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## **Lawyers as Insincere (but Truthful) Actors**

Lawrence M. Solan

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## LAWYERS AS INSINCERE (BUT TRUTHFUL) ACTORS

Lawrence M. Solan\*

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*Insincerity has a way of showing through, and there is little that is less persuasive than an overtly insincere attorney.<sup>1</sup>*

A Gallup poll taken in 2006 asked respondents how they would rate “the honest and ethical standards” of people working in different professions.<sup>2</sup> Eighty-four percent rated nurses “high” or “very high.”<sup>3</sup> But

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1. STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 463 (4th ed. 2009).

2. The Gallup Poll, 12/8-10/2006, <http://www.galluppoll.com/content/?ci=1654&pg=>.

3. *Id.*

only eighteen percent thought as highly of lawyers.<sup>4</sup> The fact that lawyers suffer such negative reputations is not the result of some profession-wide ethical gap suffered by all and only the hundreds of thousands of people who join the legal profession. Rather, I argue in this essay, at least some of the reason that lawyers so easily alienate those outside the legal profession is the fact that lawyers are given special license to be insincere to an extent that would ordinarily violate social norms. Moreover, this license makes what appears so irritating about lawyers exactly what makes people find them so exciting and admirable that they cannot get enough legal culture in the films they watch and the books they read.<sup>5</sup>

Lawyers are given license to suspend what philosophers have called “sincerity conditions.”<sup>6</sup> We ordinarily take people as being sincere in their speech. They expect us to do so, just as we, when we speak, expect others to take us as being sincere. The assumption of sincerity is generally suspended when we know that a person is speaking on behalf of someone else and taking an assigned position, making lawyers’ insincere speech a special case of a more general phenomenon. Just as debaters and actors can and should put their own beliefs aside, lawyerly conduct can, in broad terms, be justified by the attorney’s obligations in the adversarial system. These obligations are often discussed under the rubric of role morality.<sup>7</sup> After all, how can a lawyer represent a party in litigation without advocating for that party’s position, whatever the lawyer believes?

Not all forms of insincerity are acceptable, however. Lawyers are trained to be simultaneously truthful and insincere. While they may structure their speech to lead others into drawing inferences that will serve the lawyer’s goals, whether or not those inferences reflect a fair assessment of facts or law, they must not lie. It is acceptable to use cross-examination to direct a jury toward a theory that the evidence supports but which the lawyer does not believe to be true. It is not acceptable, however, for the lawyer to misstate the evidence in a closing argument.

This distinction—between lying and deception by misdirection—is accepted as a skill at which lawyers should become facile. Yet it rests on a shaky moral foundation. People typically have strong intuitions that lying is bad *per se*, and that that it is better to frame something deceptively than to lie about it. But many moral philosophers do not give much credit to

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4. *Id.*

5. For example, a study by the Section of Litigation of the American Bar Association found that 76% of people who had been represented by counsel were either “very satisfied” or “somewhat satisfied” with the quality of the service provided. Only 9% were “very dissatisfied” with the service. American Bar Association Section of Litigation, *Public Perceptions of Lawyers: Consumer Research Findings* (2002).

6. JOHN SEARLE, *INTENTIONALITY* 164 (1983).

7. The issue of role morality and its limits is a common theme in the ethical literature. For an important thoughtful work, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

this intuition. A person who is the victim of a deceptive practice generally feels no less violated just because the deception was not accomplished through a bald-faced lie. This essay explores this distinction, on which so much of lawyerly practice is based.

Moreover, the best lawyers are so convincing that they are able to cause their audience to let down their guard and to forget that they are dealing with an advocate. The essay also explores some of the psychology that leads to this sometimes unwise placement of trust. Thus, lawyers can be truthful, insincere, and effective all at the same time. In fact, they *must* be both truthful and insincere to be effective advocates, because zealous advocacy requires some degree of insincerity, and lawyers are not permitted to lie. This, in turn, explains why it is easy to distrust lawyers while, at the same time, admiring them. As Robert Post observed, lawyers “are simultaneously praised and blamed for the very same actions.”<sup>8</sup>

While the legal system attempts to establish an appropriate balance between compliance with everyday moral norms on the one hand, and appropriate space for advocacy on the other, there is no consensus about how the tension should be resolved in each situation. Yet, a fair reading of the various ethical rules and the literature on legal ethics suggests that those who address this question take it seriously.<sup>9</sup> Many rules place limits on insincere speech,<sup>10</sup> which in turn are balanced against the requirement that lawyers represent their clients zealously. In fact, a comment to the ABA Model Rules of Professional Conduct requiring zealous representation notes: “A lawyer is not bound, however, to press for every advantage that might be realized for a client.”<sup>11</sup> I do not defend the status quo here, but do point out that legal ethicists are well aware that this balance is a core issue to be addressed and continually monitored.

In contrast, legal educators are remiss in failing to take the license to be insincere seriously in training lawyers. Although law schools have courses on professional responsibility, the curriculum as a whole fails to emphasize the trade-off between the special privilege of insincerity and the responsibilities that accompany it. Instead, good cross-examination technique, and other such opportunities for misdirection are typically included in skills training courses, which are considered separate educational experiences apart from substantive training. This, I argue, is a serious shortcoming that should be corrected.

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8. Robert Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 380 (1987).

9. See *id.* at 125. Standard sources are replete with such balancing. See, e.g., RESTATEMENT (3<sup>RD</sup>) OF THE LAW GOVERNING LAWYERS, and many of the sources cited *infra* in this essay.

10. See *infra* note 48, discussing ABA Model Rule 8.4, which bars deception outright. There are many others requiring candor with tribunals in various contexts.

11. MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt 1.

Part I of the essay begins by looking at sincerity conditions in everyday speech and in the speech of attorneys. The argument continues by exploring the similarities and differences between lying and deceiving by other means. The adversarial system places a great deal of weight upon this distinction, more than it can bear as a matter of moral judgment. The essay goes on to explain that lawyers are able to use deceptive tactics successfully because of what psychologists have called the *correspondence bias*. People tend to overestimate the extent to which the behavior of others stems from their personal characteristics, and to underestimate the extent to which the behavior is a normal reaction to circumstances. Thus, the skilled lawyer can cause witnesses, judges and jurors to forget the adversarial situation and to let down their guards. By acting like a trustworthy person, the lawyer is perceived as such, even though his role in the situation is deserving of less trust. I then discuss situations in which the model rules permit actual lying, which puts additional reputational burdens on members of the legal profession.

Part II focuses on two sets of lawyers for whom it is sometimes argued that the suspension of sincerity should not apply: government lawyers and law professors. The very fact that there is debate about whether these individuals act with heightened candor highlights the fact that lawyers in the mainstream of the profession are not expected to act with candor. Part III explores some ways in which the legal system attempts to set limits on insincerity, which it recognizes as an element of the profession. The Article concludes by discussing the role of the educator in helping new lawyers to understand that they will be the recipients of a special license to act insincerely, and the responsibilities that accompany that license.

## I. SINCERITY SUSPENDED

### A. *Sincerity in Everyday Speech and in Law*

#### 1. *Sincerity as a Norm*

Everyday speech is bounded by "sincerity conditions."<sup>12</sup> We typically understand people as being sincere in what they say. As philosopher John Searle points out, it would be strange to say, "I apologize for insulting you, but I am not sorry that I insulted you."<sup>13</sup> Apology assumes enough actual remorse to make this sentence seem contradictory, or at least abusively insincere.

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12. J.L. Austin, *How to do Things with Words* 15 (1962); John Searle, *Intentionality* 164 (1983).

13. SEARLE, *INTENTIONALITY* at 8.

Outside the legal context, this presumption of sincerity extends generally to the act of arguing with the intent to persuade. If I criticize the American government's 2003 invasion of Iraq, you may agree or disagree with my position, but you are very likely to believe that I am actually stating my position, and will judge me accordingly. If you want to challenge my position, you might ask me if I would think it is ever justified to depose a tyrant, or whether there was some legitimate level of fear in the United States so soon after September 11, 2001 that Iraq had weapons of mass destruction. We might discuss the British government's unwavering support, and the Italian government's initial cooperation and later withdrawal. We may discuss lots of things. But whatever we do discuss, we will generally believe that the arguments are made with sincerity. I not only intend to convey the information that my arguments contain, but I also intend to persuade you of them because they are my beliefs.

In fact, when we are not being sincere, we actually feel obliged to signal our insincerity by saying such things as "let me play devil's advocate," or "while I agree with you, those who disagree make the following point. . .", or "I'm not sure what I think, but here are my concerns," or by using scare quotes, and so on. We use such devices because we know that without them, our hearer would be entitled to believe that we mean what we say, and we would not want to give the false impression that this is so when we do not mean what we say.

Moreover, the law looks negatively on those who are insincere in their everyday lives. The fact that we presume the sincerity of those who communicate with us is why insincere threats count legally as threats nonetheless.<sup>14</sup> When a person holds a knife to someone's throat and credibly says words taken as a threat of harm, it does not matter—either practically or legally—that he later says that he was just kidding. If the knife appeared to be real and the circumstances made the threat a credible one, then the person has engaged in a threat and should be held accountable.

As Searle puts it, in everyday life we assume a double level of intent.<sup>15</sup> In our threat story, we assume both an intention to say the things that the hearer would reasonably take to be a threat, and an intention to threaten. If only the first of these intentions actually existed, that is, if the threat is insincere, we take it to be a threat anyway as long as it sounds like one to the person who feels threatened. Were the assumption of sincerity not the norm, we would expect legal doctrine to be more forgiving of the insincere

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14. See LAWRENCE M. Solan and Peter M. Tiersma, *Speaking of Crime: The Language of Criminal Justice*, 198-211 (2005) for discussion of language issues concerning threats.

15. SEARLE, INTENTIONALITY at 8.

threatener, since it would not be considered reasonable to have felt threatened by his words.

The same holds for promises, as Austin points out.<sup>16</sup> Insincere promises are promises nonetheless. Philosopher David Owens argues that promises need not even imply an intention to carry out one's commitment: they must only convey that the speaker has taken on an obligation to perform, whatever his innermost thoughts.<sup>17</sup> Most of the time, however, the promisor indeed conveys the sense that she intends to live up to her commitment. When this happens, promising without intending to carry out one's commitment makes the promisor insincere.

Owens suggests that the promisor's state of mind requires intent only with respect to recognizing the commitment.<sup>18</sup> If you lend me money that neither of us expects me to repay, I might promise to pay you back just to save face. I had no intention of doing so when I made the promise, and you did not expect me to have any such intention. But I also understand that I've given you the opportunity to require me to live up to my promise, and that gesture is indeed sincere – you can hold me to it if things change.

