<sup>55</sup>

## **Psychopathology and the Banality of Evil**

The debate among mental health professionals whether they should engage in public commentary concerning Trump's behavior is characterized by two compartments: (1) those whose epistemological position of justified true belief makes public commentary morally *permissible* at least and, indeed, morally *imperative* as a duty to warn the American public; (2) those who subscribe to the Goldwater Rule (and its expansive annotations) judging public pronouncements by member psychiatrists “a dangerous morality” that is, in fact, no morality insofar as political motivations displace the proper motive to perform according to the duty of Section 7.3. To this is to be added interpretations of duty in legislative context, such as with Congressman Jamie Raskin (115<sup>th</sup> Congress, 2018-2019) introducing H.R. 1987 (House Bill)—Oversight Commission on President Capacity Act. This bill proposed to “mandate a procedure for medically and psychiatrically evaluating a president who is suspected of being incapacitated to a degree that would require removal under the 25<sup>th</sup> Amendment.”<sup>56</sup>

As for the question of Trump's psychopathology evident in his personality and overt behavior, psychiatrists, criminologists, and philosophers have worked to describe the unique clinical presentation of the phenomenon. Psychiatrist Claire Pouncey notes that mental illness presents “a philosophical challenge for empiricists,” because of its “intangibility,” hence raising questions about “confidence” about the research methods in use, even though psychiatrists believe they “can explain human behavior in terms of psychopathology.”<sup>57</sup> This is a question of the scientific legitimacy of psychiatric taxonomy (i.e., classification), what counts as a disorder and what are the criteria that distinguish disorders (that is, that enable clinical diagnosis). Relevant to the present concern, Pouncey reminded of the work of J. Z. Sadler, who

has argued with reference to the DSM that “aesthetic, epistemic, ethical, ontological, and pragmatic values all have a role”<sup>58</sup>—the debate about the “danger” or “dangerous morality” of diagnosing Trump clearly calling attention to these “values” to a degree. Thus, a psychiatrist is expected to account for the fact that “extra-empirical considerations, including values, always fill the gap between our observations and the conclusions we draw from them.”<sup>59</sup> When psychiatrists or psychologists “analyze” Trump, their observations are not merely empirical, satisfying some “realist” criteria of correspondence of observational statements to the behavioral phenomena under review. There is also the psychiatrist’s interpretive act that includes prejudices in understanding. Among those prejudices that need to be made explicit are the values at play, whether in the background or foreground of the psychological assessment.

There is no automatic correspondence between observed behavior and diagnosis. On the contrary, as Pouncey reminds, psychopathology presents the psychiatrist with “fundamentally complex phenomena;” any examination of a presumptive disorder requires “conceptual fecundity.”<sup>60</sup> Pouncey, therefore, raised the important epistemological question: “Given our basic empiricist epistemology, and given that psychopathology consists in phenomena that cannot be directly observed, on what basis do we have confidence in our nomenclature and our classifications? [...] Can we identify and characterize psychopathology on empirical grounds alone, or must philosophy play a role?”<sup>61</sup>

This is an important question for ostensible diagnosis of Trump’s “mental” health or illness. There are assumptions being made: psychiatrists engaged in this debate have “justified true beliefs” (hence satisfying logical criteria for truth *qua* correspondence) and “valid inferences” from observations of overt behavior to causes (whether genetic, neurobiological, psychotic, environmental, habitual, etc.). But,

there is no professional agreement as to the *veracity* of either the justification of those beliefs or the inferences made. Pouncey reminds that, “diagnostic test results are measured along a continuum, and that categorical thresholds are subsequently imposed.”<sup>62</sup> Hence, questions about *scientific reliability* (as “empirical” validity) add to expressed concern about the *morality* of “diagnosing at a distance.”

Practitioners of psychology and psychiatry normally understand they have professional duties consistent with various moral principles articulated in codes of professional ethics. The two primary principles governing the practitioner-patient relationship are normally rank-ordered, thus: (1) the *principle of non-maleficence* (do no harm) and (2) the *principle of beneficence* (do good to the extent of professional ability/competence). Other principles, e.g., consequentialism’s *principle of utility*, deontology’s *categorical imperative* (law of humanity) and *principle of autonomy*, etc., may be added, of course, consistent with any principled approach to moral decision-making in the setting of clinical practice or in view of a collectively taken recommendation concerning public law, public policy, or public regulation.

