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Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements

by
STUART P. GREEN*

Introduction

The term “legal moralism” has traditionally referred to the view that it is permissible to use government sanctions, including criminal sanctions, to enforce prohibitions on conduct that is immoral but not directly harmful (or even offensive) to others or self. Legal moralists of this stripe thus embrace the anti-liberal view that the state may legitimately criminalize acts such as adultery, incest, and prostitution, even when performed in private by consenting adults.¹

In recent years, however, “legal moralism” has also come to mean something else. The term is now frequently used to refer to the view that, as Dan Kahan has put it, “law is suffused with morality and,

* Associate Professor of Law, Louisiana State University. I am grateful to Bob Batey, Pam Bucy, Bernard Harcourt, Kyron Huigens, Paul Roberts, Greg Smith, and Sarah Welling for their helpful comments on an earlier draft. Thanks also to Lohr Miller for his excellent research support. No one should be deceived into thinking that the author is not responsible for any errors that remain.

1. See, e.g., PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (Univ. of Chicago Press ed. 1991) (1873). The opposing, liberal, view is that the only morally legitimate basis for criminal prohibitions is harm or (in some formulations) offense to non-consenting parties other than the actor. See, e.g., H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 6 (1963); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 12-13 (1984). Bernard Harcourt has recently argued, however, that the terms of the Hart-Devlin debate have shifted in recent years. According to Harcourt, those who want to prohibit prostitution, pornography, drug use, and other kinds of conduct that once were viewed as “harmless wrongdoing,” now argue that such acts are in fact harmful to others or self. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

as a result, can't ultimately be identified or applied . . . without the making of moral judgments."² Proponents of this brand of legal moralism seek to explain how moral judgments about character, virtue, and vice relate to and explain a broad range of rules and concepts in criminal law, including, for example, negligence as a basis for criminal liability,³ the distinction between voluntary manslaughter and murder,⁴ and the maxim that ignorance of the law is no excuse.⁵ Legal moralists of this sort need not take any particular position on the criminalization of non-harmful or non-offensive acts.⁶ Their goal instead is primarily a descriptive one: to explain both the role that morality plays in the creation of various criminal law rules, and, to a lesser extent, the reciprocal role that the criminal law plays in the formation of our moral judgments.⁷

2. Dan M. Kahan, *Ignorance of Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 128 (1997).

3. Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1473-76 (1995); see also Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943 (2000) (explaining criminal fault generally in virtue ethics terms); Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195 (2000) (dealing with death sentencing in virtue ethics terms).

4. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 305-22 (1996).

5. Kahan, *supra* note 2.

6. Michael Moore uses "legal moralism" in what is arguably yet another sense of the term. According to Moore, a legislator who subscribes to legal moralism would believe that in some sense there are right answers to moral questions . . . and that such right answers do not depend on what most people in his society happen to think about these matters. Further, a theorist of this type would believe that every legislator has the right and the duty to legislate his view of what the correct moral order is, into law.

MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 645 (1997). Ultimately, the *content* of the "liberal" legal moralism that Moore endorses looks very different from the content of the "conservative" legal moralism embraced by writers such as Lord Devlin, see *supra* note 1. (For example, because Moore believes that "morality is indifferent to sexual practices, and that avoidance of much else in the way of conventionally regarded 'vice' is only supererogatory but not obligatory," he would decriminalize "much of what passes as 'morals offences' in our current criminal code." MOORE, *supra* at 662.) Nevertheless, from a methodological standpoint, Moore's version of legal moralism seems more like the primarily prescriptive version developed by Devlin than the primarily descriptive version used by Kahan.

7. Used in this second sense, the term "legal moralist" might apply even to Joel Feinberg, who has offered both a famously sustained critique of legal moralism in the first sense, see JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988), and a retributivist theory of criminal law that consistently deals with the making of moral judgments. See, e.g., Joel Feinberg, *Some Unswep Debris from the Hart-Devlin Debate*, 72 SYNTHESIS 260 (1987) (quoted in Jean Hampton, *How You Can Be Both a Liberal and a Retributivist: Comments on Legal Moralism and Liberalism by Jeffrie Murphy*, 37 ARIZ. L. REV. 105, 106 (1995)):

The liberal . . . can and must concede that the criminal *process* in its very conception is inherently immoral (as opposed to nonmoral)—a great moral

This article presents a study in legal moralism in this second sense. Even those writers, like Joel Feinberg, who reject legal moralism in the first sense, agree that conduct must be more than merely harm-producing in order to be criminalized; it must also involve some form of moral wrongfulness.⁸ In recent work, I have attempted to describe the various forms that such wrongfulness might take, such as cheating, disobedience, and promise-breaking.⁹ In this article, I focus on the relationship between lying, non-lying deception, and falsely denying, on the one hand, and perjury, fraud, and false statements on the other. Each of these offenses involves obviously harmful or risk-producing conduct, and each is uncontroversially subject to criminal sanctions.¹⁰ My focus, therefore, is not on harmfulness, but on moral wrongfulness.¹¹ I explain the various and subtle ways in which our moral views on lying, misleading, and falsely denying inform and shape the content of these criminal prohibitions.

* * *

Part I of the article offers an account of the structural and moral differences among three different kinds of deception, which I shall refer to as “lying,” “merely misleading,” and “falsely denying.” Lying, as we shall see, involves asserting what one believes is literally false. When *A* lies to *B*, *A* gets *B* to place his faith in him, and then breaches that faith. Merely misleading, by contrast, involves a quite

machine, stamping stigmata on its products, painfully “rubbing in” moral judgements on the persons who had entered at one end as “suspects” and emerged from the other end as condemned prisoners. The question the liberal raises about this moral machine is “which action should cause their doers to be fed into it?”, and his answer is: “only those actions that violate the rights of others.” There is no doubt in his mind that the law may “enforce morality.” The question is “*which* morality (or which sector of morality) may it properly enforce?”, and he restricts the criminal law to the enforcement of “grievance morality.”

Id. For a criticism of the supposed inconsistencies between Feinberg’s liberalism and his retributivism, see Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 79-84 (1995).

8. See FEINBERG, *supra* note 1, at 36.

9. E.g. Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

10. On the reasons why some deceptive conduct is subject to criminal (or other legal) sanctions, and some is not, see Rob Atkinson, *Lucifer’s Fiasco: Lawyers, Liars, and L’Affair Lewinsky*, 68 FORDHAM L. REV. 567, 596-7 (1999) (“[T]he law of defamation punishes intentional falsehoods that injure someone’s reputation, and the law of fraud penalizes false inducements that deprive people of their property. . . . Perjury, lying under oath in a judicial proceeding, is illegal for fairly obvious reasons. In liberal regimes, a fundamental purpose of trials is to discover truth, so that law can be justly applied to the facts of the case.”).

11. I have previously described the difference between the two concepts in Green, *supra* note 9, at 1549-52.

different dynamic. When *A* merely misleads *B*, *A* invites *B* to believe something that is false by saying something that is either true or has no truth value.¹² Any mistaken belief that *B* may draw from *A*'s misleading statement is, at least in part, *B*'s responsibility, and (other things being equal) *A* should be regarded as less fully culpable than if she had lied. This postulate, which I refer to as the principle of *caveat auditor*, or "listener beware," helps to explain much about the differences between lying and other forms of deception.

"Falsely denying" refers to a separate moral category, which involves both lying and non-lying deception that occurs in the context of a person's falsely denying some prior accusation of wrongdoing. My claim here is that deception of this sort is associated with a defensive "right of self-preservation," and that, as a result, will frequently be viewed as morally "excused," even if not typically "justified."

Part II shows how the moral concepts of lying, misleading, and falsely denying correspond, respectively, to the legal concepts of perjury, fraud, and "exculpatory noes." The parallel between lying and perjury is demonstrated most dramatically by the requirement—expressed by the Supreme Court's much-maligned opinion in *Bronston v. United States*¹³—that perjury involve "literal falsity." I defend the supposedly rigid rule laid down in *Bronston* by demonstrating its consistency with our intuitions regarding the relatively rigid formal structure and moral content of lying.

I then turn to the relationship between deception and the fraud offenses. At early common law, the only kind of fraud that was criminalized was the narrowly defined offense of false weights and measures—against which ordinary prudence was considered insufficient to defend. All other business transactions were subject to a broad rule of *caveat emptor*. As commercial relations became increasingly complex, however, the rule of *caveat emptor* could not hold. The definition of what counted as criminal fraud in newer common law offenses such as false pretenses and forgery became increasingly flexible. In short, the paradigm of "lying" began to be replaced by the paradigm of "misleading." Today, the definition of what constitutes deception in offenses like mail fraud, securities fraud, and the Model Penal Code's theft by deception exhibits a much more flexible formal structure and moral content than ever could have been anticipated at common law.

12. For example, imagine that *A* was in New York continually from January 1-4. If *B* asks *A* whether she was in New York on January 3, and *A* answers, "no, I was not in New York on January 3," *A* has lied. But if *A* answers, "well, I was in New York on January 1," *A* has led *B* into believing that she (*A*) was not in New York on January 3, but she has not lied.

13. 409 U.S. 352 (1973).

The third parallel between the moral and the legal is that between falsely denying and “exculpatory noes.” Prior to its recent repudiation by the Supreme Court in *Brogan v. United States*,¹⁴ the exculpatory no doctrine served as a defense in an important class of prosecutions for false statements under 18 U.S.C. § 1001. I argue that the pre-*Brogan* persistence of the exculpatory no doctrine in the lower federal courts—notwithstanding the lack of substantial statutory or constitutional support for it—reflects the same right of “self preservation” that underlies our moral attitudes towards false denials.

In Part III of the article, I apply the moral and legal analysis developed earlier to what is surely the most intriguing case of deception in recent memory: namely, the Clinton sex-perjury scandal, viewed now from the distance of more than two years.¹⁵ Through the examination of five representative statements alleged by Independent Counsel Kenneth Starr to be perjurious, I evaluate the argument made by Clinton and his attorneys that, no matter how misleading such testimony might have been, it did not constitute perjury. I conclude that, while some of Clinton’s testimony undoubtedly *was* literally false (and therefore likely to be perjurious), a good deal of it—including some of his most notorious circumlocutions—probably did not meet the legal definition of perjury.

14. 522 U.S. 398 (1998).

15. I quote from Richard Posner’s concise summary of the affair:

The year-long political, legal, constitutional, and cultural struggle that began on January 21, 1998, when the world learned that Independent Counsel Kenneth Starr was investigating charges that President Clinton had committed perjury and other crimes of obstruction of justice . . . in an effort to conceal a sexual affair with a young White House worker named Monica Lewinsky, is the most riveting chapter of recent American history. The investigation culminated on December 19, 1998, in the impeachment of President Clinton by the House of Representatives for perjury before a grand jury and for obstruction of justice. . . . On January 7, 1999, the Senate trial of President Clinton began. Truncated and anticlimactic—indeed, a parody of legal justice—the trial ended on February 12, with the President’s acquittal.

RICHARD POSNER, *AN AFFAIR OF STATE* 1-2 (1999) (footnotes omitted). Nearly two years later, on the eve of his final day in office, President Clinton entered into an agreement with Starr’s successor, Robert W. Ray, under which he would avoid the possibility of indictment in exchange for admitting that “certain of [his] responses to questions about Ms. Lewinsky were false,” and agreeing to surrender his law license for a period of five years. Neil A. Lewis, *Exiting Job, Clinton Accepts Immunity Deal: Admits Testimony Was False—Long Legal Fight Ends*, N.Y. TIMES, Jan. 20, 2001, at A1. According to Clinton’s statement, “I tried to walk a fine line between acting lawfully and testifying falsely, but I now recognize that I did not fully accomplish this goal. . . .” *Statements of Clinton and Prosecutor and Excerpts from News Conference*, N.Y. TIMES, Jan. 20, 2001, at A14. Clinton’s eleventh hour statement did not, of course, identify *which* of his responses were false.

I then ask how Clinton could have survived the Lewinsky ordeal with such remarkably high approval ratings. While not disputing any of the conventional theories that have been offered (including the crucial point that the Starr investigation involved essentially *private* matters), I consider instead two theoretically deeper explanations. The first is that the public was able to intuit the moral difference between lying and merely misleading and that it was able to assess Clinton's statements in light of that distinction. The second is that many of Clinton's apparent falsehoods came in the form of false denials made "defensively," in response to specific questions put to him, rather than "offensively," on his own initiative. The public, I argue, is much less likely to forgive the second kind of denial than the first—a point that is as relevant to our assessment of Clinton's denials during the Lewinsky affair as it may turn out to be to our assessment of his most recent denial of wrongdoing (made on the February 18, 2001 Op-Ed page of the *New York Times*) — namely, that "there was absolutely no quid pro quo" in his pardon of fugitive financier Marc Rich.¹⁶

I. Lying, Misleading, and Falsely Denying

Like many distinctions we make in our everyday moral thinking and discourse, the distinctions we make among the concepts of lying, misleading, and falsely denying are far from sharp. Nevertheless, these concepts are widely used, easily recognized, and generally understood. There are good reasons for thinking that the distinctions among them are based on genuine moral differences.

A. Conceptual Differences Between Lying and Other Forms of Deception

For purposes of this article, I shall use the term "deception" to refer generally to the communication of a message with which the communicator, in communicating, intends to mislead—that is, the communication of a message that is intended to cause a person to believe something that is untrue.¹⁷ A few points about this definition are worth making.

16. William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. TIMES, Feb. 18, 2001, § 4, at 13. ("The suggestion that I granted the pardons because Mr. Rich's former wife, Denise, made political contributions and contributed to the Clinton library foundation is utterly false. There was absolutely no quid pro quo.")

17. I have written previously about the concept of deception in Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY 1087 (2000), and *Deception*, in READER'S GUIDE TO THE SOCIAL SCIENCES (Jonathan Michie ed., 2001). My *Reader's Guide* article offers an interdisciplinary survey of the literature on deception. Two wide-ranging works on deception published since that article appeared, which deserve mention here, are JEREMY CAMPBELL, *THE LIAR'S TALE: A HISTORY OF FALSEHOOD* (2001) and EVELIN

The first is that there is no deception unless the communicator intends to deceive. Untrue statements made by mistake are not deceptive, although they might cause a listener to be misled. For example, if Bill mistakenly tells Hillary that he was at home in Chappaqua on the night of February 3, when in fact he was in New York City, Bill might cause Hillary to be misled, but he has not deceived her. Second, there is no requirement that the message itself be untrue, since "literally true" statements (a concept that is discussed below) can obviously be deceptive. For example, if Bill is asked where he was on the night of February 3 and says he was "either in Chappaqua or in the City," while knowing for certain that he was in the City, he has deceived his questioner into believing that he is unsure about his whereabouts on that night, even though his statement is in fact true. Third, deception can come in a variety of different forms. One can deceive by making a statement, asking a question, issuing a command, stating an opinion, displaying a picture, making a facial expression or gesture, or engaging in various other forms of verbal and non-verbal behavior. Kant gives a famous example: *A* deceives *B* into believing that he is headed on a journey by conspicuously packing a suitcase, and hoping that *B* will draw the intended conclusion.¹⁸

Lying constitutes a subset of deception, involving a much narrower range of behavior. As generally used, the term *lying* refers to (intentional) deception that (1) comes in the form of a verifiable assertion, and (2) is "literally false." By verifiable assertion, I refer to a statement that has a determinable truth value (i.e., is either true or false, although its truth value may not be known at the time the assertion is made).¹⁹ Because they have no truth value, questions, commands, statements of opinion, greetings, apologies, christenings, and so forth are not capable of being lies, although they can certainly

SULLIVAN, *THE CONCISE BOOK OF LYING* (2001). For additional analysis of the definition of deception (and lying), see David Simpson, *Lying, Liars and Language*, 52 PHIL. AND PHENOMENOLOGICAL RESEARCH 623, 623 (1992) (deception "occurs when some organism believes it is in situation A, whereas in fact it is in situation B, and this belief or action may arise at least partly due to the action of some other organism"); Frederick A. Siegler, *Lying*, 3 AM. PHIL. Q. 128 (1966); Raphael Demos, *Lying to Oneself*, 57 J. PHIL. 588 (1960); Thomas L. Carson, *On the Definition of Lying: A Reply to Jones and Revisions*, 7 J. BUS. ETHICS 509 (1988); D.S. Mannison, *Lying and Lies*, 47 AUSTRALASIAN J. PHIL. 132 (1969).

18. IMMANUEL KANT, *LECTURES ON ETHICS* 226 (Louis Infield trans., 1963).

19. This definition is adapted from Jill Humphries, *The Logic of Assertion and Pragmatic Inconsistency*, 3 CAN. J. PHIL. 177, 179 (1973). For more on the theory of assertion, see Nathan U. Salmon, *Assertion and Incomplete Definite Descriptions*, 42 PHIL. STUD. 37 (1982).

be misleading.²⁰ The same is true of deceptive nonverbal acts like Kant's bag packer packing his luggage.²¹

What does it mean for a statement to be "literally false"? "Assuming that a sentence is not ambiguous, [its] literal meaning is derived, roughly speaking, by determining the meaning of the individual words . . . and applying the grammatical rules of the language to those words."²² The "literal meaning" of the sentence is to be distinguished from what the speaker intends by the sentence when she utters it.²³ A statement that is literally false is thus one that is false on its face, without reference to the speaker's meaning. For example, the statement "in the final days of his term, President Clinton pardoned convicted financier Michael Milken," is a literally false statement, even if the speaker has confused Marc Rich with Michael Milken and has intended to refer to the former.