Ian Ayres and Gregory Klass argue, in contrast, that at the very least, a person making a promise implies that he is not committed to *not* keeping a promise.<sup>19</sup> Perhaps this implication arises more from the presumption of sincerity than from the nature of promising. Seana Shiffrin goes further, arguing that some breaches of contract are immoral because some breaches of promise are immoral.<sup>20</sup> Whichever version is right, we are held to our contractual commitments whether or not we were sincere in making them. If a car salesman promises you that a vehicle will be in perfect condition when you drive it off, when in fact the car has no working brakes, then he has not kept his word if you buy the car based on his representation. And the law will not permit him to say, after the fact, that you had no right to rely on his sincerity. In fact, the "objective theory of contracts," taught to first year law students, places the reasonable interpretation of a statement above the actual intent of the speaker, so that people are held responsible for the foreseeable interpretation of what they say. The law will not hear a defense that the speaker "did not mean to bind himself" if the statement reasonably enough sounds like a promise.<sup>21</sup>

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16. Austin, *supra* note 12.

17. David Owens, *Promising Without Intending*, 105 JOURNAL OF PHILOSOPHY 737 (2008).

18. OWENS, *supra* note 17 at 749-50.

19. See IAN AYRES & GREGORY KLASS, *INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT* (2005); See also Jonathan Yovel, *What is Contract Law About? Speech Act Theory and a Critique of "Skeletal Promises"*, 94 NW. U. L. REV. 937 (2000).

20. Seana Shiffrin, *Could Breach of Contract be Immoral*, 107 MICH. L. REV. 1551 (2009).

21. A classic example is *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954), in which a person who had apparently agreed to sell his farm at a price below market was held to the reasonable interpretation of

Similarly, fraud includes not only lying, but also deception that takes the form of statements that are true, but misleading. Below is Securities and Exchange Commission Rule 10b-5, the basis of most claims of securities fraud:

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

<sup>22</sup>  
...

Outlawed is both false and insincere speech: The law does not distinguish between clever misdirection and out-and-out lying.<sup>23</sup> To the contrary, the regulation carefully lists both deceptive practices as part of the same species of wrongdoing: fraud.

## 2. *The Suspension of Sincerity Conditions*

The lawyer, in contrast, typically does not speak on his or her own behalf. The obligation of the lawyer is to assist clients in putting their best foot forward within a system in which the lawyer is skilled and the client is not. It does not matter whether the lawyer personally believes in the client's cause. While lawyers generally have every right not to accept a case, they do not have the right to take a case and then handle it badly because of their own beliefs.<sup>24</sup> That is why zealous advocacy not only licenses but demands insincerity. Ethical and procedural rules require that lawyers do such things as speak truthfully,<sup>25</sup> disclose legal authority that directly contradicts their clients' positions,<sup>26</sup> not suborn perjury,<sup>27</sup> and disclose evidence to opposing

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his words, notwithstanding that he was drunk at the time. For discussion of the language issues in that case, see Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353 (2007).

22. 17 C.F.R. § 240.10b-5 (2010).

23. I sweep aside such devices as puffery, where the law regards insincere statements as unbelievable per se, and thus holds the hearer responsible for discounting them accordingly.

24. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) makes this separation clear: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

25. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1); 4.1.

26. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2).



parties even when that evidence would damage their client's cause.<sup>28</sup> What attorneys are not required to do, however, is to certify that they believe in the causes they advocate, or even in the adversarial acts they perform in the service of the promoting the causes they advocate. In fact, when a jury is present, they are not permitted to express their personal beliefs as such.<sup>29</sup>

Chief Justice Roberts put it this way in his confirmation hearing before the Senate Judiciary Committee:

Q: What is a lawyer's obligation, as you understand it, under the Code of Legal Responsibility?

A: I think the standard phrase is "zealous advocacy" on behalf of a client. You don't make any conceivable argument. The argument has to have a reasonable basis in law, but it certainly doesn't have to be a winner. I've lost enough cases that I would hate to be held to that standard. But if it's an argument that has a reasonable basis in the law, including arguments concerning the extension of precedent and the reversal of precedent—the lawyer is ethically bound to present that argument on behalf of the client. And there is a longstanding tradition in our country, dating back to one of the more famous episodes, of course, being John Adams' representation of the British soldiers involved in the Boston Massacre, *that the positions a lawyer presents on behalf of a client should not be ascribed to that lawyer as his personal beliefs or his personal positions.*<sup>30</sup>

Roberts was speaking of his role as a government lawyer. Later, we return to the question of whether government lawyers have an obligation of candor that goes beyond that of lawyers representing private clients. For now, though, let us accept his description as a fair account of ordinary practice.

Searle observes in a footnote that there exists an exception to the expectation of sincerity: "cases where one dissociates oneself from one's speech act."<sup>31</sup> He notes: "In such cases it is as if one were mouthing a speech act on someone else's behalf. The speaker utters the sentence but dissociates himself from the commitment of the utterance."<sup>32</sup> This might

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27. See *Nix v. Whiteside*, 475 U.S. 157 (1986).

28. Fed. R. Civ. Pro. 26.

29. See text accompanying note 24 *infra* (concerning the rule against vouching for a witness's veracity).

30. Testimony before the Senate Judiciary Committee, January 29, 2003 (emphasis added).

31. SEARLE, *supra* note 6 at 8.

32. *Id.*

happen when someone has a “duty to inform you” of *x*, or when an officer is obliged to give an order.<sup>33</sup> But it also naturally fits the role of the lawyer, as it does the debater and the actor.

When lawyers speak on behalf of a client, they are obliged to have only the first of Searle’s two intentions in their speech acts, and they are so trained. When I make an argument on behalf of a client, I intend to make the argument, and I tacitly represent that the argument is a legitimate one within the legal culture. But I may or may not believe in the argument. That is, my argument may be well-crafted and intended to persuade, but insincere. This was Chief Justice Roberts’ point in his confirmation hearing testimony.

This is also the rationale behind a lawyer’s representing criminal defendants, knowing that they are probably guilty. The lawyer is not permitted to lie on their behalf, or to offer perjured testimony or doctored evidence. The lawyer’s job is to stand up in court and to give his client the best shot of prevailing within the rules. In the criminal context, the lawyer has an obligation to force the government to put on a strong enough case to survive tough scrutiny and to convince a judge or jury of the defendant’s guilt to a high level of certainty: proof beyond a reasonable doubt. The lawyer does not have an obligation to be sincere. As Gerald Shargel, a well-known trial lawyer, has put it, “a trial may be a search for the truth, but I—as a defense attorney—am not part of the search party.”<sup>34</sup>

Thus, it is up to the lawyer to point out inconsistencies in the testimony of an opposing party or witness, even when the lawyer believes that that witness has testified both truthfully and accurately. This obligation even goes so far as to permit the lawyer to present a “false defense,” although there is some controversy over the ethics of when it is appropriate to go that far.<sup>35</sup> Monroe Freedman presents the case of the defendant who “has been wrongly identified as the criminal, but correctly identified by [a] nervous, elderly woman who wears eyeglasses, as having been only a block away five minutes before the crime took place. If the woman is not cross-examined vigorously and her testimony shaken, it will serve to corroborate the erroneous evidence of guilt.”<sup>36</sup> Should the lawyer cast doubt on the

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33. *Id.*

34. Gerald L. Shargel, *Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 *FORDHAM L. REV.* 1229 (2007).

35. For varying views on this question, see William H. Simon, *The Ethics of Criminal Defense*, 91 *MICH. L. REV.* 1703, 1717-19 (1993) (arguing that conventional defenses of this practice are not adequate to overcome moral objections); Carl Selinger, *The “Law” on Lawyer Efforts to Discredit Truthful Testimony*, 46 *OKLA. L. REV.* 99 (1993); see also Harry I. Subin, *The Criminal Lawyer’s “Different Mission:” Reflections on “the Right” to Present a False Case*, 1 *GEO. J. LEGAL ETHICS* 125 (1987); see also John B. Mitchell, *Reasonable Doubts are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyer’s “Different Mission.”* 1 *GEO. J. LEGAL ETHICS* 339 (1987).

36. MONROE FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 48 (1975).

elderly woman's identification to keep his innocent client out of prison? Assuming the lawyer knows the facts of the matter (perhaps from his client), he is being sincere in his effort to discredit, but insincere in his creating doubts about something he knows to be true.

Or, consider the following hypothetical taken from Bradley Wendel, based on a Michigan ethics opinion:<sup>37</sup>

The defendant is charged with armed robbery, and has admitted the crime to his lawyer. At the preliminary hearing, the victim testified that the crime took place at midnight, when the defendant was (truthfully) playing poker with three friends, all of whom have a good reputation in the community and will probably be believed by the jury. Unfortunately, the victim was mixed up on the time, probably because the defendant had hit him on the head in the course of the robbery. The crime actually occurred at 2:00 a.m. The defendant is not going to take the stand, and thus will not falsely testify that he did not commit the robbery. The ethical question is whether the defense lawyer may call the friends to testify about the card game, knowing that the jury will draw the false inference that the defendant did not commit the robbery.<sup>38</sup>

Most lawyers say such tactics are fine, and many, including Shargel, would go further, stating that the lawyer has the obligation to try to discredit the witness even if he believed his client to be guilty. In neither case, however, has the lawyer been untruthful, introduced tainted or perjured evidence, or otherwise violated the rules.

Not all legal cultures accept this level of insincerity, but the gaps in values are narrower than they might appear at first blush. For example, Ontario has the following rule:

4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.<sup>39</sup>

The following commentary to the rule elaborates:

Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defense, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to

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37. Michigan Bar Association Ethics Opinion CI-1164 (1987).

38. W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 192 (2010).

39. Rules of Professional Conduct of the Law Society of Upper Canada, *available at* <http://www.lsuc.on.ca/regulation/a/profconduct/>.

constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence which, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.<sup>40</sup>

This rule applies only to situations in which the lawyer has information from his or her client about the facts on the ground. Therefore, it is not easy to discern the extent to which the rule discourages clients from being candid with their lawyers from the extent to which it imbues the system with less game-playing and more respect for the truth. Nor is it easy to draw the line on what it means to “test the evidence.” Yet the Ontario approach illustrates how the balance between the role of the lawyer as advocate, and the values of everyday morality are in tension, and that legal systems can and do balance that tension in different ways.

Various forms of insincerity are embedded in the everyday lives of lawyers. They play themselves out differently in different legal contexts, but they always lurk. For example, lawyers know the law. Lay people do not. Notwithstanding many differences between the legal genre in which statutes are written and a more natural style of speaking and writing, laws use commonplace words. When a lawyer questions a witness about an event, the lawyer will try to incorporate the words contained in the law so that the witness’s answer will be maximally relevant to the legal issues in the case. A good lawyer knows how to do this by sounding natural and not tipping his hand that he has really chosen his words carefully to incorporate key statutory language in his questions.