Engaging the relation of theoretical and philosophical psychology, philosopher N. K. Swazo considered the ethical problem that concerns appeal to a given theoretical structure in psychology, whether such a structure is “ontologically reliable, i.e., that it satisfies reasonably compelling criteria of *correspondence to reality*.”<sup>63</sup> This issue of correspondence to reality is central to the conflict between behaviorists and psychoanalysts about what they study, how they account for it, and how theoretical and methodological commitments are manifested in codes of conduct. Hence, as Swazo remarked, “anyone concerned to articulate a responsible professional ethic but who does so on the basis of an unexamined intellectual allegiance does harm rather than good, for any principles adduced to guide

professional practice are compromised from the outset by ontological inadequacy,”<sup>64</sup> that is, by a lack of correspondence to reality. Psychiatrists practicing under the theoretical influence of psychoanalysis thus object to violation of the GR in the absence of examination of an individual as patient and according to the diagnostic procedures of psychoanalysis; whereas, in contrast, behaviorists are quick to respond that they are examining overt behavior and not mental or covert causally determinate phenomena as such, for example, not determining the relation of “unconscious” causes to “conscious” thoughts and consequent or correspondent behavior, mental states so understood thus irrelevant to their assessments.<sup>65</sup>

Hence, when it comes to the GR, the *theoretical-situational* context of the individual professional practitioner commenting on a public personality such as Trump cannot be ignored. Former psychoanalyst Jeffrey Masson, writing his *Against Therapy* (1994), is an example of a practitioner engaged in self-examination, who complained at the time that, professional training leads to “a psychologic amalgamation of the person with the function that he is to perform.”<sup>66</sup> Thus, even in present context of the debate over the authority of the GR, it is important to remember that, “Theoretical commitments have their consequences in practice even as they are comprised of ontological and epistemological commitments”<sup>67</sup>—that is, the latter means what counts as reliable theory, reliable methods of analysis, diagnostic criteria, categories of mental disease or behavioral dysfunction, methods and scope of treatment (different in the case of psychoanalysis and behaviorism), etc.

If mental health practitioners are *morally* correct to offer public commentary, then the operative assumptions are that: (1) there is a rational basis for such assessments; (2) this is articulated in relation to American citizens’ right to know; and (3) American citizens have a right to expect their elected president to be mentally

competent to hold office. This “right” is grounded in either Article 2 of the US Constitution (with authorized declaration of incompetence then allowing for Congress to exercise its check on executive behavior through the procedures of impeachment and conviction) or removal from office through Article 25.

In view of the above, Americans who respond favorably to Trump’s sophistic rhetoric may be characterized to be “under his influence” in the way those suffering from psychopathy affect those around them. And, it is in this sense of psychological effect that the banality of evil such as Arendt characterized it may find its entrance into the body politic, thus to engender the sort of thoughtlessness among the American electorate. The work of Paul Babiak (corporate psychologist) and Robert Hare (specialist in psychopathy) provides one empirical context for hypothesis that has not been considered fully as part of the ostensible duty to warn. Consider that Dr. Lance Dodes (formerly assistant professor of clinical psychiatry at Harvard Medical School and affiliated currently with the Boston Psychoanalytic Society and Institute) has claimed that President Trump is at least “close to psychosis when he’s stressed...All of his delusional ideas come up when he is stressed in some way, and then he loses track of reality because it doesn’t fit what he needs to believe...[He] is villainous because of his sociopathy and psychopathy but with a tremendous veneer that he’s extremely good at it.”<sup>68</sup>

Such remarks are clearly *presumptively diagnostic* with reference to overt behavior—psychosis, delusion, dissociation from reality, sociopathy, psychopathy. Obviously, any hypothesis in the above sense is expected to have its ready confirmation or falsification according to reliable scientific methods in the discipline, in this case clinical psychology/psychiatry. In the case of remarks such as Dodes offers, of course, there is neither confirmation nor falsification unless and until Trump



is subjected to the appropriate diagnostic tests developed for individual personality assessment (e.g., psychometric evaluations such the Hare Psychopathy Checklist-Revised).

