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Lies, Deceit, and Bullshit in Law

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I. INTRODUCTION

Gerald Shargel, a prominent criminal attorney in New York, has written, “A trial may be a search for the truth, but I – as a defense attorney – am not part of the search party.”¹ This essay asks who is a member of the search party, and by what tactics parties and lawyers impede a successful search for the truth, both in the courtroom and in the interactions among people that set the stage for judicial intervention. In this effort, the essay distinguishes among three kinds of dishonesty: lies, deceit, and bullshit.

The federal perjury statute criminalizes an assertion of a material fact that the speaker believes to be false but which is asserted

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1. Gerald L. Shargel, *Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 FORDHAM L. REV. 1263 (2007).

as true.² Once one has taken an oath to tell the truth, it is a crime for that person to “willfully and contrary to such oath state[] or subscribe[] any material matter *which he does not believe to be true*.”³ The law purports to disapprove of lying. By and large it does, but not always. For example, the legal system gives law enforcement officers license to lie both during the interrogation of witnesses and during sting operations and subsequently permits prosecutors to take advantage of these lies.⁴ The prosecutors themselves may not lie, however. Moreover, there is well-studied tolerance by judges of police officers lying about the circumstances under which they seized evidence or interrogated a suspect.⁵

Apart from such selective tolerance, conceptual questions about lies arise from time to time. May a witness who intended to lie be saved from a perjury conviction if the testimony turns out to be true by some kind of fluke? For example, what if the witness was mistaken about the facts and what he intended as a lie was really true? Another issue is whether the witness must intend that the false statement be believed. In the film *Casablanca*, Humphrey Bogart’s character, Rick, is asked his nationality and answers, “I’m a drunkard.”⁶ Whether that was a lie or not depends upon whether an intention to deceive is part of the definition of lying. In civil litigation, a plaintiff who claims to have been damaged by having relied on a false statement must demonstrate that the reliance was reasonable. Whether perjury requires that the speaker could reasonably expect to be believed is not well-established in the case law, suggesting that there are few, if any, prosecutions that raise the issue.

While lying is about both false testimony and the state of mind of the speaker, deceit is more about the state of mind of the information’s recipient. A speaker has deceived another when the speaker has led the hearer to come to believe something to be true that the speaker believes to be false. It makes no difference whether the speaker did this by means of making false assertions of fact or by uttering half-truths or by other means of persuasion. Speech act theorists refer to a hearer-oriented element of an act of speech as the *perlocutionary effect* of the utterance—the effect it has on the state of mind of the hearer, rather than the communicative

2. 18 U.S.C. § 1621 (2016).

3. *Id.* (emphasis added).

4. For discussion, see Stuart Green, *Lying in Law*, in OXFORD HANDBOOK OF LYING (Jörg Meubauer, ed.) (forthcoming) (manuscript at 11-12).

5. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

6. Mjcgonzales, *Are My Eyes Really Brown?*, YOUTUBE (June 5, 2009), <https://www.youtube.com/watch?v=ZkM6HegRk3A>.

intent of the speaker.⁷ Verbs vary as to their focus in this regard. “Persuade,” for example, holds when the perlocutionary effect of an assertion is to convince the hearer of a proposition.

As for “bullshit,” I intend that word to be understood as described by Harry Frankfurt, in his 2005 book *On Bullshit*.⁸ Frankfurt paints the bullshitter as an amoral person, not concerned about whether what he says is true or false. Thus, the bullshitter is not a liar because the liar must say something he believes is false, and the bullshitter does not bother himself with such concerns. Whether the bullshitter engages in deceit is a different matter. The bullshitter may be concerned with the perlocutionary effect of his or her statements but not with whether the statement is intended to convince the hearer of something true or false. As Frankfurt puts it:

The fact about himself that the bullshitter hides . . . is that the truth-values of his statements are of no central interest to him; what we are not to understand is that his intention is neither to report the truth nor to conceal it. . . .

It is impossible for someone to lie unless he thinks he knows the truth. Producing bullshit requires no such conviction.⁹

In a number of circumstances, the law declares bullshit as unacceptable, recognizing that it would not be covered by the ordinary definitions of deceit or lying. Illustrations include Rule 11 of the Federal Rules of Civil Procedure, which requires that an attorney (or party) make adequate investigation of the facts underlying a submission to a federal court or be subject to monetary or other sanctions.¹⁰ Of course, lawyers do sometimes intentionally include false allegations in a legal pleading. More often, however, a lawyer may simply intend to fill in the gaps in a narrative in which a number of the assertions required for the lawyer to succeed can be proven, but not all such assertions. When a lawyer takes liberties with these remaining facts, the lawyer is engaged in bullshitting. The same holds true for fraud under a number of common law and statutory definitions. Asserting something as true without finding out whether it is true or not is considered fraudulent behavior.

The remainder of this essay explores the themes raised in this introduction with examples from legal proceedings, from business

7. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 101 (1962).

8. HARRY G. FRANKFURT, ON BULLSHIT (2005).

9. FRANKFURT, *supra* note 8, at 55.

10. FED. R. CIV. P. 11.

transactions (real and hypothetical) that may become the subject of such proceedings, and from political discourse.

II. LYING

Lying is outlawed in one context after another. Lying under oath is perjury.¹¹ Lying to a government official is a federal crime.¹² Lying in a business transaction is a species of fraud if the party lied to reasonably relies on the lie to his or her detriment.¹³ Lawyers may not lie in the course of representing a client.¹⁴ Nor may they arrange to have a non-lawyer employee lie as their agent.¹⁵

A. *What is a Lie?*

Linguist/philosopher Laurence Horn sets forth four criteria that have been proposed in defining what constitutes a lie:

- (C1) S says/asserts that p
- (C2) S believes that p is false
- (C3) p is false
- (C4) S intends to deceive H¹⁶

There is general agreement that a lie must be an assertion of some kind. An opinion, a question, a promise and other such speech acts do not have truth value and therefore cannot be false.¹⁷ Philosopher Don Fallis elaborates: “I think that you *assert* something when (a) you say something and (b) you believe that you are in a situation where you should not say things that you believe to be

11. 18 U.S.C. § 1621 (2016).

12. 18 U.S.C. § 1001 (2016).

13. A classic example is Rule 10b-5 of the Securities and Exchange Commission, which defines securities fraud. 17 C.F.R. § 240.10b-5 (2018). It is fraudulent conduct “[t]o make any untrue statement of a material fact” in a securities transaction. While lying is sufficient to constitute fraud, it is not a necessary condition, in that the rule also outlaws other types of deceptive practice. See *infra* note 80 for further discussion of this rule.

14. See, e.g., N.Y. RULES OF PROF'L CONDUCT r. 4.1 (2017) (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.”).

15. See, e.g., N.Y. RULES OF PROF'L CONDUCT, r. 5.3(b)(1) (2017) (“A lawyer shall be responsible for the conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if: (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it[.]”).

16. Laurence Horn, *Telling it Slant: Toward a Taxonomy of Deception*, in *THE PRAGMATIC TURN IN LAW* 23, 24-25 (Janet Giltrow & Dieter Stein eds., 2017).