If the lawyer’s characterization of the events is taken innocently enough, the witness might agree for the sake of being cooperative, but would never have done so had he known that the words were loaded with legal power. That is because the lawyer will often ask the witness to

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40. *Id.*

acknowledge as accurate a possible characterization of events, but a characterization that a fair-minded person would not adopt.

In this way, the skilled lawyer appears to be acting within Grice's *cooperative principle*,<sup>41</sup> but actually is pursuing another agenda: an effort to extract an admission from a witness by exploiting the lawyer's superior knowledge of what needs to be proven. The cooperative principle directs speakers: "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."<sup>42</sup> Both speakers and hearers use this principle in conversation to resolve uncertainty and indeterminacy in meaning toward achieving this basic conversational goal. If a witness can be made to relax enough to forget that she is in a linguistic minefield during her testimony, she is likely to default to the cooperative principle, and accept characterizations of facts that are not only against her interest (or the interest of an opposing party if she herself is not a party to the case), but not even a fair characterization at all. I pursue the mechanisms through which this happens below, in the discussion of correspondence bias.

Linguists Malcolm Coulthard and Alison Johnson present a good example of this phenomenon using the UK Theft Act of 1968.<sup>43</sup> A transcript of testimony is replete with questions that use the words of the statute, a fact about which the witness is presumably unaware, unless he has been well-advised. This is good lawyering. A skilled lawyer knows how to use words that are legally significant, but to make them sound like ordinary chit-chat. There is nothing unethical about practicing law this way. The lawyer need not say, "there is an imbalance of knowledge that might make you think twice about whether you agree to my characterization of your actions." Yet the lawyer's characterization of the facts may not be the fairest one. Knowing that lawyers might be attempting to get the witness to agree to a disadvantageous characterization of the facts, without knowing exactly how that is happening, would surely leave most people legitimately distrustful of the lawyer.

Arthur Applbaum catalogues a number of these insincere acts:

Good trial lawyers do everything within their power and within the rules of the court to establish personal authority, trustworthiness, and credibility, and to insert their own character into the trial for the benefit of their clients. If it helps their case, they do everything within their power and the rules to close the distance between

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41. PAUL H. GRICE, LOGIC AND CONVERSATION, IN SYNTAX AND SEMANTICS 41-59 (P. Cole & J. Morgan eds., Academic Press 1975).

42. *Id.*

43. MALCOLM COULTHARD & ALISON JOHNSON, AN INTRODUCTION TO FORENSIC LINGUISTICS: LANGUAGE IN EVIDENCE. (2008).

presenting what could be believed and misrepresenting, what they actually believe. If it suits the lawyer's job, steer the jury away from employing the constrained and structured rules of inference that the institution requires, and toward applying commonsense inference to a most uncommon task . . . . When lawyers engage in these strategies, they intentionally misrepresent what they believe in order to induce what they believe are false beliefs in the jurors.<sup>44</sup>

The quotation at the beginning of this article, from a leading trial practice text, suggests that lawyers are trained to hide the ball in just these ways prenatally in their professional development. In other words, lawyers are not only insincere in their conduct, but good lawyers are insincere about being insincere.

Each lawyer must draw his or her own line as to when insincerity becomes too much of a burden. Some try early to escape the professional and moral tension that insincerity brings, by choosing careers through which they will represent only causes in which they believe, such as environmentalism, workplace safety, one side or the other in the criminal justice system, the relationship between religion and education, and the like. Others are more generally willing to be the agents of those who request their services. Regardless, there will always come a time when the lawyer is faced with the obligation to make an argument to which he or she is not personally committed. For criminal lawyers, it will happen on the first day of work. For others, it will happen when they must characterize a situation in a manner that will help their cause, but does not intuitively seem to be the fairest characterization in the lawyer's own mind. Or it will happen when they have an opportunity to exploit a procedural advantage that they think is unfair such as making or responding to discovery, or moving for or opposing summary judgment. Or it will happen some other way. But it will happen.<sup>45</sup> It is at least as likely to happen when the lawyer believes in the cause as when she does not, because the lawyer will feel more justified in grabbing the permissible insincere moment when it is being used toward accomplishing a goal of independently praiseworthy moral stature.

Although the problem of insincerity, as I have described it, is a consequence of the adversarial system,<sup>46</sup> that cannot be the whole story. Lawyers in less combative legal systems have similar obligations to their

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44. ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 107-08 (1997).

45. For discussion of some of the moral dilemmas of this kind that lawyers face, see Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 6-10 (1975).

46. This is a significant theme in the literature. For recent discussion, see Daniel Markovits, *A Modern Legal Ethics* (2008). See also STEPHEN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE*. (1984).

clients. A European lawyer may be a strong proponent of worker safety, but help a business client complete a transaction that is well within the law as it now exists, but far below the standard acceptable in the lawyer's own personal belief system. Or she will argue that a trademark has been infringed, making credible, and perhaps successful arguments, but not really believing in the cause. In a system in which the lawyer is permitted fewer speech acts (such as the accusatorial system of criminal justice), the lawyer will make fewer insincere speech acts. But the problem does not go away.

### *B. The Morality of Truthful Insincerity*

The situation is made both better and worse by the fact that the license to be insincere is only a partial one. It covers deceit, but not outright lies. As a formal matter, both are proscribed. Model Rule 4.1(a) covers lies: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person;"<sup>47</sup> Deceit in general is covered by Model Rule 8.4(c): "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>48</sup> There are plenty of more specific anti-fraud provisions, including Rule 4.1's prohibition against failing to disclose sufficient information to protect an adverse party against a current fraud being committed by the client.<sup>49</sup> Nonetheless, notwithstanding their literal parity, these two provisions play significantly different roles in a lawyer's life. Lawyers really must not lie, with only a few interesting exceptions to which we return below. In contrast, lawyers are a font of subterfuge, only some of which is not tolerated.<sup>50</sup>

For non-lawyers operating in commercial environments, both are out of bounds. As we saw, the law of fraud does not distinguish between the two at all. Yet most people intuitively feel that there is something worse about lying than about misdirecting people by providing less than full information. Because the adversarial system appears to rely on the distinction, at least as a practical matter, it is worth looking a little more closely at the differences between deception and lying and to ask whether the distinction is pulling more weight than it should.

In the courtroom, lying and deception are distinguished for both lawyers and witnesses. For the lawyers, the matter is simple: Questions do not have truth value, so by definition lawyers cannot lie by asking

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47. MODEL RULES OF PROF'L CONDUCT R. 4.1.

48. MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

49. Specifically, ABA Model Rule 4.1 states that a lawyer shall not "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."

50. For a catalogue of what is "in" and what is "out", see Markovits, *supra* note 46 at 44-66.

questions. “Weren’t you in Bermuda with your lover last April” can be neither true nor false. And lawyers know this. They also know that they way they frame their questions can imply various facts about the character or actions of the person being questioned, and they know how to frame questions strategically. The law places limits on the insincere use of this tactic, by requiring that lawyers have a good faith basis for the questions they ask.<sup>51</sup> Otherwise, they could ask witnesses about all kinds of conduct in which they knew the witness had not engaged, insinuating that the judge or jury should nonetheless begin to consider the possibility that the witness had engaged in the conduct and was lying about it. Short of this limitation, however, lawyers have wide latitude to use questions to imply insincere skepticism or support, whichever serves the client’s cause.

As for witnesses, the Supreme Court drew the line between lying and deception in 1973 when it held that perjury was about lying—not deceit accomplished through truthful, but misleading statements. In *Bronston v. United States*,<sup>52</sup> a debtor in a bankruptcy proceeding was convicted of perjury based on the following exchange during questioning under oath by counsel for his creditors:

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.<sup>53</sup>

In fact, Bronston did have a bank account in Zurich for a period of time, but he testified deceptively. The Supreme Court held this did not constitute perjury. Writing for a unanimous court, Chief Justice Burger remarked:

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. 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

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51. Litigation over whether a lawyer had a good faith basis for asking a question is commonplace, with appellate judges almost always deferring to the judgment of the trial judge. For recent examples, see *United States v. Whitten*, 610 F.3d 168 (2<sup>nd</sup> Cir. 2010); *United States v. Tucker*, 533 F.3d 711 (8<sup>th</sup> Cir. 2008).

52. 409 U.S. 352 (1973).

53. *Id.* at 354.



witness to willfully state any material matter that *implies* any material matter that he does not believe to be true.<sup>54</sup>

As Burger appropriately noted, the perjury statute appears to be limited to such situations. It reads:

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.<sup>55</sup>

Although literal truth is not literally a complete defense, because the statute appears to cover the person who believes himself to be lying but by sheer luck has told the truth,<sup>56</sup> truthful, though misleading answers are not proscribed. So the statute says, accounting for the unanimous decision. But the Court went further. It blamed the questioning lawyer for not being alert enough in the rough and tumble of the adversarial system to detect the deceptive answer and probe further:

It should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so, or that a debtor may be embarrassed at his plight and yield information reluctantly. 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.<sup>57</sup>

This is quite an acknowledgement. The opinion elevates the combative nature of the adversarial system above candor.

Notwithstanding the rather low moral vision that *Bronston* sets for the courtroom, I do not think that the case was wrongly decided. For one thing, the statute says what it says. For another, as Peter Tiersma and I

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54. *Id.* at 357.

55. 18 U.S.C. § 1621(1).

56. *See United States v. DeZarn*, 157 F. 3d 1042 (6<sup>th</sup> Cir. 1998).

57. 409 U.S. at 358-59.

have argued, it is fair enough for a witness not to be subjected to a perjury prosecution for answering truthfully, but misleadingly, when the lawyer asking the questions has license to attempt to mislead both witness and jury through a clever sequence of questioning.<sup>58</sup> Should the lawyer who succeeds in doing so raise his fees while the witness who attempts to stave him off go to prison?