Confirmation and/or falsification would also have to account for the fact of “individual variation in psychopathy” in the general population and the kind of evidence related to “whether psychopathy is associated with deficits in...distinct moral domains [that is, “harm, fairness, group loyalty, respect for authority, and purity”].”<sup>69</sup> In their informative book published in 2007, entitled *Snakes in Suits: When Psychopaths Go to Work* (which relates to Hare’s other book, entitled *Without Conscience: The Disturbing World of the Psychopaths Among Us*, published in 1999), Babiak and Hare describe the behavior of corporate psychopaths in particular. Important in the context of allegations of psychopathology with reference to Trump is that white-collar corporate psychopaths *are not readily recognized to be such* (in contrast to “blue collar” psychopaths readily to be found among recidivist and often violent criminals readily arrested and incarcerated). Important to any assessment in present context, psychopaths can be *cognitively functional yet suffer from a persistent deficit in moral judgment*, due to *lack of a conscience* that normally functions to govern such judgment.

Babiak and Hare provide “profiles” of “generic psychopaths,” that is, typical descriptions of personality traits “based upon composites of psychopathic characteristics derived from published reports, the news media, and [their] own research about such personalities.”<sup>70</sup> Psychopaths are normally distinguished in clinical taxonomies from sociopaths, neurotics, and psychotics, although there are some commonalities in perceived behavior. According to these two specialists, psychopaths are individuals *lacking in conscience* (understood in both moral

psychology and moral philosophy to be the seat of moral judgment) and, therefore, these individuals are “incapable of empathy, guilt, or loyalty to anyone but themselves.” [The foregoing and following quotations are excerpts from Babiak and Hare (2007).]

Psychopaths can be “egocentric in the extreme...seemingly unable to experience deep human emotions, especially love and compassion.” In interpersonal relations “psychopaths tend to overreact in response to perceived personal insults or insufficient demonstration of respect for their authority.” More important, “They are known for their ability to don many masks, change ‘who they are’ depending on the person with whom they are interacting, and make themselves appear likable to their intended victim.” Thus, “Because they see most people as weak, inferior, and easy to deceive, psychopathic con artists will often tell you that their victims deserve what they got.” The psychopathic personality manipulates others to serve his interests with determined effect: “Amazingly, more often than not, victims will eventually come to doubt their own knowledge of the truth and change their own views to believe what the psychopath tells them rather than what they know to be true.”

Both mental health professionals and the public media have identified the foregoing behaviors to be persistently evident in Trump. The political consequences of psychopathic behavior, however, are often not recognized until the damage has been done (in the same way Arendt refers to Shakespeare’s Iago whose knavery is not evident until it is spent)—hence the reasonably valid duty to warn the American public as so many mental health professionals have argued. If it is the case that the victims of the psychopath eventually come to doubt their own knowledge of the truth and change their views according to the sophistry of the psychopathic personality, it is no wonder that the banality of evil can install itself in the collective public

consciousness to its moral and political injury. This is the lesson Arendt has delivered for all who see the need for institutional bulwarks against totalitarian tendencies—even in the USA.<sup>71</sup>

We cannot assume that a political leader elected to national office is not affected by psychopathy. One cannot assume philosophically that all humans as rational beings have a conscience that directs them to do right rather than wrong and to manifest empathy in the face of human suffering. Trump's overt behavior betrays his absence of conscience and lack of empathy in the face of the suffering of Americans, especially clear in the failed federal government's control of the coronavirus 2019 (COVID-19) pandemic as the interests of corporate economics mattered to Trump more than public health. The fact is that the foregoing assessment of behavioral traits such as Hare and Babiak disclose is supported by more recent studies.<sup>72</sup> These hypothesize that, “psychopaths have normal *understanding* of right and wrong, but abnormal regulation of morally appropriate *behavior*.” When such behavior is found in an individual *undiagnosed* as a psychopathic personality, these traits are especially disturbing because of the harm and wrongdoing that such an individual does *before anyone knows the better* as to the causal determinants of the observed behavior or the likely harmful consequences that ensue. This is, as Swazo put it, a “grave problem of conscience”<sup>73</sup> for those interacting with one suffering from psychopathy, collectively often becoming unwitting sycophants.

The ordinary citizen, along with moral philosophers (e.g., Immanuel Kant), assumes that (a) everyone has a conscience and, thus, that (b) everyone is more or less rational in the exercise of his or her moral judgment, notwithstanding reasonable bases of moral disagreement both theoretical and practical and individuals being irrational yet amenable to correction. In the case of a psychopath, however, this

assumption is misplaced when cognitive efficacy combines with a deficit in empathy and absence of conscientious moral judgment. And, that is the unmistakable danger of Donald Trump at the helm of the executive branch of government. A psychopathic personality is all the more dangerous in that official capacity, precisely because of the communicative efficiency of sophistic deception that enables the banality of evil.