The difference between lying and non-lying verbal deception (which I shall henceforth refer to simply as "misleading") is, therefore, essentially the difference between (1) asserting what one believes is literally false, and (2) leading the listener to believe something false by saying something that is either true or has no truth value.²⁴ For example, if Bill knows that he was in New York City on the night of February 3, but tells Hillary that he was "either in the City or Chappaqua," Bill has deceived Hillary by leading her to believe that he either doesn't know or is uncertain about where he was on that night. He has, in Evelin Sullivan's phrase, led Hillary "down the garden path"²⁵; he has been deceptive, but he has not lied, because his statement is literally true; he has "asserted too much."²⁶ Similarly, a person might deceive by "asserting too little." Imagine that Bill is asked by Hillary whether he was in New York City last week. If Bill was in fact in the City every day last week, but answers, "well, I *was* in the City on Thursday of last week," he has misled

20. The classic analysis of the way in which such utterances function in our communication is J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 5-6 (1962).

21. On the other hand, it should be noted that a lie need not involve an utterance. One can lie, for example, by nodding or shaking one's head in response to a question, using sign language, sending smoke signals, or making other gestures. Roderick M. Chisholm & Thomas D. Feehan, *The Intent to Deceive*, 74 J. PHIL. 143, 149 (1977). One can even lie by remaining silent in the face of certain kinds of questions. See discussion *infra* note 136.

22. Peter Meijes Tiersma, *The Language of Perjury: "Literal Truth," Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 379-80 (1990).

23. *Id.* at 380 n.18.

24. Cf. Jonathan E. Adler, *Lying, Deceiving, or Falsely Implicating*, 94 J. PHIL. 435, 437 (1997).

25. SULLIVAN, *supra* note 17, at 81.

26. See Mannison, *supra* note 17, at 132.

Hillary into believing that he was in the City only one day last week, but he has not lied, since he was, in fact, in the City on Thursday.²⁷

B. Caveat Auditor: The Moral Distinction Between Lying and Merely Misleading

Assuming a formal distinction between lying and merely misleading, we need next to ask whether there exists any *moral* difference between the two concepts.²⁸ Imagine that Bill, who was in Chappaqua from February 1-5, is asked about his whereabouts on February 3. Is there really any moral difference between his responding, “no, I was not in Chappaqua on February 3” (a lie), and the statement, “well, I *was* in Chappaqua on February 4” (a literally true statement that nevertheless creates the misleading impression that he was not in Chappaqua on February 3)? The fact is, people sometimes go to great lengths to avoid not only telling the truth, but also to avoid lying. If lying and merely misleading were morally equivalent, such behavior would be irrational. How can it be explained?

My claim is that, other things being equal,²⁹ merely misleading is less wrongful than lying because what I call the principle of *caveat auditor*, or “listener beware,” applies to merely misleading but does not apply to lying. Like the principle of *caveat emptor*, which says that a buyer is responsible for assessing the quality of a purchase before buying,³⁰ the principle of *caveat auditor* says that, in certain circumstances, a listener is responsible for ascertaining that a statement is true before believing it.³¹

27. For further discussion of the concept of literal truth and the particular problem of “baldly understated” responses to quantitative inquiries, see *infra* notes 177-81 and accompanying text.

28. For purposes of this discussion, I will not attempt to explain why deception itself is morally wrongful. Rather, I assume that it is, and inquire only into the differences between the moral status of lying and merely misleading. On the moral aspects of deception more generally, see, for example, SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978); CHARLES FRIED, *RIGHT AND WRONG* 54-78 (1978); Jane S. Zembaty, *Aristotle on Lying*, 31 *J. HIST. PHIL.* 7 (1993); Joseph Kupfer, *The Moral Presumption Against Lying*, 36 *REV. METAPHYSICS* 103 (1982); Neil MacCormick, *What is Wrong with Deceit*, *SYDNEY L. REV.* 5 (1982).

29. By restricting the claim in this manner, my intention is to anticipate the obvious objection that some lies, about relatively trivial subjects, are less morally wrongful than non-lying deception concerning more serious matters. In addition, I defer until later, see *infra* notes 37-44 and accompanying text, discussion of cases in which deception might be justified or excused.

30. The doctrine of *caveat emptor* is discussed *infra* note 90 and accompanying text, in connection with the development of English theft law.

31. The principle of *caveat auditor* also bears analogy to the tort law doctrine of comparative negligence, under which damages are apportioned between injurer and victim according to the parties' relative fault in bringing about harm. See, e.g., John G. Fleming,

Lying involves the creation, and simultaneous breach, of a relationship of trust between a speaker and listener. As Charles Fried has put it:

Lying is wrong because when I lie I set up a relation which is essentially exploitative. . . . Lying violates respect and is wrong, as is any breach of trust. Every lie is a broken promise [which] is made and broken at the same moment. Every lie necessarily implies—*as does every assertion*—an assurance, a warranty of its truth.³²

By making an assertion to *B*, *A* tells *B* that she herself believes what she is saying. As a result, *B* is justified in putting her faith in *A*; *B* need not be on her guard or question *A*'s veracity. If *A* is mistaken about her assertion, then she is wholly responsible for *B*'s false belief. And if *A*'s untrue statement has been intentional, it is *A* who is wholly to blame.

Merely misleading involves a very different dynamic. When *A* merely misleads *B* without making an assertion, she has not told *B* that she believes what she is saying is true (since what she is saying is neither true nor false). There is thus no warranty of truth that *B* could rely on.³³ Again, Kant's bag packer provides a good example. If the bag packer lies and asserts that he is going on vacation, then he will be wholly responsible for the spectator's false belief. But if the bag packer merely acts as if he is going on vacation, and his spectator draws the wrong conclusion from those actions, then the spectator will be partly responsible for his mistaken belief. The underlying idea, as explained by Jonathan Adler, is "that each individual is a rational, autonomous being and so fully responsible for the inferences

Foreword: Comparative Negligence at Last—By Judicial Choice, 64 CAL. L. REV. 239 (1976); William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978). See also *infra* note 90.

32. FRIED, *supra* note 28, at 67; see also MacCormick, *supra* note 28, at 8 (describing lying as "special case of deceit," which presupposes some "neighbourly" relationship between the liar and the person deceived).

33. Several philosophers have attempted to explain the moral difference between lying and non-lying deception in terms of rights and duties. See, e.g., Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers*, in 16 THE TANNER LECTURES 309, 337 (1995) (presenting Kant's view that "my duty is to assert only what is true and that the mistaken inferences that others may draw from what I say or what I do are, in some cases at least, not my responsibility, but theirs"); Chisholm & Feehan, *supra* note 21, at 149, 153 (in telling a lie, "the liar 'gives an indication that he is expressing his own opinion.' And he does this in a special way—by getting his victim to place his faith in him"; "[I]f a person *L* asserts a proposition *p* to another person *D*, then *D* has the right to expect that *L* himself believes *p*. And it is assumed that *L* knows, or at least that he ought to know, that, if he asserts *p* to *D*, while believing himself that *p* is not true, then he violates this right of *D*'s. But analogous assumptions are not made with respect to all other types of intended deception."). Although I would prefer to avoid talk of rights and duties in this context, such talk may ultimately be unavoidable in attempting to construct a full analytical account.

he draws, just as he is for his acts. It is deception, but not lies, that requires mistaken inferences and so the hearer's responsibility."³⁴

Lying and merely misleading can also be distinguished on the grounds that each tends to elicit a different set of reactive emotions, and cause a different set of harms, in its victims.³⁵ A victim who is deceived by a non-lie feels foolish and embarrassed, presumably because he believes he has contributed to his own harm by drawing unwarranted inferences from misleading premises. By contrast, a victim of lies is much more likely to feel "brutalized" (in Adler's

34. Adler, *supra* note 24, at 444. Traditional Jewish and Christian ethics both recognize the moral distinction between lying and merely misleading. On the former, see NACHUM AMSEL, *Truth and Lying*, in THE JEWISH ENCYCLOPEDIA OF MORAL AND ETHICAL ISSUES 295 (1994):

[In certain situations, an] out-and-out lie is forbidden, but if it is an ambiguous statement that can be construed as a partial truth, it is permitted. For example, when Samuel said he was coming to sacrifice animals [1 *Samuel* 16:7], that was indeed true, but it was not the entire truth, since it was a purpose of his trip (he did indeed sacrifice animals) but not *the main* purpose of the trip. . . . This is similar to the case of the bride. The final ruling is like Beit Hillel, that we must say to every bride that she is beautiful. This, too, is not a complete lie since every bride, no matter how ugly, is indeed beautiful – to her groom. Also, beauty need not reflect physical beauty, but might mean a beautiful personality, as in the expression a "beautiful person."

See also JOSEPH TELUSHKIN, *JEWISH WISDOM: ETHICAL, SPIRITUAL, AND HISTORICAL LESSONS FROM THE GREAT WORKS AND THINKERS* 58-64 (1994) (surveying Jewish approach to question of justified lying and deception).

The Jesuits, moreover, seem to have espoused an even more aggressive doctrine of permissible non-lying deception, or equivocation. See LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 29 (1996) (quoting BLAISE PASCAL, *THE PROVINCIAL LETTERS* 140 (A.J. Krailsheimer trans., 1967) ("One of the most embarrassing problems is how to avoid lying, especially when one would like people to believe something untrue. This is where our doctrine of equivocation is marvelously helpful, for it allows one to use ambiguous terms, conveying a different meaning to the hearer from that in which one understands them himself.")). For a contrary view—i.e., that the form of deception is irrelevant to its moral content, see T.M. SCANLON, *WHAT WE OWE EACH OTHER* 317-22 (1998).

It should be emphasized, however, that simply because a distinction between lying and non-lying deception can be found in some Jewish and Catholic sources does not mean that the distinction is universally recognized, or that non-lying deception is generally condoned. Indeed, the traditional Yiddish proverb that "a half truth is a full lie" would seem to indicate a rejection of precisely the distinction that I have been seeking to draw. More importantly, it should be stressed that both Jewish and Catholic authorities place a very high value on truth-telling, and that they would permit deception only in the narrowest of circumstances. On the Jewish approach to deception more generally, see AMSEL, *supra* at 291-96. On the Catholic approach, see SULLIVAN, *supra* note 17, at 77-80 (Jesuit doctrine of "equivocation" applies only when such deception is otherwise justified—for example, in order to avoid religious persecution). For more on the ethics of lying and deception in Christian thought, see *infra* notes 48 & 66.

35. I have previously discussed the role of the reactive emotions in making moral evaluations in Green, *supra* note 9, at 1594-98.

word) by some external force. What one feels when discovering one has been lied to is much like what one feels when one is subjected to threats or coercion.³⁶ Moreover, lying and merely misleading feel different not only to the victim, but also evoke different reactions in the *perpetrator*. One who lies is likely to feel a different degree, or at least different kind, of guilt than one who merely misleads. The non-lying deceiver will be much more able to rationalize his conduct than the liar—a fact that may explain why people go to such considerable lengths to avoid the need to lie.

In arguing that lying is distinguishable from other forms of deception, I do not of course mean to suggest either that lying is always wrong or that lying is always worse than other forms of deception. A lie told to avoid some greater harm is not likely to be viewed as wrongful. And non-lying deception about a matter of real importance will be viewed as more wrongful than an outright lie about some trivial concern. Moreover, in some unusual cases, a “bald-faced” lie may actually seem less objectionable than other forms of deception—with all of their subterfuges, dissembling, and pretense. At this point, my claim is simply that there are real and articulable differences in moral content between lying and other forms of deception, and that, *ceteris paribus*, lying is more wrongful than merely misleading.

C. The Special Moral Status of Falsely Denying

Having distinguished in the foregoing section between lies and other forms of deception, I now want to introduce an additional moral category, which I refer to as “falsely denying.” My contention here is that we accord a distinct moral status to lies and other forms of deception that occur when a person falsely denies an accusation of wrongdoing. In particular, I want to suggest that, in some cases, we regard the false denial of accusations as morally “excused.”

(1) Deception, Justification, and Excuse

In order to understand the special moral status of falsely denying, we need first to consider the familiar distinction between justification and excuse. Conduct that is justified is conduct that is right and good, or at least not wrong. Conduct that is excused, though itself morally wrong, is conduct for which the perpetrator should not be punished or blamed.³⁷ Thus, to say that a lie or other act of deception is justified is to say that it was the right thing to do in

36. Adler, *supra* note 24, at 435.

37. The classic discussion of excuse is J.L. AUSTIN, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 123 (1961).

a given instance. To say that an act of deception is excused is to say that, though the act was bad, the deceiver should not be blamed for it.

Under what circumstances might a lie or other deception be justified? Much of the literature on lying and deception deals with just this issue.³⁸ While almost everyone (save a Kantian) would agree that it is permissible to lie to protect an innocent human life, there is a wide range of opinion on questions such as whether and when it is justifiable for doctors to lie to their patients, political leaders to lie to their constituents, and parents to lie to their children.³⁹ Among legal scholars, there has been particular concern with the circumstances, if any, under which it is permissible for lawyers and police officers to lie in the exercise of their duties.⁴⁰ In addition, many people would agree that it is permissible to engage in certain kinds of trivial or white lies when such deception will serve, say, to avoid giving offense to others or to maintain good social relations.⁴¹

The generally accepted consequentialist principle seems to be that it is permissible to lie or deceive in order to prevent some greater

38. See, e.g., BOK, *supra* note 28; Robert N. Van Wyk, *When is Lying Morally Permissible? Casuistical Reflections on the Game Analogy, Self-Defense, Social Contract Ethics, and Ideals*, 24 J. VALUE INQUIRY 155 (1990); Robert C. Solomon, *Is it Ever Right to Lie? The Philosophy of Deception*, CHRON. HIGHER ED., Feb. 27, 1998, at A60.

39. See, e.g., BOK, *supra* note 28; MacIntyre, *supra* note 33, at 318-23 (discussing the wide range of commonly held attitudes about when lying is permissible); Daniel Q. Haney, *Study: Doctors Often Dishonest with the Dying*, BATON ROUGE ADVOC., May 21, 2000, at B1.

Kant seems to have taken the famously categorical view that lying is never justified, even to save an innocent life. See Immanuel Kant, *On the Supposed Right to Lie from Altruistic Motives*, in ETHICS 280 (Peter Singer ed., 1994). Perhaps Kant's unusually hard line on lying may help explain his desire to distinguish lies from merely misleading, referred to *supra* note 18. For more on Kant's theory of lying, see Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 PHIL. & PUB. AFFAIRS 325 (Fall 1986); FRIED, *supra* note 28, at 69-78.

40. On lying by lawyers, see, for example, DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1 (1987); William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433 (1999); Alan Strudler, *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529, 1537-42 (1998); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1223 (1990); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926. On lying by police, see, for example, Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997).

41. Your son wants to know what you thought of his violin solo, your mother-in-law asks your opinion of her new meatloaf recipe, your spouse asks what you think of his or her new outfit. Sometimes, in situations like these, the right thing to do is to lie. Such lies can serve as an element of tact or politeness that helps people to maintain good social relations with family, friends, and colleagues. For the Jewish view of white lies, see AMSEL, *supra* note 34, at 293-96. BOK, *supra* note 28, at 60-76, however, is quite critical of society's tolerance for white lies.

harm from occurring. At the same time, however, we recognize the strong deontological pull of the rule against lying. The problem of justified lies stems from the clash between these two inconsistent modes of moral thinking.⁴² In any event, the claim in these cases is typically that the person who lies or deceives has done the right thing—i.e., that he is justified in his action. Many writers have argued that, despite the prima facie rule against it, an individual is morally permitted—even required—to use deception when doing so could prevent some greater harm.⁴³

The contention that a lie is *excused* (rather than justified) takes a quite different form. Imagine that *A*, while having a gun held to his head by *B*, is forced to lie to *C*, who is on the other end of the telephone. *A* has done something wrongful; he has misled *C*, and he has done so intentionally; he has acted unjustifiably. But *A* has acted under duress. Though *A*'s act itself was wrongful, most of us would agree that he should not be blamed for it—that *A*'s conduct, in other words, should be excused.⁴⁴

42. I have dealt previously with the conflict between deontological and consequentialist thinking in Stuart P. Green, *The Challenge of Harmless Error*, 59 LA. L. REV. 1101, 1101-02 (1999) (symposium foreword).

43. See sources cited *supra* note 38-43.

44. As a matter of criminal law, duress can serve as a defense only if the defendant reasonably feared *immediate* death or serious bodily injury which could be avoided only by committing the criminal act charged. In perjury cases, where the crime is generally committed in the relative safety of a courtroom, it is difficult to satisfy the requirement that the danger to the defendant be present, imminent, impending, or unavoidable. As a result, the defense of duress or coercion is usually ineffective in cases of perjury. See, e.g., *Hall v. State*, 187 So. 392, 408 (Fla. 1939) (jury charge requiring that, for coercion, danger must be real, present, imminent, and unavoidable); *Bain v. State*, 7 So. 408 (Miss. 1890); *Hardin v. State*, 211 S.W. 233, 237 (Tex. Crim. App. 1919); *People v. Ricker*, 262 N.E. 2d 456, 460 (Ill. 1970) (threat to perjurer was not sufficiently imminent); *United States v. Nickels*, 502 F.2d 1173 (7th Cir. 1974); *Edwards v. State*, 577 P.2d 1380, 1384 (Wyo. 1978).