Recall President Clinton's grand jury testimony. Clinton, although in the roles of client and witness, sounded preposterously lawyerly when he famously testified, "It depends upon what the meaning of the word 'is' is. If 'is' means 'is and never has been' that's one thing—if it means 'there is none', that was a completely true statement,"<sup>59</sup>

Clinton was being asked to admit that the statement made by his lawyer at Clinton's earlier deposition in the Paula Jones lawsuit that there "is" no sexual relationship between him and Monica Lewinsky was false, implying that his failure to correct this statement during his deposition constituted improper conduct on his part. The questioning lawyer, after quoting the statement accurately, actually misstated it in his question, using the word "was" instead of "is." But two can play at that game, a practice that the Supreme Court approved, or at least accepted in *Bronston*. The lawyers questioning Clinton were themselves aggressive and insincere. They knew that Clinton had had an affair that he was denying, but that he was no longer having one at the time of his earlier testimony. Yet they tried to bully him into admitting more than the facts would allow. Clinton, in turn, attempted to outmaneuver the lawyers by playing his own language game. Neither Clinton nor his interrogator had any interest in a fair and accurate record being established. Clinton's testimony brought both laughter and anger. The prosecutor's conduct was not typically noticed as part of the same dance, but his was no better.<sup>60</sup>

People differ in how much they distinguish between lies and truthful deceptions. Linguists Linda Coleman and Paul Kay conducted an experiment in which they asked people to rate on a 1-7 scale whether certain statements were lies.<sup>61</sup> "1" indicated certainty that the statement was not a lie, "7" indicated certainty that the statement was a lie, and "4" is the midpoint. Participants were presented with stories that were varied systematically as to whether the relevant statement was literally false; whether the speaker intended to make a false statement; and whether the

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58. Solan and Tiersma, *supra* note 14, chapter 11.

59. Grand Jury Testimony of President William Jefferson Clinton, August 17, 1998, available at <http://jurist.law.pitt.edu/transcr.htm>.

60. However, in a Gallup poll, more people blamed Special Prosecutor Kenneth Starr for the Lewinsky scandal getting out of control (44%) than blamed Clinton (39%). GEORGE HARRIS GALLUP, THE GALLUP POLL 200-01 (1999).

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

speaker intended to deceive. Coleman and Kay hypothesized that lying is a family resemblance category, and that the more of these aspects of lying were present, the more likely participants would deem them to be lies. Consider this scenario, taken from Coleman and Kay, but which could easily enough have been taken from Clinton:

John and Mary have recently started going together. Valentino is Mary's x-boyfriend. One evening John asks Mary, "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?<sup>62</sup>

The mean score was 3.48, not far from the midpoint. But this tells us little, since a mean of 4 could mean that all 67 subjects expressed uncertainty, or that half emphatically thought it was a lie while the other half insisted that it was not. Closer analysis of the data show that of the 67 subjects, 63 per cent thought that Mary did not lie, while only 27 per cent thought she did. The rest were undecided. Most people, then, do distinguish between lies and truthful deceptions. For those who do not, or who did think that Mary lied, perhaps some would agree with the proposition that Mary did not lie, but her deception of John was morally as bad as a lie. Further questioning of the subjects might have been informative.

Why should people care about the difference? Jonathan Adler explains: "The desperate means to avoid lying, while going easy on deception is not accidental. For if it is never right to cooperate with evil and lying is a fundamental wrong, then only a strong distinction (where deception is not seriously bad at all) will help."<sup>63</sup> But Adler explains only why we might make more of lying than deception as a wrong. He makes it clear that he does not justify each act of deception as better than each corresponding lie, where each is used effectively to persuade an individual to believe something that the speaker knows to be false.

The core difference between the two is that a liar directly leads a hearer or reader to believe something to be true that the liar knows to be false, while a mere deceiver leads the hearer or reader to draw false inferences, thus arriving at the same place, but with more participation from the target of the deception. Ultimately, the two practices lead us to the same thing—a false belief. The liar accomplishes this goal by doing something that is an unequivocally wrong. The deceiver does it through a more complicated

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62. *Id.* at 31.

63. Jonathan Adler, *Lying, Deceiving, or Falsely Implicating*, 94 JOURNAL OF PHILOSOPHY 439 (1997).

and well-planned scheme. This, no doubt, is why some theorists insist that there be no difference in the moral culpability of the two.

Thomas Scanlon comes down on the side of there being no moral difference between deception by lying and deception through any other means. It is hard, if not impossible to come up with examples of situations in which it feels right to deceive through misdirection, but wrong to deceive through misstatement.<sup>64</sup> Some theorists agree. Markovits, for example, is comfortable using the word “lie” to refer both to outright falsehoods and to deceptive practices.<sup>65</sup> And while Charles Fried distinguishes between lying and deceiving conceptually,<sup>66</sup> his argument that lying is a moral wrong includes examples of deception,<sup>67</sup> and does not rely on the difference between the two.

This view is in direct contrast with the position that lying is bad *per se*, and that deception to avoid a lie can be justified precisely because the evil of lying has been avoided.<sup>68</sup> This is the Kantian view, which has a history in Catholic doctrine as well.<sup>69</sup> Some contemporary thinkers adhere to it, or at least some version of it. Philosophers Roderick Chisholm and Thomas Freehan adopt this traditional view—that lying is morally worse than deception by other means: “Lying, unlike other types of intended deception, is essentially a breach of faith.”<sup>70</sup>

Many, however, find this categorical distinction too forgiving of deception by misdirection.<sup>71</sup> They attempt to explain the additional opprobrium against lying as a second-order effect, reflecting on the value

64. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 320 (1998).

65. Markovits, *supra* note 46 at 50 (referring to deceptive questioning practices as “lying cross-examinations.”).

66. CHARLES FRIED, RIGHT AND WRONG 58 (1978).

67. *Id.* at 61.

68. I limit this discussion, as do the theorists whom I cite, to lies intended to deceive the hearer. People sometimes lie in situations in which they do not expect to be believed, and these lies are not of the same moral status. For discussion, see Roy Sorensen, *Bald-Faced Lies! Lying Without the Intent to Deceive*, 88 PACIFIC PHILOSOPHICAL Q. 251 (2007).

69. See Immanuel Kant, *Of Ethical Duties Toward Others, and Especially Truthfulness*, LECTURES ON ETHICS (27:444)(trans. Peter Heath 1997); *On a Supposed Right to Lie Because of Philanthropic Concerns*, in *GROUNDING FOR THE METAPHYSICS OF MORALS* 62, 64–65 (trans. James W. Ellington)(3<sup>rd</sup> ed. 1981). I will not describe the long and very interesting history of this position here, but others have. For discussion, focusing first on early Catholic doctrine and later on Kant, see BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 101–108 (2002); Alisdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?*, 16 TANNER LECTURES ON HUMAN VALUES 307, 314–15 (1995).

70. Roderick M. Chisholm & Thomas D. Freehan, *The Intent to Deceive*, 74 JOURNAL OF PHILOSOPHY 143, 150 (1977). FRIED, *supra* note 66 quotes these authors in support of his argument that lying is an evil in itself, but as noted in the text, does not distinguish between the morality of lying and deceiving. See also Seana Valentine Shiffrin, *Lies and the Murderer Next Door*, unpublished manuscript, UCLA (2010) for nuanced discussion of the limits of Kant’s position.

71. For convincing counterexamples, see JENNIFER SAUL, LYING, MISLEADING AND WHAT IS SAID: AN EXPLORATION IN PHILOSOPHY OF LANGUAGE AND IN ETHICS ch. 4, ms at 10–13 (forthcoming OUP).

of sincerity more generally. Adler argues that while lying and other forms of deception share a moral status on a case-by-case basis, there is good reason for society to draw a line in the sand when it comes to outright lies.<sup>72</sup> For while the deceptive person can be accused of elaborate scheming, which can make his conduct even more reprehensible than that of the person willing to take responsibility for having told a bald-faced lie, at least the deceiver has bowed in respect toward the social norm of truthfulness by avoiding the lie.

Thus, truthfulness is a good communicative norm, even though many acts of deception are tantamount to lying.<sup>73</sup> If Adler is right, we might expect people to respond more harshly to *Bronston* if he had simply said “no” when asked about his Swiss bank accounts. But our reaction to the lying *Bronston* is harsher than our reaction to the merely sleazy *Bronston*, not because the lie is itself worse than the deception, but rather because *Bronston* is a worse person for lying than he is for deceiving.

Bernard Williams takes a similar position. On the one hand, lying and misdirection are similar expressions of insincerity, hard to distinguish on moral grounds: “If lying is inherently an abuse of assertion, then so is deliberately exploiting the way in which one’s hearer can be expected to understand one’s choice of assertion.”<sup>74</sup> On the other hand, Williams acknowledges that a lie is “peculiarly odious or insulting,”<sup>75</sup> because it is an in-your-face form of deceit that shows maximum disrespect to the obligation to be truthful, engendering additional resentment.

Not that this is always so. Clinton was not the first politician to play language games to deceive without telling a lie. Nor was he the last. Recall President George W. Bush’s 2003 State of the Union Address in which he said: “The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.”<sup>76</sup> Bush avoided a lie by insinuating a nuclear threat as a reported speech act from the British. The misdirection, however, was too transparent, and the effort to stick to the truth to mislead in the context of justifying a war drew harsh criticism from those who opposed Bush’s policies.

Whatever the relative moral status between the two, our intuitions are that there is a difference between lying and misleading through indirection and the former is worse, all other things being equal. Jennifer Saul writes about the person who saw a young man killed in a traffic accident. When visiting the victim’s mother, who herself was old and dying, the witness to

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72. Adler, *supra* note 63 at 435.

73. *Id.*

74. See Williams, *supra* note 69 at 107.

75. *Id.* at 118.

76. State of the Union Address, January 28, 2003, available at <http://www.johnstonsarchive.net/policy/bushstun2003.html>.

the accident is likely to feel more comfortable saying to the mother (insincerely in both instances) that she had seen the woman's son the day before and he was well, than saying to the mother that the son is well.<sup>77</sup> The first is true and highly deceptive, the second simply false. Of course, the person who elevates truthfulness to a high moral imperative will tell the mother the truth, whether it hurts her or not.<sup>78</sup> As between the other two choices, most of us would feel better with the deceptive remark, notwithstanding that they are both intended to accomplish the same thing, and that the mother would not know the difference one way or the other. This, as both Adler and Williams argue, is a positive gesture toward respect for truthfulness, and thus the importance of trust between people. But it is no more than a gesture of respect for a value. As far as the mother is concerned, it is all the same. And that is surely true of the person who is defrauded one way or the other, as Saul argues forcefully.

Thus, our perception that lying is worse than deception short of lying is either a moral blindspot (as Saul argues) or stems from a judgment that the merely deceptive person recognizes that dishonesty is wrong and implies in her dishonesty that he or she draws some limits for which she should be credited. It may well be, as both Saul and Adler write, that the prohibition against lying is so deeply ingrained within us that people actually believe that they are being virtuous in some way when they deceive by other means. But those people who do so are morally wrong in their complacency, regardless of the fact that most of us would rather not be forced to regard ourselves as liars even if most particular acts of deception are no better than corresponding lies.