Americans in 2021 are not in a political culture analogous to Germans in 1930 Germany. But, under conditions of hostile party politics and the “White-Black” racial divide that Trump has energized to call forth a political base of “*Trumpenvolk*,”<sup>74</sup> they can be readily as gullible as were the Germans in the face of the psychological appeal of Hitler’s political rhetoric that installed the Third Reich. One ought not underestimate the danger of a large percentage of the American electorate succumbing to Trump’s blatant mendacity, to the point that their unwitting thoughtlessness provides fertile ground for an irreversible deformation of the American democracy. There is much yet to be understood empirically as to why 75 million Americans voted for Trump in 2020, despite his rampant falsehoods about any number of issues of electoral politics. A “good citizen,” guided by a positivist legal philosophy at best and thoughtlessness at worst, is not necessarily a “good person” guided by a reasonably compelling moral philosophy. The preservation of the American constitutional order, as Arendt understood in her study of totalitarianism, requires the exercise of both political and philosophical responsibility in the face of an unprecedented assault on truth, on law, and on morality. A public duty to warn is, therefore, a call for all Americans to exercise due moral and political diligence, irrespective of allegiance to political party, thus to safeguard the American republic that it may, as Lincoln hoped, indeed endure.

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<sup>1</sup> Maeve Reston and Kevin Liptack, “The day America realized how dangerous Donald Trump is,” *CNN News*, 09 January 2021, accessed at <https://edition.cnn.com/2021/01/09/politics/donald-trump-dangerous-capitol-riot/index.html>, 10 January 2021.

<sup>2</sup> Apparently, this quotation first appeared in 1906 in the *American Historical Review*, when it published “notes of James McHenry, a Maryland delegate to the Constitutional Convention,” where the citation is presented as: “A lady asked Dr. Franklin Well Doctor what have we got a republic or a monarchy. A republic replied the Doctor if you can keep it.” See here, Zara Anishanslin, “What we get wrong about Ben Franklin’s ‘a republic, if you can keep it’,” *Washington Post*, 29 October 2019, accessed at <https://www.washingtonpost.com/outlook/2019/10/29/what-we-get-wrong-about-ben-franklins-republic-if-you-can-keep-it/>, 01 December 2020.

<sup>3</sup> According to polls of registered voters for the period 08-10 November 2020, 40% of registered voters believe voter fraud occurred enough to influence the outcome of the 2020 presidential election, with 81% of Trump supporters thinking so, compared to only 3% of Biden supporters thinking so. See here <https://today.yougov.com/topics/politics/articles-reports/2020/11/19/america-speaks-do-they-think-fraud-occurred-2020-p>, accessed 01 December 2020. See here also, Kaleigh Rogers, “Americans Were Primed to Believe The Current Onslaught of Disinformation,” *FiveThirtyEight*, 12 November 2020, accessed at <https://fivethirtyeight.com/features/americans-were-primed-to-believe-the-current-onslaught-of-disinformation/>, 01 December 2020. Concerning the “illusory truth phenomenon,” see Gordon Pennycook, Tyrone D. Cannon, and David G. Rand, “Prior Exposure Increases Perceived Accuracy of Fake News,” *Journal of Experimental Psychology: General*, 147(12), (December 2018): 1865-1880, accessed at <https://pubmed.ncbi.nlm.nih.gov/30247057/>, 01 December 2020.

<sup>4</sup> Paul Kane and Scott Clement, “Just 25 congressional Republicans acknowledge Joe Biden’s election win, Washington Post survey finds,” *Philadelphia Inquirer*, 05 December 2020, accessed at <https://www.inquirer.com/politics/election/washington-post-republican-election-survey-trump-20201205.html>, 06 December 2020. According to the *Washington Post* survey, only 25 Congressional Republicans acknowledged Biden’s win.

<sup>5</sup> Katie Benner and Michael S. Schmidt, “Barr Acknowledges Justice Dept. Has Found No Widespread Voter Fraud,” *The New York Times*, 01 December 2020, accessed at <https://www.nytimes.com/2020/12/01/us/politics/william-barr-voter-fraud.html>, 03 December 2020.