One exception is *People v. Richter*, 221 N.W.2d 429 (Mich. Ct. App. 1974). Defendant Richter's cousin, Cook, escaped from prison with Richter's assistance. The day after his escape, Cook threatened to kill either defendant or her daughter if they divulged any information concerning the escape. A grand jury was convened to investigate the escape. Under oath, the defendant denied having seen or aided Cook. At her subsequent trial for perjury, defendant admitted that she had lied, but maintained that she had done so under duress. The trial court held that, because three weeks had elapsed between the time of the threat and the time of the testimony, the threat was not sufficiently contemporaneous to create a legal defense to the crime charged. The appellate court disagreed and reversed the conviction. The court said:

what constitutes present, immediate, and impending compulsion depends on the circumstances of each case. . . . Cook told defendant that if he was unable to kill her, his friends would. The fact that Cook was convicted later not only of first-degree murder but conspiracy to commit murder offers some indication that this was more than an idle threat. Given this threat, a jury might find that the compulsion under which defendant operated was present, immediate, and impending and fostered a well-grounded apprehension of death or serious bodily

(2) *The Morality of False Denials*

Most people would agree that it is a virtue to accept responsibility for one's wrongdoing. We teach our children that it is better to admit to a wrongful act than to cover it up by lying; indeed, one of our great national myths is that of George Washington and the cherry tree.⁴⁵ Most religious thought, as well, regards repentance as a centrally important concept and practice.⁴⁶ Even in our criminal justice system, we put considerable value on the role of contrition and remorse, recognizing that they serve important moral, social, and psychological ends.⁴⁷

Nevertheless, the fact is that people often do fail to accept responsibility for their wrongful acts. Sometimes they do so by remaining silent. Other times they do so by falsely denying the accusations that are made against them or by engaging in acts of deception to avoid detection. Imagine that *B* asks *A* about some wrongdoing in which *A* has engaged, and *A* responds with a false denial. How should we judge *A*'s conduct? The answer is not likely to be simple: it will depend on a wide range of complex factors, including the circumstances of *A*'s wrongdoing, the nature of the relationship between *A* and *B*, the form of *A*'s denial, the consequences of his denial, and, perhaps, the basis for *B*'s suspicion.⁴⁸

injury.

Id. at 432. See also *State v. Rosillo*, 282 N.W.2d 872, 874 (Minn. 1979) (defendant could establish coercion defense to charges of perjury where he "fear[ed] a shot through a courthouse window").

45. MASON L. WEEMS, *THE LIFE OF WASHINGTON* 11-12 (Belknap, 1962) (1800). See also Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 680 (1968) ("No parent would teach [a doctrine of self-incrimination] to his children; the lesson parents teach is that while a misdeed . . . will generally be forgiven, a failure to make a clean breast of it will not be.").

46. Of course, different religions understand the role of repentance in different ways. Compare *Luke 15* (Christian parable of Prodigal Son) with ABRAHAM ISAAC KOOK, *RABBI KOOK'S PHILOSOPHY OF REPENTANCE* (Alter B. Metzger trans., 1968) (expounding a Jewish philosophy of *teshuvah*).

47. See, e.g., Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999); Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507 (1997).

48. There is support for such an ad hoc approach, interestingly, in the Roman Catholic Catechism. See *CATECHISM OF THE CATHOLIC CHURCH* 596 (Libreria Editrice Vaticana trans., 1994) (catechism on Eighth Commandment, "Thou shalt not bear false witness against thy neighbor") (emphasis modified):

2488. The *right to the communication of the truth* is not unconditional. Everyone must conform his life to the Gospel precept of fraternal love. This requires us in concrete situations to judge whether or not it is appropriate to reveal the truth to someone who asks for it.

2489. Charity and respect for the truth should dictate the response to every request for information or communication. The good and safety of others,

We can envision a small number of cases in which *A*'s false denial might actually be justified.⁴⁹ More often, though, *A*'s denial is likely to be unjustified, particularly if: (1) *A*'s prior wrongdoing was harmful, (2) *B* has a relationship of trust with *A*, (3) *A* could easily and without adverse consequences remain silent, or (4) exposure of *A*'s wrongful conduct might help alleviate some additional harm to a victim or facilitate some good, such as restitution.

Nevertheless, the fact that *A*'s conduct is unjustified does not necessarily mean that it should not be excused. Although we admire people who take responsibility for their wrongful acts, we are nevertheless sympathetic to those who not only fail to do the virtuous thing but actually compound their wrongdoing by attempting to conceal it.

The basis for this moral sentiment, I believe, is an implicit recognition of the right to self-preservation—a right not to cooperate with those who would seek to bring adverse consequences against oneself. Kent Greenawalt has referred to it as “a basic right to avoid very destructive consequences to [oneself] even if submission would serve the welfare of others.”⁵⁰ Although often associated with a narrow constitutional right “of silence,” the right of self-preservation is better understood as linked to a broader right against self-incrimination.⁵¹ That the right to self-preservation might include a right to falsely deny seems particularly plausible in cases in which remaining silent in the face of accusatory questioning would be

respect for privacy, and the common good are sufficient reasons for being silent about what ought not be known or for making use of a discreet language. The duty to avoid scandal often commands strict discretion. No one is bound to reveal the truth to someone who does not have the right to know it.

(Thanks to my colleague, Robert Pascal, for bringing this text to my attention.)

49. For example, imagine that: (1) *A* has engaged in some form of harmless or minor wrongdoing, (2) *A* is asked about his conduct by *B*, a busybody neighbor with whom *A* has only a fleeting acquaintance, (3) if *A* were to respond to *B*'s questions about his conduct by refusing to answer or by telling *B* that it is none of his business, *A*'s response would be construed as an admission of guilt and would be broadcast in *A*'s community, and (4) exposure of *A*'s wrongful conduct would cause harm to *A* or to *A*'s family or community.

50. R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 29 (1981). The *locus classicus* concerning the right of self-preservation is THOMAS HOBBS, *LEVIATHAN*, ch. 14 (Michael Oakeshott ed., 1955).

51. On the moral right to self-preservation as it relates to the constitutional right against self-incrimination, see David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986); Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627 (1999); Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1254 (1988).

tantamount to admitting guilt.⁵² Indeed, to limit the right against self-incrimination to the right to remain silent *simpliciter* would be akin to saying that the right to life is a wholly passive right and does not entail the right to use force, actively, in its defense.⁵³ Thus, in Continental criminal practice, parties to a lawsuit were exempt from prosecution for perjury on precisely these grounds.⁵⁴

Lest I be misunderstood, however, let me reiterate that I am not contending that it is good that people fail to accept responsibility for their wrongdoing, or that contrition and remorse do not serve important ends. I would regard either contention as perverse. Nor, of course, am I suggesting that the self-incrimination clause of the Fifth Amendment gives one the legal right to lie in one's defense. My purpose has been merely to suggest that we tend to view the false denial of accusations as morally distinct from other kinds of unjustified deception, and to offer an account of why that might be.

II. Distinguishing Between "Lying" Crimes and "Misleading" Crimes

Having examined an array of key moral categories in the last section, we turn now to a corresponding collection of legal categories. The first category (the "lying crimes") tracks the moral category of lying described above, and consists of perjury and false declarations. The second category (the "misleading crimes") parallels the moral notion of merely misleading, and comprises fraud, false pretenses, forgery and counterfeiting, common law cheat, and larceny by trick. We shall also have occasion to talk about a third, "hybrid" category of crimes, which reflects attributes of both lying and misleading. The most significant of these is the crime of making "false statements," found in 18 U.S.C. § 1001 and a host of kindred statutes.

We can identify two basic distinctions between lying and misleading crimes. The first is that lying crimes (such as perjury) typically involve deception intended to obstruct the administration of

52. Although in the formal context of court proceedings jurors are instructed not to make adverse inferences from a defendant's exercise of the right to remain silent, see *James v. Kentucky*, 466 U.S. 341 (1984), the fact is that, in our normal social dealings, one who remains silent in the face of an accusation often is presumed to be guilty.

53. I have previously dealt with the moral basis for the right of self-defense in Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 18-24.

54. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 130 (1986) (noting that "civil parties were actually exempt from liability for perjury in a great number of European jurisdictions. To impose on them the duty to tell the truth and thereby to harm their own interests was proclaimed to be inhumane, akin to a form of a moral torture, even though civil parties had also acquired the right to refuse to testify.") (footnote omitted).

justice or government investigation or operations, whereas misleading offenses (such as fraud) generally involve deception aimed at misappropriating money or property. Each group of offenses thus involves a different kind of harm.

The second difference is in the kind of deception involved. Misleading offenses tend to use a flexible, open-ended definition of deception, whereas lying offenses tend to impose more rigid criteria for what constitutes actionable deceit. Moreover, misleading and lying each involve a different kind of moral wrongfulness. My focus in this article is on this second distinction—the differences in the way each group conceptualizes the deception element. I show how the distinctions described in the previous section shape our legal rules, and, to a lesser extent, how these legal rules inform our moral understanding.

A. Lying Crimes: Perjury and False Declarations

As interpreted by the courts, the federal perjury statute requires five basic elements: (1) an oath authorized by a law of the United States; (2) taken before a competent tribunal, officer, or person; and (3) a false statement; (4) willfully made; (5) as to facts material to the hearing.⁵⁵ The closely related crime of false declarations requires that a “false material declaration” be made knowingly, under oath, in a proceeding “before or ancillary to any court or grand jury.”⁵⁶

At common law, perjury was considered one of the most odious of criminal offenses.⁵⁷ Under the Code of Hammurabi, the Roman law, and the medieval law of France, the punishment for bearing false witness was death; in the colony of New York, punishment included branding the letter “P” on the offender’s forehead.⁵⁸ In recent studies of public attitudes toward crime (and putting aside for now the

55. 18 U.S.C. § 1621; *United States v. Debrow*, 346 U.S. 374 (1953).

56. 18 U.S.C. § 1623. The crime of false declarations differs from perjury in that it: (1) can be proved by means of showing inconsistent sworn statements, *see id.* at 1623(c); (2) does not require corroboration through the common law “two witness” and “direct evidence” rules; (3) contains a limited recantation defense, *see United States v. Norris*, 300 U.S. 564 (1937); (4) has a less demanding oath requirement, *see Christoffel v. United States*, 338 U.S. 84 (1949); (5) has a less demanding mens rea requirement; and (6) applies in a narrower range of proceedings, *see Dunn v. United States*, 442 U.S. 100 (1979).

57. Bennet L. Gershman, *The “Perjury Trap,”* 129 U. PA. L. REV. 624, 636 (1981). *See also United States v. Carollo*, 30 F. Supp. 3, 6 (W.D. Mo. 1939) (noting that, for centuries, perjury has been regarded as an offense involving “moral turpitude”—an act that offends the moral code of mankind even in the absence of a prohibitive statute); Comment, *Perjury: the Forgotten Offense*, 65 J. CRIM. L. & CRIMINOLOGY 361, 363 & n.37 (1974).

58. STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION, Legis. Doc. No. 60, 25-26 (1935).

question of public opinion regarding the Clinton case), perjury continues to be viewed as a particularly serious offense.⁵⁹

The reason perjury has been viewed in this manner, I believe, is that it involves an aggregation of several significant forms of moral wrongfulness. First, it involves the breaking of an oath or promise to tell the truth (an element that is absent from both fraud and the offense of false statements). And what is broken is not just any promise but a promise typically invoking God.⁶⁰ Second, as I have suggested elsewhere, the moral wrongfulness of perjury derives in part from the fact that it involves a form of disobedience; in this sense, the moral content of perjury is similar to the moral content of crimes such as contempt, obstruction of justice, bribery, prison escape, tax evasion, and draft dodging.⁶¹

My focus here, however, is on a third kind of moral wrongfulness entailed by the crimes of perjury and false declarations—namely, deception. My contention is that the particular kind of deception required for perjury and false declarations closely parallels the special kind of deception that constitutes “lying” in that it involves the dual requirement of an assertion and a literal falsehood.

(1) *The Requirement of an Assertion*

Perjury and false declarations have consistently been interpreted as requiring an assertion, the truth or falsity of which can be ascertained by relatively uncontroversial methods.⁶² Thus, most

59. See MARVIN WOLFGANG ET AL., U.S. DEPT. OF JUSTICE, NATIONAL SURVEY OF CRIME SEVERITY viii (1985) (“A person knowingly lies under oath during a trial” ranks as more serious than both “three high school boys beat a male classmate with their fists. He requires hospitalization” and “a company pays a bribe to a legislator to vote for a law favoring the company.”). For a discussion of the public’s views regarding former President Clinton’s alleged perjury, see *infra* note 185 and accompanying text.

60. See Gershman, *supra* note 57, at 636 (“Penal sanctions provide temporal punishment; violating an oath suggests ultimate punishment by a supernatural power.”); cf. SULLIVAN, *supra* note 17 (“The oath is a serious matter, not only in the Judeo-Christian but, as we’ll see, in other systems of belief as well, and its violation is doubly serious because it involves not only telling a lie but a false appeal to a higher authority or concept—such as one’s father’s grave—in order to have that lie taken for the truth.”). The word “perjury” itself is derived from the Latin *perjurium*, which refers to the act of invoking a god to bear witness to the truth of a statement although the speaker knew the statement was false.

61. See Green, *supra* note 9, at 1612; see also *United States v. Manfredonia*, 414 F.2d 760, 764 (2d Cir. 1969) (“It is for the wrong done to the courts and the administration of justice that punishment is given” in cases of perjury).

62. The requirement of an assertion also arises in the context of Federal Rule of Evidence 801(c), which defines “hearsay” as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matters asserted.” This rule is meant to apply to direct statements of fact offered to prove the truth of the matter directly stated. See Paul S. Milich, *Re-Examining Hearsay*

expressions of mere belief or opinion cannot constitute perjury.⁶³ (The cases in which the witness states that he holds an opinion or belief that he does not in fact hold constitute an exception: in such cases, the existence or nonexistence of the belief or opinion is itself a matter of material fact that is theoretically capable of verification.)⁶⁴

(2) *The Requirement of Literal Falsity*

Under modern case law, it is clear that a statement constitutes neither perjury nor a false declaration unless it is found to be literally false.⁶⁵ Indeed, as Renaissance scholar Debora Shuger has explained, “[i]t was precisely to give witnesses and defendants a way out of the perjury trap that theologians distinguished between a lie and a misleading or equivocal statement.”⁶⁶

The leading contemporary case is *Bronston v. United States*.⁶⁷ Bronston was president of a movie production company that petitioned for bankruptcy. At a bankruptcy hearing, Bronston was asked, “Do you have any [Swiss bank accounts]?” to which he responded “no”; and “Have you ever?” to which he responded, “The company had an account there for about six months, in Zurich.”⁶⁸ The truth was that Bronston had had Swiss bank accounts for five

Under the Federal Rules: Some Method for the Madness, 39 U. KAN. L. REV. 893, 900 (1991) (discussing various meanings of “assertion”).

63. Among the kinds of testimony that cannot constitute perjury are statements as to beliefs concerning (1) the cause of an accident, *Trullinger v. Dooley*, 266 P. 909 (Ore. 1928); (2) the effect of a contract or instrument, *Goad v. State*, 61 S.W. 79 (Tenn. 1900); and (3) one’s status as a principal or agent, *Harp v. State*, 26 S.W. 714 (Ark. 1894).

64. Annotation, *Statement of Belief or Opinion as Perjury*, 66 A.L.R.2d 791 (1959).

65. See John D. Perovich, Annotation, *Incomplete, Misleading, or Unresponsive but Literally True Statement as Perjury*, 69 A.L.R. 3d 993 (1976). It should be noted, however, that this has not always been the case. At common law, a witness could apparently be prosecuted for perjury if he believed that his sworn statement was false, even if it later turned out to be true. 3 EDUARDO COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 166 (photo. reprint 1986) (1797); 2 SARAH N. WELLING ET AL., *FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO* 215 (1998). Indeed, the literal language of Section 1621, apparently reflecting the common law rule, contains no explicit requirement that the witness’ statement actually be false. Rather, it refers simply to statements that the witness “does not believe to be true.” 18 U.S.C. § 1621.

66. Debora Shuger, *Sins of the Tongue*, SLATE (Sept. 14, 1999), at <http://slate.msn.com/Features/tongue/tongue.asp>. Shuger goes on:

Henry Mason, an Anglican priest writing in the early 17th century, points out that in traditional Protestant and Catholic ethics “if there be just cause for concealing of a truth,” one may use words in a “less known and common signification, and in another meaning than it is likely the hearers will understand them.”

Id.

67. 409 U.S. 352 (1973).

68. *Id.* at 354.

years, but did not have any at the time of the trial, and so his first answer was correct. As for his second answer, had he said “no,” he would have been guilty of perjury. Instead, he gave a literally true answer to a question that had not been asked—namely, whether his *company* had ever had a Swiss bank account—which was misleading as an answer to the question actually asked. In overturning Bronston’s conviction, the Court held that the perjury statute is not meant to apply to: (1) statements that are literally true; (2) statements that are untrue only by “negative implication” (*i.e.*, literally true, but evasive, answers); and (3) literally true but misleading or incomplete answers. Under the Court’s reasoning, although a witness’ testimony might be misleading, it is the responsibility of the questioning lawyer to probe until the truth can be uncovered. If the lawyer fails to do so adequately, the witness is not guilty of perjury.

Like perjury, the crime of false declarations also requires literal falsity.⁶⁹ Consider, for example, the Fourth Circuit’s decision in *United States v. Earp*. During the course of his testimony before a grand jury, defendant, a member of the Ku Klux Klan, was asked whether he had ever burned a cross at the home of an interracial couple. He denied that he had. The truth was that he had *attempted* to burn a cross, but had fled before it was lit. The court, following *Bronston*, reversed his conviction on the grounds that defendant’s testimony, though obviously misleading, was nevertheless literally true, and therefore not perjurious.⁷⁰

The reasoning in each of these literal truth cases is strikingly similar to the argument offered regarding the moral status of lying. Recall that one of the features that distinguishes lying from evasion and related forms of linguistic and non-linguistic non-lying deception is that the latter afford the listener the opportunity for more precise questioning, which bald-faced lies generally do not.⁷¹ This distinction applies *a fortiori* in the courtroom. A lawyer who fails to clarify evasive or nonresponsive statements from a witness bears even more responsibility for improper inferences than does a listener in everyday conversation. As *Bronston* put it:

69. See, e.g., *United States v. Hairston*, 46 F.3d 361, 375 (4th Cir. 1995); *United States v. Reveron Martinez*, 836 F.2d 684, 689 (1st Cir. 1988).