If lying is worse than deception even in this limited sense, then the legal profession maintains some high ground by drawing the line on insincerity as it does. Lawyers cannot lie. But it does not gain much high ground because, like the moral theorists just discussed, none of us thinks that deception is good. And most of us waiver, depending on the circumstances, as to whether we think that there is a moral difference between members of a minimal pair differing only in whether the statement contains a successful deceptive ploy or a false statement. If I ask a car dealer whether the car I am thinking of buying has a history running well, I will be no angrier at the dealer who says "no" knowing that the car is a mechanical mess, than I will with the dealer with the same knowledge about the car who says, "It's remarkable. Other than routine maintenance the car has not even once been in my shop."

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77. SAUL, *supra* note 71, ch. 4 at 3.

78. See Kant, *supra* note 69. Kant's *On a Supposed Right to Lie* presents "the murderer at the door." An individual planning a murder asks a person with knowledge where his planned victim is. Kant argues that even in this circumstance lying is impermissible.

The justification for permitting lawyers to engage in deceptive practices but not to lie should be regarded as one limit placed on the license to be insincere. It is not much of a limit, though. Once again, I do not mean to be critical of the morals of practicing lawyers in general. Whether a particular legal system is adversarial or not, businesses and individuals need knowledgeable professionals to represent their interests when legal issues arise. But to the extent that talking like a lawyer means talking insincerely, we should not be surprised that people have their doubts about the integrity of the legal profession.

*C. Why Lawyer Insincerity Works: Leveraging the Correspondence Bias*

How do lawyers get away this behavior? After all, anyone coming in contact with a lawyer representing someone else's interest is on notice that the lawyer has a job to do, and that it might be a good idea to be on guard. What the good lawyer is trained to do is to help the suspicious individual—whether a witness, a judge, a juror, or someone else—to forget for just a moment that they are dealing with someone whose mission might be to distort the interaction for the benefit of the client's interest (without lying, of course). Lawyers do this by leveraging on what psychologists call the "correspondence bias." Psychologists have found that while much of our behavior is influenced heavily by the circumstances in which we must make decisions and act, we are biased in favor of attributing the behavior of others to their character, rather than to the situation in which they find themselves. The "correspondence" in correspondence bias is between character and behavior. Psychologists Daniel Gilbert and Patrick Malone explain: "When people observe behavior, they often conclude that the person who performed the behavior was predisposed to do so—that the person's behavior corresponds to the person's unique dispositions—and they draw such conclusions even when a logical analysis suggests they should not."<sup>79</sup>

Much social psychological research over almost half a century has pointed toward the fact that people behave differently in different social contexts. To illustrate with a classic study, Darley and Latané<sup>80</sup> demonstrated in 1968 that whether a bystander will rescue a person in distress is heavily influenced by whether others who do not choose to rescue are present at the scene. In one of their experiments, a subject was placed alone in a room with a headset and microphone and told that he or

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79. Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21 (1995).

80. John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377 (1968).

she was participating in a study of how students react to the stress of college in an urban environment.

In one condition,<sup>81</sup> there were five other individuals in the discussion, which was conducted by allowing one participant at a time to speak over the sound system, allegedly to preserve the participants' anonymity. In reality, the subject was the only person present, the others having been tape recorded. One of the participants—the victim—had a simulated seizure, which the subject heard over the headset. When subjects thought they were part of a group of six (which included the subject, the victim, and four others), only 31% of the subjects left the room to tell the experimenter of the seizure while the simulated seizure was still occurring. But when they thought that the only two people in the study were the subject himself and the victim, subjects attempted to intervene 85% of the time.<sup>82</sup> Those who thought they were one of three, performed in the middle. In other words, only the number of people whom subjects thought were present changed, yet behavior was markedly different from one condition to the next.

Were I not told specifically about the manipulation in the experiment, my first reaction would be that the non-intervening subjects are not very kind people. That is because I am subject to correspondence bias. It is only after the circumstances are made explicit that I override my default assumption that the explanation is a function of the participants' character traits.

How does this apply to people's perception of lawyers? Consider another classic study, this one by Edward Jones and Victor Harris.<sup>83</sup> Subjects were asked to read an essay about Cuba that was either pro-Castro or anti-Castro. Half of the subjects were told that the author of the essay was free to express his or her own views in the essay. The other half were told that the author was assigned the task of taking one or the other position by the school's debate coach. As expected, those who were told that the author was unconstrained concluded that the person's views corresponded to the views described in the essay. But so did the subjects who were told that the author was given the assignment to take one side or the other, although to a lesser extent.<sup>84</sup> Since this early study, there has been a wealth

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81. Over time, Darley and Latané performed a series of studies on bystander intervention, reported in BIBB LATANÉ & JOHN M. DARLEY, *THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP?* (1970). I could have chosen among many of these experiments, e.g., responding to a smoke-filled room, *id.* at 43-54, to illustrate the point made here.

82. *Id.* at 380.

83. Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1 (1967). For earlier work on which these studies were based, see Edward E. Jones & Keith E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219 (Leonard Berkowitz, ed., 1965).

84. Jones & Harris., *supra* note 83, at 6.



of research on correspondence bias (sometimes called the “fundamental attribution error”),<sup>85</sup> delving into its causes, limits and robustness.

Debaters, like lawyers, speak for positions to which they are assigned, and therefore enjoy a suspension of the sincerity conditions. Yet knowing that the debater is playing only that role is insufficient to put some people on adequate notice that they should not associate the views expressed in the debate with the views of the person articulating them. Why not?

An early hypothesis was that weaknesses in the design of Jones and Harris’s experiment might have produced this result. If the pro-Castro essay was even more pro-Castro than one might have expected from a debater assigned to the task, and the anti-Castro essay even more anti-Castro than one might have expected, then the additional zeal perceived by the experimental subjects might be attributed to the writers’ attitudinal dispositions. Further experimentation showed this explanation not to be adequate, however. When subjects were themselves assigned to write essays taking various attitudinal positions, and then asked to read the essays of others who had been given the same task, subjects associated the content of the essays they read with the dispositions of their authors.<sup>86</sup>

This idea that we perceive behavior not in absolute terms, but rather in comparison to normative expectations, is relevant both to the nature of the correspondence bias and to its role in the legal setting. In another study, Snyder and Frankel showed subjects a videotape of a young woman being interviewed.<sup>87</sup> There was no sound, so the subjects were reacting to their perception of the interviewee’s demeanor during the interview. Half of the subjects were told that the questions were about attitudes toward sexual conduct, for example, “If you knew an undergraduate female who engaged in sex with most of her dates, would you consider her promiscuous and why or why not?” The others were told that the questions were about the political system, such as, “What is your impression of the two-party system?”<sup>88</sup> It was anticipated subjects would conclude that the interviewee answering rather personal questions about sex would be perceived as more anxious than would the interviewee answering general questions about

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85. This expression was first used by Lee Ross. Lee Ross, *The Intuitive Psychologist and his Shortcomings*, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173 (Leonard Berkowitz, ed., 1977). Legal academics have discussed the bias under this name in various contexts. See Jeffrey J. Rachinlinski, *Bottom-Up versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933 (2006); Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L. J. 311 (2008).

86. Melvin L. Snyder & Edward E. Jones, *Attitude Attribution when Behavior is Constrained*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 585 (1974).

87. Melvin L. Snyder & Arthur Frankel, *Observer Bias: A Stringent Test of Behavior Engulfing the Field*, 34 J. PERSONALITY AND SOC. PSYCHOL. 857 (1976).

88. *Id.* at 859.

politics, although all subjects, in reality, saw the same video. And that is what happened.<sup>89</sup>

But that is not all that happened. Subjects were also presented with a series of measures to assess how the interviewee would react to other situations. Those subjects who believed the interviewee to have been interviewed about sex judged the interviewee to be more apprehensive, more nervous, and more anxious. That is, the situation spilled over into judgments about the person's dispositions in general.

Interestingly, one group of subjects was not told anything about the topic of the interview until the video ended, at which time they received the same information that the others had received before watching the tape. These subjects thought that the interviewee was less anxious in the sex condition than in the politics condition. The authors explain this in terms of a mismatch between expectations and reality: The interviewee appeared fairly neutral during the interview—more nervous than appropriate for casual talk about the two-party system, less anxious than appropriate for personal opinions about sexual conduct in others.<sup>90</sup> Thus, when the subjects knew nothing in advance about the topic of the interview, they judged in retrospect that the interviewee was either disproportionately nervous or calm, depending upon whether they thought the interview was about politics or sex, respectively. These judgments also spilled over into judgments about the interviewee's personality more generally.<sup>91</sup>

Correspondence bias explains why trial advocacy texts warn aspiring lawyers not to appear insincere. For the lawyer's appearing to be sincere is enough to influence people to think that the lawyer really *is* being sincere, even when they have good reason to know better. Below is advice from a leading text on how to present a closing argument:

First, the jurors are looking for conviction. They are looking to see which lawyer *really believes* his side should win, as contrasted with the lawyer who is merely making a closing argument because it's expected. Therefore, your most important concern is to present your closing argument in a way that demonstrates your total

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89. *Id.* at 861.

90. *Id.*

91. I do not suggest that my discussion of these few articles covers the full range of research on attribution. I chose these articles because they relate especially well to the themes of this article. For a good summary of work in this area, see Gilbert, *supra* note 69; Daniel T. Gilbert, *Speeding with Ned: A Personal View of the Correspondence Bias*, in *ATTRIBUTION AND SOCIAL INTERACTION: THE LEGACY OF EDWARD E. JONES 5* (John M. Darley & Joel Cooper, eds., 1988). Many of the other papers in that volume are also both informative and relevant to the issue at hand here.

conviction in your case and your unwavering commitment to your side.<sup>92</sup>

This is good advice. Witnesses are on guard when being questioned by lawyers representing interests other than their own. They grasp the situation: lawyers are insincere and manipulative. But when the lawyer appears more natural, more sincere, more of a regular person than the witness (or other player) expects, the propensity to associate the conduct (sincere speech) with the dispositions of the speaker (sincere person) is given the opportunity to predominate, and the situational factors can be discounted.<sup>93</sup> As in the study by Snyder and Frankel, when the lawyer's conduct exceeds baseline expectations, people are especially responsive to the unexpected conduct.<sup>94</sup>

Of course, the sincerity gambit will not work every time. It will not work at all with some people, whose correspondence bias is either weak or more easily overcome, and some attorneys will be better at amplifying the bias than others. Nonetheless, the lawyer who is able to appear sincere will be perceived as being sincere, at least some of the time. And good lawyers know perfectly well that this is the case, even though they in all likelihood have never read a word about the correspondence bias, or about any other advances in social psychology, for that matter.