<sup>6</sup> Michael D. Shear, “Trump, in Video from White House, Delivers a 46-minute Diatribe on the ‘Rigged’ Election,” *The New York Times*, 02 December 2020, accessed at <https://www.nytimes.com/2020/12/02/us/politics/trump-election-video.html>, 03 December 2020.

<sup>7</sup> This recommendation comes from one such as Trump’s former National Security Advisor and retired General Michael Flynn, along with a group recommending the same under the manner of “We the People Convention.” See here, David Moyer, “Michael Flynn Wants Trump to Declare Martial Law and Redo the Election,” *Huffington Post*, 02 December 2020, accessed at [https://www.huffpost.com/entry/michael-flynn-martial-law-new-election\\_n\\_5fc7d3e6c5b6f3fe59724a45?ncid=NEWSSTAND0001](https://www.huffpost.com/entry/michael-flynn-martial-law-new-election_n_5fc7d3e6c5b6f3fe59724a45?ncid=NEWSSTAND0001), 03 December 2020.

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<sup>8</sup> Associated Press, “Chairman of Joint Chiefs says not role for military in presidential election,” *NBC News*, 29 August 2020, accessed at <https://www.nbcnews.com/politics/2020-election/chairman-joint-chiefs-says-no-role-military-presidential-election-n1238772>, 03 December 2020.

<sup>9</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963)

<sup>10</sup> See H.L.A. Hart, *The Concept of Law*, 3<sup>rd</sup> Edition (Oxford: Oxford University Press, 2012); H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2<sup>nd</sup> Edition (Oxford: Oxford University Press, 2008). In his *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963), Hart explicitly asked: “Must some reference to morality enter into an adequate definition of law or legal system? Or is it just a contingent fact that law and morals often overlap...and that they share a common vocabulary of rights, obligations, and duties?” He takes note of the further question: “Is law open to moral criticism? Or does the admission that a rule is a valid legal rule preclude moral criticism or condemnation of it by reference to moral standards or principles?”

<sup>11</sup> Joseph Raz, “Authority, Law and Morality,” *The Monist*, Vol. 68, No. 3, July 1985, 295-324. In Chapter VIII, “Justice and Morality” (156-157), of his *The Concept of Law*, Hart commented on propositions of law that, for some commentators, “fail to conform to certain fundamental requirements of justice of morality,” even though there is the claim “that between law and morality there is a necessary connection” expressed, for example, in “Natural Law,” such that “man-made laws which conflict with these principles are not valid law. ‘Lex iniusta non est lex.’” However, a moral relativist would likely hold that “conflict between law and even the most fundamental requirements of morality is not sufficient to deprive a rule of its status as law; they interpret the ‘necessary’ connection between law and morality in a different way. They claim that for a legal system to exist there must be a widely diffused, though not necessarily universal, recognition of a moral obligation to obey the law, even though this may be overridden in particular cases by a stronger moral obligation not to obey particular morally iniquitous laws.”

<sup>12</sup> Robert Alexy, “On Necessary Relations Between Law and Morality,” *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law*, Vol. 2, No. 2 (July 1989): 167-183.

<sup>13</sup> See, e.g., Terry Nardin and David R. Mapel, eds., *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992).

<sup>14</sup> See, e.g., Kent Greenwalt, *Conflicts of Law and Morality* (New York: Oxford University, 1987); David Lyons, *Moral Aspects of Legal Theory* (Cambridge: Cambridge University Press, 1993); Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, & The Dilemmas of Law* (Durham NC: Duke University Press, 2001); Wibren van der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (New York: Routledge, 2016).

<sup>15</sup> Robert P. George, “Natural Law, the Constitution, and the Theory and Practice of Judicial Review,” *Fordham Law Review*, 69(6) (2001): 2269-2283, accessed at <https://ir.lawnet.fordham.edu/r/vol69/iss6/1>, 02 December 2020.

<sup>16</sup> George, “Natural Law...” p. 2270.

<sup>17</sup> Ronald Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 1986).

<sup>18</sup> Dworkin, *Law’s Empire*, vii.

<sup>19</sup> See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978).

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<sup>20</sup> Dworkin, *Taking Rights Seriously*, 163.

<sup>21</sup> Dworkin, *Taking Rights Seriously*, 184.

<sup>22</sup> Dworkin, *Taking Rights Seriously*, 184-185.

<sup>23</sup> Dworkin, *Taking Rights Seriously*, 185.