70. *United States v. Earp*, 812 F.2d 917 (4th Cir. 1987). Similar is the Sixth Circuit’s decision in *United States v. Eddy*, 737 F.2d 564 (6th Cir. 1984) (reversing conviction for false declarations in a case in which defendant, who had sought to become a Navy doctor, answered “no” to the question whether he had submitted a “diploma” and “official college transcript” from Ohio State University College of Medicine as proof of his qualifications, because the diploma and transcript submitted by defendant were, in fact, forgeries; defendant’s statement, though misleading, was held to be literally true and therefore not a false declaration).

71. See, e.g., THOMAS HILL, JR., *Autonomy and Benevolent Lies*, in *AUTONOMY AND SELF-RESPECT* 25, 41 (1991).

[I]t 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.⁷²

This is in accordance with the idea that perjury requires lying, and that the witness who makes an evasive or unresponsive, but literally true, statement has not lied, and therefore has not committed perjury.⁷³

Understanding *Bronston* in this manner also helps to explain why the Sixth Circuit was mistaken in its recent opinion in *United States v. DeZarn*, which creates a seemingly significant limitation on

72. *Bronston*, 409 U.S. at 358-59.

73. This is not to say, of course, that it will always be easy to draw a bright line between perjury and non-perjury or lying and other forms of deception. Consider an example given by Peter Tiersma, *supra* note 22, at 392 (suggesting that *Bronston*'s approach to literal truth is too simplistic because it fails to account for the different ways in which a witness' answer might be unresponsive):

Q: Why didn't you come to work yesterday?

A: I was sick.

Suppose that the fact is that I felt wonderful and went fishing, that I drank too much beer during the course of the afternoon, and that by ten o'clock that evening I was sicker than a dog. My statement that I was sick is, of course, literally true, but the hearer will interpret my response . . . as an answer to the question, as I well know and must in actuality have intended or at least allowed. Unless I misunderstood the question, I must have intended my response to induce the hearer to believe that my being sick was relevant to, or the reason for, my not going to work yesterday. Few would dispute that despite the "literal truth" of my response, I communicated something false.

Tiersma then argues that it:

would be extremely problematic to have *Bronston*'s literal truth rule apply to instances such as these. A large part of the rationale underpinning the *Bronston* holding was that when a witness evades, the questioner has the duty to bring that witness back to the mark. But this is impossible in cases of superficial responsiveness, where the questioner cannot be expected to know that the witness is being evasive. It seems evident that if the questioner cannot reasonably determine that a reply is not responsive, the need for further probing cannot be anticipated. As a result, a superficially responsive reply, even though literally truthful, should constitute a false statement.

It seems to me that there are two possible rejoinders to Tiersma. The first is that the notion of literal truth is more complicated than he acknowledges. Whether the statement was literally true can only be determined in the context of the question that was asked. The speaker was saying, in effect, the reason he didn't come to work yesterday was that he was sick. It is far from clear that this statement was in fact literally true. The second is that Tiersma assumes too much when he says that "the questioner cannot be expected to know that the witness is being evasive." In a case in which the reason for the respondent's absence is material, one would expect a competent questioner to ask a number of follow-up questions, such as: "What was the nature of your illness?," and "Was your illness the only reason you didn't come to work yesterday?"

Bronston.⁷⁴ Defendant DeZarn was prosecuted for perjury after being questioned, under oath, by Robert Tripp, a staff member in the office of the Army's Inspector General, regarding DeZarn's connection to alleged violations of the Hatch Act, which prohibits the improper solicitation of government employees (in this case, members of the Kentucky National Guard) in political campaigns. DeZarn had been present at two parties organized around a horse racing theme: a "Preakness Party" in 1990, and a "Belmont Stakes" party in 1991. Only the 1990 party involved any political fund-raising. Although Tripp apparently *meant* to ask DeZarn about the events surrounding the 1990 party, he mistakenly asked him whether there had been any political fundraising activity at the "1991" party. DeZarn, undoubtedly aware of Tripp's mistake, and seizing on the opportunity it created, answered "[a]bsolutely not," he was "not aware" of any fundraising at the party.⁷⁵ In so doing, DeZarn made a literally true, but apparently misleading, statement.

The Court of Appeals—mistakenly, in my view—upheld DeZarn's conviction for perjury, reading the *Bronston* literal truth rule narrowly to apply only when a defendant responds to a question with an *nonresponsive* answer.⁷⁶ Since defendant's answer in this case was responsive, the court viewed it as distinguishable from the nonresponsive (and therefore nonperjurious) answer given in the *Bronston* case.

Why did *DeZarn* read *Bronston* in this narrow way? According to *DeZarn*, unresponsive answers (like those in *Bronston*) are "unique," because they require "speculation" by the fact-finder as to what they imply. As a consequence, unresponsive answers allow no "finding beyond a reasonable doubt that [an] answer is untruthful."⁷⁷ By contrast, *DeZarn* says, "when . . . the answer given is responsive to the question asked and 'it is entirely reasonable to expect a defendant to have understood the terms used in the question,'" the literal truth defense should not apply.⁷⁸

The *DeZarn* opinion has been celebrated as "nudg[ing] federal criminal law closer to everyday morality."⁷⁹ In reality, however, it did

74. 157 F.3d 1042 (6th Cir. 1998).

75. *Id.* at 1045.

76. Recall that *Bronston* responded to the question, "Do you have any bank accounts in Swiss banks" by stating, "the company had an account there for about six months," whereas DeZarn responded to the question, did the 1991 party involve "political fundraising activity," by stating, "absolutely not." *Bronston*'s answer was unresponsive; DeZarn's was not.

77. *DeZarn*, 157 F.3d at 1048.

78. *Id.* (quoting *United States v. Slawik*, 548 F.2d 75, 86 (3d Cir. 1977)).

79. Recent Case, *Criminal Law—Perjury—Sixth Circuit Sustains Perjury Conviction for Answer to Question with Mistaken Premise*—*United States v. DeZarn*, 157 F.3d 1042 (6th Cir. 1998), 112 HARV. L. REV. 1783, 1783 (1999).

just the opposite. By reading the literal truth rule in this restrictive manner, *DeZarn* tends to blur the distinction in everyday morality between lying and merely misleading. If anything, the questioner in *DeZarn* bore even more responsibility for being misled than the questioner in *Bronston*. In *Bronston*, the questioner asked the right question, but failed to seek a follow-up clarification of the answer. In *DeZarn*, the questioner asked the wrong question. A witness who fails to respond to a question the questioner *meant* to ask, instead of the one he did ask, certainly cannot, in any “everyday morality” sense of the term, be said to have lied. Nor should he be said to have committed perjury. *DeZarn* is wrongly decided because the distinction it implies between literally true, *responsive* testimony and literally true, *nonresponsive* testimony is one without any real moral significance.

In light of such difficulties, it should not be surprising that the influence of *DeZarn* has been rather limited. Despite the initial enthusiasm about it expressed in a student *Harvard Law Review* note,⁸⁰ the case has been cited only rarely by the courts,⁸¹ and the distinction between literally true, misleading, and *responsive* testimony, on the one hand, and literally true, misleading, and *non-responsive* testimony, on the other, seems to have had little resonance. In the end, *DeZarn* may turn out to be nothing more than a theoretical dead end.

(3) Responses to Ambiguous Questions

Closely related to—really, an implication of—the literal falsity rule is the principle that ambiguous questions cannot produce perjurious answers. That is, when there is more than one way of understanding the meaning of a question, and the witness has answered truthfully as to his understanding, he cannot be held liable for perjury. The leading case is the District of Columbia District Court’s opinion in *United States v. Lattimore*,⁸² in which a witness was

80. *Id.* The approach in *DeZarn* also seems to have been endorsed in POSNER, *supra* note 15, at 49; Stephen Gillers, *The President’s “Accurate Lies”: The Legal World of Oxymorons*, L.A. TIMES, Aug. 30, 1998, at M1; and Stephen Gillers, *A Time of Trial: From the Same Set of Facts: A Tale of Two Stories*, L.A. TIMES, Jan. 17, 1999, at M1.

81. The case has been cited five times, twice by the Sixth Circuit, and once each by the Third and Seventh Circuits and California Court of Appeals. Twice it has been cited for propositions entirely unrelated to the *Bronston* issue. *United States v. Gatewood*, 173 F.3d 983, 986 (6th Cir. 1999); *United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999). Once it was cited in a case involving a statement that was literally false. *United States v. Radford*, 2001 WL 857192, at *5 (6th Cir. June 19, 2001). In another case, it was cited along with *Bronston* for “comparison.” *United States v. Serafini*, 167 F.3d 812, 822-23 (3d Cir. 1999). In a final case, *DeZarn* was distinguished on its facts. *People v. Bishop*, 2000 WL 520878, at * 34 (Cal. App. Mar. 13, 2000).

82. 127 F. Supp. 405 (D.D.C. 1955).

questioned before a Senate Subcommittee about his ties to the Communist party. The witness was asked whether he was a “follower of the Communist line” and whether he had been a “promoter of Communist interests.” He answered “no” to both questions, and was subsequently indicted for perjury. In dismissing the charges, the court stated that “‘follower of the Communist line’ is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony.”⁸³

The applicability of the ambiguous question rule is particularly important in cases in which a witness faces a compound question or its functional equivalent. Consider, for example, the Ninth Circuit’s decision in *United States v. Sainz*. Defendant, a border patrol inspector for the Immigration and Naturalization Service, was charged with making a false declaration before a federal grand jury. During the course of his testimony, the defendant was asked a series of questions regarding his duties at an INS border station. The following colloquy formed the basis for the charge:

Q: Have you ever failed to follow your agency’s procedure in running license plates of cars coming into the United States to determine whether or not they were listed as suspicious narcotics vehicles?

A: No, sir.⁸⁴

The government contended that this response was perjurious because, on two separate occasions, automobiles had traveled through defendant’s lane and defendant had failed to enter their license plate numbers into the INS computer.

In reversing defendant’s conviction, the Ninth Circuit explained that the term “procedure” was ambiguous, and in fact had been used by the questioner to refer to the practice of both routing entering traffic as well as placing a driver’s documents in a cone on top of the entering vehicles.⁸⁵ Moreover, the prosecutor’s question presented “two distinct alternative questions within one compound question”: first, whether defendant always followed the discrete steps necessary to “run” plates through the computer;⁸⁶ and second, whether defendant failed to “run” license plates for the specific purpose of aiding in the importation of controlled substances while on duty.⁸⁷ In

83. *Id.* at 409-10.

84. 772 F.2d 559, 561 (9th Cir. 1985).

85. *Id.* at 563.

86. “For example,” the court pointed out, “this question might be probing whether the defendant ever negligently or intentionally input incorrect information into the computer.” *Id.*

87. As the court pointed out, “the prosecutor had preceded this question with three

light of the ambiguity in the prosecution's questioning, the court held, defendant's conviction could not stand.

The concerns expressed by cases like *Lattimore* and *Sainz* are congruent with those expressed in *Bronston*. As *Sainz* put it:

"Precise questioning is imperative as a predicate for the offense of perjury." A witness cannot be forced to guess at the meaning of the question to which he must respond upon peril of perjury. . . . The perjury statute and its goal of truth in our system is served by fostering truthful answers to precise questions, not by penalizing unresponsive answers to unclear questions.⁸⁸

Once again, the principle of *caveat auditor* applies. One who asks an ambiguous question cannot expect an unambiguous answer; one who answers an ambiguous question with a statement that may be misleading cannot be said to have lied.

B. Crimes of Misleading: Fraud and Theft by Deception

In contrast to perjury and false declarations—which, as we have seen, require both an assertion and literal falsity—offenses such as fraud, false pretenses, and the Model Penal Code's theft by deception reflect a more flexible concept of deception.⁸⁹ Under modern criminal law, literally true but misleading assertions, misleading statements expressing mere beliefs and opinions, and various forms of misleading nonverbal conduct can all provide a predicate to prosecution for fraud and related offenses.

(1) *Common Law Misleading Offenses: Common Law Cheat, Forgery, False Pretenses, and Larceny by Trick*

In order to understand the role of deception in modern offenses such as fraud, false pretenses, and theft by deception, it will be helpful to view these offenses in historical context. Although theft offenses today reflect a broad concept of deception, this was not always the case. Initially, the role of deception in theft law was limited to a

substantially identical questions as to the defendant's direct or indirect involvement in the importation of controlled substances while on duty." *Id.*

88. *Id.* at 564 (quoting *Bronston v. United States*, 409 U.S. 352, 362 (1973)).

89. The Supreme Court in *Bronston* noted this explicitly when it said:

[Perjury] is not to be measured by the same standards applicable to criminally fraudulent or extortionate statements. In that context, the law goes "rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations." In contrast, "under our system of adversary questioning and cross-examination the scope of disclosure is largely in the hands of counsel and presiding officer."

409 U.S. at 358 n.4 (quoting MODEL PENAL CODE § 208.20, cmt. (Tentative Draft No. 6, 1957)).

narrowly defined set of circumstances. It was only slowly that this role broadened.

At early common law, one who obtained title to another's property by force or stealth was guilty of robbery or larceny, respectively, but one who obtained title to another's property by deception was generally held not to have committed a crime. In such cases, the doctrine of *caveat emptor* prevailed.⁹⁰

There was, however, an important exception to the general rule of *caveat emptor*—namely, the offense of common law cheat, which consisted of fraud perpetrated by means of some false token, typically false weights or measures.⁹¹ The rationale for such an exception was

90. See *Regina v. Jones*, 91 Eng. Rep. 330, 330 (1703) (Holt, C.J.) (“[W]e are not to indict one for making a fool of another.”); WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 344 (6th ed. 1777) (“[It] is . . . needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient surety.”); ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 289 (3d ed. 1982) (“[A] person who deprived another of his property by force or stealth was regarded by all as a very evil person, but he who got the better of another in a bargain by means of falsehood was more likely to be regarded by his neighbors as clever than as criminal.”); Peter Alldridge, *Sex, Lies and the Criminal Law*, 44 N. IRELAND LEGAL Q. 250, 265-67 (1993) (contrasting treatment of deception in criminal law concerning obtaining of property with that concerning the obtaining of sexual access). It is interesting to note, however, that Talmudic law, in contrast to the English common law, seems to have treated the thief more severely than the robber. ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* 156 (1976) (“[T]he robber is preferable to the thief since he acts openly, and his attitude toward God, in transgressing against his commandments and committing a robbery, is equal to his attitude toward his fellow men, from whom he steals openly, without fear or shame. The thief, on the other hand, demonstrates that he fears men more than he fears God, since he hides himself from his fellow men but not from the Almighty; he therefore deserves [greater punishment].”).

In some respects, the attitudes that underlay the common law doctrine of *caveat emptor* were analogous to the attitudes that underlay the rule of contributory negligence in the common law of torts. As Joel Feinberg has put it:

[I]f an accident victim's own negligence, no matter how slight compared to that of a second party, was a causal factor without which the accident would not have occurred, then he is not entitled to a penny of compensation from the second party for his injuries even though the second party luckily was unscathed. Similarly, a dupe is himself negligent, according to the prevailing assumption, for having assumed risks on the word of a [deceiver], so he cannot complain afterwards of being badly used. “He has no one to blame but himself,” we say, even though the other was at fault too. When we believe that ordinary prudence would have sufficed to protect one party from the mendacity of another, we sometimes opine that “anyone that gullible *deserves* to be swindled.”

FEINBERG, *supra* note 1, at 286. See also *supra* note 31.

91. On the origins of common law cheat, see JEROME HALL, *THEFT, LAW AND SOCIETY* 40 (1935); 2 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* ch. 10, 77-94 (5th ed. 1872). In 1541, the scope of common law cheat was expanded by statute to apply not only to frauds committed upon the general public, but also to frauds of a more private nature. 33 Hen. 8, ch.1 (1541) (Eng.) made it a misdemeanor to

falsely and deceitfully obtain, or get into his or their hands or possession, any

clear: unlike other forms of fraud, the use of false weights or false tokens was something against which common prudence could not adequately protect, it threatened the public as a whole, and to be always on guard against it imposed serious costs.⁹² This explanation thus bears a striking resemblance to the reasoning used above to describe the difference between lying and other forms of deception: whereas most forms of deception can be guarded against by common prudence, lying typically cannot.

Over time, however, this narrow definition of theft by deception could not stand. As commercial relations became increasingly complicated, society increasingly urbanized, and business entities more and more powerful, the principle of *caveat emptor* became harder and harder to sustain, and the definition of what constituted actionable deception was bound to become broader. The paradigm of lying thus began to yield to the paradigm of misleading.

Forgery—defined as the fraudulent making or alteration of a writing having apparent legal significance—was made a crime in England beginning in the early fifteenth century.⁹³ The offense was initially restricted to royal documents, then expanded to sealed documents, and finally to public documents generally.⁹⁴ In forgery, the deception is found not in the *content* of the document; rather,

money, goods, chattels, jewels, or other things of any other person, or persons, by colour and means of any privy false token or counterfeit letter made in another man's name, to a special friend or acquaintance, for the obtaining of money, &c. from such person.

33 Hen. 8, ch.1 (1541) (Eng.) Although the offense of common law cheat has mostly been superseded by subsequent, broader legislation, vestiges of it can be still be found in provisions like MODEL PENAL CODE § 224.7(1) (making it a misdemeanor, "in the course of business," to use or possess for use "a false weight or measure, or any other device for falsely determining or recording any quality or quantity"). For a useful discussion of how false weights and measures and other forms of fraud are dealt with in Jewish law, see MEIR TAMARI, *SINS IN THE MARKETPLACE* 56-61 (1996).

92. See, e.g. *Rex v. Wheatly*, 97 Eng. Rep. 746 (K.B. 1761) (upholding dismissal of charges for common law cheat where defendant was alleged to have "falsely, fraudulently and deceitfully" sold and delivered to victim as 18 gallons of beer what was really only 16 gallons; reasoning that the case involved what was essentially a civil wrong, "an inconvenience and injury to a private person," not an offense under the criminal law, which would involve the use of false weights and measures affecting "all or many of his customers" or which were used in the "general course of his dealing," and which "common care and prudence are not sufficient to guard against").