By the same token, because they are understood to have a job to do, and and that job involves insincerity, lawyers will be seen as people who are not trustworthy in general. That is the other consequence of the correspondence bias, and it provides a partial explanation for why the Gallup polls show people distrusting lawyers as much as they do.<sup>95</sup>

#### *D. When Lawyers May Lie*

We have seen that just as lawyers may frame a case to encourage others to draw false inferences about the underlying facts, and that they may do so by encouraging others to let down their guard and to draw false inferences about the lawyer herself. Yet just as the lawyer may not lie outright about the facts, the lawyer may not say outright that she is not a lawyer, or that she represents a party other than the one she represents. But there are exceptions, and the exceptions are interesting for the same reason

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92. THOMAS A. MAUET, TRIAL TECHNIQUES 398 (7<sup>th</sup> ed. 2007).

93. See Gilbert & Malone, *supra* note 79 at 25 ("In short, only when people observe behavior that is more extreme than the situation leads them to expect do they make dispositional inferences about the actor.").

94. Snyder & Frankel, *Observer Bias: A Stringent Test of Behavior Engulfing the Field*, 42 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 857 (1976).

95. Honest/Ethics Professions, GALLUP, <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (last visited April 15, 2012).

that exclusion of deceit from the perjury law is interesting: greater dishonesty is permitted when it reinforces values the adversarial system.

The default rule, as stated by a federal district court in Colorado, is: “Law enforcement authorities are afforded license to engage in unlawful or deceptive acts to detect and prove criminal violations. Private attorneys are not.”<sup>96</sup> After all, it would shut down law enforcement if prosecutors could not order and supervise undercover operations. The rule differs from one jurisdiction to another, with some states permitting sting operations in the service of private litigation and both sides of a criminal prosecution, other states being more nuanced.<sup>97</sup>

It is not easy, however, to justify the asymmetry between prosecutors and defense lawyers in the face of a defense lawyer using an undercover operation to expose exculpatory evidence. Should an innocent person go to prison because the defendant’s lawyer hired an investigator to root out the truth? Authorities who are asked to discipline defense lawyers for using sting operations are less and less willing to do so. In Wisconsin, a lawyer used subterfuge to gain control over the computer of a child who was the lead witness against the lawyer’s client in a prosecution for possession of child pornography and other crimes involving sexual misconduct.<sup>98</sup> An examination of the child’s computer showed that he had downloaded pornography from other sources, which undermined an important part of the prosecution’s case.<sup>99</sup> To gain access to the computer, the lawyer hired a detective who contacted the child and told him that he had won a new HP laptop, which he would receive simply by exchanging his old one for it.<sup>100</sup> The ruling on a disciplinary action favored the defense lawyer, accepting the trickery as part of the adversarial system.<sup>101</sup>

For that matter, even those who would limit the privilege to prosecutors recognize that there are limits. For example, while a prosecutor may supervise pre-indictment undercover operations even knowing that the suspect is represented by counsel, the prosecutor cannot, as part of the operation, use a counterfeit grand jury subpoena, which constitutes “a misuse of the name and power of the court.”<sup>102</sup>

By the same token, a prosecutor may not affirmatively pose as a public defender to gain access to a person whom the prosecutor legitimately

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96. *Sequa Corp. v. Lititech, Inc.*, 807 F. Supp. 653, 663 (D. Colo. 1992).

97. For discussion of the various approaches to this issue, see Barry R. Temkin, *Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE UNIV. L. REV. 123 (2008).

98. *In re Hurley*, 2008 Wisc. LEXIS 1181 (Wisc. 2008).

99. *Hurley*, 2008 Wisc. LEXIS 1181.

100. *Id.*

101. *Id.* at 36.

102. *United States v. Hammad*, 858 F.2d 834, 840 (2<sup>nd</sup> Cir. 1988).

believes to be a very dangerous person who needs to be stopped.<sup>103</sup> That undermines the structure of the attorney-client relationship. In a very dramatic case, Mark Pautler, a Colorado prosecutor, misrepresented himself as a public defender in order to help facilitate the surrender of a psychopath who had murdered several people and was ready to turn himself in, but only if he had counsel to assist him.<sup>104</sup> Pautler was found to have violated the ethical rules by posing as a party's lawyer when he was really a lawyer for an adverse party.<sup>105</sup> He was given probationary discipline in light of the circumstances surrounding his behavior.<sup>106</sup>

The issue is especially difficult when the target of the deception is an opposing party, or someone whose conduct may lead to that person's becoming an opposing party, for it is also unethical for lawyers to communicate with opposing parties whom they know to be represented by counsel without that counsel's consent.<sup>107</sup> Recording conversations with such individuals can be considered doubly unethical because the recording involves both communication with a party and the deceptive practice of recording a conversation without advising the other individual.

But the rule has eroded even in civil cases, with courts permitting lawyers to engage in undercover operations when they seem justified and do not interfere with traditional lawyer-client relations. Consider the facts of *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*,<sup>108</sup> a 1999 case decided by the Southern District of New York. An Italian furniture designer had licensed an American company as its sales agent in the U.S. After that arrangement was terminated, the agent continued representing itself as selling the designer's furniture.<sup>109</sup> Once customers entered their warehouse, however, they would be shown other furniture in a classic "bait and switch" operation.<sup>110</sup> The designer sued for violation of the trademark laws, and its lawyers hired two investigators who, both before and after the complaint was filed, posed as interior designers to visit the warehouse and record their conversation with the sales agent.<sup>111</sup> Sure enough, the recordings suggested that the designer's allegations were accurate.<sup>112</sup>

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103. See, MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

104. *In re Pautler*, 47 P.3d 1175 (Colo. 2002).

105. *Pautler*, 47 P.3d 1175.

106. *Id.* at 33.

107. MODEL RULES OF PROF'L CONDUCT R. 4.2."In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." *Id.* DR-7-104(A)(1), then in effect, says the same thing in substance.

108. 82 F. Supp. 2d 119 (S.D.N.Y. 1999).

109. *Gidatex*, 82 F.Supp. 2d 119.

110. *Id.* at 120.

111. *Id.*

112. *Id.*

Did the lawyers commit an unethical act? They admittedly sent an agent to an opposing party represented by counsel to deceive the party in two separate ways: by posing as interior decorators,<sup>113</sup> and by secretly recording the conversations. The court held that “hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation,”<sup>114</sup> and that the purpose of the rule prohibiting contact a lawyer’s contact with an opposing party who is represented by counsel would not be served by applying it to these circumstances.

Six years later, another federal district court judge in New York held that Cartier’s lawyers did not violate ethical rules when they sent an administrative assistant to a local jeweler whom Cartier believed was altering Cartier watches to make them look like a more expensive model, which he would then sell at a discount.<sup>115</sup> The judge held that the use of undercover agents to discover wrongdoing has become an accepted practice, especially when there is no other way to get to the fact of the matter.

But not all such misrepresentations of identity are acceptable. Consider the Eighth Circuit’s opinion in *Midwest Motor Sports, Inc. v. Arctic Cat, Inc.*<sup>116</sup> Midwest had a franchise to sell and repair Arctic Cat products (mostly snowmobiles). Arctic Cat cancelled the agreement, and Midwest sued. Arctic Cat’s lawyers then sent undercover agents to Midwest to pose as customers and talk with Midwest’s sales people. Efforts were made to get them to bad-mouth Arctic Cat’s products and to praise competitive products, to obtain admissions that the cancellation of the franchise was not really hurting Midwest. In one instance, the investigator interviewed a senior executive of Midwest. The conversations were recorded. The court would have none of this:

Arctic Cat was using Mohr’s undercover ruse to elicit damaging admissions from Elliott’s employee and A-Tech’s president to secure an advantage at trial. Such tactics fall squarely within Model Rule 8.4(c)’s prohibition of “conduct involving dishonesty, fraud, deceit or misrepresentation.” Arctic Cat contends that it only retained Mohr after traditional means of discovery had failed. Arctic Cat’s attorneys may have become frustrated with their opposing counsel’s refusal to cooperate, but that frustration does not justify a self-help remedy. It is for this very reason that our

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113. It makes no difference that the lawyers themselves did not pose as decorators. MODEL RULES OF PROF’L CONDUCT R. 5.3 holds the lawyer responsible for the violation of ethical rules by others “if the lawyer orders, or with the knowledge of the specific conduct, ratifies the conduct involved;”.

114. *Gidatex*, 82 F. Supp. 2d at 121.

115. *Cartier v. Symbolix, Inc.*, 386 F. Supp. 2d 354 (S.D.N.Y. 2005).

116. 347 F.3d 693 (8th Cir. 2003).

system has in place formal procedures, such as a motion to compel, that counsel could have used instead of resorting to self-help remedies that violate the ethical rules.<sup>117</sup>

*Midwest* is different from the other cases in an interesting way. In both of the New York cases, the undercover agents really were acting as customers.<sup>118</sup> They asked questions that customers would ask, and the evidence that they gathered implied violations of agreements not to act toward customers the way the defendants acted toward the investigators. The same applies to "testers" in civil rights cases. Courts have routinely accepted as evidence of discrimination in housing and lending, for example, the testimony of investigators posing as prospective renters, borrowers or buyers. When the target is more receptive to white testers than to non-white testers, the difference is accepted as evidence of a discriminatory practice.<sup>119</sup> The scholarly literature contains examples of similar methods.<sup>120</sup>

Not so with *Midwest*. There, Arctic Cat's lawyers attempted to lower the guard of the opposing party by sending in agents posing as customers to take the equivalent of an unsworn deposition about the firm's business practices. Not knowing that they were dealing with the agents of opposing lawyers, the employees might be more inclined to make statements against their employer's interest. The tactics accepted by the courts are sting operations designed to test the target's practices at the time. The rejected ploy was more testimonial in nature, attempting to learn about history and general practices that the legal system provides a forum to investigate.

But this tactic—trying to make the opposing party comfortable enough to speak candidly despite the fact that the questioner is a lawyer (or the lawyer's agent, in these cases)—is exactly the skill that the trial advocacy books teach law students to develop. The goal is to relax the witness enough to allow him to forget to maintain as guarded a position. The general message seems to be that what the lawyer cannot learn through the normal route of discovery, the lawyer is entitled to learn from stealth, even if it requires the use of outright lies. But lying cannot serve as a substitute

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117. *Arctic Cat*, 347 F.3d at 700.

118. *Gidatex*, 82 F.supp.2d 119; *Cartier*, 386 F.Supp.2d 354.

119. *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983). For discussion of the practice and the ethical issues that it raises for lawyers, see David Isbell & Lucantonio Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995).

120. For seminal work in this area, see Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991); Ian Ayres, *Further Evidence of Discrimination In New Car Negotiations And Estimates Of Its Cause*, 94. MICH. L. REV 109 (1995).

for available legal process, even if the subterfuge is more likely to bring out the truth about the facts underlying the case.