17. Well, almost. One can lie about what one's opinion is, although as an opinion, its substance lacks truth value.

false.”¹⁸ Fallis, in turn, takes this condition on assertions to follow from Paul Grice’s maxim of quality that we expect of our partners in conversation: “Do not say what you believe to be false.”¹⁹

There is also wide agreement that one does not lie if one says what one believes to be true but is wrong. Such cases are matters of mistake. It is the last two criteria that create disagreement and some confusion. Does a statement have to be false for it to constitute a lie? Most say “no,” following the writings of St. Augustine in late antiquity.²⁰ If one intends to make a false statement, he is not rescued by the truth if he happens to have spoken truthfully because he mistook the facts. If I attempt to protect my friend by saying he was in Cleveland when a crime was committed although I am quite certain that he was in Pittsburgh committing the crime, I have lied even if it turns out that I was wrong and he really was in Cleveland. As we shall see, the law of perjury follows this tradition.

Finally, there is a question of whether a lie must be part of an effort to deceive. Those who argue that this is not required (although it is characteristic of most lies) cite examples such as the student who lies to the school authorities as not having cheated, knowing that they will not believe him, but maintaining the position so that there will not be adequate proof to justify severe punishment. No doubt the student lied. Likewise, a witness afraid of repercussions may testify falsely to protect himself, knowing full well that he will fool no one, having already told authorities the true story before the trial began. Roy Sorensen refers to such assertions as bald-faced lies.²¹ In keeping with positions taken by Jennifer Saul, Don Fallis,²² and other philosophers, this essay proceeds on the claim that an attempt to deceive is a feature of the prototypical lie but not a necessary condition for an assertion to be deemed a lie.²³

18. Don Fallis, *What is Lying?*, 106 J. PHIL. 29, 33 (2009).

19. *Id.* (quoting PAUL GRICE, *Logic and Conversation*, in STUDIES IN THE WAY OF WORDS 22, 27 (1989)). Grice also includes a maxim to the effect that one should avoid bullshit in conversation: “Do not say that for which you lack adequate evidence.” *Id.*

20. See generally Saint Augustine, *To Consentius, Against Lying*, NEW ADVENT, <http://www.newadvent.org/fathers/1313.htm> (last visited May 10, 2018).

21. Roy Sorensen, *Bald-Faced Lies! Lying Without the Intent to Deceive*, 88 PAC. PHIL. Q. 251 (2007).

22. See Fallis, *supra* note 18.

23. See Horn, *supra* note 16 at 26-27; JENNIFER MATHER SAUL, LYING, MISLEADING, AND WHAT IS SAID 8-12 (2012); see generally Sorensen, *supra* note 21.

B. Perjury

As for perjury, the leading case is a 1973 unanimous Supreme Court decision *Bronston v. United States*.²⁴ Bronston was a film producer who had filed for bankruptcy. Required to answer questions under oath from the creditors from whom he sought relief, the following colloquy took place:

‘Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?’

‘A. No sir.’

‘Q. Have you ever?’

‘A. The company had an account there for about six months, in Zurich.’²⁵

It turned out that not only did the company have an account in Zurich in the past, but so did Bronston himself. As a result, he was prosecuted for perjury and convicted. The perjury statute states in relevant part:

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; . . . is guilty of perjury[.]²⁶

But the Supreme Court reversed the conviction, relying on a distinction between a false statement on the one hand and a true statement leading to a false inference on the other:

The words of the statute confine the offense to the witness who ‘willfully . . . states . . . any material matter which he does not believe to be true.’ Beyond question, petitioner’s answer to the crucial question was not responsive if we assume, as we do, that the first question was directed at personal bank accounts.

24. 409 U.S. 352 (1973).

25. *Id.* at 354.

26. 18 U.S.C. § 1621 (2016).

There is, indeed, an implication in the answer to the second question that there was never a personal bank account; in casual conversation this interpretation might reasonably be drawn. But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true.²⁷

This has come to be known as the “literal truth defense” to perjury.²⁸ The Court noted that Bronston’s answer was unresponsive, not false, and that an alert lawyer would be on sufficient notice to ask a follow-up question, such as, “Mr. Bronston, I didn’t ask about your company; I asked about you.” As Peter Tiersma and I have noted, this holding, at least if taken at face value, sets a very low moral floor for witnesses who swear to tell the truth in an enterprise whose goal is to seek out and discover the truth.²⁹

Yet the questions and answers in a courtroom or a deposition are not ordinary conversational exchanges. The philosopher Paul Grice famously wrote that conversation is a cooperative enterprise. When speaking with others, we typically abide by his cooperative principle, “Make your contribution such as it is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.”³⁰ In litigation contexts, however, witnesses are instructed by their lawyers to answer the questions asked and not to volunteer more information for the sake of being helpful. This instruction does not entirely flout the cooperative principle because witnesses must give answers that are both relevant and truthful. Grice lists four maxims as components of cooperation in conversation. Two are the maxim of relation (be relevant) and the maxim of quality (be truthful).³¹ Others have elevated relevance to the principal component of conversational responsibility.³²

As for Bronston, the Court held, in essence, that by giving an answer that was literally both truthful and irrelevant, he had flouted

27. 409 U.S. at 357-58.

28. See, e.g., RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON 49 (1999).

29. LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME (2005). I also explore this issue in Lawrence M. Solan, *Lawyers as Insincere (But Truthful) Actors*, 36 J. LEGAL PROF. 487 (2012).

30. H. P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975).

31. *Id.* at 46.

32. See DAN SPERBER & DEIRDRE WILSON, RELEVANCE: COMMUNICATION AND COGNITION (2d ed. 1995).

the maxim of relation but not the maxim of quality. But that, of course, is not all that Bronston did. In ordinary discourse, if a person says that his company had a Swiss Bank Account in response to a question about whether the witness himself had one, the normal inference is that the witness intends to convey, "No. I never had one, but. . ." Bronston thus succeeded in misleading the questioner into concluding that Bronston himself did not have one. If the questioner thought otherwise, he would indeed have asked the follow-up question necessary to button down the facts about what Bronston himself owned.

Without question, Bronston engaged in dishonest conduct. Some commentators believe that the case was wrongly decided for that reason.³³ But if perjury is about lying, and the Court decided to articulate a bright line rule, then at first glance, it seemed to have accomplished its goal. The Court itself took a second glance, however, recognizing that whether an answer to a question is truthful requires not only analysis of the answer, but also analysis of the question. Because Bronston's response was so blatantly unresponsive, the Court reasoned, it was the questioner who should be held responsible for the truth not coming out. The Court thus distinguished Bronston's conduct from the conduct in a hypothetical case that the trial court had presented. It concerns the third of Grice's maxims: the maxim of quantity (say whatever is necessary to make one's point but not more).³⁴ The district court, which the Supreme Court quoted, had noted:

(I)f it is material to ascertain how many times a person has entered a store on a given day and that person responds to such a question by saying five times when in fact he knows that he entered the store 50 times that day, that person may be guilty of perjury even though it is technically true that he entered the store five times.³⁵

The Supreme Court argued that the situation was unlike that in *Bronston* because "the answer 'five times' is responsive to the hypothetical question, and contains nothing to alert the questioner that he may be side-tracked."³⁶ The Court continued:

33. See, e.g., Philip Gaines, *Toward a Communicative Approach to Law- and Rule-Making*, in *SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA* 235 (Lawrence M. Solan, Janet Ainsworth & Roger Shuy, eds. 2015).