93. On the origins of the English law of forgery, see 3 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 180-87 (1883); J.W. Cecil Turner, "*Documentis*" in the Law of Forgery, 32 VA. L. REV. 939 (1946). Under the broader Model Penal Code definition, a person commits forgery if, knowingly facilitating fraud or injury of another, the person makes, alters, or authenticates a writing that purports to be another's without authorization to do so. MODEL PENAL CODE § 224.1.

94. See MODEL PENAL CODE § 224.1, cmt. 1 (1980).

forgery involves deception about the *genuineness* of the document itself.⁹⁵

With the advent of the Industrial Revolution, the broadening of fraud offenses accelerated. The offense of false pretenses was added to the list of deception offenses in England in 1757, under a statute that made it a crime for any person to “knowingly or designedly” by false pretenses obtain title to “money, goods, wares or merchandizes” from another person “with the intent to cheat or defraud.”⁹⁶ Although significantly broader in scope than both common law cheat and forgery, false pretenses was still limited in that it required a false representation of an existing fact, rather than merely a false promise,⁹⁷ opinion,⁹⁸ or prediction.⁹⁹ For example, “falsely stating that a gem has been appraised at \$1,000 constitutes a false representation for purposes of false pretenses liability, but falsely stating that the gem *will* appreciate in value over the next year does not.”¹⁰⁰

95. PAUL H. ROBINSON, *CRIMINAL LAW* 790 (1997). Note that, at common law, not every faked document constitutes a forgery. For example, if one wrote out the Gettysburg Address, simulating the handwriting and signature of Abraham Lincoln, and sold it to a collector of antique manuscripts, that would not be forgery, because the Gettysburg Address—unlike, say, a negotiable instrument, deed, mortgage, bill of lading, will, sales receipt, bond, contract, diploma, certificate of marriage, divorce decree, army discharge, or railroad ticket—does not have any immediate legal significance. PERKINS & BOYCE, *supra* note 90, at 416-17. Attempting to pass off a copy of the Gettysburg Address as the original, however, would constitute false pretenses.

96. 30 Geo. 2, ch. 24, § 1 (1757) (Eng.).

97. The evolution of the “existing fact” dogma of false pretenses is described in Arthur R. Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967, 968-78 (1953). Pearce advanced a strenuous argument against the then-prevailing common law doctrine which excluded false promises from the scope of false pretenses. He argued that such exclusion was based principally on historical accident, and that subsequent developments in federal fraud law (which has long included false promises within its scope) point towards a needed expansion of doctrine in the law of false pretenses as well.

98. The leading case of *Regina v. Bryan*, 7 Cox Crim. Cas. 312, 319 (Crim App. 1857), seems to carry this approach to extremes. D obtained money from P by representing that certain spoons were of the best quality, equal to Elkington’s A, and having as much silver as Elkington’s A. These statements were known by defendant to be false. In reversing the conviction, the court held that this was not false pretenses: “Whether these spoons . . . were equal to Elkington’s A or not, cannot be, as far as I know, decidedly affirmed or denied in the same way as a past fact can be affirmed or denied, but it is in the nature of a matter of opinion.” *Id.* But, as J.C. Smith points out, “[t]his can hardly be true . . . of the statement that the spoons had as much silver in them as Elkington’s A.” J.C. SMITH, *THE LAW OF THEFT* 91 (5th ed. 1984).

99. PERKINS & BOYCE, *supra* note 90, at 369-70.

100. KATHLEEN F. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME* 119 (2d ed. 1995) (emphasis added). The idea was, first, that many opinions expressed by sellers of goods are merely “puffing,” and cannot be taken literally as fact. Second, there was a reluctance to treat a debtor’s breach of contract as the basis for a false pretenses prosecution, the explanation being that “the act complained of . . . is as consonant with ordinary commercial default as with criminal conduct. . . . Business affairs would be

In addition to false pretenses, English law also criminalized a separate offense known as larceny by deceit. At common law, larceny was defined as the trespassory taking of personal property from the *possession* of another. Because false pretenses was limited to cases involving the use of deception to obtain *title* to money or goods, it did not cover cases in which a defendant had used deception to obtain mere possession. The most famous example is *Pear's Case*, in which defendant fraudulently rented a horse from a stable, intending from the outset to steal it.¹⁰¹ Because only possession of, and not title to, the horse passed with the rental agreement, defendant could not be prosecuted for false pretenses. Instead, defendant was prosecuted for a newly created theft offense—namely, larceny by trick.

This collection of common law misleading offenses illustrates two things. The first is the absence of any requirement of assertion. A charge of common law cheat, for example, would lie when a butcher misled a customer into believing that a slab of meat weighs more than it actually does by some action—say, placing an underweight slab on a rigged scale.¹⁰² Likewise, as noted above, the crime of forgery consists not in the falsity of the statements contained in the document, but rather in the misrepresentation of the genuineness or authenticity of the document itself. False pretenses is also frequently committed without an assertion, as it was in the case in which defendant obtained credit from a shopkeeper by wearing an Oxford college cap and gown to create the false impression that he was an Oxford student.¹⁰³ As for larceny by trick, *Pear's Case* itself demonstrates that no statement was necessary for the offense to be committed; it was enough that defendant *acted* as if he would return the horse.

Second, unlike perjury, fraud and the other misleading offenses do not require a literal falsehood. This is most obvious in the context of cases such as *Rex v. King*, in which the defendant, a used car salesman, allegedly stated that the mileage shown on the odometer of a second hand car “may not be correct.” The court held that, though literally true, the statement falsely implied that the defendant did not

materially encumbered by the ever present threat that a debtor might be subject to criminal penalties.” *Chaplin v. United States*, 157 F.2d 697, 698-99 (D.C. Cir. 1946).

101. *Rex v. Pear*, 168 Eng. Rep. 208 (Cr. Cas. Res. 1779).

102. One can easily imagine the butcher saying, as he places a 3½ pound slab of beef on the rigged scale, “there’s four pounds for you, Mrs. Jones.” Although such a statement would undoubtedly be false, a false statement is obviously not an element of the offense.

103. *Rex v. Barnard*, 173 Eng. Rep. 342 (1837); *Regina v. Robinson*, 10 V.L.R. 131 (Cent. Crim Ct. 1884) (defendant in *Barnard* would have been guilty of false pretenses even if he had said nothing); see also SMITH, *supra* note 98, at 86-87. Indeed, even silence can constitute false pretenses when the non-speaker has a duty of disclosure. See, e.g., *People v. Johnson*, 150 N.Y.S. 331 (N.Y. Crim. Term 1914).

know the odometer to be incorrect, and therefore constituted false pretenses.¹⁰⁴ Similarly, a 1932 British court “sent Lord Kysant to prison because his steamship line had issued a prospectus that had *truthfully* stated its average net income for the past ten years and its dividends for the past seventeen, but had deliberately *concealed* the fact that its earnings during the first three of the ten years had been greatly augmented by World War I as compared with the seven lean years that followed.”¹⁰⁵ In sum, according to Wayne LaFave, a “statement which though literally true is nonetheless misleading because it omits necessary qualifications—the half-truth which can operate to deceive quite as effectively as the outright lie—constitutes a form of misrepresentation which, when done with intent to deceive, ought to qualify as a false pretense.”¹⁰⁶

104. See SMITH, *supra* note 98, at 86.

105. LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* 848-49 (4th ed. 2001), citing *Rex v. Kysant*, 1 K.B. 442 (Ct. Crim. App. 1932). According to Loss, under false pretenses or common law fraud, “[i]t is now quite clear that a half-truth is as bad as an outright lie.” *Id.* at 848.

106. WAYNE R. LAFAVE, *CRIMINAL LAW* 833 (3d ed. 2000). There is also another aspect of fraud law that should be mentioned here. There are usually said to be two kinds of fraud: fraud in the factum and fraud in the inducement. Fraud in the factum (which is relatively rare) occurs when a victim is deceived about the very fact that he is entering into a contractual agreement. For example, *V* (who has bad eyesight) is tricked into believing that the document he is signing is just a receipt, when it is actually a contract. Fraud in the inducement (the much more familiar form of fraud) occurs when the victim is deceived not about the existence of the agreement, but about its terms. For example, *V* is tricked into believing that the stone she is buying is a valuable diamond when in fact it is a rhinestone fake. See JOEL FEINBERG, *HARM TO SELF* 291-300 (1986); ROLLIN M. PERKINS, *CRIMINAL LAW* 856-61 (1957); ALAN FARNSWORTH, *CONTRACTS* § 4.10 (2d ed. 1990); *Nuclear Elec. Ins. Ltd. v. Cent. Power & Light Co.*, 926 F. Supp. 428, 433 (S.D.N.Y. 1996). In most criminal law contexts, where the absence of consent is not an element of the crime, the distinction between fraud in the factum and fraud in the inducement is of no practical consequence. The defendant who tricks *V* into believing that she is signing a receipt when she is really signing a contract has engaged in a “scheme or artifice to defraud” just as surely as the defendant who has tricked *V* into believing that she is buying a valuable diamond. By contrast, in the case of sexual offenses, where the absence of consent is an element, the distinction between the two kinds of fraud may be quite significant. According to Anne Coughlin:

The traditional approach holds that it is a crime to obtain sexual intercourse by fraud in only two narrow contexts. The first (and, apparently, most common) case of rape by fraud in the factum involves a man who obtains the sexual connection by deceiving the woman into thinking that she is submitting to a nonsexual act. The other tactic sometimes found to constitute rape by fraud in the factum involves a man who obtains intercourse by masquerading as the woman’s husband. All other types of misrepresentations that men use to elicit women’s sexual submissions are fraud in the inducement and provide no basis for a rape conviction. [For example,] “[i]t is not rape where a medical practitioner represents to a patient that coition is necessary for the treatment of her case, and she consents to connection with him, through a belief in his representations; for there is a consent to the act, though fraudulently obtained.”

(2) *Modern Misleading Offenses: Mail Fraud, Securities Fraud, and Theft by Deception*

Like their common law antecedents, the modern misleading offenses reflect a significantly more flexible approach to deception than crimes such as perjury and false declarations. Although they obviously can be committed by means of outright lies, literal falsity is seldom, if ever, required. The most prominent example of flexibility in approaching the requirement of deception is the federal mail fraud statute, originally enacted in 1872, which makes it a crime to use the mails to further a "scheme or artifice to defraud" or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."¹⁰⁷ Under this statute, the courts have repeatedly recognized that a statement need not be literally false to constitute fraud, as long as it is both material and made with intent to deceive.¹⁰⁸ Moreover, "deception need not be premised upon verbalized words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance."¹⁰⁹

Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 19 & n.70 (1998) (quoting Note, 80 Am. Dec. 361, 366 (1861)).

107. Mail fraud is currently codified at 18 U.S.C. § 1341. The original mail fraud statute was codified at Rev. Stat. § 5480. There are, of course, numerous other fraud provisions in federal law, including 18 U.S.C. § 1343 (2000) (wire, radio, or television fraud), 18 U.S.C. § 371 (2000) (conspiracy to commit offense or defraud United States); 18 U.S.C. § 1344 (bank fraud); 18 U.S.C. § 157 (2000) (bankruptcy fraud); 18 U.S.C. § 1347 (health care fraud). The enormous literature on mail fraud includes the following: ANTHONY J. ARLIDGE, ET AL., *ARLIDGE & PARRY ON FRAUD* (2d ed. 1996); BRENDA L. NIGHTINGALE, *THE LAW OF FRAUD AND RELATED OFFENCES* (1996); Craig M. Bradley, *Foreword: Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573 (1988); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C.L. REV. 435 (1995); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729 (1999); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980); Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1 (1998).

108. See, e.g., *Lustiger v. United States*, 386 F.2d 132, 136 (9th Cir. 1967) ("While the statements in the advertising materials may not have been literally false, taken as a whole they were fraudulently misleading and deceptive."). On the other hand, not all literally false statements made with intent to deceive will necessarily constitute fraud, as demonstrated by the Second Circuit's decision in *United States v. Regent Office Supply*, 421 F.2d 1174 (2d Cir. 1970) (rejecting application of mail fraud statute premised upon use of false pretenses in the preliminary stages of a sales solicitation). The most important factor is that the statement be material. In the words of the court in *Regent Office Supply*, it must be "directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain." *Id.* at 1179.

109. *Lustiger*, 386 F.2d at 138 (citing *Gusow v. United States*, 347 F.2d 755, 756 (10th Cir. 1965)).

The modern misleading offenses are even more flexible than their common law antecedents. They eliminate not only the requirements of assertion and literal falsity, but also the requirement that what is falsely represented be an existing fact. Again, mail fraud provides an excellent example. In the Supreme Court's 1896 case of *Durland v. United States*,¹¹⁰ the defendant was charged with making false promises to investors in his investment company. In rejecting defendant's argument that the mail fraud statute reaches only "such cases as, at common law, would come within the definition of 'false pretences,'" the Court made clear that the statute reflected a much broader conception of deception, which included "representations as to the past or present, or suggestions and promises as to the future."¹¹¹

The law of securities fraud has followed a similar pattern.¹¹² Nowhere has the abandonment of the doctrine of *caveat emptor* been

110. 161 U.S. 306 (1896). See also Note, *Whatever Happened to Durland?: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333 (1992) (describing history of fraud law).

111. *Durland*, 161 U.S. at 312-14. Several qualifications need to be made here. The first is that the current mail fraud statute has both a "schemes to defraud" and "false pretenses" provisions. To the extent that a defendant is charged under the false pretenses prong only, he might be able to argue that a common law-like limitation on deception should apply. Cf. 2 SARAH N. WELLING, ET AL., FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO 11 (1998) ("Although the federal courts give the concept of affirmative misrepresentation a fairly broad interpretation, the experience under the bank fraud statute demonstrates [that] convictions that would have been upheld under the defraud prong may be reversed if they are brought only under the false pretenses prong."). Second, there are a number of mail fraud cases that seem to construe the term "fraud" to apply to conduct that, strictly speaking, is not really fraud, such as breaches of fiduciary duty. See John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981). Third, while the Court has made clear that "fraud" means using deceit to obtain money or property, or deprive citizens of other "intangible property," see *Carpenter v. United States*, 484 U.S. 19 (1987), it has also held that it does not consist of attempts to obtain money or property by means of threats or coercion. Thus, the mail fraud statute has been held not to apply to cases in which a defendant used the mails to communicate a threat of blackmail or a demand for ransom in a kidnapping. See *Fasulo v. United States*, 272 U.S. 620, 628-29 (1926) (an attempt to obtain money by intimidation does not involve "anything in the nature of deceit or fraud as known to the law or generally understood").

112. See, e.g., Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q (2001) (making it "unlawful for any person in the offer or sale of any securities . . . (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser"); Rule 10b-5 of the SEC's regulations, 17 C.F.R. § 240.10b-5 (2001), promulgated pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78j (2001) (providing that it is unlawful, in connection with the purchase or sale of any security, to "(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to

more explicit than in this context.¹¹³ In *Lucia v. Prospect Street High Income Portfolio, Inc.*, for example, defendants issued a mutual fund prospectus containing a ten-year profit comparison of junk bonds and United State Treasury notes.¹¹⁴ Although the ten-year period did in truth show that junk bonds had outperformed Treasury securities, the fact was that during the six years immediately preceding each fund's public offerings, Treasury securities had outperformed junk bonds. The court concluded that a triable issue was presented as to whether the defendants had committed fraud:

[T]he fact that a statement is literally accurate does not preclude liability under federal securities laws. "Some statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors. For that reason, the disclosure required by the securities laws is measured not by literal truth, but by the ability of the material accurately to inform rather than mislead prospective buyers."¹¹⁵

Finally, we can look to Model Penal Code Section 223.3, theft by deception, which provides that a person is guilty of theft if he "purposely obtains property of another by deception," and which, in turn, defines "deceive" to mean "create[] or reinforce[] a false impression, including false impressions as to law, value, intention or other state of mind," as well as certain cases in which the actor knowingly takes advantage of another's misinformation, though he may not have been responsible for disseminating it in the first place.¹¹⁶ As the Comments to Section 223.3 make clear, it is the "falsity of the *impression* purposely created or reinforced that is determinative, rather than the falsity of any particular representations made by the actor. Thus, deception may be accomplished by statements that are literally true or that consist of a clever collection of half-truths."¹¹⁷

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.").

113. See, e.g., *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988) ("We have recognized time and again, a 'fundamental purpose' of the various Securities Acts, 'was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.'") (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)).

114. *Lucia v. Prospect Street High Income Portfolio, Inc.*, 36 F.3d 170 (1st Cir. 1994).

115. *Id.* at 175 (quoting *McMahan v. Warehouse Entm't, Inc.*, 900 F.2d 576, 579 (2d Cir. 1990)). See also Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87 (1999) (discussing treatment of half-truths, misrepresentation, and nondisclosure in securities fraud cases). As described *supra* note 89, *Bronston* itself makes a similar point.

116. Model Penal Code § 223.3.

117. *Id.* § 223.3, cmt. 3(a).

Legislatures and courts have thus defined misleading offenses much more broadly and flexibly than perjury or false declarations. Not only do misleading offenses not require a literally false statement, they do not require any statement at all. They can be committed by means of deceptive conduct, pictures, even silences.

C. A Hybrid Offense: False Statements

Having considered both lying offenses (such as perjury) and misleading offenses (such as fraud), we can now turn our attention to the crime of making false statements, codified most prominently in 18 U.S.C. § 1001, as well as in numerous kindred provisions of federal and state law.¹¹⁸ As we shall see, false statements law is a hybrid of lying and misleading rules.¹¹⁹ Some of these statutes are similar to perjury, in that they require both an assertion and literal falsity. Others, like fraud, require neither. A final group, which includes Section 1001 itself, has sometimes been interpreted as perjury and other times as fraud—depending on the operative statutory provision at issue, the court presiding, and the underlying facts of the case. The sum total is a complex, chameleon-like body of law with few clear governing principles.