## II. LAWYERS HELD TO A HIGHER STANDARD

Within the legal system, not all lawyers play the same role, and debate arises as to whether lawyers who do not represent private clients should share in the license to be insincere. I will touch on two such debates here: the obligations of government lawyers, and the role of law professors writing as scholarly friends of court.<sup>121</sup> The debates are interesting in their own right. What they have in common, though, is perhaps the most interesting aspect of them: They all assume that ordinary lawyers have only a limited obligation to be sincere, and that others might have a heightened burden. It is the common understanding of the baseline of insincerity that is most relevant to this inquiry.

### A. *Government Lawyers and Limits on the License to be Insincere*

Prosecutors have a higher duty of candor than do lawyers representing private clients. As the notes to the ABA Model Rules of Professional Conduct make clear:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of an innocent person.<sup>122</sup>

In New York, it is unethical for a prosecutor to bring a criminal case “when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.”<sup>123</sup> There are various other rules and ethical considerations that instruct government lawyers not to take advantage of all adversarial opportunities if doing so would bring

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121. I do not write here about the sincerity of judges in the arguments they make to support their rulings because there is little basis for comparing the obligation of judges and other public officials to be sincere to the obligations of practicing lawyers. There exists a rich literature on this question, with thoughtful arguments on both sides of how important it is for judges to be personally committed to the arguments they offer. For recent contrasting views, compare Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008) (advocating for sincerity in public judicial reasoning); and Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?* 59 DEPAUL L. REV. 1091 (2010) (arguing that sincerity must extend only to the legitimacy of the legal argument and not to belief in its merit).

122. MODEL RULES OF PROF'L CONDUCT, R. 3.8, cmt 1.

123. 22 N.Y. ADC 1200.30.



about unjust results.<sup>124</sup> These special rules are needed because without them prosecutors would have the same duty of candor as other lawyers have—which is not much of a duty, as we have seen.

Even murkier are the ethical standards for government lawyers who are not engaged in litigation, but are advisors. This became a public issue in debates over the so-called “torture memos” generated by lawyers in the Office of Legal Counsel (OLC) to President George W. Bush, concerning the legality of harsh interrogation techniques under various domestic and international laws that outlaw the use of torture.<sup>125</sup>

These memos, especially one written by John Yoo,<sup>126</sup> a Berkeley law professor who joined the Bush administration, have provoked a huge literature, mostly very critical.<sup>127</sup>

To take one example, the federal anti-torture statute imposes severe punishment on “[w]hoever outside the United States commits or attempts to commit torture . . . .”<sup>128</sup> One way to argue for that statute’s having a narrow scope is to define torture narrowly. The statute itself defines torture as: “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;”<sup>129</sup> The memo argued first that the words “specifically intended” mean that the principal goal of the act must be the infliction of severe pain. A person who tortures to get information, knowing that he is inflicting severe physical pain, does not have the requisite state of mind. Yoo acknowledges, however, that a jury is likely to infer otherwise.<sup>130</sup>

As for what constitutes “severe pain,” Yoo turns to a statute that limits reimbursement of medical services provided to illegal aliens. That statute draws an exception for “emergency medical conditions,” which it defines as:

a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity

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124. See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY EC 7-14 (requiring that government lawyers in civil actions or administrative proceedings not use his or her position “to bring about unjust settlements or results.”).

125. Memorandum from U.S. Dept. of Justice, Office of Legal Counsel (August 1, 2002; March 14, 2003; May 10, 2005).

126. Memorandum from U.S. Dept. of Justice, Office of Legal Counsel (March 14, 2003) (hereinafter “Yoo Memo”).

127. See, e.g., W. Bradley Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (a Response to Professor Hatfield)*, 104 NW. UNIV. L. REV. COLLOQUY 58 (2009).

128. 18 U.S.C. § 2340A (2010).

129. 18 U.S.C. § 2340 (2010).

130. Yoo memo at 37.

(including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—

- (1) placing the patient's health in serious jeopardy,
- (2) serious impairment to bodily functions, or
- (3) serious dysfunction of any bodily organ or part.<sup>131</sup>

Based on this language, Yoo infers that severe physical pain sufficient to constitute torture “must rise to a similarly high level—the level that would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of bodily functions.”<sup>132</sup>

Yoo's argument is a non-sequitur. There is nothing in either statute or its structure that suggests that pain is sufficiently severe to constitute torture only if it can reasonably be expected to result in such things as serious dysfunction of bodily organs.<sup>133</sup> Jack Goldsmith, who ran OLC from 2003 until he resigned in 2004 as a consequence of his withdrawing Yoo's memorandum, described it as “more an exercise of sheer power than reasoned analysis.”<sup>134</sup> For this reason, it is difficult to believe that Yoo himself thought that the argument was a fair statement of the law governing torture. If he did not, then he was insincere in making it, although he might have been sincere in trying to conjure up whatever arguments could possibly be made in favor of the administration's position. Insincerity of this kind (making arguments that the lawyer himself could not believe to be legitimate legal argument) is not accepted among advocates generally,<sup>135</sup> and is therefore not acceptable among government lawyers if they are held to a higher standard of sincerity than the rest of the profession. Peter Brooks calls the analysis “legal textualism run wild,”<sup>136</sup> and suggests: “Legal interpretation must be held to some realist ethical standards.”<sup>137</sup>

Among the major concerns raised about the Yoo memo is the absence of any discussion of the how some of the interrogation techniques—waterboarding in particular—had been treated as a matter of law in the past. Typically, such analysis forms the basis of any legal advice.<sup>138</sup> The issue is how much a lawyer in the position of advisor to the executive

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131. 8 U.S.C. § 1369 (2010).

132. Yoo memo at 38-39.

133. For discussion, see PETER MARGULIES, *LAW'S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION* 60 (2010).

134. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 150 (2007).

135. See MODEL RULES OF PROF'L CONDUCT R. 3.3.

136. Peter Brooks, *Literature as Law's Other*, 22 YALE J. L. & HUMAN. 349, 352 (2010).

137. Brooks, *supra* note 136, at 355.

138. *Id.*, referring to U.S. v. Lee, 744 F.2d 1124 (5th Cir. 1984)(referring to waterboarding as “water torture”).

branch of government should see his job as finding legal justification for policies the government wishes to carry out but cannot do so if the government itself deems them illegal, and how much the government lawyer should be giving neutral legal advice, to the extent that is possible.<sup>139</sup> Arguments in defense of the government lawyers' deceptive, but truthful conduct turn on justification of the policy decisions, which, in times of emergency, may override the niceties of neutral analysis. In other words, as long as there is some colorable degree of legal cover, that is enough.<sup>140</sup> Again, while I do not endorse that position, my point here is that the debate is only possible by virtue of the low level of commitment to their arguments to which lawyers are held generally.

Similarly, two U.S. Supreme Court justices—Chief Justice Roberts and Justice Alito—were questioned about statements they made as lawyers in the Reagan administration during their confirmation hearings, and both hid behind the mantle of licensed insincerity. We have already seen some of Roberts' statements on this matter. He also testified:

My view in preparing all the memoranda that people have been talking about was as a staff lawyer. I was promoting the views of the people for whom I worked. And in some instances those are consistent with personal views. In other instances, they may not be. In most instances, no one cared terribly much what my personal views were. They were to advance the views of the administration for which I worked.<sup>141</sup>

Alito had this to say about his arguing that the Constitution did not protect a woman's right to an abortion:

This was a statement that I made at a prior period of time when I was performing a different role. And as I said yesterday, when someone becomes a judge, you really have to put aside the things that you did as a lawyer at prior points in your legal career and think about legal issues the way a judge thinks about legal issues.<sup>142</sup>

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139. Trevor Morrison argues that the tradition within the OLC has been to honor past precedent, which suggests that even those who defend insincerity would have difficulty justifying a rejection of precedent as internally legitimate. See Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010).

140. See JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

141. *Hearings on the Nominations of John G. Roberts, Jr. to be Chief Justices of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 109-158 (2005).

142. *Hearing on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 109-277 (2006).

According to Alito, then, lawyers may not believe in all they say—even government lawyers in policy positions, which is a controversial matter. Both Chief Justice Roberts and Justice Alito, then, used the license to be insincere as a shield against any responsibility for positions they took while in government. Any debate about this issue occurs not over whether lawyers generally are entitled to be insincere, which appears to be generally accepted, but rather over the narrower question of whether lawyers in government share the license with private practitioners, or whether public officials are, as Micah Schwartzman puts it, obliged to take seriously the value of “sincerity in public reasoning.”<sup>143</sup>

### B. Law Professors as Scholar/Advocates

When law professors write briefs as *amici curiae*, they hold themselves out not as advocates, but as intellectuals who can assist the court by sharing their disinterested scholarly perspective and are not acting as advocates. Richard Posner criticizes law professors for crossing the line into advocacy.<sup>144</sup> To take his example, a law known as the “Solomon Amendment” requires that schools within universities permit the military to recruit on campus, notwithstanding its discrimination against homosexuals, or risk losing federal funding throughout the university.<sup>145</sup> Most universities have a general policy of not allowing employers who engage in such conduct to recruit students on their campuses for future employment. The Solomon Amendment was intended to create irresistible incentives for them to do so when the employer is a branch of the armed forces. The sanction for violating the law can be loss of all federal funding for the institution, which means that if the law school does not let the military on campus, the physics department can lose all of its federal grant money.

Universities sued, arguing (among other things) that the law is an unconstitutional encroachment on the freedom of speech. The case made its way to the Supreme Court, which upheld the law by a vote of 8–0.<sup>146</sup> Posner had little regard for the constitutional arguments, but reserved his strongest criticism for the Harvard professors who wrote an *amicus* brief arguing that, as a matter of statutory interpretation, there is no violation of the law itself as long as the university disallows recruitment by all

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143. Micah Schwartzman, *The Sincerity of Public Reasoning* 4 (January 7, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1532779](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532779). (advocating that “sincerity is an important condition of public deliberation, and that deliberation is necessary to evaluate, criticize and improve the quality of public justifications”). Not everyone shares this view. See Cohen, *supra* note 121 (arguing that public officials should be sincere in their tacit representation that their reasons are legitimate, but not necessarily sincere in the match between the given reason and their person motivations).

144. RICHARD A. POSNER, *HOW JUDGES THINK*, 225 (2008).

145. 10 U.S.C. § 983(b) (2010).