34. Grice, *supra* note 30, at 46-47.

35. *Bronston v. United States*, 409 U.S. 352, 355 n.3 (1973).

36. *Id.*

Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect, because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question—unless there is to be speculation as to what the unresponsive answer ‘implies.’³⁷

The Court was correct in declaring that unresponsive answers may generate false inferences but are not false answers to the questions in their own right. But the situation is a bit more complex. Ambiguous questions pose a similar problem. If a question is subject to more than one interpretation, a witness’s answer may be truthful if the question is understood one way yet false if it is understood another way. Generally, as the Court assumes, if we ask someone how many times he or she has been to a particular place, we mean to ask for the sum total of times. But this is not always true of quantitative inquiries. Consider this hypothetical: Two friends are taking a long walk, and one sees a beverage machine at a gas station that they pass. It requires inserting a \$1 bill and some coins. He has the coins but not the \$1 bill. He asks his friend, “How much cash do you have?” The friend, understanding the situation, responds, “I have a dollar.” In fact, he has \$32. Did he lie? No. He was merely trying to advance the conversation by giving a relevant response. What he meant was that he had at least the dollar required for the beverage, and he would be understood that way. By the same token, if a store has a special promotion for patrons who had been there at least five times in the past month, a person who had been there fifty times could enter the store and say forthrightly that he had been there five times when asked how many times he had been there.

If what I have said thus far is right, it presents a problem for the Court’s analysis. The Court was correct in its assertion that construing an unresponsive answer as misleading requires it to speculate as to the inferences that a reasonable hearer would draw. However, it is also true that determining whether a seemingly responsive answer is true or false requires a court to speculate as to the inferences that the witness drew in understanding the question, at least in the examples that the Supreme Court used. Of course, some questions are sufficiently clear that this is not a problem. But many are not, and we routinely resolve ambiguity as we attempt to understand the discourse.

37. *Id.*

If the truth of an answer can be judged only with respect to the question that was asked, can a witness be saved from a perjury conviction if the questioner misstated the question but both questioner and witness understood the question to mean what the questioner intended to ask? This inquiry may sound bizarre, but it is exactly what happened in *United States v. DeZarn*³⁸—and the answer the Sixth Circuit gave was “no”: If you are under oath, and you answer a question in a manner that you believe to be false, then you have committed the crime of perjury even if your answer is literally true.

In 1990, Robert DeZarn, a retired officer in the Kentucky National Guard, attended and participated in a fundraising party for a political candidate running for governor of Kentucky. The party was held at the home of an officer in the Kentucky National Guard, General Wellman. The party was referred to as a “Preakness party” because it was held on the day of the annual Preakness horse race. It is illegal for officers to solicit such funds from military personnel. In 1991, that same officer held another, smaller party, this time on the day of the Kentucky Derby race. DeZarn attended that party as well. No fundraising took place at the 1991 event.

Because of the illegality of the fundraising by military personnel, an investigation ensued once authorities heard about the incident. DeZarn was questioned by an officer, in relevant part, as follows:

Q: Okay, sir. My question is going to deal with General Wellman, though. Was it traditional for General Wellman to hold parties at his home and invite Guardsman to attend?

A [by DeZarn]: Well, I suppose you could say that for a number of years that going back to the late 50s he has done this on occasion.

Q: Okay. In 1991, and I recognize this is in the period that you were retired, he [i.e., General Wellman, the host] held the Preakness Party at his home. Were you aware of that?

A: Yes.

Q: Did you attend?

A: Yes.

* * * * *

38. 157 F.3d 1042 (6th Cir. 1998).

Q: Okay. Sir, was that a political fundraising activity?

A: Absolutely not.

Q: Okay. Did then Lieutenant Governor Jones, was he in attendance at the party?

A: I knew he was invited. I don't remember if he made an appearance or not.

Q: All right, sir. You said it was not a political fundraising activity. Were there any contributions to Governor Jones' campaign made at that activity?

A: I don't know.

Q: Okay. You did not see any, though?

A: No.

Q: And you were not aware of any?

A: No.³⁹

DeZarn was convicted of perjury for having given these answers. He appealed on the ground that the questioner placed the party in 1991, and in that year, there was no political fundraising. The jury, though, believed that DeZarn and the questioner both understood at the time that they were talking about the 1990 fundraising Preakness party that had occurred the year before and that he had therefore testified falsely.

Had the questioner asked DeZarn about a 1991 Kentucky Derby party, there would have been little justification for the conviction. The testimony as it did occur, however, presents a thorny doctrinal question. Why is it that Bronston's answer *is not* perjurious because it requires the hearer to draw an inference that Bronston himself did not have a Swiss Bank Account, but DeZarn's testimony *is* perjurious, even though his answer requires the hearer to draw an inference that the questioner had mistakenly placed the Preakness party in the wrong year? Interestingly, in *Bronston*, the Court put the blame on the lawyer for not following up after receiving an unresponsive answer:

39. *Id.* at 1044-45.

It is the responsibility of the lawyer to probe; testimonial interrogation, and cross examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.⁴⁰

In *DeZarn*, in contrast, the questioner, rather than failing to follow up with the witness, simply asked the wrong question in the first place, leaving a degree of ambiguity that the witness attempted to leverage to create a misleading record. The court reasoned:

At trial, DeZarn testified that Colonel Tripp, by mistakenly setting the questions in his interview about the Preakness Party in 1991, rather than 1990, led him to answer the questions with reference to the 1991 dinner party, which was not a fundraiser and at which he did not collect any contributions.

Evidence was presented at trial, however, to establish that DeZarn was not misled by the 1991 date but had answered the investigators' questions as he had with intent to deceive them. Specifically, all of the individuals questioned by the investigators described the same party, even though some were questioned about a "Preakness Party", some were questioned about a "1990 Preakness Party", and some, like DeZarn, were questioned about a "1991 Preakness Party".⁴¹

Let us assume that the court was accurate in its description of DeZarn's motives. The question then becomes what difference should DeZarn's motives make if he arguably did not answer falsely in light of the questioner's mistake in wording the question? After all, Bronston had bad motives, too.

The perjury statute, read literally, does not have a literal truth defense.⁴² Bronston did not violate the law if we read the law as written. He did not say something that he did not believe to be true. What about DeZarn? If DeZarn believed that the question was asking about the 1990 Preakness party, then he did violate the law. But what if he was just being cagey? What if DeZarn saw an opening in the question that permitted him to answer as he did without actually lying? If so, he did this not because he was trying to be

40. 409 U.S. at 358-59.

41. 157 F.3d at 1046.

42. 18 U.S.C. § 1621 (2016).

helpful and forthright, but rather because he wanted to take advantage of the lawyer's mistake and avoid having to say what really took place without perjuring himself. If that is what happened, it is difficult to distinguish the two cases on their relevant facts.

The Supreme Court was certainly correct in concluding that one cannot assess the truthfulness of an answer without knowing what the question was. Yet it is not a simple matter to reconcile *Bronston* and *DeZarn*. There was only one Preakness party, and it was an illegal fundraising event. If DeZarn understood the question as referring to that party, then he committed perjury. By the same token, there was only one relevant party in 1991, and it was not a fundraising party. If DeZarn understood the question as referring to that party, then he did not commit perjury. The more difficult question is what should happen if DeZarn recognized the error, and for the sake of obfuscating the facts, chose the 1991 date over the name of the horse race to accomplish this goal. Perhaps it was right to leave that decision to the jury. The rule of lenity tells us that ambiguities in law are to be resolved in favor of the defendant. But this, at least arguably, is not an ambiguity of law. Rather, it is a murkiness in the facts regarding the defendant's state of mind.