(1) *False Statements in Historical Perspective*

A brief examination of the history of the false statement statutes helps explain the reason for their hybrid nature. The statutory progenitor of Section 1001 was enacted in 1863.¹²⁰ Entitled “An Act to Prevent and Punish Frauds Upon the Government of the United States,” it prohibited the filing of “false, fictitious, or fraudulent” claims against the government.¹²¹ Passed in the midst of the Civil

118. *E.g.*, 18 U.S.C. § 1014 (2000) (making it a crime to make a “false statement or report . . . for the purpose of influencing” various federal bank loan and credit agencies); 18 U.S.C. § 287 (2000) (making it a crime to make or present a claim to the United States Government knowing such claim to be “false, fictitious or fraudulent”); 18 U.S.C. § 494 (2000) (making it a crime, *inter alia*, to “falsely make[], alter[], forge[], or counterfeit[] any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States”). For a comprehensive listing of federal false statements statutes, see 3 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY 314-19 (2d ed. 1991-94).

119. This hybrid nature is also reflected in the major commentaries on white collar crime. For example, Kathleen Brickey emphasizes the similarities between Section 1001 and perjury, *see* 3 BRICKEY, *supra* note 118, at 239-326, while Sarah Welling, Sara Beale, and Pamela Bucy emphasize its relation to fraud-type statutes (particularly fraud against the government), 1 WELLING, ET AL., *supra* note 111, at 505-28.

120. Act of March 2, 1863, ch. 67, 12 Stat. 696.

121. *See* Brogan v. United States, 522 U.S. 398, 412 (1998) (Ginsburg, J., concurring) (citing Act of March 2, 1863, ch. 67, 12 Stat. 696); Hubbard v. United States, 514 U.S. 695, 705 (1995).

War, the statute was a response to a “spate of frauds”—particularly, procurement frauds—being committed on the U.S. Government.¹²² In 1918, this time at the end of the First World War, the statute was broadened slightly, to cover false statements made “for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States.”¹²³ At this point in its development, the concept of deception in the false statements statute was virtually indistinguishable from the concept of deception found in the various fraud-type statutes discussed above.¹²⁴

Starting in the 1930s, the crime of false statements began to undergo dramatic changes. With the advent of the New Deal and the creation of numerous regulatory programs and agencies, self-reporting became an increasingly important element in compliance. The Government’s concern was no longer merely with the direct loss of property or money; it now had a strong interest in preventing the loss of information through inaccurate and untruthful reporting—most notoriously in connection with unreported shipments of “hot oil.”¹²⁵

In response to these concerns, Congress took several initiatives. First, it amended the precursor to Section 1001 to prohibit not just “false, fictitious, or fraudulent” *claims* against the government, but also “any false or fraudulent *statements or representations*” made within the jurisdiction of the government.¹²⁶ In addition, it began passing or amending various specialized false statements statutes that would apply in specific regulatory contexts. The result was to transform the crime of false statements into one that simultaneously reflects both the looser “misleading” and the more restrictive “lying” models.

122. *United States v. Bramblett*, 348 U.S. 503, 504 (1955).

123. Act of Oct. 23, 1918, ch. 194, § 35, 40 Stat. 1015, 1015.

124. *See United States v. Cohn*, 270 U.S. 339, 346 (1926) (statute limited to cases in which defendant has allegedly “cheat[ed] the Government out of property or money”).

125. *Brogan*, 522 U.S. at 412 (Ginsburg, J., concurring) (describing New Deal history of Section 1001: “[I]f regulated [industries] could file false reports with impunity, significant Government interests would be subverted even though the Government would not be deprived of any property or money.”). “Hot oil frauds” were schemes in which petroleum producers falsify shipping documents by stating that their in-state oil wells are producing a certain amount of oil, when in fact they are producing less oil and supplementing it with contraband oil purchased from out of state. *United States v. Gilliland*, 312 U.S. 86, 94-95 (1941); *United States v. Yermian*, 468 U.S. 63, 80 (1984) (Rehnquist, J., dissenting).

126. Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996 (emphasis added); *see also Gilliland*, 312 U.S. at 93 (1934 amendment removed restriction to matters in which government has financial or proprietary interest).

(2) *The Hybrid Nature of False Statements*

In its current form, Section 1001 makes it a crime, within the jurisdiction of the United States Government, to (1) make a “materially false, fictitious, or fraudulent statement or representation,” (2) make false writings containing a “materially false, fictitious, or fraudulent statement,” or (3) “falsify, conceal, or cover up by any trick, scheme, or device a material fact.”¹²⁷ Although the term “false claim” was deleted from the statute in 1948,¹²⁸ the use of terms such as “fraudulent,” “falsify, conceal, or cover up,” and “trick, scheme, or device,” continue to be understood as signifying a broad, fraud-like conception of deception. At the same time, the use of the term “false statement” has been interpreted to connote a much narrower, perjury-like conception. In order to appreciate this hybrid nature of false statements law, we need to consider the requirements of both assertion and literal falsity.

(a) False Statements and the Requirement of an Assertion

A good example of how the crime of false statements takes on the rigid contours of the lying offenses can be found in the Supreme Court’s opinion in *Williams v. United States*,¹²⁹ which involved a prosecution under 18 U.S.C. § 1014, making it a crime to “knowingly make[] any false statement” for the purpose of influencing the action of any federally insured bank. Defendant had allegedly engaged in a series of transactions usually characterized as “check kiting,” a scheme whereby credit is obtained by the exchange and passing of worthless checks between two or more banks. In rejecting the government’s contention that the defendant, by depositing a check that was not supported by sufficient funds, had made a “false statement,” the Court relied on the fact that:

technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as “true” or “false.” Petitioner’s bank checks served only to direct the drawee banks to pay the face amounts to the bearer, while committing petitioner to make good the obligations if the banks dishonored the drafts. Each check did not, in terms, make any representation as to the state of petitioner’s bank balance.¹³⁰

Had defendant been prosecuted for mail or bank fraud, rather than false statements, there is little question that his check kiting scheme would have been viewed as actionable, since one who draws a

127. 18 U.S.C. § 1001 (2000).

128. In 1948, the false claim language was moved into a separate provision, 18 U.S.C. § 287. See Act of June 25, 1948, §§ 287, 1001, 62 Stat. 698, 749.

129. 458 U.S. 279 (1982).

130. *Id.* at 284-85.

check on a bank is generally understood to be making a representation that he has sufficient funds in his bank account to cover the check.¹³¹ But since check kiting does not involve an assertion, it does not constitute a false statement. *Williams* should thus be understood as consistent with the narrow “lying” approach to false statements described above.¹³²

A different situation arises in false statements cases involving defendants who give either no response at all or only an incomplete response to government questioning. Consider the case of then-Governor George W. Bush’s response (or lack of response) to a 1996 jury questionnaire, which became something of an issue in the final days of the 2000 presidential campaign. In the questionnaire, Bush was asked to check whether he had ever been an accused, a complainant, or a witness in a criminal case. Despite the fact that he had been arrested on at least two occasions, and despite the instruction that “[t]his form must be completed and returned when reporting for jury duty,” Bush (or his agents) left the question blank.¹³³ Did Bush’s failure to respond constitute a false statement?

What little case law there is seems to indicate that a person who has a duty to answer a question posed by a government official or form, and fails to do so, is guilty of making of a false statement. Typical of this view is the Fifth Circuit’s opinion in *United States v.*

131. See, e.g., *United States v. Giordano*, 489 F.2d 327 (2d Cir. 1973) (affirming conviction for bank fraud in scheme involving check kiting); *United States v. Constant*, 501 F.2d 1284 (5th Cir. 1974) (upholding mail fraud conviction for scheme involving check kiting).

132. Unfortunately, the courts have not always been clear about exactly what constitutes an assertion. Consider the Second Circuit’s decision in *United States v. Worthington*, in which a defendant was prosecuted under Section 1001 after submitting to the Internal Revenue Service a check printed with the name of a fictitious drawee bank. 822 F.2d 315 (2d Cir. 1987). In upholding his conviction, the Second Circuit wrote:

The rationale of *Williams*—that drawing a check unsupported by sufficient funds is [not] a statement . . . is simply inapplicable . . . here. . . . Here, of course, the check contains the name of a drawee “bank,” which designates where the check may be presented for payment. Naming a bank is a representation that the bank upon which the check is drawn does in fact exist. Thus, unlike *Williams*, the assertion in the instant case constitutes a statement.

Id. at 318. In this reasoning, the court clearly erred. Submitting a check printed with the name of a fictitious drawee bank, though certainly deceptive, does not constitute a statement, since it has no determinable truth value. If it constitutes any crime, it is probably forgery, see *supra* notes 93-95 and accompanying text, rather than false statements.

133. Wayne Slater & Pete Slover, *Race Heating up in Homestretch: Bush Camp Tries to Stem DUI Fallout, Denies Misleading Answers on Arrest*, DALLAS MORNING NEWS, Nov. 4, 2000, at 1A. Bush was arrested in 1966 for stealing a Christmas wreath from a Connecticut store in a “fraternity prank,” and again in 1976 for drunk driving. There were also allegations that, on a number of occasions, Bush had lied to, or misled, the media regarding the fact of these arrests. *Id.*

Mattox, in which defendant was prosecuted under 18 U.S.C. §§ 1001 and 1920 (making false statements in connection with federal worker's compensation claims).¹³⁴ A Labor Department form required applicants to "report all employment during the past 12 months" and "account for the entire time, including periods of self-employment or unemployment." In response to one question, defendant wrote "N/A." Another question he left blank. In rejecting defendant's apparent argument that his response (or lack of response) did not constitute a statement, the court argued that "[s]ilence may be falsity when it misleads, particularly if there is a duty to speak. The evidence warranted the conclusion that Mattox had a duty to fill in the blank if he had been employed and that his failure to do so was equivalent to an answer, and a false one at that."¹³⁵

Such reasoning seems to me mistaken. The mere fact that a person is under a legal duty to give a response does not necessarily mean that her failure to do so constitutes a false statement.¹³⁶ Indeed,

134. 689 F.2d 531 (5th Cir. 1982).

135. *Id.* at 533. See also *United States v. Irwin*, 654 F.2d 671, 676 (10th Cir. 1981) (upholding conviction under Section 1001 for submitting a federal grant application to the Economic Development Association and leaving a blank under the column marked "compensation already paid," when in fact defendant had received compensation; "leaving a blank is equivalent to an answer of 'none' or a statement that there are no facts required to be reported."); *United States v. Olin Mathieson Chemical Corp.*, 368 F.2d 525, 526 (2d Cir. 1966) (nondisclosure or partial disclosure may constitute concealment under section 1001); *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986) (in nondisclosure cases, the Government must prove that the defendant had a legal duty to disclose); *United States v. Dale*, 140 F.3d 1054, 1056 (D.C. Cir. 1998); *United States v. Anzalone*, 766 F.2d 676, 682-83 (1st Cir. 1985); *United States v. London*, 550 F.2d 206 (5th Cir. 1977); *United States v. Private Brands, Inc.*, 250 F.2d 554 (2d Cir. 1957); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE EIGHTH CIRCUIT, § 6.18.1001A (Concealing a Material Fact from a Governmental Agency (18 U.S.C. § 1001)). In a leading Supreme Court case, *United States v. Yermian*, 468 U.S. 63, 65 (1984), defendant was charged with violating Section 1001 by, *inter alia*, "fail[ing] to disclose that in 1978 he had been convicted of mail fraud." The Court, however, did not address the question whether a failure to respond constitutes a violation of the false statements statute.

136. I say "mere" fact because one can easily imagine a scenario in which it would be reasonable to construe a failure to give a response as a statement "no." For example, if I say to my students, "please raise your hand if you did not do the homework for today," the fact that *A* is one of several people who has not raised her hand can reasonably be understood as an assertion that she did do her homework. If in fact she did not do her homework and nevertheless did not raise her hand, we might think that she has lied. (Of course, it is also possible that she did not respond because she could not hear my question, was not paying attention, or perhaps wanted to question my authority.) Similarly, if a government form said, "please list all of your assets," then it might well be reasonable to infer that one who left the appropriate space on the form blank would be making an assertion that he had no assets. My point, though, is that the mere fact that there is a legal duty to respond to a question does not tell us much about what can reasonably be inferred from a silence. Rather, we need to know more about precise context in which the question

the fact that a person is under a legal obligation to make a statement is no more relevant to the truthfulness of her statement than the fact that she is under no such obligation.¹³⁷ Here again, morality illuminates law. A person who refuses to answer a question that she is morally obligated to answer (say, a child who is asked a question by a parent) may be defiant and obstreperous, but she is not necessarily mendacious.¹³⁸ Similarly, while a witness who is subpoenaed to testify and refuses to do so may be guilty of contempt, and a party who declines to answer questions required on a government form guilty of failure to answer, neither should necessarily be guilty of perjury or false statements.¹³⁹

(b) False Statements and the Requirement of Literal Falsity

Another way in which the crime of false statements reflects the rigid "lying" approach can be observed in cases involving the literal falsity requirement. A majority of—though not all—courts have held that conviction for false statements requires a showing of literal falsity. A good example is the Eighth Circuit's opinion in *United States v. Vesaas*.¹⁴⁰ In 1972, defendant had personally guaranteed a Small Business Administration loan made to a corporation formed by a group of his friends. After the corporation failed, the government obtained a default judgment against him. Defendant had held a number of stocks in joint tenancy with his mother, who died in August 1977. In November 1977, defendant was asked at a deposition if he "knew of any stocks, bonds, or other property owned by his deceased mother and himself in joint tenancy." He answered "no." Since it is legally impossible to be a joint tenant with a decedent, defendant's response, though misleading, was literally true. Accordingly, the Eighth Circuit, following *Bronston*, reversed the conviction.¹⁴¹

was asked.

137. False statement prosecutions frequently involve statements that were offered voluntarily. See, e.g., *United States v. Kingston*, 971 F.2d 481, 490 (10th Cir. 1992); *United States v. Irwin*, 654 F.2d 671, 678 (10th Cir. 1981).

138. At this point, it is worth distinguishing between *refusing* to provide a required answer and *failing* to do so. To the extent that the latter is more likely than the former to be understood as an assertion, see *supra* note 136, it is also more plausibly characterized as a "lie."

139. For a prosecution for failure to file a required form, see, for example, *United States v. McCarthy*, 422 F.2d 160 (2d Cir. 1970) (upholding conviction for failure to file report under 29 U.S.C. § 432, regarding certain labor practices, where defendant filed a report but failed to list certain payments that were required to be listed).

140. 586 F.2d 101, 104 (8th Cir. 1978).

141. See also *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963) (reversing conviction for false statements where defendant's statements to immigration officials to the effect that he was the "spouse of" and "married to" an American woman were literally

In contrast to the rigid lying approach followed in *Vesaas* and elsewhere is the flexible deception formula adopted by the Second Circuit in *United States v. Stephenson*.¹⁴² Stephenson was an Export Licensing Officer at the U.S. Department of Commerce. His duties included reviewing applications for federal approval to export high-technology equipment from the United States abroad. In 1987, the Zamax Company sought a Commerce Department license to ship high technology medical equipment to China. Starting in mid-October 1987, Stephenson began pressing Zamax officials, including Wilson Chang, for a bribe to approve the license. During subsequent meetings, Chang, acting as an FBI informant, offered to pay Stephenson at least \$35,000 for one of the required licenses. Several months later, Stephenson, fearing that he might be caught, went to Michael Dubensky, a Commerce Department Special Agent, and told him that he, Stephenson, “had received a bribe offer from a company in New York by the name of Zamax.” As a result of his statement to Dubensky regarding Chang’s offer, Stephenson was prosecuted under Section 1001.

In his defense, Stephenson argued that his statement to Agent Dubensky—to the effect that he had received a bribe offer from Zamax—was literally true, and therefore not actionable under Section 1001. In upholding Stephenson’s conviction, the court said that, even if his statement were literally true,¹⁴³ he would still be subject to prosecution under Section 1001. In so doing, the court rejected the literal truth defense, emphasizing the significance of the “falsifie[d], conceal[ed], or cover[ed] up” language in Section 1001, in apparent contrast to the perjury-like term, “false statement.”

Unfortunately, the legislative history offers little explanation for why Congress made some false statements statutes perjury-like and

true, even if ultimately intended to mislead authorities about the true nature of his immigration status); *United States v. Lozano*, 511 F.2d 1, 5 (7th Cir. 1975) (similar); *United States v. Gahagan*, 881 F.2d 1380, 1383 (6th Cir. 1989) (reversing conviction for false statements where defendant, who was required to file financial report listing all of his assets, failed to report his ownership of a automobile, after transferring title to the vehicle to his girlfriend prior to his completion of the financial report; statement of assets was “literally and factually correct”).

142. 895 F.2d 867, 873 (2d Cir. 1990).

143. In fact, the court found that Stephenson’s statement was not literally true: “Based upon the evidence, the jury easily could have found that by his statement to Dubensky, Stephenson intended to communicate that he was an unwilling victim of a bribery scheme initiated and orchestrated by Chang. So construed, the statement becomes clearly false.” *Id.* at 874. This argument, however, is clearly specious. When Stephenson told Dubensky that he had received a bribe offer from Chang, the fact is that, no matter how misleading, he was saying something that was literally true. Stephenson’s statement was precisely analogous to the misleading, but literally true, statements made in cases such as *Bronston*, *Earp*, *Eddy*, and *Vesaas*, discussed *supra* notes 70 & 140 and accompanying text.

others fraud-like. Nor have the courts been helpful in explaining the difference. In large part, the fact that some false statements statutes provisions look like perjury and others like fraud seems to be a result of nothing more than historical accident.

As explained above, however, there are good reasons for maintaining a clear distinction between those contexts in which a defendant has lied and those in which a defendant has merely misled. In light of that analysis, I would propose that legislatures and courts adopt the following approach: When a false statements statute is to be applied to a statement made in a formal or quasi-formal proceeding, in which a government agent has had the opportunity for follow-up questioning, such statute should reflect the attributes of perjury, including the requirement of literal falsity. When a false statement statute is applied to a statement made in informal proceedings, without the opportunity for "cross-examination," it should function like fraud or false pretenses. Such an approach would bring much needed coherence and consistency into the law of false statements.