<sup>24</sup> Dworkin, *Taking Rights Seriously*, 186.

<sup>25</sup> Adam Gabbatt, "Trump's refusal to condemn white supremacy fits pattern of extremist rhetoric," *The Guardian*, 01 October 2020, accessed at <https://www.theguardian.com/us-news/2020/sep/30/trump-white-supremacy-extremist-rhetoric>, 02 December 2020.

<sup>26</sup> See here Michael J. Gerhardt, "Constitutional Arrogance," *University of Pennsylvania Law Review*, 165 (2016): 1649-1675, accessed at <https://core.ac.uk/download/pdf/304667614.pdf>, 02 December 2020. Gerhardt opines: "My argument is that the presidency of the United States has the institutional disposition and capacity for constitutional arrogance—to take unilateral actions challenging its constitutional boundaries and extending its powers at other authorities' expense...While the presidency was originally constructed to defend against legislative tyranny, its power has grown offensively. Through historical practices and hierarchical design, the presidency has developed the disposition and capacity to take advantage of constitutional indeterminacy and wrest power from other branches."

<sup>27</sup> Tara L. Branum, "President or King? The Use and Abuse of Executive Orders in Modern-Day America," *Journal of Legislation*, 2(1) (1975): 1-86.

<sup>28</sup> In relation to Article II of the Constitution, e.g., see Michael Brice-Saddler, "While bemoaning Mueller probe, Trump falsely says the Constitution gives him 'the right to do whatever I want,'" *The Washington Post*, 23 July 2019. See Louis Fisher, "How the Supreme Court Promotes Independent Presidential Power," *Cato Institute Cato Journal*, 39(3) (Fall 2019), accessed at <https://www.cato.org/publications/cato-journal/how-supreme-court-promotes-independent-presidential-power>, 02 December 2020. In relation to Trump's impeachment and argument against Trump's view that "the Constitution allows him to do whatever he wants," see law professor Michael Gerhardt's, "The Impeachment Inquiry is Fully Legitimate," *The Atlantic*, 01 November 2019, accessed at <https://www.theatlantic.com/ideas/archive/2019/11/why-impeachment-inquiry-legally-legitimate/601165/>, 02 December 2020. Gerhardt commented: "If you add up the nonsense that the president's defenders have proliferated and his protestation that the Constitution allows him to do whatever he wants, their proposed result is disturbing: an executive who can shut down an impeachment inquiry and protect from disclosure anything done by anyone in the executive branch, and who is immune to criminal investigation and allowed to defy subpoenas. This is not the president our Constitution established. He would be a king, in spite of the Founders' generation rebelled against one. They set out to create a presidency that was accountable to Congress if the occupant abused power and breached the public's trust. Donald Trump's efforts to delegitimize the impeachment inquiry destroy their vision."

<sup>29</sup> See John Yoo, *Defender in Chief: Donald Trump's Fight for Presidential Power* (New York: All Points Books, 2020).

<sup>30</sup> Brett M. Kavanaugh, "Our Anchor for 225 years and Counting: Enduring Significance of the Precise Text of the Constitution," *Notre Dame Law Review*, 89(5), (2014): 1907-1927. At the time of publication, Kavanaugh was United States Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. Kavanaugh's advocates an expansive, and even exceptionalist, view of presidential

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power in the context of opposition to an “oppressive” power of the legislature, despite his position that, “In its design and structure, the Constitution is tilted in the direction of liberty [of individual citizens].” He writes: “To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch—at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise.” This latter point is notable for Kavanaugh’s assertion that, in the light of *Marbury v. Madison*, “The Court...has the power to reject the President’s interpretation of the Constitution...”

<sup>31</sup> Arendt, *Eichmann in Jerusalem*

<sup>32</sup> Arendt, “Eichmann in Jerusalem-1,” *The New Yorker*, 16 February 1963, accessed at <https://www.newyorker.com/magazine/1963/02/16/eichmann-in-jerusalem-I>, 06 December 2020; emphasis added. Arendt here cites *Les lours de notre mort*, 1947.