Regardless, taken together, the cases describe a rather simple story: If a person makes a statement under oath that she believes to be false at the time she makes it, then that person has committed perjury. *Bronston* tells us that a false statement must be literally false—not a true statement that leads the hearer to infer something false. *DeZarn* tells us that the “literal truth” defense is a misnomer. More important than literal truth is the speaker's belief in the falsity of her statement, which is exactly how the perjury statute is worded.

Experimental work in the psychology of language suggests that native speakers' intuitions about what constitutes a lie match the holding of the *DeZarn* court. Most notably, linguists Linda Coleman and Paul Kay set out to determine how people understand the concept of lying.⁴³ Participants in a study were presented with vignettes that ended with a person making some kind of statement. The participants were then asked to rate the statement on a 1-7 scale, where 1 indicated “very sure” it is not a lie, 2 and 3 were “fairly sure” and “not too sure” it is not a lie, 4 was “can't say,” and 5-7 went from “not too sure” it is a lie to “very sure” it is a lie.⁴⁴

43. Linda Coleman & Paul Kay, *Prototype Semantics: The English Word Lie*, 57 LANGUAGE 26 (1981).

44. *Id.* at 30.

The statements in the vignettes were varied systematically along three axes. First, the statement was either true or false. Second, the speaker either believed the statement to be true or believed it to be false. Third, the speaker either intended to deceive the hearer or not. These axes are the very features that Horn attributes to the various definitions of lying, in addition to the requirement that a lie be an assertion.⁴⁵

Coleman and Kay hypothesized that these three factors each contributed to the meaning of the verb "to lie," but that none is a necessary condition; some combination may be sufficient. They further hypothesized that participants would rate the statements with either all three or no elements to be the strongest, i.e., prototypical examples of lying, with various combined features being less clear. And that is just what happened.

First, consider the all-or-nothing vignettes. Vignette (I) has all of the features of a prototypical lie, vignette (II) none of them:

(I) Moe has eaten the cake Juliette was intending to serve to company. Juliette asks Moe, 'Did you eat the cake?' Moe says, 'No.' Did Moe lie?⁴⁶

(II) Dick, John, and H.R. are playing golf. H.R. steps on Dick's ball. When Dick arrives and sees his ball mashed into the turf, he says, 'John, did you step on my ball?' John replies, 'No, H.R. did it.' Did John lie?⁴⁷

Both answers are self-serving, but only one is true and intended to convey the truth. Sure enough, Coleman and Kay's subjects almost universally thought confidently that (I) contains a lie (6.96 average) and that (II) does not contain a lie (1.06 average).⁴⁸

The more interesting cases are ones in which some, but not all, of the three elements of lying are present. What do people think when a person makes a truthful statement, knowing it to be true, but with the intention of attempting to get the hearer to draw a false inference? This is the typical scenario of fraud without lying, discussed earlier. Below is the scenario that contains these conditions:

(VI) John and Mary have recently started going together. Valentino is Mary's ex-boyfriend. One evening John asks Mary,

45. See Horn, *supra* note 16, at 25.

46. Coleman & Kay, *supra* note 43, at 31.

47. *Id.*

48. *Id.* at 33.

‘Have you seen Valentino this week?’ Mary answers, ‘Valentino’s been sick with mononucleosis for the past two weeks.’ Valentino has in fact been sick with mononucleosis for the past two weeks, but it is also the case that Mary had a date with Valentino the night before. Did Mary lie?⁴⁹

The mean score on this question was 3.48,⁵⁰ close to the midpoint of 4.00. This suggests that, on the average, people did not consider this to be a lie, but it approaches being a lie. I have presented this scenario to law students who, when probed, typically agree with the statement: “I don’t think Mary lied, but what she did was dishonest, and I’m uncomfortable saying it’s not a lie because that answer doesn’t reflect my disapproval of her behavior.”

In essence, this scenario is *Bronston*. Mary evaded answering the question directly so that she would not have to tell the whole story or take responsibility for having lied, neither of which was palatable under the circumstances. It also resembles President Bill Clinton’s efforts to evade the truth without lying.⁵¹ Clinton had been sued by Paula Jones, an employee of the state of Arkansas, for sexual harassment while Clinton was Governor of that state. Later, Kenneth Starr, a special prosecutor appointed to investigate whether the President or those close to him had committed any crimes in connection with a real estate investment called Whitewater, convened a grand jury to determine whether Clinton had perjured himself or obstructed justice when he testified in a deposition in the *Jones* litigation. Much of the questioning in the deposition was about his sexual relationship with Monica Lewinsky, which apparently caught him off guard. Before the grand jury, he testified in true Bronstonian fashion:

Q [W]as it your responsibility . . . to answer those questions truthfully, Mr. President?

49. *Id.* at 31.

50. *Id.* at 33.

51. For a fair account of the relevant facts, see generally RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (2000). Both Peter Tiersma and I wrote about linguistic issues concerning the Clinton impeachment and the events leading up to it. See SOLAN & TIERSMA, *supra* note 29, at 221-31; Lawrence M. Solan, *The Clinton Scandal: Some Legal Lessons from Linguistics*, in LANGUAGE IN THE LEGAL PROCESS 180-95 (Janet Cotterill ed., 2002); Peter Tiersma, *Did Clinton Lie? Defining Sexual Relations*, 79 CHI-KENT L. REV. 927 (2004).

A It was. . . . But it was not my responsibility, in the face of their repeated illegal leaking, it was not my responsibility to volunteer a lot of information.⁵²

The House of Representatives voted to bring Articles of Impeachment against Clinton for lying to the grand jury but not for lying in the *Jones* deposition. Both before the grand jury and at his deposition, Clinton refused to characterize his conduct with Lewinsky as “having sexual relations” because in his dialect of English, the term is only applicable if the relationship includes sexual intercourse. In fact, it was not until his grand jury appearance that he admitted having a physical relationship with Lewinsky at all. Testifying about an affidavit that Lewinsky had sworn, Clinton said to the grand jury: “I believe at the time that [Lewinsky] filled out this affidavit, if she believed that the definition of sexual relationship was two people having intercourse, then this is accurate. And I believe that is the definition that most ordinary Americans would give it.”⁵³

To Clinton, intercourse is a necessary element of the concept “sexual relations.” Along these same lines, Clinton had famously told the press: “I did not have sexual relations with that woman, Ms. Lewinsky.”⁵⁴ Whether he would agree that his own conduct may be within that term but not its prototype for some people is something we cannot know.

If the Mary vignette and Clinton’s statements resemble *Bronston’s* approach to the truth, what do they say about *DeZarn*? The following Coleman and Kay vignette describes a person who thought he was lying but later found out that he had spoken truthfully:

Superfan has got tickets for the championship game and is very proud of them. He shows them to his boss, who says, ‘Listen, Superfan, any day you don’t come to work, you better have a better excuse than that.’ Superfan says, ‘I will.’ On the day of the game, Superfan calls in and says, ‘I can’t come to work today, Boss, because I’m sick.’ Ironically, Superfan doesn’t get to

52. THE STARR REPORT: THE EVIDENCE 361 (Phil Kuntz ed., 1998).

53. H.R. DOC. NO. 105-311, at 473 (1998) (deposition of William Jefferson Clinton in *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998)).