D. False Statements Involving an "Exculpatory No"

In the previous three sections, we observed how the everyday moral concepts of lying and misleading find analogues in the legal concepts of perjury, fraud, and false statements. In this section, I want to explore an analogy between the moral concept of "falsely denying" and the legal doctrine of "exculpatory noes"—a doctrine that was widely recognized in the lower federal courts until its recent repudiation by the Supreme Court in *Brogan v. United States*.¹⁴⁴

Under the most common form of the exculpatory no doctrine, a statement that would otherwise violate Section 1001 was exempt from prosecution if it satisfied two conditions.¹⁴⁵ First, it had to convey "false information in a situation in which a truthful reply would have incriminated the interrogee."¹⁴⁶ Second, it had to be limited to simple

144. 522 U.S. 398 (1998).

145. Among the variations in the exculpatory no doctrine, as developed in the lower federal courts, were the requirement that defendant be unaware that he is under investigation, that the nature of the government inquiry be investigative and not administrative, that the false statement not impair the basic functions of the government agency, that the statement be unrelated to a privilege or a claim against the government, that the statement be oral and unsworn, and that the statement be a response to an inquiry initiated by the government. See Tim A. Thomas, Annotation, *What Statements Fall Within Exculpatory Denial Exception to Prohibition, Under 18 U.S.C. § 1001, Against Knowingly and Willfully Making False Statement Which is Material to Matter Within Jurisdiction of Department or Agency of United States*, 102 A.L.R. FED. 742 (1991); Lauren C. Hennessey, Note, *No Exception for "No": Rejection of the Exculpatory No Doctrine—Brogan v. United States*, 118 S. Ct. 805 (1998), 89 J. CRIM. L. & CRIMINOLOGY 905, 911 n.50 (1999).

146. Scott D. Pomfret, Note, *A Tempered "Yes" to the "Exculpatory No,"* 96 MICH. L.

words of denial (such as “no, I did not,” “none,” or “never”) rather than more elaborate fabrications.¹⁴⁷ If, for example, an FBI agent had asked a suspect whether he possessed drugs, and the suspect had falsely responded, “no, I do not,” the suspect would have been protected by the exculpatory no doctrine and could not have been convicted under Section 1001.

Prior to 1998, a majority of the lower federal courts (seven of the nine circuits to consider the issue) had adopted some form of the exculpatory no doctrine.¹⁴⁸ The courts and commentators offered two basic arguments in favor of the doctrine. First, allowing defendants who utter exculpatory noes to be prosecuted under Section 1001 would be inconsistent with the purpose of the statute, which is to criminalize only those acts that “pervert governmental functions.”¹⁴⁹ Second, prosecution of false denials would violate the “spirit” of the Fifth Amendment, by placing a suspect in the “cruel trilemma” of admitting guilt (and incriminating himself in the underlying crime), remaining silent (and being held in contempt), or falsely denying guilt (and facing prosecution for perjury or false statements).¹⁵⁰

In *Brogan*, a majority of the Court rejected both of these arguments. In response to the first argument, Justice Scalia said that even if exculpatory noes do not actually thwart governmental functions, the Court has neither the power nor the desire to apply a construction that would limit “the unqualified language of a statute to

REV. 754, 755-56 (1997). To be incriminating, it would either have to support a conviction under a federal criminal statute or “furnish a link in the chain of evidence needed to prosecute.” *Id.* at 756 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

147. *Id.* at 756-57.

148. *Moser v. United States*, 18 F.3d 469, 473-74 (7th Cir. 1994); *United States v. Taylor*, 907 F.2d 801, 805 (8th Cir. 1990); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988); *United States v. Tabor*, 788 F.2d 714, 717-19 (11th Cir. 1986); *United States v. Fitzgibbon*, 619 F.2d 874, 880-81 (10th Cir. 1980); *United States v. Rose*, 570 F.2d 1358, 1364 (9th Cir. 1978); *United States v. Chevoor*, 526 F.2d 178, 183-84 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976). The only circuits to reject the exculpatory no doctrine were the Second, *United States v. Wiener*, 96 F.3d 35 (2d Cir. 1996), and the Fifth, *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994).

149. *See, e.g., United States v. Gilliland*, 312 U.S. 86 (1941) (Section 1001 is intended to criminalize only those statements that “pervert governmental functions”). Because exculpatory noes almost always occur in the context of investigatory or adversarial questioning, it is unlikely that any governmental function would be impaired in the manner contemplated by Congress.

150. *Brogan v. United States*, 522 U.S. 398, 404 (1998). A third argument, emphasized in Justice Ginsburg’s concurrence, is that the exculpatory no doctrine is necessary to eliminate the risk that Section 1001 will become an instrument of prosecutorial abuse—a means of “piling on” offenses, at times punishing the denial of wrongdoing more severely than the wrongdoing itself. *Id.* at 411-12 (Ginsburg, J., concurring). *See generally* Giles A. Birch, Note, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990).

the particular evil that Congress was trying to remedy.”¹⁵¹ Moreover, reasoned Scalia, “the investigation of wrongdoing is a proper governmental function; and since it is the very purpose of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that [legitimate government] function.”¹⁵² In response to the second argument, Scalia asserted, the Fifth Amendment gives suspects the right to remain silent, not to lie. Therefore, the Fifth Amendment is inapplicable to exculpatory noes.¹⁵³

As a matter of statutory and constitutional interpretation, Justice Scalia’s opinion in *Brogan* is surely correct. Neither the broad wording of Section 1001 nor its legislative history evidences any plausible safe harbor for exculpatory noes.¹⁵⁴ Petitioner’s suggestion that “the unqualified language of” Section 1001 should be used exclusively to combat “the particular evil that Congress was trying to remedy” is nothing more than wishful thinking. Moreover, Justice Scalia was undoubtedly right that, as a matter of constitutional law, the Fifth Amendment guarantees only the right to silence, not the right to lie.

The interesting question, though, is this: How can we explain the fact that—notwithstanding the lack of textual, legislative, or constitutional support for it—seven of nine federal circuit courts, the Department of Justice, and numerous other courts and commentators, over the course of some 36 years,¹⁵⁵ were willing to adopt some version of the exculpatory no doctrine? Ironically, I believe, it is precisely the lack of credible legal support for the doctrine that makes its persistence so telling.

151. *Brogan*, 522 U.S. at 403.

152. *Id.* at 402 (emphasis omitted).

153. *Id.* at 405. Scalia dismissed out of hand the contention that silence is an “illusory” option because a suspect may fear that his silence will be used against him later, or may not even know that silence is an available option.

154. In fact, Congress expressly considered, but never adopted, a provision that would have established a “defense to a prosecution for an oral false statement to a law enforcement officer” if “the statement was made during the course of an investigation of an offense or a possible offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of such offense.” S. REP. NO. 97-307, at 407 (1981), quoted in *Brogan*, 522 U.S. at 417 (Ginsburg, J., concurring).

155. The earliest appellate court decision endorsing the exculpatory no doctrine was *Paternostro v. United States*, 311 F.2d 298, 305 (5th Cir. 1962), which ultimately was overruled by *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (en banc). See also UNITED STATES ATTORNEY’S MANUAL ¶ 9-42.160 (Feb. 12, 1996) (“It is the Department’s policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government.”).

The exculpatory no doctrine survived, and flourished, because it is consistent with deeply held, if mostly tacit, moral intuitions. The idea of bringing a prosecution for false statements against one who falsely denies his own wrongdoing strikes us as unfair and demeaning, particularly in cases in which the alternative (i.e., remaining silent) would be tantamount to admitting guilt. As I have suggested above, the deception contained in a false denial or exculpatory no is, from a moral perspective, qualitatively different from the deception that occurs in other contexts. It is deception that, though unjustified, is often viewed as excused. Speaking about the slightly different context of perjury, William Stuntz has made this point well:

Self-protective perjury . . . looks a good deal like the commission of any victimless crime under great pressure. The defendant's conduct is no doubt wrong, and seriously so, but the harm the conduct causes in any one case is both slight and diffuse while the pressure is both substantial and concentrated. So described, the choice seems to be one for which excuse is classically appropriate. One could hardly imagine punishing a bank robber for leaving the scene of his crime after the robbery in order to avoid immediate arrest; the defendant who lies on the witness stand to avoid confessing is in much the same position.¹⁵⁶

The fact that the exculpatory no doctrine thrived even in the absence of tenable statutory or constitutional support is a manifestation of the strength of these moral concepts. Given the force of such claims, I therefore agree with Justice Ginsburg's concurrence in *Brogan* that Congress should amend Section 1001 by carving out an exception for exculpatory noes.¹⁵⁷

III. Rethinking the Clinton Sex-Perjury Scandal

The Clinton sex-perjury scandal, which embroiled and captivated the nation during most of 1998 and early 1999, presents a rich factual context for thinking about the moral and legal aspects of lying, misleading, and falsely denying. But it also presents special hazards. The case is so controversial, and the facts so familiar, that most readers will long since have formulated strongly held views about its almost every aspect.¹⁵⁸ Given understandably strong feelings about

156. Stuntz, *supra* note 51, at 1254.

157. See *Brogan*, 522 U.S. at 416-18 (Ginsburg, J., concurring).

158. Depending on one's view, Clinton was either so blameworthy as to be unfit for his office, or the victim of a "vast right wing conspiracy"; Independent Counsel Kenneth Starr was either an overzealous voyeur, or a tireless public servant; the House Republican prosecutors were either partisan hypocrites, or fearless statesmen. Leading commentary includes POSNER, *supra* note 15; PETER BAKER, *THE BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON* (2000); WILLIAM J. BENNETT, *THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS* (1999); ANN H. COULTER, *HIGH CRIMES AND MISDEMEANORS: THE CASE*

the larger question of Clinton's performance in office and the appropriateness or inappropriateness of impeachment, it is easy to lose sight of the underlying criminal law issues that gave rise to the question of impeachment in the first place.

I hope to avoid these pitfalls by sticking close to the factual record and taking a fairly narrow look at a number of specific instances of alleged perjury. Each instance is meant to be representative of some specific doctrinal aspect of the law of perjury.¹⁵⁹ From this, I attempt to draw some larger (and presumably more controversial) conclusions about the reasons the Clinton perjury case ultimately failed. I focus here on two: The first is that much of what Clinton did was merely mislead rather than lie; and that the public was able to recognize, if only at some intuitive level, the moral and legal differences between those two acts. The second conclusion is that most of Clinton's deceptions came in the form of defensive denials rather than offensive falsehoods, and that, once again, the public was able to intuit the difference.

A. Clinton and the Literal Truth Defense

This section considers five pieces of testimony given by former President Clinton during either his January 17, 1988 deposition in the

AGAINST BILL CLINTON (1998); SUSAN SCHMIDT & MICHAEL WEISSKOPF, TRUTH AT ANY COST: KEN STARR AND THE UNMAKING OF BILL CLINTON (2000); JEFFREY TOOBIN, A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT (1998). My own view—for what it's worth—is that there is plenty of blame to go around: Bill Clinton squandered the promise of his presidency through recklessness and mendacity; Independent Counsel Kenneth Starr abused the office of Independent Counsel through, among other things, an unwarranted expansion of his statutory mandate and the inclusion of gratuitously embarrassing details in his Referral to the House of Representatives; and the House Republican managers sacrificed the good of the country for their own partisan political ends. As to whether the charges against Clinton, assuming they were true, were sufficient to merit impeachment and removal from office, that question is best left to the constitutional scholars. See, e.g., MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 175-94 (2d ed. 2000); Charles J. Cooper, *A Perjurer in the White House?: the Constitutional Case for Perjury and Obstruction of Justice as High Crimes and Misdemeanors*, 22 HARV. J. L. & PUB. POL. 619 (1999); Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279 (1998).

159. I make no attempt to deal with every possible instance of perjury, or with questions of intent, materiality, and proof. For example, I do not consider questions such as whether lies made in a deposition in a civil case that is subsequently dismissed are material. On such questions, see Charles W. Collier & Christopher Slobogin, *Terms of Endearment and Articles of Impeachment*, 51 FLA. L. REV. 615 (1999); Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 682, 656-66 (1999); Alan Heinrich, Note, *Clinton's Little White Lies: The Materiality Requirement for Perjury in Civil Discovery*, 32 LOY. L.A. L. REV. 1303 (1999). Nor do I deal in any detail with the possibility that Clinton lied to, or misled, potential grand jury witnesses, the public, his staff, his family, or his friends.

Paula Jones sexual harassment case¹⁶⁰ or August 17, 1998 videotaped appearance before the grand jury.¹⁶¹ Each statement is meant to illustrate a different facet of the law of perjury or the morality of deception.

(1) *Testimony that Was Nonresponsive, Misleading, and Literally True*

According to the allegations contained in the Referral of the Office of Independent Counsel,¹⁶² one of the most significant instances of perjury during the course of President Clinton's deposition in the *Jones* case occurred in the following colloquy:

Q: . . . At any time were you and Monica Lewinsky together alone in the Oval Office?

A: . . . [A]s I said, when she worked at the legislative affairs office, they always had somebody there on the weekends. Sometimes they'd bring me things on the weekends. She—it seems to me she brought things to me once or twice on the weekends. In that case, whatever time she would be in there, drop it off, exchange a few words and go, she was there. I don't have any specific recollections of what the issues were, what was going on, but when the Congress is there, we're working all the time, and typically I would do some work on one of the days of the weekends in the afternoon.¹⁶³

According to the Referral, Clinton's response constituted perjury because, in fact, Clinton had been alone with Lewinsky in the Oval Office for extended periods of time on a number of occasions.¹⁶⁴

Was this testimony really perjurious? Note that Clinton never actually answers the question asked of him. He never says whether he and Lewinsky were alone together in the Oval Office. Instead, he offers a rather elaborate, and somewhat rambling, explanation of the circumstances in which legislative aides might have brought him materials in the Oval Office—an explanation that would appear to be

160. The facts of that case are described in *Clinton v. Jones*, 520 U.S. 681, 685 (1997).

161. As it turns out, only Clinton's alleged perjury before the grand jury and to potential witnesses were the subject of the impeachment articles themselves, *see* House Resolution 611, in *THE IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON: THE OFFICIAL TRANSCRIPTS, FROM THE HOUSE JUDICIARY COMMITTEE HEARINGS TO THE SENATE TRIAL* 445-50 (Merrill McLoughlin, ed. 1999), although his alleged perjury during the deposition received at least as much attention in the press and in Starr's Referral.

162. *REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES FILED IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, § 595(C) SUBMITTED BY THE OFFICE OF THE INDEPENDENT COUNSEL*, H.R. DOC. NO. 105-310 (1998) [hereinafter *REFERRAL*].

163. *Id.* at 46. For purposes of analytical clarity, I have omitted the phrase with which Clinton begins his response: "I don't recall." Because Clinton was almost certainly lying when he said he could not recall being alone together with Lewinsky in the Oval Office, this statement should be regarded as perjurious. For discussion of another literally false statement made by Clinton, *see infra* notes 182-84 and accompanying text.

164. *Id.*

accurate on its face. In other words, Clinton offers an evasive, non-responsive, and factually true reply to the question posed.

Was Clinton's testimony misleading? Probably, it was. A reasonable conclusion to be drawn from his statement is that Clinton and Lewinsky were never alone together in the Oval Office, at least for a period long enough to engage in sexual activity. Bill Clinton—a witness so slippery he makes Bronston look like an amateur—evades the question he does not want to answer by answering a different, relatively innocuous question about White House procedures. Under *Bronston*, however, evasive answers are not perjurious: "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."¹⁶⁵ Here, Jones's lawyers had the opportunity to obtain a clarification of Clinton's response, but, for whatever reason, they did not pursue it.¹⁶⁶ Any conclusions, true or untrue, that can be drawn from such statements would seem to be at least partly the questioner's fault.

(2) *Testimony that Was Responsive, Misleading, and (Arguably) Literally True*

Perhaps the single most infamous example of alleged perjury by President Clinton occurred during his deposition, in the course of the following colloquy with a lawyer for the Office of Independent Counsel. Clinton was asked, "have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?," and he responded, "I have never had sexual relations with Monica Lewinsky."¹⁶⁷

Here again, Clinton's testimony was obviously misleading. In normal discourse, one would infer that if *A* and *B* had not had "sexual relations," then *A* and *B* had not had sexual intercourse, oral sex, or any other form of sexual contact. But this was not normal discourse. It was a deposition, and the term "sexual relations" had already been defined in a quite specific way. According to Exhibit 1:

[A] person engages in "sexual relations" when the person knowingly engages or causes –

- (1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person.¹⁶⁸

165. *Bronston v. United States*, 409 U.S. 352, 358-59 (1973) (emphasis added).

166. For a discussion of other apparent errors made by Jones's lawyers, see Gordon, *supra* note 159, at 682.

167. REFERRAL, *supra* note 162, at 133.

168. SUBMISSION BY COUNSEL FOR PRESIDENT CLINTON TO THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. PRT. NO. 105-16 (1998) [hereinafter CLINTON SUBMISSION], at 37.

Initially, Jones's lawyers had submitted a much broader definition of "sexual relations," which included both "contact between any part of the person's body or an object and the genitals or anus of another person" and "contact between the genitals or anus of the person and any part of another person's body."¹⁶⁹ But for reasons that are now difficult to ascertain, Judge Wright narrowed the meaning of the term by striking these last two clauses.

As a result, the remaining definition did not include a number of acts that might ordinarily be thought of as involving sexual activity—including, most significantly, fellatio performed by Lewinsky on Clinton.¹⁷⁰ Thus, assuming that Clinton's sexual activity with Lewinsky was limited to his being fellated by her,¹⁷¹ it follows that Clinton's response was literally true, that he did not lie, and that, under *Bronston*, he did not commit perjury.