<sup>33</sup> See, e.g., Bernard J. Bergen, *The Banality of Evil: Hannah Arendt and ‘The Final Solution’* (Lanham MD: Rowman & Littlefield, 1998); Yaacov Lozowick, *Hitler’s Bureaucrats: The Nazi Security Police and the Banality of Evil*, trans. Haim Watzman (New York: Continuum, 2000); Birgit Maier-Katkin and Daniel Maier-Katkin, “At the Heart of Darkness: Crimes against Humanity and the Banality of Evil,” *Human Rights Quarterly*, 26(3) (August 2004): 584-604; Paul Hollander, “Revisiting the Banality of Evil: Contemporary Political Violence and the Milgram Experiments,” *Sociology*, 53, 56-66, 04 January 2016, accessed at DOI 10.1007/s12115-015-9973-4, 01 December 2020.

<sup>34</sup> In Shakespeare’s *Othello*, (2.1.267), Iago ironically says: “knavery’s plain face is never seen till used.” The words are telling in that they are portentous, insofar as they characterize anyone who is a knave, even as one finds such knavery in politics and in political leaders who may engender a consequent banality of evil.

<sup>35</sup> In Shakespeare’s *Macbeth* we find in his character a man whose criminal acts follow one upon the other, each one easier than the one before, as all moral restraint fails.

<sup>36</sup> Arendt, *Eichmann in Jerusalem*, emphasis added.

<sup>37</sup> Judith Butler, “Hannah Arendt’s Challenge to Adolf Eichmann,” *The Guardian*, 29 August 2011, accessed at <https://www.theguardian.com/commentisfree/2011/aug/29/hannah-arendt-adolf-eichmann-banality-of-evil>, 06 December 2020.

<sup>38</sup> Peter J. Haas, *Morality After Auschwitz: The Radical Challenge of the Nazi Ethic* (Philadelphia: Fortress Press, 1992). See also, Haas’s “Ethics in the Post-Shoah Era: Giving up the Search for a Universal Ethics,” *Ethical Perspectives*, 8(2) (2002): 105-116. For the concept of a post-Holocaust ethic, see John Roth and Peter J. Haas, ed., *Ethics After the Holocaust: Perspectives, Critiques, and Responses* (St. Paul MN: Paragon House, 1999); Leonard Grob, “Post-Holocaust Ethics: The Morality of the Use of Power,” in John Roth, et al., ed., *Remembering the Future* (London: Palgrave Macmillan, 2001), accessed at [https://doi.org/10.1007/978-1-349-66019-3\\_69](https://doi.org/10.1007/978-1-349-66019-3_69), 03 December 2020; John Roth, *Ethics During and After the Holocaust: In the Shadow of Birkenau* (London: Palgrave Macmillan, 2005).

<sup>39</sup> Haas, “Ethics in the Post-Shoah Era,” 108.

<sup>40</sup> Haas, “Ethics in the Post-Shoah Era,” 108.



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- <sup>41</sup> See United Nations Human Rights Office of the Higher Commissioner, *International Covenant on Civil and Political Rights*, accessed at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, 03 December 2020.
- <sup>42</sup> Bandy X. Lee, *The Dangerous Case of Donald Trump* (Thomas Dunne Books, 2017, 2019); Bandy X. Lee, *Profile of a Nation: Trump's Mind, America's Soul* (World Mental Health Coalition, 2020)
- <sup>43</sup> Lee, *Profile of a Nation*, 13.
- <sup>44</sup> Bandy Lee, ed., *The Dangerous Case of Donald Trump: 27 Psychiatrists and Mental Health Experts Assess a President* (Thomas Dunne Books, 2017; expanded edition, March 2019)
- <sup>45</sup> Hara Estroff Marano, "Shrinks Battle Over Diagnosing Donald Trump," *Psychology Today*, 32 January 2017, accessed at <https://www.psychologytoday.com/intl/blog/brainstorm/201701/shrinks-battle-over-diagnosing-donald-trump>, 14 June 2019.
- <sup>46</sup> Marano, op. cit.
- <sup>47</sup> Chemi Shalev, "Analysis: After Boosting neo-Nazis, How Would Trump Fare in a Test for Psychopaths?" *HaHaretz*, 17 August 2017, accessed at <https://www.haaretz.com/us-news/.premium-how-would-trump-do-on-psychopaths-test-1.5443844>, 18 January 2018.
- <sup>48</sup> Aaron Levin, "Goldwater Rule's Origins Based on Long-Ago Controversy," American Psychiatric Association, accessed at <https://www.psychiatry.org/newsroom/goldwater-rule>, 15 June 2019.
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[...] exhibit little coherence or stability in their opinions. [...] From the exalted heights of democratic theory, Americans seem like inexplicably bad citizens.”