54. See, e.g., jw00534, *Bill Clinton--“I did not have sexual relations with that woman”*, YOUTUBE (Apr. 18, 2012), https://www.youtube.com/watch?v=VBge_guezGGc.

go to the game because the slight stomach ache he felt on arising turns out to be ptomaine poisoning. So Superfan was really sick when he said he was. Did Superfan lie?⁵⁵

Most people said he did. The mean score was 4.61,⁵⁶ again fairly close to the midpoint of 4 but nonetheless on the “lying” side of the line.

Other findings were interesting as well. When a person makes a false statement as a result of having mistaken the fact of the matter, participants did not call it a lie. But they did call it a lie when the speaker made a true statement as a result of having mistaken the facts in an effort to tell a lie. They also considered a polite statement from a guest to a host after a dismal party to be a lie. These results reinforce the intuitive appeal of the perjury law, which focuses on the belief of the speaker, rather than on the speaker’s factual accuracy. It also gives some credence to both *Bronston* and *DeZarn* as consistent with people’s judgments about what constitutes a lie and what does not.

Coleman and Kay’s results indeed suggest that we are more comfortable calling some statements lies than others and that falsity is not the determining factor—at least, not by itself. Rather, in keeping with the earlier work of Eleanor Rosch,⁵⁷ we are more comfortable categorizing prototypical cases as members of a category than we are categorizing fringe cases as members of a category. Work by British psychologist James Hampton and his colleagues confirms that consensus about category membership dissipates as we stray from the prototype.⁵⁸ This explains why the scores get closer to the midpoint when some, but not all, of the features of a prototypical lie are present. Steven Winter develops the case for this approach impressively in his book *A Clearing in the Forest*.⁵⁹ However, it should be kept in mind that the means reported by Coleman and Kay are only partly informative. If half the participants are certain that a statement is a lie, the other half certain that it is not, the mean on a 1-to-7 scale would be exactly 4—the midpoint—even though there is no uncertainty about category membership, only sharp disagreement.

55. Coleman & Kay, *supra* note 43, at 31-32.

56. *Id.* at 33.

57. Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104 J. EXPERIMENTAL PSYCHOL.: GEN. 192, 197-99, 229-33 tbl.A1 (1975).

58. James A. Hampton, Zachary Estes & Sabrina Simmons, *Metamorphosis: Essence, Appearance, and Behavior in the Categorization of Natural Kinds*, 35 MEMORY & COGNITION 1785, 1797-98 (2007).

59. See generally STEVEN L. WINTER, *A CLEARING IN THE FOREST: LIFE, LAW, AND MIND* (2001).

Also to be kept in mind are the findings of Lila Gleitman and her colleagues. A study by Sharon Armstrong, Lila Gleitman, and Henry Gleitman found that while words indeed have prototypes, people use them more to sort out good and bad examples of a concept than they do in deciding category membership in the first place.⁶⁰ For example, people agree that a robin is a better example of a bird than a penguin. However, when asked, they also say that a penguin is no less a bird than a robin. Regardless, with the law's concern about "ordinary meaning" in legal interpretation, it seems clear that prototype analysis has a place in legal argumentation.

C. Section 1001: Lying to a Government Official

Perjury is not the only crime that requires proof of a lie. It is also a crime to lie to a government official in the context of an official interaction even when not under oath. Section 1001 of the U.S. Criminal Code reads in relevant part:

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years[.]⁶¹

The law does not apply to false statements made by parties or their lawyers in judicial proceedings.⁶² Those are covered by the

60. Sharon Lee Armstrong, Lila R. Gleitman & Henry Gleitman, *What Some Concepts Might Not Be*, 13 COGNITION 263, 267 (1983) (describing view of categories that considers "[m]embership in the class [as] categorical, for all who partake of the right properties are in virtue of that equally birds; and all who do not, are not").

61. 18 U.S.C. § 1001(a) (2016).

62. 18 U.S.C. § 1001(b) (2016).

perjury and obstruction of justice laws and by procedural rules that sanction parties who act dishonestly.

As this essay is being written, Section 1001 has come into play in American culture. Two members of President Trump's inner circle have pleaded guilty to violating this statute. On December 1, 2017, former National Security Advisor Michael Flynn pleaded guilty to lying to the FBI about contacts he had with a former Russian ambassador to the United States, Sergey Kislyak, in violation of Section 1001.⁶³ The charges to which he pleaded guilty alleged that he falsely told the FBI that he did not ask the Russian Ambassador "to refrain from escalating the situation in response to sanctions that the United States had imposed against Russia"; that he did not remember being told that Russia agreed to moderate its response as a result of Flynn's request; that Flynn did not ask the Russian Ambassador to act with respect to a then pending UN Security Council resolution; and that the Russian Ambassador never conveyed to Flynn Russia's response to this request.⁶⁴ He has not yet been sentenced as of this writing. The agreement requires Flynn's cooperating with Special Counsel Robert Mueller in the investigation into Russian meddling in the 2016 presidential election.⁶⁵

About six weeks earlier, George Papadopoulos, who served as a foreign policy advisor to Donald Trump during his campaign, also pleaded guilty to violating Section 1001 by lying to the FBI about his interactions with individuals connected to the Russian government. He told the FBI that his contacts with these individuals were superficial and occurred before he joined the campaign; in fact, the contacts were serious efforts to work with the Russian individuals and occurred during his tenure with the Trump campaign.⁶⁶

This law has been the source of another interesting interpretive issue: The "exculpatory no" defense. As noted, Section 1001 does not apply to statements made in judicial proceedings. This, of course, includes pleading "not guilty" to a crime that the defendant actually committed. What, if instead, a suspect tells a federal law

63. The documents are available at Matthew Kahn, *Michael Flynn Plea Agreement Documents*, LAWFARE (Dec. 1, 2017, 9:44 AM), <https://www.lawfareblog.com/michael-flynn-plea-agreement-documents>.

64. Statement of the Offense at 2-4, *United States v. Michael T. Flynn*, available at <https://www.lawfareblog.com/michael-flynn-plea-agreement-documents>.

65. Letter from Special Counsel's Office to Michael Flynn and his counsel dated November 30, 2017 at 5-6, available at <https://www.lawfareblog.com/michael-flynn-plea-agreement-documents>.