146. *Rumsfeld v. FAIR*, 126 S.Ct 1297 (2006).

employers who discriminate on the basis of sexual preference—not just the military. The argument had little chance of prevailing, as Posner notes with derision:

A lawyer whom you hire to represent you can in perfect good faith make any argument on your behalf that is not frivolous. But the professors were not parties to *Rumsfeld v. FAIR* and so a reader of their amicus curiae brief might expect the views expressed in it to represent their best professional judgment on the meaning of the Solomon Amendment. The brief identifies them as full-time faculty members of the Harvard Law School rather than as concerned citizens, and one expects law professors, when speaking *ex cathedra* as it were, to be expressing their true beliefs rather than making any old argument that they thought had a 1 percent chance of persuading a court. It is hard to believe that all of the professors who subscribed to the Harvard brief actually thought that interpreting the Solomon Amendment as a nullity was the best interpretation, or that they are interpretive nihilists who believe that the meaning of a text is *entirely* in the eye of the beholder.<sup>147</sup>

Both halves of Posner's arguments are telling. First, it is wrong for law professors to be insincere, and second it is wrong for them to be insincere because they are not acting as advocates for a party, and have thus lost their license to be insincere.

Nonetheless, Posner was too hard on the Harvard faculty. Most significantly, the professors began their brief with a clear statement that they really were acting as advocates: "Our goal is to vindicate Harvard Law School's right to apply its evenhanded antidiscrimination policy to all recruiters—including those from the United States military—in harmony with the numerous federal, state, and local laws that outlaw various forms of discrimination by private actors."<sup>148</sup> In announcing this stance right from the start, they candidly gave the Court the notice that it should treat their brief as that of an interested party, and not as that of a group of disinterested scholars whose principal goal is to assist the Court analytically, independent of any personal stake.

The fact that the professors held themselves out as advocates renders Posner's second point irrelevant. Because the faculty members announced that they were acting as advocates, their license to make the best prevailing arguments they could, regardless of whether they sincerely believed that these were analytically the strongest arguments in the case, survived. As

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147. POSNER, *supra* note 144, at 225-26.

148. Brief of Professor William Alford, et al. at 1 *Rumsfeld v. FAIR*, 126 S.Ct 1297 (2006).

advocates, they needed only to hold a sincere belief that the argument was not frivolous, but was rather a novel, legitimate addition to the constellation of arguments made by the parties and by other *amici*. There is no reason to conclude that they did not hold those beliefs.

Yet my criticism of Posner's treatment of the Harvard professors reinforces his broader argument: Law professors who participate in the adversarial system holding themselves out as disinterested scholars forfeit their license to be insincere. Presupposed in this argument is the accurate assumption that lawyers acting as advocates in the ordinary course of litigation have and retain such a license.

### III. TEACHING THE RULES OF THE ROAD

As we have seen, the liberties with sincerity discussed in this essay do have their limits. For example, lawyers are not permitted to make frivolous arguments in civil cases, and are sometimes punished for doing so.<sup>149</sup> Even in criminal cases, lawyers are not permitted to argue theories of the case that lack evidentiary support.<sup>150</sup> Nor are lawyers permitted to vouch for the veracity of witnesses in their closing arguments.<sup>151</sup> The anti-vouching rule is particularly germane to the question of sincerity because it specifically combats the lawyer's being insincere about the role she plays in the system by enlisting the jury's trust.

These limits, however, do not alter the basic nature of the lawyer's task, which is to act on behalf of another regardless of the lawyer's belief in the cause. This, I believe, explains in large part the public's suspicion of lawyers. Lawyers are duty-bound to insert themselves into situations of grave importance, and then to hide the ball by suspending the sincerity conditions by which we ordinarily conduct our lives. David Luban points out that both lawyers as individuals and those who set ethical standards need to "balance the demand of a role against the demand of common morality, giving each some weight."<sup>152</sup> Nonetheless, to the extent that insincerity is an acceptable tool in performing the lawyer's task, and it is now, lawyers will legitimately feel that they are not doing their jobs adequately if they jettison this device in favor of their own sense of right and wrong.<sup>153</sup>

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149. See Fed. R. Civ. P. 11.

150. THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 452-454 (3d ed. 2005)

151. See, e.g., *United States v. Carr*, 424 F.3d 213 (2nd Cir. 2005).

152. Luban, *supra* note 7, at 125.

153. This point has been the source of considerable discussion. For some seminal work, see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AMER. BAR FOUND RESEARCH J. 613, 627; Wasserstrom, *supra* note 45.

Indeed, legal educators teach their students these limits, or at least most of them, in courses on professional responsibility, which are required courses. Nonetheless, with the suspension of sincerity conditions at the heart of legal practice, law schools train their students to hide the ball right from the beginning. In fact, it appears to be such a natural part of what lawyers do, that the issue is given little notice. The casebooks in American law schools contain problems, which are typically hypothetical situations built on actual cases. Students are asked to play the role of a lawyer representing one party or the other, and then are challenged in the classroom to come up with answers to questions raised by students advocating for the other side. Simulation classes, in which students spend time litigating a hypothetical case or completing a hypothetical transaction over time are both popular in law schools and strongly encouraged by influential studies on legal education.<sup>154</sup> Many professors ask students to take one or another position in discussing cases that the class has read.

This is an important tool when support for one of the parties would require the student to take positions that would be unpopular with classmates. Role-playing explicitly permits insincerity, which takes the student off the hook morally, and permits the legal debate to go forward. And clinical education—actual hands-on experience—is an important part of legal education, and becoming more so. Elizabeth Mertz, an anthropologist and American law professor, describes many ways in which the skills of learning to act and sound like a lawyer are introduced to students in the classroom.<sup>155</sup> Influential reports on legal education encourage more such training.<sup>156</sup> What is problematic about these devices is that they all involve the teaching of insincerity without bringing that fact to the students' attention. Law students should be told from the first day of class that their ethical burden will be a special one: they are licensed, and at times even obligated, to speak insincerely. They must not abuse that privilege and must do everything they can to act with integrity in light of it.

If lawyers have both the right and obligation to be insincere, then whatever ethical rules constrain them should be taken very seriously and become part of the culture. American law schools require that students be trained in legal ethics. Ethicists address this question under the rubric of

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154. See American Bar Association, Section on Legal Education and Admissions to the Bar, *Legal Education and Professional Development: An Education Continuum*. (1992); See also WILLIAM M. SULLIVAN, ANN COLBY, JUDITH WELCH WEGNER, LLOYD BOND, & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

155. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (2007).

156. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW* (2007) (report known as "The Carnegie Report" as a result of its sponsorship by the Carnegie Foundation for the Advancement of Teaching); ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007).

*role morality*. The special role of lawyers (and other professionals, for that matter) establishes a set of expectations.<sup>157</sup> But the importance of behaving with total honor within the system, given the license taken to speak insincerely, which itself reflects some compromise in honor, must be brought home from the very first day of school. Law schools currently fall far short of this important commitment.

Law schools do not adequately instill these values into their students because everyone is too busy teaching the substance of the law and the tricks of the trade. To take one example, Civil Procedure is a required first year course in just about every American law school, and Criminal Procedure is a popular elective, taken up by many students. Much has been written about the relationship between legal cases and the way we tend to structure our world into narratives.<sup>158</sup> As Bernard Jackson points out, there are really two interlocking narratives involved in a legal case: the underlying story that brought the players to court, and the story of the litigation.<sup>159</sup>

Legal education teaches law students how to understand the players in procedural terms. A recent empirical study asked law students to react to a vignette involving a legal dispute.<sup>160</sup> The participants were three groups of students: incoming students, students who had finished three of the six semesters of full-time legal study, and students about to graduate. Among the findings of the study was that the group of students about to graduate identified significantly more procedural categories than did either of the other two groups.<sup>161</sup>

Students begin to re-conceptualize people in terms of their role in the system from the very beginning of law school.<sup>162</sup> And it is not easy. Consider the opening words of *Hawkins v. McGee*, a famous contracts case decided in 1929, and in fact, the case that the fictional Professor Kingsfield used to introduce his students to the Socratic method of legal education in the film and television series, *The Paper Chase*:

Assumpsit against a surgeon for breach of an alleged warranty of the success of an operation. Trial by jury. Verdict for the plaintiff.

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157. See Luban, *supra* note 7; see also Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992).

158. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

159. BERNARD JACKSON, *MAKING SENSE IN LAW: LINGUISTIC, PSYCHOLOGICAL AND SEMIOTIC PERSPECTIVES* (1995).

160. Stefan H. Kreiger, *The Development of Legal Reasoning Skills in Law Students: An Empirical Study*, 56 J. LEGAL EDUC. 332 (2006).

161. Kreiger, *supra* note 160, at 350.

162. For an interesting discussion of how the framing of people's roles contributes to the legal system's sense of obligation to the individuals involved, see APPLBAUM, *supra* note 44, at 77.



The writ also contained a count in negligence upon which a nonsuit was ordered, without exception.

Defendant's motions for a nonsuit and for a directed verdict on the count in assumpsit were denied, and the defendant excepted. During the argument of plaintiff's counsel to the jury, the defendant claimed certain exceptions, and also excepted to the denial of his requests for instructions and to the charge of the court upon the questions of damages, as more fully appears in the opinion.<sup>163</sup>

The case was actually a medical malpractice case against a surgeon who botched a skin-grafting effort—he promised a boy that he would repair his scarred hand but in the process made things worse. But you would not know any of this from reading the first lines of the opinion. That is because it is devoted to describing the procedural posture of the case without regard to what happened. The case, in fact, is studied as an illustration of the standard remedy under American contract law: the difference in value between a promised result and the actual result.

Students, or at least some of them, still study this opinion in their introduction to the law of contracts.<sup>164</sup> It becomes part of the process, begun on the first day of law school, to train students to conceptualize people in terms of the roles they play in legal procedures, which is necessarily alienating to people involved in traumatic events in their own lives. The gap is probably at its most extreme when the legal system deals with such people as victims of rape and other sexual assault. Not only does the victim of a trauma play a particular role with which she does not identify, but she is then subjected to the cross-examination of a defense lawyer duty-bound to put on a vigorous effort to discredit her, even when he does so insincerely.<sup>165</sup>

What is to be done about all of this? Perhaps not much. At the very least, however, some soul searching is in order as to whether the regulation of the profession is in proper balance with the suspension of sincerity that comes with advocacy. This balance should be constantly reexamined, with judges stepping up their role, not only as disciplinarians, but as educators and representatives of the highest standards. Whatever changes are made or not made, legal educators should instill in young lawyers a solemn obligation to accept the license to be insincere as a serious statement of

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163. *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

164. For example, it is the first case in Steven Burton's casebook.

165. See ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* (1999); see also JOHN CONLEY & WILLIAM M. O'BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* (1998).

social trust, an obligation that is not taken nearly as seriously as it should be.