Moreover, the fact that Clinton's testimony here was responsive (as in *DeZarn*), rather than non-responsive (as in *Bronston*), should make no difference. Recall that, in *Bronston*, the lawyer's only error was in failing to follow up on a non-responsive answer. By contrast, the lawyer here, as in *DeZarn*, actually asked the wrong question. The rule of *caveat auditor* thus applies *a fortiori*. By adhering to the idiosyncratic definition of "sexual relations" contained in Exhibit 1,

169. *Id.*

170. The import of the "oral sex does not constitute sexual relations" defense would not become fully clear until Clinton testified before the grand jury on August 17, 1998. When asked about his understanding of the term "sexual relations" as defined for use in the deposition, Clinton said it "covers contact by the person being deposed with the enumerated areas, if the contact is done with an intent to arouse or gratify," but it does not cover oral sex being performed on the person being deposed. "[I]f the deponent is the person who has oral sex performed on him, then the contact is with—not with anything on that list, but with the lips of another person." REFERRAL, *supra* note 162, at 16. In other words, assuming again that the only sexual contact Clinton had with Lewinsky consisted of her performing fellatio on him, then what Clinton testified to in his deposition was literally true. Even if Lewinsky had engaged in "sexual relations" with Clinton, technically speaking, Clinton had not engaged in "sexual relations" with her, because he had allegedly not had contact with any of her listed body parts with the "intent to arouse or gratify [her] sexual desire."

171. I recognize, of course, that this is a big assumption. According to Lewinsky's testimony, in addition to *her* performing oral sex on Clinton, *he* also touched her in various sexual ways. *Id.* at 148 ("She described with precision nine incidents of sexual activity in which the President touched and kissed her breasts and four incidents involving contacts with her genitalia."). If Lewinsky's testimony on this point is to be believed, then Clinton's assertion that he did not have "sexual relations" as defined in Exhibit 1 would be literally false, and he would thereby have committed perjury. On the other hand, it is also possible that Lewinsky was lying about the precise nature of her sexual contact with Clinton. In any event, the requirement that the government present the testimony of two witnesses, *Hammer v. United States*, 271 U.S. 620, 626 (1926), or at least one witness and independent evidence corroborating that witness's testimony, *United States v. Ford*, 603 F.2d 1043 (2d Cir. 1979), would, under the circumstances, have been hard to satisfy.

rather than asking straightforward questions about the precise nature of the sexual relationship between Clinton and Lewinsky,¹⁷² Jones's lawyers drew unwarranted conclusions about the nature of their relationship. Assuming again that Clinton's contact with Lewinsky was limited to her performing oral sex on him, his statement that he had "never had sexual relations with Monica Lewinsky" was not perjurious.¹⁷³ Under *Bronston*, it would have been unreasonable to

172. For example, Jones's lawyers could have asked questions such as: "Did Lewinsky ever have 'sexual relations' with you?" "Did Lewinsky ever perform fellatio on you?" "Did Lewinsky ever have contact with any of your following body parts?" "Did you ever have contact with any of her following body parts?"

173. It is also worth considering Clinton's denial in the January 17 deposition that he ever had a "sexual affair" or a "sexual relationship" with Lewinsky—terms that, unlike "sexual relations" were never expressly defined. The Clinton defense team argued that the terms "sexual affair" and "sexual relationship" both refer to sexual intercourse or coitus, and that since Clinton (even by Lewinsky's own admission) had never had intercourse with her, it follows that they did not have a sexual "affair" or "relationship." See CLINTON SUBMISSION, *supra* note 168, at 35-36.

This strikes me as a difficult claim to sustain. The problem is the premise that the terms "sexual affair" and "sexual relationship" refer exclusively to sexual intercourse or coitus. To be sure, there are a number of sex-like activities that might not necessarily qualify as a "sexual affair" or "relationship," such as kissing and fondling and even phone sex. Similarly, it could be argued that a sexual encounter with an anonymous partner or with a prostitute would not be a sexual "affair" or "relationship." But it strains the limits of language to suggest that a relationship that involves mouth-to-genital contact with intent to arouse is not a sexual relationship.

There is, however, a better argument that the Clinton defense team could have made, but apparently did not. We are dealing with three terms that, in ordinary discourse, would be understood as basically synonymous: sexual relations, sexual affair, and sexual relationship. Only the first is defined. In such a situation, one would expect to see the undefined terms used in one of two situations: either because the speaker *intends* to be limited by the defined term, and has simply been careless; or because the speaker intends *not* to be limited by the defined term. If one looks at the deposition transcript, it seems obvious that the former is true here: Jones's lawyers did intend to use the undefined terms "sexual relationship" and "sexual affair" as synonyms for the defined term "sexual relations." For example, consider the following colloquy:

Q: Did you have an extramarital sexual affair with Monica Lewinsky?

WJC: No.

Q: If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?

WJC: It's certainly not the truth. It would not be the truth.

Q: *I think I used the term "sexual affair." And so the record is completely clear, have you ever had sexual relations with Monica Lewinsky, as that term is defined in Deposition Exhibit 1, as modified by the Court?*

* * *

WJC: *I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.*

REFERRAL, *supra* note 162, at 133 (emphasis added). As the italicized language indicates, both Jones's lawyers and Clinton used the undefined term "sexual affair" as a synonym for the defined term "sexual relations." Therefore, to the extent that the defined term "sexual relations" does not refer to Clinton's being fellated, it seems reasonable to conclude that

expect Clinton to volunteer information that exceeded the scope of the definition given.

(3) *Testimony Given in Response to Ambiguous or Imprecise Questioning*

At another point in the deposition, Jones's lawyers questioned Clinton about the number of times he and Monica Lewinsky had been alone together in the Oval Office, and the following colloquy ensued:

Q: So I understand, your testimony is that it was possible, then, that you were alone with her, but you have no specific recollection of that ever happening?

A: Yes, that's correct. It's possible that she, in, while she was working there, brought something to me and that at the time she brought it to me, she was the only person there. That's possible.¹⁷⁴

Here again, the Office of Independent Counsel maintained that Clinton had committed perjury, on the grounds that he did in fact have a specific recollection of having been alone with Ms. Lewinsky.¹⁷⁵

Under the reasoning of cases like *Lattimore* and *Sainz*, this conclusion is highly doubtful.¹⁷⁶ The question posed to Clinton has two discrete parts: "is it possible that you were alone with her?"; and "is it true that you have no specific recollection of being alone with her?" When Clinton answered, "yes, that's correct," he could have been responding either to part 1 of the question, or to part 2, or to both parts at once. Under the Independent Counsel's theory, the only truthful answer he could have given would have been something to the effect that, "yes, it is possible that I was alone with her, but no, it is not true that I have no specific recollection of being alone with her." The fact that Clinton failed to clarify an ambiguous and poorly framed question in this manner surely cannot mean that he committed perjury.

(4) *False Testimony Given in Response to Questioning Regarding Precise Quantities*

During the deposition in the *Jones* case, in response to the question, "[h]as Monica Lewinsky ever given you any gifts?," the President responded, "[o]nce or twice. I think she's given me a book or two."¹⁷⁷ Here, Clinton misleads his questioner by implying that the

the undefined terms "sexual relationship" and "sexual affair" are also so limited. Under this construction, and assuming again that Clinton's relationship with Lewinsky was in fact limited in this manner, it appears that Clinton did not make a literally false statement.

174. REFERRAL, *supra* note 162, at 152.

175. *Id.*

176. See *supra* notes 82-84 and accompanying text.

177. REFERRAL, *supra* note 162, at 156.

only gifts he received from Lewinsky were one or two books when in fact, according to Lewinsky, she gave him numerous gifts, perhaps as many as 38.¹⁷⁸ Does this response from Clinton constitute perjury, or is it too protected by *Bronston's* literal truth rule on the grounds that, after all, Lewinsky *did* give Clinton "a book or two"—in addition to a slew of other gifts?

As a matter of law, the answer to this question lies in footnote 3 of *Bronston*, in which the Court refers to (and distinguishes) an example of perjury given by the District Court below:

[I]f it is material to ascertain how many times a person has entered a store on a given day and that person responds to such a question by saying five times when in fact he knows that he entered the store 50 times that day, that person may be guilty of perjury even though it is technically true that he entered the store five times.¹⁷⁹

Indeed, the Court says, "it is very doubtful that an answer which, in response to a specific quantitative inquiry, baldly understates a numerical fact can be described as even 'technically true.'"¹⁸⁰ In this case, Clinton seems to have done exactly what footnote 3 says he may not do. He has responded to a quantitative inquiry by "baldly understat[ing]" the numerical response.¹⁸¹ Accordingly, this statement should be regarded as perjurious.

Moreover, the approach in footnote 3 is consistent with everyday morality. Imagine that *A* needs to borrow a car for the evening and asks *B* how many he owns. *B*, who in truth owns four cars, replies, "I have one car, and I'm using it this evening." Has *B* lied in saying that he owns "one car"? Has *B* made an assertion that is literally false, or has he merely caused *A* to draw an improper conclusion from a misleading, but literally true, statement? It seems wrong to say that *B* has merely misled *A*. After all, *B* told *A* that he owns "one car." Perhaps *A* could have asked the follow up question, "are you saying that you own *only* one car and no more?" but this seems to take the principle of *caveat auditor* to extremes. In terms of everyday morality, one who responds to a specific quantitative inquiry by baldly understating a numerical fact should be regarded as uttering a lie.

178. *Id.* at 157.

179. *Bronston v. United States*, 409 U.S. 352, 355 n.3 (1973) (quoting district court opinion).

180. *Id.* at 355-56.

181. The fact that Clinton was asked, "[h]as Monica Lewinsky ever given you any gifts?," rather than "how many gifts has she given you" should make no difference to the perjury inquiry, given the fact that he responded with a specific quantitative answer.

(5) *Literally False and Misleading Testimony*

At yet another point in the *Jones* deposition, Clinton was asked, "have you ever given any gifts to Monica Lewinsky?," to which he replied, "I don't recall. Do you know what they were?"¹⁸² In light of Lewinsky's testimony, physical evidence (namely, the gifts themselves), and Clinton's own testimony to the contrary,¹⁸³ his statement that he could not recall whether he had ever given any gifts to Monica Lewinsky was almost certainly literally false. Assuming that it was also intentional and material, it should be viewed as unproblematically perjurious.¹⁸⁴

B. Caveat Auditor, Exculpatory Noes, and Public Perceptions of the Clinton Scandal

What accounts for the fact that Bill Clinton managed not only to avoid removal from office but also to maintain a fairly high level of public approval throughout the Monica Lewinsky affair and its aftermath?¹⁸⁵ Explanations abound: The economy was doing well, the country was at peace, and Clinton was given much of the credit for both.¹⁸⁶ Kenneth Starr was viewed by many as overreaching, self-righteous, and vindictive; the House managers as partisan hypocrites.

182. REFERRAL, *supra* note 162, at 155.

183. *Id.* at 155-56 (describing evidence of Clinton gifts to Lewinsky).

184. Clinton's defense team, presumably at a loss as to how to respond to this particular allegation of perjury, came up with the following, almost comically far-fetched, explanation:

The videotape of the President's January 17 deposition makes clear that the cold transcript can be somewhat misleading. When the President is asked, "Well, have you ever given any gifts to Monica Lewinsky?," the transcript records his response as, "I don't recall. Do you know that they were?" Dep. at 75. The videotape reveals the President's response, however, was a run-on sentence, as though the punctuation were omitted, for the real communicative gist of his quoted response (as it appears in the videotape) was, "Yes — I know there were some — please help remind me."

CLINTON SUBMISSION, *supra* note 168, at 39 n.129.

185. According to Gallup/CNN/*USA Today* polling performed during the height of the scandal (between June and September 1998), the percentage of respondents who expressed the view that Clinton "should not be impeached and removed from office" varied between 63 and 77 percent. The percentage that indicated that Clinton should be impeached and removed varied between 19 and 35 percent. *President Clinton: Scandals and Investigations*, at <http://www.pollingreport.com/scandal2.htm> (last visited Aug. 14, 2001). The breakdown was remarkably similar in response to the question, "do you approve or disapprove of the way Bill Clinton is handling his job as president." *Id.* For further reflections on the public reaction to the scandal, see Atkinson, *supra* note 10.

186. See, e.g., CAMPBELL, *supra* note 17 at 312 ("Common sense told [the] experts that a president who behaved like [Clinton], whose personal morality was deplorable, could not stay in office. But social morality, the 'needs and interests' of the majority, which approved of the direction in which he was taking the country, transcended the principle that a president should always tell the nation the truth.").

Perhaps most importantly, Clinton's marital infidelities, immoral as they surely were, were viewed as private matters that should never have been the concern of federal prosecutors, grand juries, or the Congress.¹⁸⁷

I do not dispute any of these theories. Instead, I want to add two theoretically deeper explanations to the mix. The first is that the public grasped, if only intuitively, that there *is* a moral difference between bald-faced lies and duplicitous evasions. Although Clinton surely did make a handful of literally false statements under oath, it appears that most of his testimony consisted of statements that, though misleading, were literally true. As "legalistic" as many of Clinton's responses undoubtedly were, the public seems to have understood—and accepted—the fact that they were neither lies nor perjurious.

Second is what we may refer to as the procedural posture of Clinton's deception—i.e., the fact that it came mostly in the form of false denials. It has often been suggested that the reason Clinton survived the Lewinsky ordeal was the perceived unfairness of holding him accountable for lies told about essentially *private* matters.¹⁸⁸ But this factor is not sufficient, by itself, to account for public attitudes. Imagine that a politician *volunteered* untrue information to the media about private matters such as his relationship with his spouse and children. (One thinks of former Senator Gary Hart, who, as questions of marital infidelity arose during *his* presidential campaign, actually dared members of the media to surveil him.) Although such a politician would have lied about private matters, we would not be inclined to regard such lies as excused. By contrast, Clinton lied mostly in response to questions *put to him*, rather than on his own initiative.

When Clinton did engage in "offensive," literally false deception, the public was much less likely to be forgiving. Consider his infamous January 26, 1998 appearance in the Roosevelt Room of the White House, less than a week after the Monica Lewinsky matter was first reported by the media. Shaking his finger and looking directly into the television cameras, Clinton announced, "I want to say one thing to the American people. I want you to listen to me. I'm going to say this again: I did not have sexual relations with that woman, Miss Lewinsky."¹⁸⁹ For many observers, this seemed the low point of the whole sordid affair. Even those who were willing to excuse Clinton

187. We may think of this last theory as implied by opposition to legal moralism, as used in the first sense of the term, described *supra* note 1 and accompanying text.

188. See, e.g., Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161 (1999).

189. John F. Harris & Dan Balz, *Clinton More Forcefully Denies Having Had Affair or Urging Lies*, WASH. POST, Jan. 27, 1998, at A1.

for bending the truth during the depositions felt brutalized by this statement. Clinton had asked the American people to put their trust in him, and he had betrayed that trust. Here, there were no unwarranted conclusions to draw, no hypertechnical Exhibit 1 definitions to hide behind. Clinton had taken the initiative, he had breached the faith, and the blame for the public's being misled was wholly his.

Which brings us to a final issue concerning Bill Clinton. On February 18, 2001, this time as a former president, Clinton could again be found issuing a denial of wrongdoing. Caught in yet another storm of controversy, this time over the propriety of a last minute presidential pardon to fugitive financier Marc Rich (among others), Clinton published a piece on the Op-Ed page of the *New York Times*. According to the former president, "[t]he suggestion that I granted the pardons because Mr. Rich's former wife, Denise, made political contributions and contributed to the Clinton library foundation is utterly false. There was absolutely no quid pro quo."¹⁹⁰

Like his statement that he "did not have sexual relations with that woman, Miss Lewinsky," Clinton's "offensive" assertion that there was "absolutely no quid pro quo" for the Rich pardon is distinguishable from the "defensive" statements that otherwise characterized the Lewinsky affair. Should it turn out that there *was* a quid pro quo for the Rich pardon, then his *Times* Op-Ed statement would prove to be literally false, and he would have lied. Moreover, unlike the Lewinsky affair, he would have lied about a matter that is fundamental to the integrity of the presidency. About deception of this sort, one would expect the public to be much less forgiving.

Conclusion

People use evasion and duplicity not just to avoid telling the truth, but also to avoid lying. At times, they go to great lengths to avoid saying that which is literally false. Why not simply lie? The answer is that we recognize, if mostly at an intuitive level, that lying involves a moral wrong that is mitigated in the case of mere misleading—mitigated because the misled party shares at least some of the blame for her false belief.

This moral distinction is reflected in the law. Material statements, given under oath with an intent to deceive, are not perjurious unless they involve a literal falsity. In practice, this means that a witness might engage in considerable deception on the stand, without ever violating the criminal law. In the law that applies to business transactions, however, a different set of rules applies.

190. Clinton, *supra* note 16.

Unlike the courtroom, the business world is regarded as too complex and chaotic to allow for effective “cross-examination” of misleading statements. An intentional falsity that appears in a securities offering or real estate prospectus must be taken at its word, so that even misleading statements that are literally true might be made criminal.

We also recognize a moral distinction between deception that is used offensively, to initiate a falsehood, and deception that is used defensively, to falsely deny some accusation of wrongdoing. While false denials of wrongdoing should be neither encouraged nor condoned, the fact is that they do reflect a special moral status, as is evidenced by the history of the “exculpatory no” defense to prosecution for the offense of false statements.

As we have seen, legal concepts such as perjury, fraud, and exculpatory noes cannot be understood in a conceptual vacuum. They exist in an intricate relationship with ethical principles concerning matters such as lying, misleading, and falsely denying. To be sure, it is often hard enough to agree about what such moral concepts consist of, let alone how they correspond to law. Nevertheless, if we are to understand how our criminal law really works, we have no choice but to continue exploring the complex relationship between it and morality.