66. Statement of the Offense at 2-3, *United States v. George Papadopoulos*, available at Vanessa Sauter, *George Papadopoulos Stipulation and Plea Agreement*, LAWFARE (Oct. 30, 2017, 10:25 AM), <https://www.lawfareblog.com/george-papadopoulos-stipulation-and-plea-agreement>.

enforcement officer that he did not engage in conduct that is criminal in nature? Is such a denial a federal crime? Until 1998, many circuit courts accepted the “exculpatory no” defense, saying that a simple denial of an accusation of criminal activity comes within a suspect’s constitutional rights.⁶⁷ But that year, the Supreme Court put this practice to an end in *Brogan v. United States*.⁶⁸

James Brogan was a union leader who had illegally taken money on five occasions from a business that employed union members. The statute of limitations had run on four of the five.⁶⁹ One night, federal agents knocked on Brogan’s door and asked him whether he had accepted such funds. He answered “no” and was subsequently prosecuted for the false statement. Such a denial comes very close to simply saying, “I plead not guilty.” Had Brogan said that, instead of “no,” Justice Ginsburg observed in her concurring opinion,⁷⁰ he would not have been prosecuted. Secondly, in cases like Brogan’s, applying the statute to a situation in which the government already knows the truth, including situations in which the statute of limitations has already run, applying Section 1001 is an open invitation to law enforcement agents to create crimes when none that could be prosecuted has been committed.⁷¹

Yet the language of Section 1001 makes no exception for exculpatory “no” cases, and the majority, in an opinion written by Justice Scalia, decided to follow the text as written. This drew sharp criticism from Justice Stevens’s dissenting opinion, for courts routinely contextualize statutes to avoid having them apply to situations that were not intended to be covered.⁷²

In some respects, Brogan’s denial and the denials of members of the Trump campaign share a common narrative. All of these individuals, when approached by law enforcement officers, could have asserted their rights under the Fifth Amendment and not answered the questions. The biggest difference is that Brogan was caught by surprise in the night, whereas the Trump affiliates met with agents voluntarily and lied to them, perhaps assuming wrongly that there would be no independent record of what really happened. It is also

67. *Moser v. United States*, 18 F.3d 469, 473-474 (7th Cir. 1994); *United States v. Taylor*, 907 F.2d 801, 805 (8th Cir. 1990); *United States v. Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988); *United States v. Tabor*, 788 F.2d 714, 717-719 (11th Cir. 1986); *United States v. Fitzgibbon*, 619 F.2d 874, 880-881 (10th Cir. 1980); *United States v. Chevoor*, 526 F.2d 178, 183-184 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

68. 522 U.S. 398 (1998).

69. *Id.* at 411 (Ginsburg, J., concurring).

70. *Id.*

71. *Id.* at 412 (Ginsburg, J., concurring).

72. *Id.* at 419-20 (Stevens, J., dissenting).

possible that President Trump's affiliates did not commit a crime by meeting with the Russian representatives, and lied merely to protect the false story coming from the White House that there were no such contacts—criminal or not. Whatever their motives, it is hard to believe that people involved in a heavily-reported investigation of that sort were unaware that there may be consequences if they are caught lying to the FBI. This puts Brogan in a somewhat more sympathetic light; he may well have simply been pleading not guilty in his own way but failed to use the acceptable language to do so.

We are thus left with four observations when it comes to how the law treats lies: First, making a truthful statement that is intended to lead the recipient to believing something false is not a lie, at least as far as the perjury statute is concerned (*Bronston*). Second, making an assertion one believes to be false is a lie, even if the assertion turns out to be true (*DeZarn*). Third, bald-face lies are still lies, even if they do not fool anyone and were not intended to fool anyone (Sorensen and examples of students lying to escape serious punishment). Fourth, pleading “not guilty” in court is not a lie, but saying “I didn’t do it” to the police is a lie (*Brogan*). Philosophers are not in complete accord in drawing boundaries around the concept of lying.⁷³ Yet the illustrations in the literature suggest that the legal definition is in accord with the conclusions of many scholars who have taken positions on the definition of lying.

III. DECEIT

A. *Lying Versus Deception: Which is Worse?*

Samuel Bronston was not a perjurer, but that does not make him a paragon of virtue. His goal was to trick his creditors into thinking that he did not have assets that he actually did have to prevent those assets being distributed among them by the Bankruptcy Court. Bronston engaged in an act of deception that apparently was thwarted as a result of the assets in question having been discovered independently.

People generally consider lying to be morally worse than deceiving by misdirection. Philosopher Jennifer Mather Saul presents the following experiment to demonstrate the point:

73. For example, Jörg Meibauer, takes the position that the deceit in cases like *Bronston* should be seen as falling within an extended definition of lying. See Jörg Meibauer, *Lying and Falsely Implicating*, 37 J. PRAGMATICS 1373, 1382 (2005).

An elderly woman is dying. She asks if her son is well. You saw him yesterday (at which point he was happy and healthy), but you know that shortly after your meeting he was hit by a truck and killed. [Is it better] to utter (1) than (2)—because (1) is merely misleading while (2) is a lie[?]

(1) I saw him yesterday and he was happy and healthy.

(2) He's happy and healthy.⁷⁴

Many people choose (1) over (2) because telling the truth is morally better than lying, even if the truth is intentionally misleading. But Saul argues that it should make “no defensible moral preference” for deception through misdirection over lying.⁷⁵ The result is the same. To Saul, the difficult issue is why so many of us feel better about ourselves uttering (1) rather than (2) if there is no moral basis for preferring one over the other.

Others take the view that uttering a false statement is itself a moral wrong, which should be taken seriously in its own right. Seana Valentine Shiffrin presents strong argumentation in this direction,⁷⁶ using Kant’s “murderer at the door” as a vehicle for analysis.⁷⁷

B. What the Law Says About Deceit

At this point, one may wonder why the legal system would create a safe harbor for fraudulent conduct in the courtroom whereas it is outlawed in everyday life. If anything, one might expect judicial proceedings to be a sanctuary for honesty and fair play. Stuart Green explains the disparity this way:

Why exactly should culpable deceit be easier to prove in cases of fraud than of perjury? The distinct contexts in which the two crimes are committed suggest a possible answer: As noted above, perjury involves statements made under oath, often in a formal, adversarial setting where the truth of the witness’ statement can be tested through probing cross-examination. Fraud, by contrast, typically occurs in a commercial or regulatory setting, where the deceiver and deceived are engaged in

74. SAUL, *supra* note 23, at 70.

75. *Id.* at 86.

76. SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 5-46 (2014).

77. Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives* (1799), <https://www.unc.edu/courses/2009spring/pley/240/001/Kant.pdf>.

an arm's length, often one-shot transaction. In such circumstances, there is no opportunity for careful fact-finding or cross-examination. Likely for this reason, the courts have tended to define deception more broadly in the fraud context than in that of perjury.⁷⁸

Green's explanation is consistent with that of the *Bronston* Court, which blamed the creditors' lawyer for not following up and asking the question that would have pinned Bronston down ("What about you personally?").⁷⁹ Indeed, the adversarial system does present the opportunity to probe further. But that does not really get to the heart of the matter. For one thing, in the world of business, at least in many transactional environments, both parties have ample opportunity to ask additional questions to undo the inferences drawn from misleading statements. While we may not wish to require those in the business world to be as distrustful as those in the world of adversarial litigation, the distinction between the two settings may not be adequate to justify such a sharp distinction in moral responsibility.

Deception, like lying, is generally disallowed in the business world, especially when a victim relies on a deceptive statement to his or her detriment. That is the classic definition of fraud. There are nuances, however. When it comes to misrepresentations for which there are monetary or criminal sanctions, the conveyor's state of mind comes more into play. Consider Rule 10b-5 of the Securities and Exchange Commission:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

78. Green, *supra* note 4, at 7-8.

79. 409 U.S. at 358.

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.⁸⁰

Note that the rule specifically includes truthful statements that are designed to lead the reader or hearer to draw a false inference. This is exactly what Bronston did. It is not perjury, but it is an act of fraud. By the same token, the definition of fraud itself explains why puffery is accepted in commercial transactions. An individual is defrauded only after he reasonably relies to his detriment on a false or misleading statement. Statements on which it is not reasonable to rely because they are simply normal boasts that the recipient should know to discount as such are not fraudulent under that standard.

In our book *Speaking of Crime*,⁸¹ Peter Tiersma and I agree with the holdings in both *Bronston* and *DeZarn* but find the justification not in the lawyer's responsibility to follow up as a matter of professional competence, but, rather, in the role morality of lawyers. Lawyers are permitted to deceive in circumscribed ways, which are defining features of the relationship between lawyer and adverse witness. To take two examples, lawyers are permitted, some say required, to produce false defenses. By "false defense" I mean a defense based on legitimate evidence that is likely to lead a trier of fact to an inference that the lawyer knows to be false. This license applies particularly to criminal defense lawyers. A lawyer who decides not to challenge the time of death in an autopsy report that contains errors in calculation would be remiss even if the lawyer knew from his own client that the estimated time of death is fairly accurate. Likewise, as Monroe Freedman has pointed out, a lawyer who fails to cross-examine a visually-impaired eyewitness on what she actually saw because he knows her account to have been accurate would be committing malpractice.⁸²

Moreover, in the routine cross-examination of witnesses, it is the lawyer's job to persuade witnesses to agree to characterizations of uncontested events in ways that will help the lawyer's client. Witnesses need not agree to inaccurate characterizations, of course, but even such choices as "smash" versus "hit" in a car accident case can

80. 17 C.F.R. § 240.10b-5 (2018) (emphasis added).

81. SOLAN & TIERSAMA, *supra* note 29, at 234-35.

82. MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 48 (1975).

have a profound effect on how a juror conceptualizes the event.⁸³ The moral issue arises when the lawyer knows that the characterization is sufficiently accurate so that the witness has an obligation to accept it, but that is not a fair characterization. That is, if the lawyer was speaking in casual conversation with a person she trusts, she would have used different language.

As Bradley Wendel points out in his essay in this volume,⁸⁴ it is not enough to justify deceptive practices by lawyers as within the role of the lawyer in society unless we can justify the rules of the role itself on independent moral grounds. He writes:

We tolerate lawyers engaging in these practices not because we are indifferent to lying, but because we recognize that bluffing in negotiations and arguing for false inferences are means to broader institutional ends such as protecting liberty and enabling citizens to have access to the rights allocated to them by law. The assessment of public actors as truthful or untruthful requires situating their conduct in context, including the expectations and beliefs of others who participate in the relevant social practices and institutions. This contextual, community-grounded evaluation also suggests that we may do better at realizing the value of truthfulness by instituting and reinforcing certain methodologies and practices that are adapted to the obstacles one is likely to encounter to the maintenance of truth.⁸⁵

Returning to *Bronston*, a witness does not answer questions in a vacuum. A witness answers questions that are often designed to elicit answers that will create a misimpression, at least from the witness's point of view. At the very least, the questions are intended to elicit answers that will serve the interest of the party the lawyer represents, even if neither the lawyer nor the witness would regard the exchange as producing a fair characterization from the perspective of a neutral observer.

This license for lawyers to produce a record that may go beyond the lopsided, even to the point of being deceptive, helps explain why *Bronston* should not go to prison for playing on the same field. Grice's Cooperative Principle tells us that in ordinary conversation, we assume the other participant to be moving the discussion along

83. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAVIOR 585 (1974).

84. W. Bradley Wendel, *Truthfulness as an Ethical Form of Life*, 56 DUQ. L. REV. 141 (2018).

85. *Id.* at 154-55.

in a cooperative manner, and we give the other individual the impression that we are doing the same.⁸⁶

In cross-examination, some of this cooperation holds. For example, Grice's maxim of relation (be relevant) is required of witnesses, although Bronston himself trickily flouted that maxim. Yet trial practice manuals encourage lawyers to be conversational in their cross-examination not to cooperate with the witness, but to lull the witness into being less guarded and more cooperative—increasing the likelihood of getting helpful responses.⁸⁷

IV. BULLSHIT

As noted at the beginning of this article, bullshit may be either true or false: The bullshitter does not care which.⁸⁸ But the bullshitter does care about something. What the bullshitter cares about is winning an argument, by whatever rhetorical means is necessary. As the philosopher Jason Stanley describes, the same holds true for the propagandist.⁸⁹ Propaganda, according to Stanley, need not be false, but rather must be a statement, whether true or false, made in the service of promoting a flawed ideology.⁹⁰ Thus, while not all bullshit is propaganda in that it is not made in the service of a flawed political ideology, it is plausible to claim that all propaganda is bullshit, in that the truth of the matter is subordinate to accomplishing an illegitimate (at least in a liberal democracy) goal. Let us look first at the use of bullshit in current political discourse, and then turn to how the law deals with bullshit.

A. *A Brief Note on President Trump*

On December 30, 2017, the Washington Post published an article titled, "In a 30-minute interview, President Trump made 24 false or misleading claims."⁹¹ President Trump had been interviewed by the New York Times at one of his golf resorts and was apparently not entirely truthful in his remarks. I will not summarize the details of the interview here because this essay is focused on the legal

86. Grice, *supra* note 30, at 45.

87. See STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 87 (3d ed. 2013); THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 207 (9th ed. 2013).

88. FRANKFURT, *supra* note 8, at 55.

89. See generally JASON STANLEY, HOW PROPAGANDA WORKS (2015).

90. *Id.* at 46.

91. Glenn Kessler, *In a 30-Minute Interview, President Trump Made 24 False or Misleading Claims*, WASH. POST (Dec. 29, 2017), <https://www.msn.com/en-us/news/factcheck/in-a-30-minute-interview-president-trump-made-24-false-or-misleading-claims/ar-BBHuiGy?li=BBmkt5R&ocid=spartandhp>.

system's handling of the various species of dishonesty. However, whether it is Bill Clinton talking about his sex life, George W. Bush talking about Iraq's efforts to acquire nuclear weapons, or Tony Blair's similar efforts, politicians are known to present information in a manner that is more concerned with the narrative they wish to create than with the truth of the matter. President Trump holds a special place in this succession. In the summer of 2017, the New York Times published a full-page list of what it called "Trump's Lies," updated later to include dates through November 11.⁹² Below are two examples:

FEB. 18: "You look at what's happening in Germany, you look at what's happening last night in Sweden. Sweden, who would believe this?" (*Trump implied there was a terror attack in Sweden, but there was no such attack.*)⁹³

...

MARCH 17: "I was in Tennessee — I was just telling the folks — and half of the state has no insurance company, and the other half is going to lose the insurance company." (*There's at least one insurer in every Tennessee county.*)⁹⁴

In response to claims that Trump was no different from President Obama, the Times further reported a comparative analysis showing that Trump had produced more false statements in ten months than Obama had in his entire eight years in office.⁹⁵

How many of President Trump's inaccurate statements are lies, how many are honest mistakes, and how many are bullshit is anyone's guess. Continuing to adopt Frankfurt's definition, "bullshit" is an assertion made without regard for whether the assertion is true or not. For the bullshitter, whether a statement is true or false is a matter of convenience. When the statement happens to be true, there will be less criticism and, accordingly, less inconvenience.

92. David Leonhardt & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html?_r=0.

93. *Id.*

94. *Id.*

95. David Leonhardt, Ian Prasad Philbrick & Stuart A. Thompson, *Trump's Lies vs. Obama's*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html>. The analysis, which claimed to use the same method to evaluate the truth of statements by both presidents that had been challenged as inaccurate, found that Trump had made 108 false statements in ten months in office, whereas Obama had made eighteen in his eight years in office.

Whether bullshit is morally more blameworthy than lying or deceiving, as Frankfurt argues, is subject to debate, at least as a psychological matter. Daniel Effron, a social psychologist on the faculty of London Business School, has explored the circumstances under which people forgive false statements, at least to some extent.⁹⁶ He found that when people are presented with a plausible counterfactual statement, suggesting how a change in circumstances may have resulted in the false statement being true, they judge the false statement as less unethical. Consider this example, taken from Effron:

“It’s a proven fact that Donald Trump won the electoral vote, but lost the popular vote to Hillary Clinton.” Yet, a person falsely states: “Trump won the popular vote.” Half the subjects also received this counterfactual passage: “Trump did not campaign for the popular vote, because the law says that the winner of the electoral vote wins the presidency. Consider the following thought: *If Trump had tried to win the popular vote, then he would have won the popular vote.*”⁹⁷

In one of the studies, the other half of the subjects were presented with the vignette without the counterfactual statement quoted above, but instead with a passage that also contains an *if-then* statement that had nothing to do with Trump’s not having won the popular vote: “Senator Mitch McConnell is a Republican from Kentucky. He is currently the Senate Majority Leader. Consider the following thought: *If Mitch McConnell runs for President in 2020, then he will win the popular vote.*”⁹⁸

Effron found that when presented with a statement that provides a plausible alternative state of affairs in which the false statement could have actually been a true statement, people found the false statement less ethically objectionable and the person who uttered it less immoral for having done so.⁹⁹ Moreover, half of the scenarios contained false statements that aligned with the political preferences of Trump supporters, and the other half contained false statements that aligned with the preferences of Clinton supporters.¹⁰⁰ The studies showed that when the false statement aligned

96. Daniel A. Effron, *It Could Have Been True: How Counterfactual Thoughts Reduce Condemnation of Falsehoods and Increase Political Polarization*, 44 PERSONALITY AND SOCIAL PSYCHOL. BULL. 729 (2018).

97. *Id.* at 732 (emphasis in original).

98. *Id.*

99. *Id.* at 736-37.

100. *Id.* at 732.

with the participant's preferences, the participant condemned the falsehoods significantly less harshly than when the false statement was not aligned with their own views.¹⁰¹

What is more, when asked to create their own counterfactuals by imagining a scenario in which the false statement became a true statement, subjects' own imagined alternative scenario led them to judge the original falsehood less harshly.¹⁰² To the extent that we do this in everyday life, it begins to explain our willingness to forgive false statements made by those with whom we agree.

Effron's study does not directly answer Frankfurt. The pass we give to bullshitters with whom we agree as long as we can imagine what they said is true may well be a moral blind spot rather than evidence that such behavior is less objectionable upon reflection. It does explain, however, how it is that Trump's supporters do not become enraged when he falsely claimed that people living in portions of Tennessee had no health insurers, when in fact they did.

B. How the Law Reacts to Bullshit

Bullshit does not meet the criteria for either lying or deceiving because the requisite state of mind is absent. The person who neither knows nor cares about the truth cannot tell a lie. Moreover, bullshit may be the result of wishful thinking. People may have a general sense of a situation and fill in the details without adequate evidence. The law is not consistent in its treatment of bullshit, but it is specifically disapproved in particular contexts.

1. Federal Pleadings

Rule 11 of the Federal Rules of Civil Procedure requires that all court filings be signed and that the signature is a certification of various representations, including:

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . .

101. *Id.* at 741-42.

102. *Id.* at 738.

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.¹⁰³

This rule removes from lawyers (and pro se litigants) the right to make claims in court based on the hope that the evidence will later support the claim, unless it is specifically stated that the filer lacks evidence at the time to support the claim. In other words, it severely limits bullshit.

Added to this rule are cases decided by the U.S. Supreme Court requiring detailed, factually-based pleadings in civil litigation. In *Ashcroft v. Iqbal*,¹⁰⁴ decided in 2009, the Supreme Court set standards for a court's decision on whether to grant a motion to dismiss a complaint for failure to state a claim. Restating the test it had established in *Bell Atlantic Corp. v. Twombly*,¹⁰⁵ the Court held that:

[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.¹⁰⁶

Taken together, these cases require those who file civil cases in federal court have significant knowledge of facts, which are sometimes not in their control. When one adds to the pleading requirements the certifications under Rule 11, the likelihood of bullshit in federal

103. FED. R. CIV. P. 11(b).

104. 556 U.S. 662 (2009).

105. 550 U.S. 544 (2007).

106. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citations omitted).

pleadings has surely been reduced. I take no position here on concerns expressed that these cases have the effect of closing the court house door on many meritorious claims that require discovery to be adequately developed to meet the pleading standards.

2. *Expanded Definition of Fraud*

Recall that fraud requires an effort to lead someone to believe something that the speaker believes to be false. Yet some statutes, and many statements of the common law, include “reckless disregard for the truth” as a substitute for knowingly making a false statement.¹⁰⁷ This standard requires somewhat more regard for the truth than does Frankfurt’s bullshit because the truth must be fairly overt for it to be recklessly disregarded. Nonetheless, the fact that an individual can commit fraud without knowing the truth and flouting it is a significant step away from classic definitions of deceit.

By the same token, the Restatement (Second) of Contracts makes a contract voidable for misrepresentation when the aggrieved party relies on a representation that is either fraudulent or material (or both).¹⁰⁸ And a fraudulent misrepresentation includes bullshit:

(1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker

(a) knows or believes that the assertion is not in accord with the facts, or

(b) does not have the confidence that he states or implies in the truth of the assertion, or

(c) knows that he does not have the basis that he states or implies for the assertion.¹⁰⁹

The broad definition of fraudulent misrepresentation makes sense in this context, where the remedy is rescission of a contract. If a person enters into an agreement because the other party misinformed her, that party should not be bound as long as the misinformation was of a material fact, regardless of the state of mind of the purveyor of falsity.

107. See, e.g., *Pace v. Parrish*, 247 P.2d 273, 274-75 (Utah 1952).

108. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (AM. LAW. INST. 1981).

109. RESTATEMENT (SECOND) OF CONTRACTS § 162(1) (AM. LAW. INST. 1981).

V. CONCLUSION

This essay has attempted to demonstrate differential tolerance for various forms of dishonest conduct in legal contexts. Lying is never allowed as a formal matter, but it is tolerated in courtrooms when offered by law enforcement agents. Deception short of lying is permitted by witnesses in court but not by people engaged in commercial life. Bullshit, the bread and butter of political life, is outlawed as a species of fraud in some circumstances, tolerated in others. When we add to this set of facts the materiality requirement in both perjury and fraud cases, the law appears to recognize the fact that people do not always tell the truth—but it ensures that the legal system operates with sufficient integrity such that dishonesty does not compromise the integrity of business interactions or the truth-seeking function of the courtroom.